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Acknowledgements

The articles in this edition of *The Appellate Advocate* are republished from the September 2024 Advanced Civil Appellate Course, with the sole exception of the Texas Supreme Court Update which uses the most recent version supplied by the Texas Supreme Court. We would like to extend our gratitude to TexasBarCLE and their staff, for all their hard work on the course, and for helping to make this edition possible. We would also like to thank the Supreme Court of Texas for its efforts to continuously provide updates on recent cases decided by the court. Most importantly, we want to thank the authors and speakers who contributed their time and efforts to the Advanced Civil Appellate Course and this publication. Without your willingness to volunteer your time and expertise, none of this would be possible.

Publication Policies

The Appellate Section is always looking for professional and timely legal articles that are important to appellate practitioners. If you are interested in submitting an article, please email Christina Crozier (cfcrozie@central.uh.edu), *The Appellate Advocate* Editor in Chief, for more information about our publishing guidelines, article submission process, and publication timeline. The section reserves the right to decline publication of any article, for any reason, without explanation.

Authors who submit an article in which the author represents a party in a currently pending matter must include a footnote at the outset of the article disclosing their involvement in the case or matter. Publication of any article is not to be deemed an endorsement of the views expressed therein.

Disclaimer

The opinions expressed in *The Appellate Advocate* are those of the authors and not necessarily the opinions of the State Bar of Texas, its Board of Directors, the Appellate Section Council or its members. These articles should be used for educational purposes and to enhance your law practice. Nothing in *The Appellate Advocate* should be considered legal advice. Statements of fact or law should be independently verified by the reader.

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The Appellate Advocate

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Chair's Column

William J. Chriss
Of Counsel, The Snapka Law Firm

On behalf of your Appellate Section Council, I'm happy to welcome our new Editor in Chief of *The Appellate Advocate*, Christina Crozier. This is her first issue of *The Appellate Advocate*, and she is uniquely well qualified to take over the reins of our valuable journal. Christina has been a member of Haynes Boone's appellate practice group for nearly two decades and has long been board certified in civil appellate law by the Texas Board of Legal Specialization. In addition to being named a Texas Super Lawyer in the area of appellate law, Christina serves as a professor at the University of Houston Law Center, where she teaches legal writing to first-year students. Welcome Christina! *The Appellate Advocate* will continue to serve as the section's premiere journal that includes substantive articles and important case law updates.

In addition to solidifying leadership of *The Appellate Advocate* for the foreseeable future, your Appellate Section continues to provide Texas appellate practitioners valuable networking opportunities, case updates, free CLE, and other initiatives. If renewing as a Section member has slipped your mind, remember that your annual dues of $30 (easily paid with your State Bar dues statement or via your My Bar Page) allow the Section to provide you and all members with a plethora of benefits.

This year, we continue our programs that provide you:

- A $50 discount on the Advanced Appellate CLE and additional discounts on other appellate CLEs throughout the State!
- Almost 10 hours of free CLE in our Online Classroom.
- Hundreds of free CLE papers on the Section's website!
- Monthly Lunch & Learn webinars to elevate your practice!

For more details, and to learn more about how you can get more involved and what the Appellate Section is doing to make your professional life easier, check out our website, our Twitter feed (over 1,300 followers), and our Facebook page.

On December 3, 2024, the Texas Court of Criminal Appeals hosted a reception at the Texas Law Center in Austin honoring outgoing Presiding Judge Sharon Keller, Judge Barbara P. Hervey, and Judge Michelle M. Slaughter for their years of service on the court. On December 13, 2025, we, the Court of Criminal Appeals, and the Austin Bar Association Appellate Section hosted a reception honoring the new 15th Court of Appeals, and on January 8, 2025, the historic investiture of 15th Court took place at the capitol with a reception following at the Texas Law Center. Your State Bar Appellate Section was present and well represented at each of these important events.

Your Section Council is not only committed to keeping you informed of such events and building upon these initiatives, but we are also constantly identifying and addressing new long -term areas of action. These include a new and improved website, more and updated free CLE, and a completely revamped and streamlined committee structure. We are looking forward to continuing a great year and hope you will want to be a part of it.

Editor's Message

Christina Crozier
University of Houston Law Center
Of Counsel, Haynes Boone

It's not always easy to explain what we appellate lawyers do. The elevator speech is tricky because "appellate law" encompasses so many areas that have nothing to do with appellate courts—from expert testimony to jury charges to enforcement of judgments.

And yet, appellate lawyers know "appellate law" when we see it. Whether it's a meaty legal issue or a thorny procedural challenge, appellate lawyers nerdily run toward the quagmire. And when we find a Texas-specific guide to these issues packed with citations, we start to salivate a little.

That's where the Appellate Section's newly revamped *The Appellate Advocate* comes in. Beginning in 2025, *The Appellate Advocate* will be published three times a year: in the winter, spring, and summer.

The winter issue will feature some of the best articles from the State Bar of Texas Advanced Civil Appellate Practice Course. And the spring and summer issues will contain updates on the law and fresh deep dives into appellate topics.

This winter's Best of issue contains articles which have been curated for their in-depth analysis and practical guidance. They represent the breadth of topics that fall under the wide appellate umbrella. You will, no doubt, recognize many of the authors, who are all stars in the Texas appellate bar.

And speaking of authors, we are always looking for authors for our upcoming issues. If you have an idea for an article on an appellate topic—we'll know it when we see it—I hope you will reach out to me at cfcrozie@central.uh.edu.

The Appellate Advocate
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Contempt of Court: What You Need to Know When Cooler Heads Do Not Prevail

Brian W. Wice
Law Offices of Brian Wice, Houston

BRIAN W. WICE

Brian W. Wice is recognized as one of Texas' top criminal appellate and post-conviction lawyers, having handled over 400 appellate matters, including 13 death penalty cases before 18 state and federal appellate courts. He is an attorney pro tem in the prosecution of Texas Attorney General Ken Paxton, prosecuted former Harris County District Attorney investigator Dustin Deutsch, defended Deutsch's conviction on appeal, and successfully defended the capital murder conviction and death sentence of multiple-capital murderer Dexter Johnson in state habeas corpus proceedings.

A 1976 magna cum laude graduate of the University of Houston and 1979 graduate of the University of Houston Law Center where he served on the Houston Law Review, Brian has been a frequent lecturer at continuing legal education events for the State Bar of Texas, serving as Course Director for the 2008 Advanced Criminal Law Course, as well as for the TCDLA, HCCLA, and HBA for the past 30 years.

Brian was honored as the "Attorney of the Year" by the Texas Criminal Defense Lawyers' Association in 2016, and by the Harris County Criminal Lawyers Association and the Houston Press in 2010, by the Houston Press as the "Best Legal Analyst" and "Best Appellate Lawyer, by Texas Monthly as a Texas Super Lawyer in 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, and 2023 by "H Texas" Magazine as one of Houston's Top Lawyers in 2006, 2007, 2008, and 2009, and by Martindale Hubbell as an AV-Preeminent Lawyer in 2009-2022.

Brian is a legal analyst for KPRC-TV, Ch. 2, in Houston, and appeared on the Today Show, Dateline, 48 Hours, 20-20, Good Morning America, CNN, MSNBC, and virtually every criminal justice show on network and cable television.

Brian's high-profile successes include the reversal and dismissal of all charges on appeal for former House Majority Leader Tom DeLay, a new punishment hearing in the nationally-acclaimed Susan Wright murder case in 2010, a new punishment hearing from the Fifth Circuit in 2009 for Gaylon Walbey, Galveston County's only death row inmate at the time, and the Fourth Circuit's reversal of the Rev. Jim Bakker's 45-year prison term in 1991. He was also part of the defense team for Adrian Peterson, NFL All-Pro and two-time MVP running back.

Brian was a visiting Harris County Criminal Court at Law judge, Special Master for the Harris County District Courts in post-conviction writs, and associate municipal court judge for the City of Houston from 1995 to 2005. He was as a law clerk to Court of Criminal Appeals Judge Sam Houston Clinton. His articles and op-ed pieces on the criminal justice system have appeared in a variety of publications.

ACKNOWLEDGMENTS

The author wishes to thank the late Judge Sam Houston Clinton, a giant of a jurist and unparalleled mentor, who served on the Court of Criminal Appeals with distinction from 1978 until his retirement in 1996, for whom the author had the privilege of serving as a briefing attorney from August 1979 until September 1980.

The author also expresses his sincerest appreciation to former Justices Murry Cohen and Terry Jennings, the late Judge Cathy Cochran, John Messinger, Kevin Dubose, David Gunn, Scott Durfee, David Botsford, Randy Schaffer, Rick Wetzel, Chris Downey, and Carmen Roe for their continuing advice and counsel over the years.

The author also acknowledges the contributions of Andrea Westerfeld, Zack Wavrusa, and Cody Henson, whose articles on contempt of court for the Texas District and County Attorneys Association were valuable resources in the preparation of this article.

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CONTEMPT OF COURT

WHAT YOU NEED TO KNOW WHEN COOLER HEADS DON'T PREVAIL

Judge: Miss West, are you trying to
show contempt for this court?

Mae West: On the contrary, your Honor,
I was doin' my best to conceal it.[1]

INTRODUCTION
LIFE IMITATES ART FAR MORE THAN ART IMITATES LIFE[2]

When non-lawyers – virtually everyone we know – think of a judge holding someone in contempt of court, they invariably think of the cliched elements driving such a compelling scene: raised voices, banged gavels, and an unfortunate soul being led away in handcuffs by the bailiff. Or their thoughts may run to popular culture on both the big and small screens: scenes that are dramatic, entertaining, and ultimately bearing little resemblance to what generally transpires in a Texas courtroom.

First, the big screen. While many folks may have never seen the cinema classic INHERIT THE WIND, it is well worth watching the next time it is shown on Turner Classic Movies. In one memorable scene, noted character actor Harry Morgan,[3] the folksy yet no-nonsense judge holds the

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[1] Ms. West's comments were made when she appeared in court on corruption charges over a play she wrote and starred in called "Sex," a 1926 play about a sex worker trying to choose between two men. Ms. West ultimately served a 10-day jail sentence for obscenity.

[2] OSCAR WILDE, "The Decay of Lying: an Observation," (1889).

[3] Morgan also achieved success on the small screen as Officer Bill Gannon in the latter-day iteration of DRAGNET, one of television's earliest police procedurals.

legendary Spencer Tracy in contempt for questioning the judge's ability to give Tracy's client, on trial for teaching Darwin's Theory of Evolution, a fair trial by predictably (and likely erroneously) excluding all evidence of Darwin's Theory.

In a more current milieu, we have all no doubt seen Fred Gwynne[4] as the Honorable Chamberlain Haller, the dyspeptic Alabama trial judge ringing up Joe Pesci — aka Vinny Gambini — for contempt three times in MY COUSIN VINNIE for Pesci's abrasive attitude, ignorance of courtroom decorum, and his inability to enter a plea on his clients' behalf.

On the small screen, the celebrated actor Sam Waterston, who put in two decades as prosecutor Jack McCoy and has only recently returned as Manhatten District Attorney on LAW & ORDER being teed up for contempt on both coasts. First, by telling New York Judge Nathan Marks, who had been hostile to the prosecution, demeaning to its witnesses, and basically being a bully in a murder trial that "when you change the rules of the game in the middle of a trial, there ought to be at least the appearance of impartiality."[5] And, later that season McCoy got rung up for contempt yet again by telling a Los Angeles judge whom he believed was playing to the cameras in the courtroom by ignoring well settled law that mandated a high-powered Hollywood director's extradition to the Big Apple for capital murder, "Speak up Your Honor. There are some people in the Bronx who didn't hear you."[6]

Would any or all of these courtroom antics constitute contempt in a Texas courtroom? Perhaps. Perhaps not. But this article will attempt to answer this and other consequential questions about what happens and how to deal with it when a prosecutor, defense attorney, witness, or media

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[4] Gwynne also achieved widespread fame portraying Herman Munster in the mid-sixties television comedy THE MUNSTERS and the early-sixties comedy CAR 54 WHERE ARE YOU?

[5] Season 7, episode 2 (CAUSA MORTIS). Judge Marks also holds McCoy's charismatic second chair, Jamie Ross, in contempt after castigating him to "stop focusing on [her] sex life."

[6] Season 7, episode 16 (TURNAROUND).

member steps over that proverbial line in the sand that separates zealous advocacy from contumacious conduct. It will also discuss how far the trial judge can go before her decision adjudging anyone, especially an officer of the court, in contempt before an appellate court steps in and steps up to vacate the contempt order. Finally, it will distinguish between direct and indirect contempt, criminal and civil contempt; the standard of proof in play, the panoply of constitutional protections that apply; the specificity required in the trial judge's show cause and judgment; and perhaps most important of all, what can and must be done after the trial judge has held someone in contempt to secure that individual's freedom while the process plays out.

THE LAW OF CONTEMPT

The statute defining contempt of court appears in TEX. GOVT. CODE, § 21.002, and provides that:

> (a) Except as provided by Subsection (g), a court may punish for contempt.
>
> (b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.
>
> (c) The punishment for contempt of a justice court or municipal court is a fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.
>
> (d) An officer of a court[7] who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a

[7] Officers of the court include not only attorneys but bailiffs, clerks, court reporters, and other similarly situated officials.

> determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.
>
> Three things in this provision are worthy of mention.

- Each act of contempt is punishable by a $500 fine and six months in jail, or both.

- Officers of the court is entitled to release on a personal bond pending a determination of their guilt or innocence.

- The presiding judge of one of the eleven administrative judicial regions where the contempt allegedly occurred must assign a judge to preside over the contempt proceeding.

WHAT EXACTLY CONSTITUTES CONTEMPT OF COURT?

Contempt of court is broadly defined as any "disobedience to or disrespect of a court by acting in opposition to its authority."[8] The essence of contempt is conduct that "obstructs or tends to obstruct the proper administration of justice."[9] While the authority of a trial judge to retain management and control of a trial is "broad and inherent,"[10] that power is not unlimited.[11] Given this wide-ranging definition of what constitutes contempt, some trial judges subscribe to the time-tested adage that when

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[8] *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

[9] *Ex parte Jacobs*, 664 S.W.2d at 360, 364 (Tex.Crim.App. 1984).

[10] *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976)(orig. proc.).

[11] *Ex parte Chambers*, 898 S.W.2d at 259.

it comes to contempt, "they know it when they see it."[12] But regardless of how they see it, a trial judge may not impede counsels' professional duty to effectively represent their client by prohibiting them from preserving error by threatening them with contempt.[13]

Before adjudging a defendant in contempt, the trial judge must not only be able to perceive the critical distinction between an offense to his sensibility with an obstruction to the administration of justice[14] but the fine line between redressing a public wrong and finding revenge for his private grievances.[15] As the Court of Criminal Appeals has cautioned:

> The court cannot make contempt of that which is not contempt, and if upon a review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed in contempt will be released under the writ of habeas corpus. When the facts do not constitute contempt, the court is without authority to enter the [contempt] judgment.[16]

Or, as the Court of Criminal Appeals made clear in a similar context:

> There can be no doubt that the judge has the right to punish for contempt, and yet this right is not given for the private advantage of the judge. ... [I]ts exercise is in some sense the trial of a case in which the judge is personally interested, and extreme caution is required that the judge in redressing a public wrong does not also find revenge for his private

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[12] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., *concurring*)(attempting to define the parameters of pornography).

[13] *Ruiz-Angeles v. State*, 351 S.W.3d 489, 498 (Tex.App.– Houston [14th Dist.] 2011, pet. ref'd).

[14] *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex.Crim.App. 1988).

[15] *Ex parte Davis*, 353 S.W.2d 29, 34 (Tex.Crim.App. 1962).

[16] *Ex parte Vogler*, 9 S.W.2d 733, 734 (Tex.Crim.App. 1928)(quotation marks omitted).

grievances.[17]

In the final analysis, it is the defendant's disrespect to the court "of which contempt actions are made."[18]

DIRECT V. INDIRECT CONTEMPT

Direct contempt occurs when the words spoken or acts performed constituting contempt occur in the presence of the court where the judge witnesses the conduct.[19] "In the presence of the court" does not necessarily mean "in the immediate presence" of the court. The court is present whenever any of its constituent parts are engaged in the prosecution of the business of the court, which includes the judge, the court room, the jury, and the jury room.[20] An act "in the presence of the court," i.e., when it is in the immediate presence of the judge does not constitute direct contempt when court is not in session.[21]

Actions of direct contempt are a use of judicial power to "preserve order in the courtroom for the proper conduct of business" and to "instantly ... suppress disturbance or violence or physical obstruction or disrespect to the court..."[22] An order adjudging a defendant guilty of direct contempt must be supported by findings showing beyond a reasonable doubt his conduct obstructed or tended to obstruct the proper

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[17] *Ex parte Davis*, 353 S.W.2d at 36 (emphasis added).

[18] *Ex parte Taylor*, 807 S.W.2d 746, 749 (Tex.Crim.App. 1991).

[19] *Ex parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

[20] *Ex parte Aldridge*, 334 S.W.2d 161, 165 (Tex.Crim.App. 1960).

[21] *In re Bell*, 894 S.W.2d 119, 128 (Tex. Ct. Special Review 1995).

[22] *Cooke v. United States*, 267 U.S. 517, 534-35 (1925).

administration of justice[23] or was disrespectful to the court.[24] The former category involves conduct that actually "hindered the forward progress of a trial,"[25] while the latter requires that "the act itself must be shown as intentionally disrespectful."[26] An essential element of direct contempt is that there be a proceeding, trial, or hearing in progress that the defendant intended to impede, disrupt, or obstruct.[27] While "trial" and "hearing" are easily defined, "proceeding," while not as discrete, has been defined as "business done by a tribunal of any kind."[28]

Summary punishment for direct contempt is justified only when the contempt is committed in the presence of the court and there is an exigent situation, that is, one which requires the judge to act immediately to quell disruption, violence, disrespect, or physical abuse.[29] Once an immediate disturbance has ended, due process mandates that a hearing be held.[30] Some common examples of direct contempt include:

- The applicant physically attacked the special master in open court.[31]
- The applicant "embarked on a loud and offensive discourse" in open court and "was required to be forcibly removed from such courtroom

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[23] *Ex parte Jacobs*, 664 S.W.2d 360, 364 (Tex.Crim.App. 1984).

[24] *Ex parte Taylor*, 807 S.W.2d at 749.

[25] *Ex parte Reposa*, 2009 WL 3478455 at *5 (Tex.Crim.App. Oct. 28, 2009)(orig. proc.).

[26] *Ex parte Taylor*, 807 S.W.2d at 749.

[27] *Ex parte Jacobs*, 664 S.W.2d at 364.

[28] BRIAN GARNER, *Garner's Dictionary of Legal Usage*, 714 (3rd ed.).

[29] *Ex parte Knable*, 818 S.W.2d 811, 823 (Tex.Crim.App. 1991).

[30] *In re Bell*, 894 S.W.2d at 130.

[31] *Ex parte Daniels*, 722 S.W.2d 707, 710 (Tex.Crim.App. 1987).

by officers of this Court."[32]

- The applicant made a masturbatory gesture in the presence of the trial court during a pre-trial hearing."[33]

The Court of Criminal Appeals has stressed that conduct that "may not have been commendable, and ... might have been irritating or even exasperating to the trial judge [but] did not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice," does not constitute direct contempt.[34]

"Indirect contempt," also referred to as "constructive contempt" involves disobedience which occurs outside the court's presence, such as a failure to comply with a valid court order.[35] Unlike direct contempt, which can be punished summarily, indirect contempt requires notice and a hearing at which the contemnor may present evidence.[36] Even conduct that occurs in the presence of the court may not be summarily punished as direct contempt once the immediate need to maintain decorum in the courtroom dissipates.[37] Examples of indirect contempt include:

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[32] *Ex parte Norton*, 610 S.W.2d 512, 513 (Tex.Crim.App. 1981)

[33] *Ex parte Reposa*, 2009 WL 3478455 at ** 6-7.

[34] *Ex parte Pink*, 746 S.W.2d at 762; *see also Ex parte Taylor*, 807 S.W.2d at 751 (same); *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex.Crim.App. 1991)(applicant's letter to court of appeals chiding it for their opinions failed to disrupt the orderly progress of the court, the administration of justice, or the proceedings); *Ex parte Jacobs*, 664 S.W.2d at 364 ("There is no evidence to support the conclusory assertion in the contempt order that there was an affront to the dignity and authority of the court.").

[35] *In re Mittlestead*, 661 S.W.3d 639, 648 (Tex.App.– Houston [14th Dist.] 2023, no pet.).

[36] *Ex parte Knable*, 818 S.W.2d 811, 812 (Tex.Crim.App. 1991)(defendant who falsely represented to the court that he was a lawyer could not be adjudged guilty of direct contempt when court did not find out about the misrepresentation until two weeks later).

[37] *Id*.

- an attorney who arrives late to court,[38]
- a spectator lying to a prosecutor,[39]
- photographing an undercover agent in the hallway,[40]
- or disobeying a subpoena.[41]

CRIMINAL V. CIVIL CONTEMPT

The critical distinction between civil and criminal contempt has been defined as follows:

> The purpose of civil contempt is remedial and coercive in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional and therefore the civil contemnor carries the keys of (his) prison in (his) own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court.
>
> Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court.[42]

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[38] *Ex parte Hill*, 52 S.W.2d 367, 368 (Tex. 1932).

[39] *Ex parte Bailey*, 155 S.W.2d 927, 928 (Tex.Crim.App. 1941).

[40] *Ex parte Arnold*, 503 S.W.2d 529, 532 (Tex.Crim.App. 1974).

[41] *Ex parte Dotson*, 76 S.W.3d 393, 396 (Tex.Crim.App. 2002).

[42] *Ex parte Dotson*, 76 S.W.3d at 395 n. 3 (citation omitted).

Because civil contempt is remedial, prospective, and coercive, release may be procured or commitment avoided altogether by compliance with the trial court's order.[43] A judgment of contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where obedience will benefit an opposing litigant.[44]

Criminal contempt, by contrast, is punitive in that the sentence is not conditioned upon any future performance; the contemnor is being punished for past disobedience to a court order that constitutes an affront to the dignity and authority of the court.[45] Because of its punitive nature, criminal contempt affords the defendant the panoply of procedural due process protections and proof beyond a reasonable doubt even if it arises in the context of a civil case.[46] While due process considerations include the right to counsel and the right against self-incrimination, it does not include the right to a jury trial in a civil contempt case nor does it mandate a jury trial in a criminal contempt case unless the punishment assessed exceeds six months in jail or a fine greater than $500.[47]

THE STANDARD OF PROOF: BEYOND A REASONABLE DOUBT[48]

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[43] *In re Mittlestead*, 661 S.W.3d at 648.

[44] *Ex parte Werblud*, 536 S.W.3d 542, 545 (Tex. 1976).

[45] *In re R.E.D.*, 278 S.W.3d 850, 855 (Tex.App.– Houston [1st Dist.] 2009).

[46] *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986)(the procedures followed in criminal contempt cases "should conform as nearly as practicable to those in criminal cases."); *Ex parte Barlow*, 899 S.W.2d 791, 795 (Tex.App.– Houston [14th Dist.] 1995, orig. proc.)(same); *Ex parte Gonzales*, 945 S.W.3d 830, 836 (Tex.Crim.App. 1997)("Like our sister court, we recognize that [procedures in criminal] contempt [cases] ... should conform as nearly as practicable to those in criminal cases.").

[47] *Ex parte Werblud*, 536 S.W.2d 542, 54 7 (Tex. 1976); *see also Ex parte Griffin*, 682 S.W.2d 261, 262 (Tex. 1984)(series of smaller sentences for multiple contempt violations can be combined to warrant a jury trial).

[48] While the case law set forth below is drawn from appellate challenges to the legal sufficiency of the evidence to sustain a jury verdict, it is no less applicable in the context of both the trial judge's initial finding of contempt and a reviewing court's subsequent determination of

Although a trial court's power to punish through contempt is broad, because it is a power that should be used sparingly, it is presumed not to exist.[49] In contempt proceedings, "mere preponderance of the evidence being insufficient to convict the accused ... proof of the alleged offense is required beyond a reasonable doubt."[50] To sustain an order of contempt, three elements must be proved beyond a reasonable doubt:

- a reasonably specific order,
- a violation of that order, and
- the wilful intent to violate the order.[51]

Because "the presumption of innocence lies at the foundation of our criminal law,"[52] any jurist, particularly one involved in a contempt matter, must remain cognizant that "proof beyond a reasonable doubt" means "proof to a high degree of certainty."[53] "If the evidence of contempt raises only a suspicion of guilt, even a strong one, that evidence is necessarily insufficient."[54] The standard of proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure, because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding."[55] By impressing upon the fact finder the need

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whether it is supported by proof beyond a reasonable doubt.

[49] *Ex parte Jacobs*, 664 S.W.2d at 364.

[50] *Ex parte Cragg*, 109 S.W.2d 479, 481 (Tex.Crim.App. 1937).

[51] *Ex parte Chambers*, 898 S.W.2d at 259.

[52] *Nelson v. Colorado*, 137 S.Ct. 1249, 1255-56 (2017).

[53] *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted).

[54] *Herrin v. State*, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002).

[55] *Jackson v. Virginia*, 443 U.S. at 315 (citation omitted). The sufficiency of the

to reach a subjective state of near certitude of the accused, this standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.[56]

As in any criminal proceeding, the trial judge – acting as the finder of fact – is permitted to draw multiple inferences from the facts so long as the inferences are supported by the evidence presented.[57] But the finder of fact may not reach a conclusion based on a factually unsupported inference. As the Court of Criminal Appeals has made clear in delineating the limits of appellate deference to jury verdicts:

> Under the Jackson test, we permit juries to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. ... Speculation is mere theorizing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.[58]

Proof beyond a reasonable doubt requires that the inferences drawn by the finder of fact must be reasonable based upon the combined force of all the evidence viewed in the light most favorable to the judgment.[59] A judge acting as the fact finder in a contempt hearing "may not reasonably infer an ultimate fact from meager circumstantial evidence which could

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evidence under the *Jackson* standard is a question of law reviewed de novo. *Matson v. State*, 819 S.W.2d 839, 846 (Tex.Crim.App. 1991).

[56] *Id*.

[57] *Merritt v. State*, 368 S.W.3d 516, 525 (Tex.Crim.App. 2012).

[58] *Hooper v. State*, 214 S.W.3d 9, 15-16 (Tex.Crim.App. 2007).

[59] *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex.Crim.App. 2011).

give rise to any number of inferences none more probable than the other."[60] While reviewing courts "defer to the [fact finder's] assessments with respect to credibility, conflicting testimony, and [their] choice of the competing inferences that can be drawn from the evidence, specious inferences are not indulged."[61]

A reviewing court must ensure "that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged."[62] "If the evidence establishes precisely what the State has alleged, but the acts alleged do not constitute a criminal offense under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction."[63] Evidence is legally insufficient if "the record contains either no evidence of an essential element, merely a 'modicum' of evidence of one element, or if it conclusively establishes reasonable doubt."[64]

THE SPECIFICITY OF THE COURT'S CONTEMPT ORDER

Due process requires that those individuals whose contumacious acts occur in the presence of the court be afforded reasonable notice of the specific charges.[65] To satisfy due process considerations, both a written judgment of contempt and a written commitment order are necessary in an indirect contempt in a civil case.[66] Because the show cause order in a

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[60] *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001).

[61] *United States v. Lorenzo*, 534 F.3d 153, 159 (2nd Cir. 2008).

[62] *Williams v. State*, 235 S.W.3d at 750.

[63] *DeLay v. State,* 465 S.W.3d at 235.

[64] *Queeman v. State*, 520 S.W.3d 616, 622 (Tex.Crim.App. 2012).

[65] *Taylor v. Hayes*, 418 U.S. 498-500 (1974).

[66] *Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980).

criminal contempt proceeding is akin to an indictment in a criminal case,[67] the trial court's show cause order must state in clear, precise, and unambiguous terms, probable cause to believe that the contemnor engaged in contumacious conduct that supports its show cause order.[68] The Texas Supreme Court has made it clear that:

> Due process demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and the show cause order ... must state when, how, and by what means the defendant has been guilty of the alleged contempt.[69]

No one may be punished for contempt if there was no lawful court order commanding her to do or not do some specific act.[70] A show cause order is insufficient to support a judgment of contempt if its interpretation requires inferences or conclusions about which reasonable persons might differ.[71] As the Texas Supreme Court has cautioned, "This State cannot be allowed to operate under a system whereby its citizens may be punished for contempt for violation of an order, the exact terms of which exist solely in the memory of the trial judge and the movants for contempt."[72]

Due process and due course of law require that the contemnor be personally served with a show cause order or that it be established that she had knowledge of the content of such order.[73] Notice is insufficient where the show-cause order fails to state the specific charges against the

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[67] *In re Smith*, 981 S.W.2d 909, 911 (Tex.App.– Houston [1st Dist.] 1998, no pet.).

[68] *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

[69] *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)(emphasis added).

[70] *Ex parte Gray*, 649 S.W.2d 640, 642 (Tex.Crim.App. 1983).

[71] Ex parte Chambers, 898 S.W.2d at 260 (emphasis in original).

[72] *Ex parte Wilkins*, 665 S.W.2d 760, 761 (Tex. 1984).

[73] *Id*.

contemnor[74] or where she was neither served with a show-cause order nor informed of the charges.[75] No objection is required to preserve the claim on appeal that a contemnor was not afforded such notice.[76] A contempt order rendered without adequate notification is void.[77]

WHO PROSECUTES THE CONTEMPT CHARGE?

While in most situations, the contempt action will be prosecuted by a member of the District Attorney's Office, there will always be exceptions to this rule. A common outlier would be where a prosecutor is a material fact witness, i.e., she may be the complainant where defense counsel or the defendant may have engaged in contumacious conduct towards her in the presence of the court. A second would be where, given the nature of the allegedly contumacious conduct or because of who the contemnor might be, the local prosecutor believes that the interests of justice would be served by recusing her office and appointing an attorney pro tem from an adjoining county to prosecute the contempt.[78]

COMMENTS TO OR CONDUCT BEFORE THE JUDGE

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[74] *Ex parte Pink*, 645 S.W.2d 262, 264-65 (Tex.Crim.App. 1982)(show-cause order merely told contemnor to appear on a specified date for a contempt hearing).

[75] *Ex parte Avila*, 659 S.W.2d 443, 445 (Tex.Crim.App. 1983)(the trial court simply called the contemnor to make a "last words type of statement"). While *Avila* was a case of indirect contempt, the procedure afforded an officer of the court in § 21.002(d) obscures the procedural distinction between direct and indirect contempt.

[76] *In re Wal-Mart Stores, Inc*., 545 S.W.3d 626, 632 (Tex.App.– El Paso, 2016, orig. proc.).

[77] *Id.*

[78] *See* Tex. Code Crim. Proc. § 2.07(a)("Whenever an attorney for the state is disqualified to act in any case or proceeding ... or is otherwise unable to perform the duties of the attorney's office ... , the judge of the court in which the attorney represents the state may appoint, from any county or district, an attorney for the state or may appoint an assistant attorney general to perform the duties of the office during the absence of disqualification of the attorney for the state."). Effective Sept. 1, 2019, private counsel may no longer serve as attorneys pro tem but must be an assistant district attorney, assistant county attorney, or assistant attorney general.

Comments to the judge do not constitute direct contempt unless they evince "a serious and imminent threat to the due administration of justice."[79] As the United States Supreme Court made clear almost a half-century ago:

> The vehemence of the language used is not alone the measure of the power to punishment for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil ... The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.[80]

The Court of Criminal Appeals has held that offensive comments, even those spoken in open court, are not contemptuous in the absence of a showing that they are disruptive or boisterous.[81] The tone, tenor, and context of a contemnor's statements are relevant in determining whether they constituted direct contempt.[82] Examples of comments that were not

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[79] *Ex parte Arnold*, 503 S.W.2d at 533-34.

[80] *In re Little*, 404 U.S. 553, 555 (1972)(per curiam); *see also Craig v. Harney*, 331 U.S. 367, 376 (1947)(judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him."); *Craig v. Hecht*, 263 U.S. 255, 281-82 (1923)(Holmes, J., *dissenting*)("A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he has already done.').

[81] *See e.g.*, *Ex parte Curtis*, 568 S.W.2d 363, 366 (Tex.Crim.App. 1978).

[82] *Cf. In re Bell*, 894 S.W.2d at 127 ("assertive statement in a normal tone of voice, neither loud nor threatening" by father of defendant to trial judge outside of her courtroom would not have been contumacious even if it had been made in open court); *see also In re Little*, 404 U.S. at 557 (Burger, C.J., *concurring*)("A contempt hearing depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor...").

found to be contumacious:

- I feel that you are acting in favor of this Defendant in derogation of the State's case illegally and improperly."[83]

- "I think you're acting like a biased judge trying to help this Defendant beat a darn good case."[84]

- "Maybe somebody that might go both ways, you know what I mean?"[85]

- "Isn't it a fact, sir, that in the offense report that you got, that I can't get to..."[86]

SEEKING RELIEF FROM A JUDGMENT OF CONTEMPT

Because a party adjudged to be in criminal contempt has no remedy or right of appeal, the judge lacks authority to set an appeal bond in such a situation.[87] The only manner of review is an original application for writ of habeas corpus or mandamus in the Supreme Court[88] or habeas corpus in the Court of Criminal Appeals.[89] An original habeas corpus proceeding

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[83] *Ex parte Curtis*, 568 S.W.2d at 366.

[84] *Id*.

[85] *Ex parte Taylor*, 807 S.W.2d at 749.

[86] *Ex parte Pink*, 746 S.W.2d at 762.

[87] *Ex parte Eureste*, 725 S.W.2d 214, 216 (Tex.Crim.App. 1986).

[88] *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999).

[89] *Ex parte Eureste,* 725 S.W.2d at 216. The court's original jurisdiction is embodied in Tex. Const. Art. V, § 5(c)("Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus. ... The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgment. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise

is a collateral attack on a contempt judgment.[90] The purpose of an original writ is not to determine the contemnor's guilt or innocence, but to determine whether she was afforded due process of law or if the order of contempt was void.[91] For a contempt order to be set aside, it must be void, either because it was beyond the trial court's power or because it deprived the contemnor of his liberty without due process of law.[92] In a civil contempt proceeding, if it is not within the power of the contemnor to perform the act which will purge her from contempt, the court cannot impose a coercive sentence.[93] If a trial court's order imposes a single penalty for multiple contemptuous acts but at least one act cannot support coercive contempt, the entire contempt order is void.[94]

If the contempt order does not provide for a term of imprisonment, the affected party must challenge the order by filing a writ of mandamus.[95] If the contemnor is in custody, the court's jurisdiction does not attach and the writ will be dismissed.[96] In pleadings, the contemnor is the Applicant, the opposing party is the Real Party in Interest (generally the State), and the trial judge is the Respondent.

The Court of Criminal Appeals requires a party seeking relief from

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of its jurisdiction."), and Tex. Code Crim. Proc. art. 11.05 ("The Court of Criminal Appeals ... have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law.").

[90] *Ex parte Rohleder*, 424 S.W.2d 891, 892 (Tex. 1967).

[91] *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979).

[92] *In re Markowitz*, 25 S.W.3d 1, 2 (Tex.App.– Houston [14th Dist.] 1998, orig. proc.).

[93] *Ex parte Gonzales*, 414 S.W.2d 656, 657 (Tex. 1967).

[94] *In re Henry*, 154 S.W.3d 594, 595-96 (Tex. 2005)(per curiam).

[95] *Kidd v. Lance*, 794 S.W.2d 586, 587 (Tex.App.—Austin 1990, no writ).

[96] *Ex parte Eureste*, 725 S.W.2d at 216 (dismissing original application for writ of habeas corpus because applicant was "not under restraint under the contempt order attacked in his habeas application nor by the invalid bond entered into in the district court.").

a judgment of contempt to file three pleadings: first, the original writ that must contain an appendix with all relevant documents, reporters' records, orders, and exhibits; second, a motion for leave to file as is required in any original action in the CCA;[97] and third, a request for a stay of any order of confinement if one has been assessed. If the party held in contempt is an officer of the court, a personal bond is mandated by statute. If they are not, a request for a nominal bond should accompany the filing. Unless the allegations in the writ are frivolous, the CCA will usually issue a stay and call for a response from the Real Party in Interest and, as a courtesy, from the Respondent judge (who almost never files a response). After briefing, the court can deny leave to file, vacate the stay, and deny relief without issuing an opinion. If five judges tentatively believe that the matter should be filed and set for submission, leave to file will be granted[98] and the court must write an opinion either granting or denying relief.

CONCLUSION

Whether a trial court's contempt order –whether civil or criminal – can withstand appellate review was succinctly stated by the United States Supreme Court over sixty years ago. "[I]n a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be show to conform with the fundamental requirements of law, the individual is entitled to immediate release."[99]

Regardless of whether it takes place in a criminal or civil arena, litigation is a contact sport where an occasional sharp elbow or caustic comment is not unheard of. Trial judges must recognize that because its contempt authority is powerful, it should be the course of last resort and not the first, second, or third. As the late John Onion, Presiding Judge of the Court of Criminal Appeals from 1971-1988 so aptly stated, "Contempt is strong medicine. Use it cautiously and only as a last resort."

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[97] Tex. R. App. P. 72.1. The Supreme Court's process is set out in Tex. R. App. P. 52.

[98] Tex. R. App. P. 72.2.

[99] *Fay v. Noia*, 372 U.S. 391, 401 (1963).

NO. WR-_____

IN THE

COURT OF CRIMINAL APPEALS

AT AUSTIN, TEXAS

EX PARTE WAYNE DOLCEFINO, APPLICANT.

FROM COUNTY CRIMINAL COURT AT LAW NO. 16
OF HARRIS COUNTY, TEXAS
ANCILLARY TO CAUSE NO. 2316965

APPLICANT'S ORIGINAL WRIT OF HABEAS CORPUS

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ORAL ARGUMENT REQUESTED

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IDENTIFICATION OF THE PARTIES AND COUNSEL

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Wayne Dolcefino

Counsel for Applicant: [Original Writ]
Brian Wice [Lead Counsel]
Dan Cogdell

Counsel for Applicant: [Contempt Proceedings]
Brian Wice
Dan Cogdell
Nicole DeBorde
Cordt Akers
Nick Norris

Respondent:
Judge Darrell Jordan
County Criminal Court at Law No. 16
Harris County, Texas

Real Party in Interest:
The State of Texas

Counsel for Real Party in Interest: State of Texas
Harris County Assistant District Attorney Scott Durfee
Harris County Assistant District Attorney David Mendoza
Harris County Assistant District Attorney Jeff Sims

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an original application for petition for writ of habeas corpus ["Petition"] brought by Wayne Dolcefino ["Applicant"] seeking relief from a judgment and commitment order ["Order"] entered by Darrell Jordan, Judge, Harris County Criminal Court at Law No. 16 ["Respondent"]. On June 30, 2020, Respondent adjudged Applicant guilty of direct contempt and assessed punishment at 180 days in the Harris County Jail, probated for six months, and three days in jail as a condition thereof. Respondent refused Applicant's repeated requests to defer his jail sentence because his pre-existing medical conditions made him a high-risk target of contracting COVID-19 in a jail where this deadly virus ran rampant.[1] Respondent insisted Applicant file unauthorized notice of appeal before agreeing to set an unauthorized bond securing his release from the Harris County Jail.[2]

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[1] Tab 1 at 12. *See also* Gabrielle Banks and St. John Barned-Smith, "Locked inside: a COVID-19 outbreak at Harris County Jail was the 'nightmare scenario.' Then it actually happened." www.houstonchronicle.com (last visited July 6, 2020).

[2] Tab 13. Applicant's Motion for Leave to File his Original Application for Petition for Writ of Habeas Corpus and to be Released on Bond filed with this Petition recites that: he filed a Motion to Dismiss his Appeal Instanter on July 10, 2020; and that his mere acquiescence to Respondent's show of lawful authority insisting that Applicant file an unauthorized notice of appeal and post an unauthorized appeal bond given his extremely high-risk status at becoming infected with COVID-19 in the Harris County Jail, Tab 14, do not pose jurisdictional impediments to this Court granting leave to file and setting an authorized bond in lieu of the unauthorized bond demanded by Respondent, Once this motion is granted, his unauthorized bond has no force or effect.

As a condition of this unauthorized bond, Applicant was ordered to obtain a GPS device within 48 hours of his release.[3]

WHY THIS COURT SHOULD GRANT APPLICANT RELIEF

> "Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[4]

> "There can be no doubt that the judge has the right to punish for contempt, and yet this right is not given for the private advantage of the judge. ... [I]ts exercise is in some sense the trial of a case in which the judge is personally interested, and extreme caution is required that the judge in redressing a public wrong does not also find revenge for his private grievances."[5]

The underlying narrative in this original proceeding – Respondent's revenge for his private grievances against Applicant – compels this Court to exercise its original jurisdiction to review and vacate his order of direct contempt against Applicant. Respondent's order is driven by his confusion of an offense to his sensibilities with obstruction to the administration of

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[3] Tab 11. Respondent overruled Applicant's request to remove this condition. Tab 10 at 17. As recounted below, because this condition, one trial counsel in his considerable experience as a prosecutor and defense lawyer, had never seen made a part of any misdemeanor bond, let alone in any contempt action, Tab 13, was not reasonably related to securing Applicant's attendance or protecting the safety of the community, Respondent abused his discretion in ordering it.

[4] *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex.Crim.App. 1988).

[5] *Ex parte Davis*, 353 S.W.2d 29, 34 (Tex.Crim.App. 1962).

justice, a vice this Court has repeatedly admonished trial judges to guard against.[6] Simply stated, this case involves Respondent's penchant for punishing Applicant for exercising his First Amendment right to dare ask questions about Respondent's official actions Applicant had every right to ask in a public courtroom where he had every right to be. Contrary to Respondent's evanescent findings that are directly refuted by a videotape of the events at issue, Applicant was not punished for showing disrespect to Respondent or interfering with the orderly administration of justice.[7] Using his power of contempt in what can only be viewed in a retaliatory fashion to settle a personal score with Applicant, Respondent was not redressing a public wrong but was, in fact, impermissibly finding revenge for his private grievances, contrary to this Court's longstanding mandate.[8]

As set out below, the best evidence Respondent's contempt order was personal and not business is the very reason Applicant walked into court on the morning of June 30, 2020: his troubling decision to appoint two

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[6] *Ex parte Pink*, 746 S.W.2d at 762.

[7] *See Ex parte Arnold*, 503 S.W.2d 529, 531 (Tex.Crim.App. 1974)(vacating contempt order where "the record does not reflect that justice was interfered with in this cause.").

[8] *Ex parte Davis*, 353 S.W.2d at 34; *In re Bell*, 894 S.W.2d 119, 131 (Tex.Spec.Ct.Rev. 1995)(judge's misuse of contempt power was wilful violation of Code of Judicial Conduct).

woefully inexperienced and, ultimately, indolent lawyers as attorneys pro tem to investigate alleged criminal conduct by public officials in four cases where Applicant was the complainant.[9] Indeed, it was Applicant's First Amendment protection as an investigative journalist, not to mention his standing as the complainant in an ongoing criminal investigation[10] that gave him every right to seek answers Respondent did not want to provide. When the synergistic effect of these troubling and problematic motifs is viewed through the lens of the videotape capturing the events giving rise to Respondent's order in real time, Respondent's ruling was not driven by the neutral application of law to facts. It was instead animated by his desire to use his contempt power to jail Applicant for doing what he had every right to do in a public courtroom where he had every right to be.

Because the video of Applicant's exchange with Respondent and this Court's precedent on direct contempt reveal that Respondent's contempt order "will be remembered more for audacity than legal reasoning,"[11] is

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[9] Tab 16.

[10] *Cf.* Tex. Code Crim. Proc. art. 56.02(a)(3)(A)(giving certain crime victims the right, upon request, to be informed of all relevant court proceedings).

[11] *Texas Democratic Party v. Abbott,* 961 F.3d 389, 394 (5th Cir. 2020).

"short on the facts, and short on the law,"[12] and "confected on a foundation of sand,"[13] this Court should aside the order and grant Applicant relief.

STATEMENT REGARDING ORAL ARGUMENT

This case presents an important question as to whether any rational fact finder could find beyond a reasonable doubt that Applicant's conduct constituted direct criminal contempt. The unique factual consideration virtually unheard of in contempt matters – a videotape capturing these events in real time contradicting Respondent's version of events in official court records – warrants oral argument in this original proceeding.

STATEMENT OF JURISDICTION

This Court has original jurisdiction in this extraordinary matter pursuant to Tex. Const. Art. V, sec. 5(c)[14] and Tex. Code Crim. Proc. art. 11.05.[15]

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[12] *Michigan v. Bryant*, 131 S.Ct. 1142, 1176 (2011)(Scalia, J., *dissenting*).

[13] *United States v. Stockman*, 947 F.3d 253, 263 (5th Cir. 2020).

[14] "Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus. ... The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgment. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction."

[15] "The Court of Criminal Appeals ... have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law."

ISSUES PRESENTED

1. No rational fact finder could conclude beyond a reasonable doubt that Applicant was guilty of direct contempt.

2. Respondent abused his discretion by ordering Applicant to obtain a GPS device within 48 hours of release as a condition of his unauthorized appeal bond because this condition bore no reasonable relation to securing his appearance or ensuring the safety of the community.

SUMMARY OF ENTITLEMENT TO RELIEF

1. No rational fact finder could conclude beyond a reasonable doubt that Applicant's conduct constituted direct contempt found by Respondent in his Judgment of Contempt and Commitment Order. The videotape depicting Applicant's encounter with Respondent in real time reveals that Applicant's conduct and statements did not obstruct or tend to obstruct the proper administration of justice or were disrespectful to the court. Whether Applicant's conduct and comments might have been distasteful or offensive to Respondent's sensibilities, is not the test this Court uses in dtermining whether any rational trier of fact could have concluded beyond a reasonable doubt that Applicant's behavior was contumacious.

2. Respondent abused his discretion ordering Applicant to obtain a GPS device within 48 hours of his release as a condition of his unauthorized appeal bond. This record fails to reveal that this condition was reasonably related to securing his appearance or ensuring the community's safety.

FIRST ISSUE PRESENTED

No rational fact finder could conclude beyond a reasonable doubt that Applicant was guilty of direct contempt.

STATEMENT OF FACTS

A. Applicant's forte: investigating and exposing public corruption

Applicant is the president of Dolcefino Consulting, an investigative communications firm specializing in investigations and public disclosure of public corruption, major fraud, abuse of power, and courthouse injustice.[16] Applicant spent almost 25 years at Channel 13, ABC-affiliate KTRK, establishing a well-deserved reputation as the most accomplished and feared investigative reporter in Houston.[17] His investigations resulted in the indictment and conviction of a number of Houston-area officials for public corruption, including:

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[16] Tab 15.

[17] *Id.;* www.dolcefino.com (last visited July 6, 2020); David Barron, "Wayne Dolcefino ready for his second act," www.houstonchronicle.com, Dec. 18, 2012 (last visited July 6, 2020).

- Former Harris County Precinct 1 Constable Jack Abercia, who pleaded guilty in federal court to 11 counts of exceeding authorized access.[18]

- Former Harris County Commissioner Jerry Eversole, who pleaded guilty in federal court to lying to the F.B.I.[19]

- Former Harris County Precinct 6 Constable Victor Trevino, who pleaded guilty in state court to misapplication of fiduciary property.[20]

B. Applicant suffers from a "multitude of health problems"

According to his physician, the 63-year-old Applicant suffers from a "multitude of health problems" including:

- peripheral neuropathy due to his longstanding diabetes.

- chronic central nervous system process in the family of multiple sclerosis.

- head trauma from a 75-mile-per-hour head-on collision shattering his heel in an external fracture.

- severe pain in both of his feet and ankles that creates a high risk of developing infections in these areas and ultimate loss of his limbs.[21]

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[18] Brian Rogers, "Abercia pleads guilty to illegal computer use," www.houstonchronicle.com, Aug. 29, 2013 (last visited July 8, 2020).

[19] "Jerry Eversole sentenced to three years probation," www.abc13.com, Jan.4, 2012 (last visited July 8, 2020).

[20] Cindy George, "Trevino sentenced to 10 years of probation," www.houstonchronicle.com, Nov. 17, 2014 (last visited July 8, 2020).

[21] Tab 14.

C. Applicant's dissatisfaction with Respondent's appointments of two attorneys pro tem who failed to investigate his complaints against public officials brought him to Respondent's courtroom

Applicant's encounter with Respondent was neither happenstance nor coincidence. Well before June 30, 2020, Applicant was in the midst of an 18-month investigation into Respondent's appointment of DeJean Cleggett and Maegan Bradley as attorneys pro tem[22] in four complaints Applicant filed alleging certain public officials had committed the Class B misdemeanor offense of failing to produce records made public under the Texas Public Information Act.[23] As Presiding Judge of the 16 Harris County Criminal Courts at Law, Respondent was tasked with appointing attorneys pro tem whenever the Harris County District Attorney's Office recused itself. Licensed in November 2015,[24] Clegett was appointed by

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[22] Respondent appointed Bradley and Cleggett as attorneys pro tem under the version of Tex. Code Crim. Proc. art. 2.07(a) that existed prior to Sept. 1, 2019 permitting the appointment of "any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the State." The Legislature amended this provision effective Sept. 1, 2019 to require that attorneys pro tem be either a district attorney or their assistant or the attorney general or his assistant. Cameron Langford, "Prosecutors hit new roadblocks in Texas AG's criminal case," www.courthousenews.com, June 19, 2019 (last visited July 8, 2020).

[23] *See* Tex. Govt. Code, sec. 552.353(a)("An officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter."); sec. 552.353(e)(offense under this section is a Class B misdemeanor).

[24] Tab 19.

Respondent to investigate three complaints involving Houston Mayor Sylvester Turner for violations of the TPIA alleged to have occurred on January 7, 2019,[25] March 18, 2019,[26] and May 29, 2019.[27] Respondent appointed Bradley, licensed in November 2017,[28] to investigate the fourth complaint involving the Texas Tech Board of Regents.[29] Because Leggett and Bradley's collective legal experience totaled six years and neither had prior prosecutorial experience, Respondent's appointment of them in these high-profile and complicated criminal matters was obviously problematic on multiple levels.

On May 15, 2020, Applicant emailed Adriana Moreno, Respondent's court coordinator,[30] "reaching out to [Respondent] for an interview on the money wasted after complaints are given to select lawyers in [his] court.[31]

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[25] Tab 16.

[26] Tab 16.

[27] Tab 16.

[28] Tab 20.

[29] Tab 16.

[30] www.ccl.hctx.net (listing Respondent's staff)(last visited July 8, 2020).

[31] Applicant was referring to Respondent's appointment of Bradley and Cleggett as attorneys pro tem to investigate his complaints in the Mayor Turner and Texas Tech cases.

Would like the interview by 500 [sic] pm."[32]

In an email Applicant sent on June 8, 2020, to David Mendoza, Chief of the Professional Integrity Division of the Harris County District Attorney's Office. Applicant expressed his frustration with Respondent's appointment of Bradley and Cleggett and their inaction in these matters:

> Upon investigation, it appears that neither of these lawyers ever submitted any invoice for the alleged investigation of these complaints. Neither have done a thing, and in my view without explanation to the contrary, this was an intentional act by [Respondent] and Ms. Ogg.[33]
>
> I would suggest someone get an answer to why this occurred. We also need an update on what has happened to the more recent complaints we have made, which by statute, should also be reported to a nearby jurisdiction.
>
> Not a single one of our complaints has ever been presented to a grand jury. This is outrageous, but symptomatic of a failed public integrity system.[34]

The next day, Applicant again emailed Mendoza for an update:

> Can you please provide us an update on a number of criminal

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[32] Tab 17. It is altogether likely to assume that Moreno passed on Applicant's request for an interview with Respondent. As Applicant pointed out during his exchange with Respondent, the latter never replied to Applicant's interview request. Tab 4.

[33] Harris County District Attorney Kim Ogg.

[34] Tab 18. Applicant's email was in response to Mendoza's email of July 3, 2019 advising Applicant that Respondent had appointed Cleggett in March and May 2019 on three of Applicant's complaints and appointed Bradley on the remaining complaint in May 2019. *Id.*

> complaints that are pending in your office so I can know what black hole they are being sent to.
>
> We are preparing to report that [Respondent] sent out Texas Tech and Mayor Turner complaints to two lawyers that never turned in a single invoice. Does Ms. Ogg not to [sic] know that our complaints about the Mayor were sent to a black hole?
>
> Since none of our complaints were ever investigated we will be refiling them.[35]

The next day, Mendoza assured Applicant he was looking into his concerns.[36] On June 12, 2020, Mendoza promised to get back to Applicant about the status of his complaints.[37] Mendoza emailed Applicant on June 15, 2020, to advise him that neither Leggett nor Bradley had apparently done any work on Applicant's complaints even though "it has been over a year that those four complaints have been in [their] hands."[38] Mendoza "suggest[ed] that [Applicant] contact [Bradley and Leggett] in [his] capacity as the complainant and request an update on their investigation of the complaints."[39] Mendoza reminded Applicant that Bradley and

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[35] Id.

[36] Id. Applicant replied that he was "look[ing] forward to justice."

[37] Id.

[38] Id.

[39] Id.

Leggett were "answerable to [Respondent] and to [him], at least in terms of [his] right to being advised as to the status of [his] complaints."[40]

Sixteen days later, in the context of this highly-charged backdrop, Applicant did exactly that.

D. The two-minute exchange between Respondent and Applicant as recounted by Respondent, his bailiff, and a prosecutor on Zoom

The Reporter's Record from the proceeding on June 30, 2020 does not reflect a real-time transcription of the events giving rise to Respondent's order adjudging Applicant guilty of direct contempt.[41] Prior to sentencing, Applicant's trial counsel made an offer of proof that Applicant was not aware there were live proceedings ongoing via Zoom when he entered the courtroom and would have acted differently had he been so aware.[42] He also made an offer of proof that Applicant wanted the chance to apologize to Respondent, an offer of which Respondent took judicial notice.[43]

Respondent then called on Jeff Sims, the prosecutor assigned to his

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[40] Id.

[41] Tab 1.

[42] No doubt because he had not witnessed these events nor seen the video capturing them, trial counsel mistakenly referred to Applicant's conduct as an "outburst" that occurred "in the middle of proceedings via Zoom." Tab 1 at 6.

[43] Id. at 9.

court not present in the courtroom but observing events via Zoom, to "give a recount [sic] of what [he witnessed]:

> MR. SIMS: I did observe – I did observe the [Applicant] enter the courtroom and I think he was trying to ask you something – I didn't really catch the full gist of what he was trying to ask you. But I did hear you tell him that he needs to either sit down or leave the courtroom, and that proceedings were ongoing.[44]

Respondent then called on his bailiff, Deputy Chris Journet, to "give [her] recount [sic] of what happened:

> DEPUTY JOURNET: I agree with the State. [Applicant] did come into the courtroom. He did ask to speak to you, your Honor, and you did notify him to either sit down or leave the courtroom. And you did tell him that there were proceedings going on, that you were in court; and he continued to ask, and proceedings kept going until you held him in contempt, your Honor. And I took him into custody.[45]

Respondent then made his own proffer for the record:

> And, I mean, there are other people in the courtroom – the court coordinator, the court CLO and another bailiff – and they're all present. I won't ask them to repeat the same story that we've already heard from Jeff Sims, who is a district attorney or ADA and Deputy Chris Journet.
>
> I will state on the record that I asked [Applicant] at least

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[44] Tab 1 at 10 (emphasis added).

[45] *Id*. (emphasis added).

> three times, I plead with him; the last time, I put my head down and just tried to calm myself.
>
> And, I said: Sir, if you say one more thing, I'm going to hold you in contempt.
>
> And he told me to do what I had to do.
>
> And so, at that moment, I held him in contempt and had him taken into custody.[46]

Respondent sentenced Applicant to 180 days in jail and a $500 fine both of which were probated for six months with three days in the Harris County Jail as a condition of probation.[47] Counsel asked that Respondent set a reasonable bond to secure Applicant's release, that he not be forced to spend the night in the COVOD-19-ravaged Harris County Jail, and that Respondent defer imposition of the confinement portion of Applicant's sentence.[48] Notwithstanding "a multitude" of medical problems making Applicant an extremely high-risk candidate for becoming infected with the Coronavirus in jail, Respondent remanded Applicant to custody.[49]

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[46] *Id*. at 11. (emphasis added).

[47] Id. Applicant's sentence also included 24 hours of community service, a decision-making class, and no use of drugs or alcohol. *Id*.

[48] Id. at 11-12.

[49] *Id*. As recounted p. 36, *infra*, given Respondent's deeply-felt belief that even potentially dangerous defendant with prior arrests and convictions should be given personal bonds and spared

E. Respondent's Judgment of Contempt and Commitment Order

Respondent described Applicant's contumacious conduct as follows:

> [APPLICANT] WAS DISRUPTING COURT. HE WAS WARNED 3X. HAVE A SEAT OR LEAVE COURTROOM. HE REFUSED. KEPT DEMANDING TO INTERVIEW JUDGE. UPON FINAL WARNING, JUDGE STATED HE WOULD BE HELD IN CUSTODY. TO WHICH [APPLICANT] RESPONDED: "DO WHAT YOU HAVE TO DO."

The boiler plate portion of Respondent's judgment and order recited:

> [Applicant's] behavior prevented the court from conducting its proceedings in a dignified, orderly, and expeditious manner. The court warned [Applicant] that if he persisted in behavior [sic] the Court would hold him in contempt of court. The court also informed [Applicant] that each act of contempt was punishable by a $500 fine and up to six months confinement in Harris County Jail. Despite the Court's warnings. [sic] [Applicant] persisted in disrupting the proceedings of the court.[50]

F. Respondent's Comments the Following Morning

The next morning, Respondent, with a touch of hyperbole, described Applicant's allegedly contumacious conduct as follows:

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the specter of confinement, his decision to jail Applicant is both disingenuous and hypocritical.

[50] Tab 2. Because these rote recitations have no record support, they play no part in this Court's resolution of whether any rational factfinder could conclude beyond doubt that Applicant was guilty of direct contempt. The videotape refutes the recitations Applicant was warned of the punishment range for direct contempt or there were ongoing proceedings at the time of these events. *See Carmouche v. State*, 10 S.W.3d 323, 332 (Tex.Crim.App. 2000)(disregarding trial court's findings that defendant's consent was voluntarily given when contradicted by scene videotape).

> And what happened yesterday was completely off the chart. [51] The only thing I could have done different was to get down on my knees and beg [Applicant] to please stop. And I did everything short of that.[52]

Respondent, no doubt unaware of the significance of his candor, then stated:

> I know getting involved with [Applicant] is not going to make my life easy. I told my friend I have to go get a front license plate now because I don't want some investigative report abut [sic] me driving around without a license plate."[53]

G. Unbeknownst to Respondent, his exchange with Applicant is captured in real-time on videotape

Unbeknownst to Respondent, Applicant had a video pen in his shirt pocket that captured the exchange between Respondent and Applicant in real time.[54] A review of this less-than-two-minute video[55] suggests it can be divided into three acts. The first act, punctuated by bonhomie and good

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[51] In yet another burst of sheer exaggeration and embellishment, Respondent would go on to describe Applicant's conduct as "just really a shock to the conscience of all." *Id*. at 14.

[52] Tab 10 at 13.

[53] Tab 10 at 13.

[54] Comprised of a flash drive and a disc onto which the video was downloaded, this exhibit was forwarded to the Clerk of this Court by separate cover on July 7, 2020, received by the Clerk on July 10, 2020, and is a part of the Appendix in this proceeding.

[55] A transcription of this video was prepared by certified judicial transcriber Glenn Dodson. Tab 4. All emphasis that follows is added.

feelings all around, reveals:

- Applicant enters the courtroom, tells Respondent he is there to see him, and the two exchange greetings without Applicant advising the bailiff he wants to speak to the judge as is usually required if there are ongoing proceedings in court.

- After Respondent, who does not recognize Applicant because he is wearing a COVID-19-required mask, realizes Applicant is there to see him, there is laughter among the attendees.

- A female voice light-heartedly tells Applicant no one can tell who he is with his mask on and to take it off so "we can see who you are."

- Applicant says that because he has a distinctive voice "if I don't say anything, I'm probably OK," because when he was with his wife in the grocery store, people would say, "I can't believe someone hasn't killed [Applicant] yet."

- Respondent tells Applicant he "can't talk to anybody with pending cases in court," but is told that he has "no pending cases in court."

- Respondent again tells Applicant he can't talk to him and, "however [he] wants to interpret it, I can't talk to you."[56]

- Applicant tells Respondent, "[W]hat we need to understand is why the lawyers that have been appointed –

Once Applicant apprised Respondent why he was the courtroom – to determine why the attorneys pro tem Respondent chose to investigate the allegations of criminality Applicant brought forth had failed miserably in

[56] While he obviously does not want to talk to Applicant, Respondent's claim that he "can't talk" to Applicant is simply false on multiple levels. *See* n. 10 & pp. 9-13, *supra*.

their task – the first act ended.

The second act, an intermezzo between what starts as Woodstock[57] but ends less than a minute later as Altamont,[58] begins with Respondent addressing Applicant in a tone far less amiable and far more pointed:

- "Hey, this isn't like the regular street. It's like when I'm saying I can't talk to you that means that you can either sit down and observe but if you're ... talking to me you're done. So you need to make a choice, you can sit down and talk, or you can leave."

- When Applicant asks if Respondent wants him to "sit down and talk," just seconds later, Respondent apparently no longer believes Applicant should speak, telling him, "No, sit down and watch..."

- Applicant responds, "Oh, but I came to talk to you, Judge, because we're doing a story and you've – not returned my phone calls."[59]

- When Respondent tells Applicant, "You can't do that,"[60] the latter responds, "Well court's not in session, Judge. You're not like the President, sorry."

Applicant's last remark, pithy perhaps but not contumacious, signals

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[57] The July 1969 event referred to as "Three days of peace and music."

[58] The December 1969 event where the murder of a spectator signaled the end of the Sixties.

[59] At this point, Applicant's pen camera scanning an almost-empty courtroom and a Zoom monitor buttresses this fact. While prosecutor Jeff Sims is in one of the Zoom frames, he is merely observing and not participating in any proceeding. Indeed, as Applicant leaves the courtroom in the custody of the bailiff, his video pen shows the only people in the courtroom other than Respondent are two woman seated behind a desk to Respondent's left.

[60] While Respondent's comment is difficult to decipher, given Applicant's next remark, Respondent likely told Applicant that court was in session.

the end of the second act and the onset of the third and final act that ends just seconds later with Applicant in custody:

> RESPONDENT: Uh, Mr. Dolcefino, you need to leave the courtroom.
>
> APPLICANT: Why? You don't want to answer my questions?
>
> RESPONDENT: Cause I don't want to hold you in contempt for not – for interrupting court. We are in the middle of court right now, so either you can leave –
>
> APPLICANT: I'm sorry, Judge, I didn't see anybody in court right now.
>
> RESPONDENT: I know because you don't understand how court works.[61] So either you can leave –
>
> APPLICANT: I don't –
>
> RESPONDENT: – or go into custody. Which one is your choice?
>
> APPLICANT: Well, you know what, Judge? You're going to, you can, you have the right to do whatever you want. I'm simply trying to understand why all our complaints –
>
> RESPONDENT: Mr. Dolcefino –
>
> APPLICANT: – have been appointed to your investigators.

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[61] With all due respect to Respondent's penchant for minimizing Applicant's knowledge of courtroom procedure and protocol, Applicant has spent the better part of 35 years as an investigative journalist in and around criminal courtrooms. Tab 15. Indeed, trial counsel made an offer of proof without objection that Applicant "is a veteran of the Harris County Criminal courts since the Summer of '42..." Tab 10 at 10-11.

RESPONDENT: – you are interrupting court. Either you leave or I'm going to hold you in direct contempt.

APPLICANT: Well, then, Judge, you do what you got to do. You want to hold me in contempt for simply asking questions? Go ahead. I mean, we're just trying to find out why our complaints have –

RESPONDENT: Place him into custody.

APPLICANT: – gone unanswered.

BAILIFF: Sorry, sir. You gotta come with us.

APPLICANT: Sure.[62]

ARGUMENT AND AUTHORITIES

A. Respondent's order of direct contempt must be supported by proof beyond a reasonable doubt

"The presumption of innocence lies at the foundation of our criminal law."[63] Because this proceeding is criminal in nature, Applicant may not be adjudged guilty of contempt unless Respondent's findings supporting his order are supported by proof beyond a reasonable doubt.[64] Given the

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[62] Tab 4. The video ends with Applicant being led into the holdover area by the bailiff. From the time Applicant entered the courtroom until he was ordered into custody by Respondent, just two minutes and five seconds had elapsed.

[63] *Nelson v. Colorado*, 137 S.Ct. 1249, 1255-56 (2017).

[64] *Ex parte Reposa*, 2009 WL 3478455 at *7 n. 23 (Tex.Crim.App. Oct. 28, 2009)(not designated for publication)(orig. proc.)(citation omitted).

inherently criminal nature of this matter, federal due process requires that every element constituting Respondent's order of direct contempt be proven beyond a reasonable doubt.[65] This Court held some ninety years ago that in contempt proceedings, "mere preponderance of the evidence being insufficient to convict the accused ... proof of the alleged offense is required beyond a reasonable doubt."[66] It has also repeatedly stressed that "contempt is not to be presumed, but on the contrary, is presumed not to exist."[67] In carrying out its task to assess the sufficiency of the evidence supporting Respondent's findings, this Court must remain cognizant that "proof beyond a reasonable doubt" is "proof to a high degree of certainty."[68]

Acting as the original fact finder in this matter,[69] this Court is free to draw multiple inferences from the facts in this record so long as the

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[65] *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

[66] *Ex parte Cragg*, 109 S.W.2d 479, 481 (Tex.Crim.App. 1937).

[67] *Ex parte Jacobs*, 664 S.W.2d 360, 363 (Tex.Crim.App. 1984); *Ex parte Arnold*, 503 S.W.2d at 534.

[68] *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted).

[69] Tex. Const. art. V, sec. 5(c)("The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.").

inferences are supported by the evidence presented at trial.[70] It may not, however, reach a conclusion based on a factually unsupported inference.[71] "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented."[72] This Court is tasked with ensuring "that the evidence presented actually supports a conclusion that [Applicant] committed the [conduct] that was charged [in the commitment order]."[73] The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the charged conduct.[74] If Applicant's conduct "raised only a suspicion of guilt, even a strong one, then that evidence is insufficient" to sustain Respondent's order of direct contempt.[75]

Viewed against this unbroken backdrop of precedent, Respondent's order adjudging Applicant guilty of direct contempt, like the findings he

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[70] *Merritt v. State*, 368 S.W.3d 516, 525 (Tex.Crim.App. 2012).

[71] *Hooper v. State*, 214 S.W.3d 9, 15 (Tex.Crim.App. 2007).

[72] *Id*.

[73] *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007).

[74] *Garcia v. State*, 367 S.W.3d 683, 687 (Tex.Crim.App. 2012).

[75] *Herrin v. State*, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002).

mistakenly believed supported it "may make for a good movie, [but] does not stand up as a piece of legal analysis or bear resemblance to reality."[76]

B. Because these events are depicted on videotape in real-time, Respondent's findings are not entitled to the usual degree of deference

Appellant recognizes that in reviewing Respondent's contempt order, this Court "must afford great deference to [his] findings of historical facts as long as the record supports those findings."[77] But where, as here, there is a videotape conclusively depicting these events, "any of [Respondent's] findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when the record is viewed in a light most favorable to [his] ruling."[78] If "a picture is worth a thousand words,[79] the videotape depicting not only what Applicant did and said, but critically, the manner and tone in which he said it, plainly unmasking Respondent's

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[76] *Elmore v. Ozmint*, 661 F.3d 783, 884 (4th Cir. 2011)(Wilkinson, J., *dissenting*).

[77] *Tucker v. State*, 369 S.W.3d 179, 184 (Tex.Crim.App. 2012)(citation omitted). While no doubt vested with judicial discretion, Respondent had no discretion to determine what the law is, or in applying the law to the facts, and no discretion to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)

[78] *Miller v. State*, 393 S.W.3d 255, 263 (Tex.Crim.App. 20120(citation omitted).

[79] *Erazo v. State*, 144 S.W.3d 487, 488 (Tex.Crim.App. 2004); *see also Salazar v. State*, 90 S.W.3d 330, 339 (Tex.Crim.App. 2007)(discussing the visceral impact of a video as compared with a single photograph).

insupportable and self-serving findings as an amalgam of overstatement and misstatement[80] is worth at least ten thousand words. Regardless of how many words it is worth, the videotape fortifies the conclusion that Respondent's findings are unworthy of deference.[81]

C. The elements of direct contempt

Direct contempt occurs when the words spoken or acts performed constituting contempt occur in the presence of the court where the judge witnesses the conduct.[82] Actions of direct contempt are a use of judicial power to "preserve order in the courtroom for the proper conduct of business" and to "instantly ... suppress disturbance or violence or physical obstruction or disrespect to the court..."[83] Respondent's order adjudging Applicant guilty of direct contempt must be supported by findings showing beyond a reasonable doubt his conduct obstructed or tended to obstruct

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[80] *See Coleman v. C.I.R.,* 791 F.2d 68, 69 (7th Cir. 1986)("Some people believe with great fervor preposterous things that just happen to coincide with their self-interest.").

[81] *See Carmouche v. State*, 10 S.W.3d at 332.

[82] *Ex parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

[83] *Cooke v. United States*, 267 U.S. 517, 534-35 (1925).

the proper administration of justice[84] or was disrespectful to the court.[85] The former category involves conduct that actually "hindered the forward progress of a trial,"[86] while the latter requires that "the act itself must be shown as intentionally disrespectful."[87] As the videotape patently reveals, there is insufficient evidence for this Court to find beyond a reasonable doubt that Appellant's conduct falls within either of these two categories.

D. Applicant's conduct did not obstruct or tend to obstruct the proper administration of justice

Of the myriad ways in which the videotape conclusively contradicts Respondent's findings, perhaps none is more clear nor more important to the resolution of this issue than that Applicant's conduct did not obstruct or tend to obstruct the proper administration of justice. The videotape unmistakably reveals that from the time Applicant entered the courtroom until the time Respondent ordered him taken into custody two minutes later, there was no proceeding, trial, or hearing in progress that Applicant

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[84] *Ex parte Jacobs*, 664 S.W.2d at 364.

[85] *Ex parte Taylor*, 807 S.W.2d 746, 749 (Tex.Crim.App. 1991).

[86] *Ex parte Reposa*, 2009 WL 3478455 at *5

[87] *Ex parte Taylor*, 807 S.W.2d at 749.

could have impeded, disrupted, or obstructed – an essential element of criminal contempt."[88]

At the outset, that Respondent's courtroom was a public place where Applicant had every right to be is unassailable,[89] especially in light of the fact that Applicant had every right to attempt to speak to Respondent in his dual roles as both an investigative journalist[90] and the complainant in a series of criminal investigations.[91] It is equally clear that as an elected official, Respondent was neither insulated from nor immune to answering Applicant's hard questions about his appointment of two inexperienced and apparently indolent lawyers as attorneys pro tem. Once Respondent ignored Applicant's repeated phone calls and interview request to discuss this matter of public concern, Respondent could not have been shocked to see Applicant in a public courtroom asking him these very questions.

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[88] *Ex parte Jacobs*, 664 S.W.2d at 364.

[89] *See e.g., Presley v. Georgia*, 130 S.Ct. 721, 723 (2010)(per curiam); *Steadman v. State*, 360 S.W.3d 499, 504 (Tex.Crim.App. 2012).

[90] *See e.g. Press-Enterprise Co. v. Superior Court of Cal*., *Riverside Cty*., 464 U.S. 501, 508 (1984)("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Ex parte Aldridge*, 334 S.W.2d 161, 167 (Tex.Crim.App. 1960)("This Court has always recognized the right to a free press, a valuable right of the people and one to be protected and maintained.").

[91] *See* n. 10, *supra*.

The most critical and unassailable fact vitiating the legitimacy of Respondent's contempt order is that there was no ongoing hearing, trial, or proceeding that Applicant's conduct could have disrupted, impeded, or obstructed. While "trial" and "hearing" are easily defined, "proceeding," while not as discrete, has been defined as "business done by a tribunal of any kind."[92] That no trial or hearing was ongoing during Applicant's exchange with Respondent is patent; that there was no proceeding during which Respondent was conducting official business of any kind is equally apparent. The videotape revealed merely that Respondent, two women, and a bailiff (but no defendants) were present in court.[93] The Zoom camera shows the prosecutor observing this foursome likely chatting or simply taking a break.[94] The videotape plainly reveals Respondent was not engaging in any official business in court during his two-minute encounter with Applicant other than conversing with his skeleton staff, reviewing

[92] Bryan Garner, "Garner's Dictionary of Legal Usage," 714 (3rd ed.).

[93] Respondent noted for the record that these women were his court coordinator and his court liaison officer ("CLO") who supervises defendants on community supervision. Tab 1 at 10.

[94] This conclusion is buttressed by the first few seconds of the videotape showing that as Applicant entered the courtroom and was engaged by Respondent and his staff in a light-hearted and low-key manner, none of them – particularly Respondent – admonished Applicant to stand down because Respondent was in the middle of a trial, hearing, proceeding, or was otherwise engaged in transacting official court business.

his stock portfolio, or browsing Facebook. Respondent's contrary findings, including but not limited to his unsupported and unavailing finding that Applicant "was disrupting court,"[95] are unworthy of deference.[96]

To be sure, Applicant's conduct or statements or both might have been and apparently were irritating, annoying, or irksome to Respondent. But to equally sure, they did not hinder the forward progress of any trial, proceeding, or hearing and could not have obstructed or tended to obstruct the administration of justice as this Court has found in these instances:

- The applicant physically attacked the special master in open court.[97]
- The applicant "embarked on a loud and offensive discourse" in open court and "was required to be forcibly removed from such courtroom by officers of this Court."[98]
- The applicant made a masturbatory gesture in the presence of the trial court during a pre-trial hearing."[99]

As this Court has recognized, while applicant's conduct "may not have been commendable, and while it might have been irritating or even

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[95] Tab 2.

[96] *See Miller v. State*, 393 S.W.3d at 263; *Carmouche v. State*, 10 S.W.3d at 332.

[97] *Ex parte Daniels*, 722 S.W.2d 707, 710 (Tex.Crim.App. 1987).

[98] *Ex parte Norton*, 610 S.W.2d 512, 513 (Tex.Crim.App. 1981)

[99] *Ex parte Reposa*, 2009 WL 3478455 at ** 6-7.

exasperating to the trial judge, it did not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice," and so did not constitute direct contempt.[100] Because no rational fact finder could conclude beyond a reasonable doubt that Applicant was guilty of direct contempt, he is entitled to relief.[101]

E. Applicant's statements to Respondent were not contumacious given their tone and the context within which they were made

Tellingly, Respondent made no finding in his order of contempt that Applicant's comments were disrespectful. And for good reason. They were not. The videotape reveals that, given their tone and context within which they were made, none of Applicant's statements constituted "a serious and imminent threat to the due administration of justice."[102] As the United States Supreme Court made clear almost a half-century ago:

> The vehemence of the language used is not alone the measure of the power to punishment for contempt. The fires which it kindles must constitute an imminent, not merely a likely,

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[100] *Ex parte Pink*, 746 S.W.2d at 762; *see also Ex parte Taylor*, 807 S.W.2d at 751 (same); *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex.Crim.App. 1991)(applicant's letter to court of appeals chiding it for their opinions failed to disrupt the orderly progress of the court, the administration of justice, or the proceedings).

[101] *See Ex parte Jacobs*, 664 S.W.2d at 364 ("There is no evidence to support the conclusory assertion in the contempt order that there was an affront to the dignity and authority of the court.").

[102] *Ex parte Arnold*, 503 S.W.2d at 533-34.

> threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil ... The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.[103]

This Court has echoed the Supreme Court's sentiments, having long concluded that offensive comments, even those spoken in open court, are not contemptuous in the absence of a showing that they are disruptive or boisterous.[104] First, Applicant's statements could not have been disruptive to any proceedings because no proceedings were taking place. And second, given the myriad definitions of "boisterous" as "noisy," " rowdy," "stormy," "unrestrained" "tumultuous," "clamorous," "wild," or "disorderly," the videotape plainly shows that none of Applicant's statements, either in tone or content – came within an area code of any of these terms.[105] Tellingly,

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[103] *In re Little*, 404 U.S. 553, 555 (1972)(per curiam); *see also Craig v. Harney*, 331 U.S. 367, 376 (1947)(judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him."); *Craig v. Hecht*, 263 U.S. 255, 281-82 (1923)(Holmes, J., *dissenting*)("A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he has already done.').

[104] *See e.g.*, *Ex parte Curtis*, 568 S.W.2d 363, 366 (Tex.Crim.App. 1978).

[105] It speaks volumes about Respondent's penchant for putting his own self-serving spin on events with his false and misleading avowals that "what happened yesterday was completely off the chart" and "just really a shock to the conscience of all," Tab 10 at 13-14, and describing Applicant's conduct as an "outburst" occurring "in the middle of proceedings via Zoom." Tab 1 at 6. Because

a sampling of statements made in the presence of the judge this Court has concluded were not contumacious buttresses the conclusion that none of Applicant's statements came close to meeting this threshold:

- I feel that you are acting in favor of this Defendant in derogation of the State's case illegally and improperly."[106]
- "I think you're acting like a biased judge trying to help this Defendant beat a darn good case."[107]
- "Maybe somebody that might go both ways, you know what I mean?"[108]
- "Isn't it a fact, sir, that in the offense report that you got, that I can't get to..."[109]

Moreover, the videotape reflects that Applicant's statements were made in a normal tone of voice, and were neither loud nor threatening.[110] The videotape reflects Respondent was offended by Applicant's requests

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the videotape refutes his self-serving assertions, Respondent's findings call to mind the sentiments of a former judge of this Court quoting Tallulah Bankhead, "There is less in this than meets the eye." *Ripkowski v. State*, 61 S.W.3d 378, 394 (Tex.Crim.App. 2001)(Cochran, J., *concurring*).

[106] *Ex parte Curtis*, 568 S.W.2d at 366.

[107] *Id*.

[108] *Ex parte Taylor*, 807 S.W.2d at 749.

[109] *Ex parte Pink*, 746 S.W.2d at 762.

[110] *Cf. In re Bell*, 894 S.W.2d at 127 ("assertive statement in a normal tone of voice, neither loud nor threatening" by father of defendant to trial judge outside of her courtroom would not have been contumacious even if it had been made in open court).

that, in his capacity as an elected public servant, he answer potentially embarrassing but proper questions about appointing Bradley and Cleggett as attorneys pro tem, and why they had done nothing to investigate his complaints.[111] Notably, "Whether applicant's statement offended the court is not the test in contempt actions but the act itself must be shown to be intentionally disrespectful."[112] The videotape reflects that given the tone[113] and context in which Applicant addressed Respondent, his requests and statements "fail[ed] to show disrespect in the manner of which contempt actions are made."[114] Even Applicant's last remark alluded to in Respondent's findings – "Well then, Judge, you do what you got to do,"[115] is not only not contumacious, given his comment that Respondent has "the right to do whatever [he] wants,"[116] it is a respectful acknowledgment of

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[111] *See* pp. 9-13, *supra*.

[112] *Ex parte Taylor*, 807 S.W.2d at 749 (emphasis added).

[113] *See Ex parte Pink*, 746 S.W.2d at 762 ("It should be observed that the original contempt order and the show cause order were based on the actual language used, and did not include any reference to the attitude, demeanor or expression of the applicant Pink when using the language noted.").

[114] *Ex parte Taylor*, 807 S.W.2d at 749.

[115] Respondent's finding that Applicant said, "Do what you have to do," Tab 2, is incorrect. Applicant can clearly be heard saying, "Well then, Judge, you do what you got to do," Tab 4.

[116] Tab 4.

Respondent's power to hold him in contempt. Respondent's unfounded, flawed, and false findings to the contrary, no rational fact finder could find beyond a reasonable doubt that Applicant's statements were disrespectful, let alone, contumacious.[117] Applicant, accordingly, is entitled to relief.

F. Conclusion: "Isn't it pretty to think so?"

> I know getting involved with Mr. Delcifino is not going to make my life easy. I told my friend I have to go get a front license plate now because I don't want some investigative report abut me driving around without a license plate."[118]
>
> A defendant's statement, especially a statement implicating her in the commission of the charged offense, is unlike any other evidence that can be admitted against the defendant.[119]

This proceeding reveals that criminal defendants are not the only ones whose loose lips sink ships. Respondent's admission that he "knew that getting involved with [Applicant] is not going to make [his] life easy" fortifies the tenet that Respondent's contempt order was personal and not

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[117] *Compare Ex parte Reposa*, 2009 WL 3478455 at ** 6-7 (attorney made a masturbatory gesture in the presence of the trial court; "a purposeful act of disrespect and an affront to the dignity of the court"); *Ex parte Krupps*, 712 S.W.2d 144, 151 (Tex.Crim.App. 1986)(applicants refused to rise when judge entered courtroom); *Ex parte Norton*, 610 S.W.2d at 513 (applicant "embarked on a loud and offensive discourse" in open court and "was required to be forcibly removed from such courtroom by officers of this Court").

[118] Tab 10 at 13. (emphasis added)(sic in passim).

[119] *McCarthy v. State*, 65 S.W.3d 47, 56-57 (Tex.Crim.App. 2001)(citation omitted).

business. The DNA of Respondent's order is far more about his desire for payback after Applicant had the temerity to request answers to hard, potentially embarrassing, but ultimately proper questions from an elected official than "preserving order in the courtroom for the proper conduct of business."[120] From the moment he realized that Applicant's appearance was not a social call from a well-wisher but an investigative journalist and complainant in an investigation of alleged criminality, Respondent knew – indeed admitted on the record – that Applicant was "not going to make [his] life easy."[121] And, this record most assuredly reveals Respondent made sure that he would not make Applicant's life easy. And he has not.

Rather than recognizing he had to answer for his appointment of Bradley and Cleggett as attorneys pro tem, no differently than any other elected official would, Respondent used the awesome power of his office to sidestep that responsibility to settle a personal score. Even after turning a blind eye to this Court's admonition that, "Contempt is strong medicine.

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[120] *Cooke v. United States*, 267 U.S. at 534-35.

[121] Indeed, it is often said that the job of an investigative journalist is comfort the afflicted and afflict the comfortable.

Use it cautiously and only as a last resort,"[122] Respondent turned a deaf ear to trial counsel's repeated entreaties to stay imposition of Applicant's jail sentence given his extraordinarily high risk for contracting COVID-19 in the Petri dish of infection the Harris County Jail now is.[123] Respondent is the judiciary's strongest supporter of personal recognizance bonds, one who believes even truly dangerous defendants should walk free without being remanded or posting a cash or surety bond.[124] But his insistence on jailing Applicant, requiring him to post a cash bond, failing to sign his appeal bond until the following morning,[125] and requiring him to wear a GPS device, unmasks his disingenuous and dissembling assurance that "everyone is treated the same" in his court.[126] Of course, this Court knows,

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[122] *Ex parte Pink*, 746 S.W.2d at 762; *see also In re Reece*, 341 S.W.3d 360, 362 (Tex. 2011) (contempt "is a power that must be exercised with caution").

[123] Tab 1 at 12. *See* note 1, *supra*.

[124] Roxanna Asgarian, "Meet the Harris County Judge who wants to abolish our cash-bail system," www.houstoniamag.com, Aug. 21, 2017 (last visited July 10, 2020). The article details the following incident in court where Respondent was called upon to set bond in a theft case. "'We're going to issue a PR bond,' the judge tells the man, meaning he can walk out without paying a dime because the judge will accept his word that he'll show up to his court date. A law intern working with the judge pipes up, mentioning the man's lengthy list of prior arrests and convictions. 'That's okay,' the judge replies." Respondent's riposte calls to mind the words 17th Century French scholar Francois de la Rochefoucaud that, "Hypocrisy is the homage that vice pays to virtue."

[125] Tab 10 at 12.

[126] *Id*.

because the record reveals, that when it came to Respondent's treatment of Applicant, this simply is not true, but "[i]sn't it pretty to think so?"[127]

This Court's legacy is steeped in its deeply-felt belief that as Texas's criminal court of last resort, it has "an independent interest in ensuring… that legal proceedings appear fair to all who observe them."[128] Almost a century ago, this Court reaffirmed a fundamental principle that is as true today as it was then, and nowhere as true as it is in this case:

> The court cannot make contempt of that which is not contempt, and if upon a review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed in contempt will be released under the writ of habeas corpus. When the facts do not constitute contempt, the court is without authority to enter the [contempt] judgment.[129]

Respondent's inability to perceive the critical distinction between an offense to his sensibility with an obstruction to the administration of justice[130] and his unwillingness to discern the fine line between redressing a public wrong and finding revenge for his private grievances[131] compel

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[127] Ernest Hemingway, "The Sun Also Rises," 247 (Macmillian 1987)(1926).

[128] *Bowen v. Carnes*, 343 S.W.3d 805, 816 (Tex.Crim.App. 2011).

[129] *Ex parte Vogler*, 9 S.W.2d 733, 734 (Tex.Crim.App. 1928)(quotation marks omitted).

[130] *Ex parte Pink*, 746 S.W.2d at 762.

[131] *Ex parte Davis*, 353 S.W.2d at 34 (emphasis added).

the conclusion that Applicant "fail[ed] to show [Respondent] disrespect[132] in the manner of which contempt actions are made."[133] In discharging its solemn responsibility to ensure that this original proceeding appears fair to all who observe it, this Court is constrained to conclude that this is not a close case. But even if it was, "Under a long line of our decisions, the tie must go to [Applicant]."[134] Applicant, accordingly, is entitled to relief.

SECOND ISSUE PRESENTED

> Respondent abused his discretion by ordering Applicant to obtain a GPS device within 48 hours of release as a condition of his unauthorized appeal bond because this condition bore no reasonable relation to securing his appearance or ensuring the safety of the community.

STATEMENT OF FACTS

Over trial counsel's objection,[135] and without eliciting any testimony on whether this bond condition was warranted because Applicant was a flight risk or danger to the community, Respondent ordered Applicant to

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[132] While he did not hesitate in finding Applicant's purported disrespect for him warranted a finding of direct contempt, Respondent told Roxanna Asgarian, the author of his glowing profile, "Just because I'm a judge, that doesn't give me the right to disrespect you." *See* n. 122, *supra*.

[133] *Ex parte Taylor*, 807 S.W.2d at 749.

[134] *State v. Cortez,* 543 S.W.3d 198, 210 (Tex.Crim.App. 2018)(Newell, J., *concurring*), *citing United States v. Santos,* 128 S. Ct. 2020, 2025 (2008)(Scalia, J.,).

[135] Tab 10 at 17.

"obtain a GPS device within 48 hours of release" as a condition of his unauthorized appeal bond.[136] Cordt Akers, who represented Applicant after he was adjudged to be guilty of contempt, has stated under oath:

> Having handled thousands of criminal matters in Harris County as a prosecutor and hundreds more as defense counsel, I am aware that a GPS tracking monitor is imposed in two scenarios: (1) when the defendant poses a risk of flight, or (2) when the defendant poses a risk to another individual. Mr. Dolcefino is clearly neither. I have never seen a GPS monitor imposed as a condition of bond in a misdemeanor case, let alone any criminal contempt matter. In any case, felony or misdemeanor, I have certainly never seen a GPS monitor imposed when in fact there are no persons or places which the defendant is prohibited from contacting.[137]

ARGUMENT AND AUTHORITIES

"The fountain head of constitutionality of bail conditions[138] is that they be based upon standards relevant to the purpose of assuring the presence of [the] defendant."[139] "The conditions must bear a rational relationship to the purpose of bail – namely, to secure the appearance of

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[136] Tab 11.

[137] Tab 13. (emphasis added).

[138] *See* Tex. Code Crim. Proc. art. 44.04(c)("The court may impose *reasonable* conditions on pail pending the finality of [the] conviction.")(emphasis added).

[139] *Valenciano v. State*, 720 S.W.2d 523, 525 (Tex.Crim.App. 1986).

the accused before the court."[140] Respondent's imposition of a condition of bail that Applicant wear a GPS monitor must be reasonably related to either Applicant being a legitimate and not merely illusory flight risk or a danger to the community to withstand appellate review.[141] Because this record is silent[142] on whether either of these two conditions were met, this condition was unreasonable and Respondent clearly abused his discretion ordering it as a condition of Applicant's unauthorized appeal bond.[143]

PRAYER FOR RELIEF

For these reasons, Applicant respectfully prays that this Honorable Court grant the relief sought in his petition for original writ of habeas corpus and: (1) vacate Respondent's order adjudging Applicant guilty of direct criminal contempt, and discharge him from custody or any further

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[140] *Smith v. State*, 829 S.W.2d 885, 887 (Tex.App.– Houston [1st Dist.] 1992, pet. ref'd).

[141] *Valenciano v. State*, 720 S.W.2d at 525 (bond condition requiring defendant to stay away from his family's residence held to be unreasonable).

[142] While Respondent noted that Applicant allegedly made a comment that "he has vacation house in Georgia or Florida that he's not going to give up," Tab 10 at 17, Respondent's belief that this remark, seemingly apropos of nothing, justified imposition of a GPS device is a bridge too far. *See id.* ("The condition unreasonably impinges on appellant's freedom without forwarding society's interest in assuring his presence in any way.").

[143] *See Speth v. State*, 939 S.W.2d 769, 770 (Tex.App.– Houston [14th Dist.] 1997, no pet.) (appellate bond condition prohibiting defendant from working as a chiropractor was unreasonable).

restraint of his liberty; (2) and vacate the unauthorized condition on his unauthorized appeal bond requiring him to wear a GPS device.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

_____

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WAYNE DOLCEFINO

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all interested parties by e-filing and/or e-mail on July 13, 2020.

/s/ BRIAN W. WICE

_____

BRIAN W. WICE

EX PARTE WAYNE DOLCEFINO

2020 WL 6479370
Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Do not publish
Court of Criminal Appeals of Texas.

EX PARTE Wayne DOLCEFINO, Applicant

NO. WR-91,434-01

Delivered: November 4, 2020

ON APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS, CAUSE NO. 2316965, IN THE COUNTY CRIMINAL COURT AT LAW NO. 16 OF HARRIS COUNTY

Attorneys and Law Firms

Dan Lamar Cogdell, Brian W. Wice, for Applicant.

Per curiam.

*1 Applicant filed an application for an original writ of habeas corpus pursuant to this Court's authority to issue extraordinary writs. Tex. Const. art. V, § 5(c). Applicant challenges a judgment of contempt and order of commitment. On July 17, 2020, this Court issued an order staying the judgment of contempt and order of commitment "pending further action from this Court," and inviting the parties to respond.

The State of Texas, represented by Attorneys Pro Tem, agrees that Applicant is entitled to relief. After a review of the evidence and arguments, the contempt of court allegation is not supported by the habeas corpus record. Applicant is entitled to habeas corpus relief. Applicant's motion for leave to file is granted and the relief prayed for is granted. The order adjudging Applicant guilty of direct criminal contempt is vacated and he is discharged from any further restraint of his liberty arising from the contempt order.

Keller, P.J., and Richardson, J., concurred.

All Citations

Not Reported in S.W. Rptr., 2020 WL 6479370

OPINION

End of Document

EX PARTE EDDIE OKUEZE

CASE NO. 2295552

EXPARTE	§	IN THE COUNTY
	§	CRIMINAL COURT AT
OKWUEZE, EDWARD, CONTEMNOR	§	LAW NO. 8
	§	HARRIS COUNTY, TEXAS

Order for Show Cause Hearing

OKWUEZE, EDWARD is hereby ORDERED to appear before this Court on 1/24/2020 at 10:00 am to show cause, if any he has, why he should not be held in contempt and punished for failing to abide by the ORDERS of this Court, to-wit: ON JANUARY 7, 2020, RESPONDENT APPEARED ON BEHALF OF KEN FRANCIS BROWN IN CAUSE 2291446. BAIL HAD NOT BEEN PREVIOUSLY SET IN THE CASE. COUNSEL APPEARED, ARGUED FOR BAIL OF $1000 AND THEN INFORMED THE COURT HE WOULD BE THE SURETY ON THE BOND. THE COURT SET BAIL AT $500. RESPONDENT IS ORDERED TO SHOW CAUSE WHY HE ARGUED A MATTER IN WHICH HE HAD A PERSONAL FINANCIAL INTEREST. in the above entitled and numbered cause.

The Clerk of this Court is instructed to issue proper notice of this ORDER to the said OKWUEZE, EDWARD.

SIGNED and ENTERED on 1/15/2020.

COURT AT LAW NO. 8 OF HARRIS COUNTY, TEXAS ☆ COUNTY CRIMINAL

FRANKLIN BYNUM
PRESIDING JUDGE
IN THE COUNTY CRIMINAL

COURT AT LAW NO. 8

CONTEMNOR SPN: 02733225/DEFENSE ATTORNEY
6671 SOUTHWEST FREEWAY, SUITE 624, HOUSTON, TX 77074

IN THE COUNTY CRIMINAL COURT AT LAW NO. 8
OF HARRIS COUNTY, TEXAS

EX PARTE EDWARD OKWUEZE, CONTEMNOR

Ancillary to State of Texas v. Ken Francis Brown
Harris County Criminal Court at Law No. 8
Cause No. 2291446

EDWARD OKWUEZE'S MOTION TO DISMISS
SHOW CAUSE ORDER ENTERED BY JUDGE FRANKLIN BYNUM

TO THE HONORABLE FRANKLIN BYNUM, JUDGE PRESIDING:

EDWARD OKWUEZE ["Okwueze"], by and through Counsel, KENT SCHAFFER and BRIAN WICE, files this Motion to Dismiss the Show Cause Order Entered by Judge Franklin Bynum ["the Court"], and in support will show this Honorable Court the following.

A. INTRODUCTION

Whether attorney Edward Okwueze's conduct as an officer of the Court in asking that his client be afforded a surety bond instead of a pre-trial release bond somehow offended this Court's sensibilities is not the test it must employ in determining if Okwueze is guilty of contempt of court. As the Court of Criminal Appeals has made clear:

> Whether applicant's [conduct] offended the court is not the test in contempt actions but the act itself must be shown to be intentionally disrespectful. Trial courts ... must be on guard

> against confusing offenses to their sensibilities with obstruction to the administration of justice.[1]

B. THE COURT'S SHOW CAUSE ORDER FAILS ON ITS FACE TO ALLEGE A VIOLATION OF ANY RULE, REGULATION, CASE OR STATUTE

> But the court cannot make contempt of that which is not contempt, and if upon a review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed in contempt will be released...[2]

It is a fundamental tenet of Texas criminal jurisprudence that Okwueze may not be found guilty of criminal contempt for the conduct alleged in the Court's show cause order unless it is proven beyond a reasonable doubt that he willfully intended to do so.[3] Because the show cause order in a criminal contempt proceeding is akin to an indictment in a criminal case,[4] the Court's show cause order had to state in clear, precise, and unambiguous terms, probable cause to believe that Okwueze engaged in contumacious conduct that will support its show cause order.[5] The Texas Supreme Court has opined:

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[1] *Ex parte Taylor*, 807 S.W.2d 746, 749 (internal quotation marks omitted)(citation omitted).

[2] *Ex parte Vogler*, 9 S.W.2d 733, 734 (Tex.Crim.App. 1928)(quotation marks omitted).

[3] *In re Ryan*, 993 S.W.2d 294, 297 (Tex.App.– San Antonio 1999, no pet.).

[4] *In re Smith*, 981 S.W.2d 909, 911 (Tex.App.– Houston [1st Dist.] 1998, no pet.).

[5] *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

> Due process demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and *the show cause order ... must state when, how, and by what means the defendant has been guilty of the alleged contempt.*[6]

It is also clear that the Court cannot seek to punish Okwueze if there was no lawful court order commanding him to do or not do some specific act.[7] The Court's show cause order is insufficient to support a judgment of contempt if its interpretation requires inferences or conclusions about which *reasonable* persons might differ.[8] Viewed against this backdrop of authority, the conduct the show cause order alleged Okwueze engaged in – acting as a surety on a bond – is both legal and ethical.[9] Accordingly, the Court's show cause order must be dismissed.

C. No Rational Fact Finder Could Conclude Beyond a Reasonable Doubt that Okwueze's conduct Obstructed the Administration of Justice and Impaired the Court from Conducting Its Business With Dignity and in an Orderly and Expeditious Manner

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[6] *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)(emphasis added).

[7] *Ex parte Gray*, 649 S.W.2d 640, 642 (Tex.Crim.App. 1983).

[8] *Id.* at 260 (emphasis in original).

[9] *See* **State Bar Ethics Opinion** 347 ("An attorney may act as surety on his client's criminal bond, so long as the attorney-client relationship exists prior to the signing of the bond by the attorney).

> The power to punish for contempt should only be exercised with caution, and contempt is not to be presumed, but on the contrary, is presumed not to exist.[10]

Because this proceeding is criminal in nature and the allegations in the Court's show cause order recite that Okwueze's alleged conduct constitute constructive and not direct contempt, he is entitled to the full panoply of due process considerations in play in any criminal proceeding.[11] As noted above, Okwueze may not be found guilty of criminal contempt for acting as a surety on his client's bond as alleged in the Court's show cause order unless it is first proven beyond a reasonable doubt that his conduct obstructed the administration of justice.[12]

Federal due process requires that the every element of the crime charged be proven beyond a reasonable doubt.[13] The Court, acting as the factfinder in this matter, may draw multiple inferences from the facts so long as the inferences are supported by the evidence presented at trial.[14]

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[10] *In re Taylor*, 807 S.W.2d at 748.

[11] *Ex parte Avila*, 659 S.W.2d 443, 444 (Tex.Crim.App. 1983).

[12] *In re Ryan*, 993 S.W.2d 294, 297 (Tex.App.– San Antonio 1999, no pet.).

[13] *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

[14] *Merritt v. State*, 368 S.W.3d 516, 525 (Tex.Crim.App. 2012).

It may not, however, reach a conclusion based on a factually unsupported inference.[15] "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented."[16] In the context of this matter, this Court is tasked with ensuring "that the evidence presented actually supports a conclusion that [Okwueze] committed the [conduct] that was charged [in the show cause order]."[17] "If the evidence establishes precisely what [the Court] has alleged [in his show cause order], but the acts that [he] has alleged do not constitute a [violation of the Disciplinary Rules] under the totality of the circumstances, then that evidence, as a matter of law, cannot support a [finding of criminal contempt]."[18] The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the charged conduct.[19] In carrying out its responsibility to assess the sufficiency of the evidence to support the allegations in its show cause order, the Court must remain

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[15] *Hooper v. State*, 214 S.W.3d 9, 15 (Tex.Crim.App. 2007).

[16] *Id.*

[17] *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007).

[18] *DeLay v. State*, 465 S.W.3d 232, 235 (Tex.Crim.App. 2014).

[19] *Garcia v. State*, 367 S.W.3d 683, 687 (Tex.Crim.App. 2012).

cognizant that "proof beyond a reasonable doubt" means "proof to a high degree of certainty."[20] If the evidence "raised only a suspicion of [Okwueze's] guilt, even a strong one, then that evidence is insufficient" to sustain a finding of criminal contempt.[21]

Viewed through this prism, the Court's show cause order is fatally defective on its face and must be dismissed because it fails to state a violation of the law, the Disciplinary Rules, or any other rule, regulation, case or statute. The Court's show cause order is also fatally defective on its face because it fails to state how, when, where or why Okwueze's conduct obstructed the administration of justice and impaired the Court from conducting its business with dignity and in an expeditious manner.

It is equally plain that no rational factfinder could conclude beyond a reasonable doubt that Okwueze's conduct "obstruct[ed] or tend[ed] to obstruct the proper administration of justice," an essential element of criminal contempt."[22] No rational factfinder, therefore, could conclude beyond a reasonable doubt that his conduct obstructed or tended to

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[20] *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted).

[21] *Herrin v. State*, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002).

[22] *Ex parte Jacobs*, 664 S.W.2d 360, 364 (Tex.Crim.App. 1984).

obstruct the proper administration of justice, or otherwise impaired the Court from conducting its business with dignity and in an expeditious manner.[23] Accordingly, because no rational factfinder could conclude beyond a reasonable doubt that Okwueze engaged in conduct that could sustain a rational finding that he engaged in contumacious conduct, this Court must grant this motion to dismiss.[24]

PRAYER FOR RELIEF

For these reasons, Okwueze asks this Honorable Court to grant his motion to dismiss its show cause order.

RESPECTFULLY SUBMITTED,

/s/ KENT SCHAFFER

KENT SCHAFFER
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[23] *See Ex parte Jacobs*, 664 S.W.2d at 364 (while counsel's conduct in forcing a mistrial by refusing to participate in voir dire or proceed to trial "might have been irritating to the trial judge, it did not hinder the forward progress of the trial or obstruct the administration of justice."); *Ex parte Pink,* 746 S.W.2d 758, 762 (Tex.Crim.App. 1988)(while counsel's conduct in commenting on his inability to review offense report "might have been irritating or even exasperating to the trial court," it did not hinder the forward progress of the trial or obstruct, or tend to obstruct, the administration of justice); *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex.Crim.App. 1991)(counsel's conduct in writing letter to the court of appeals castigating it for their opinions failed to disrupt the orderly progress of the court, the administration of justice, or the proceedings in any fashion.).

[24] *See Ex parte Taylor*, 807 S.W.2d at 750 (counsel's conduct in violating trial court's motion in limine "was not flagrant disregard of the court's order not an obstruction of administration of justice.").

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on opposing counsel on January 28, 2020.

/s/ BRIAN W. WICE

BRIAN W. WICE

8

CAUSE NO. **229555201010**

THE STATE OF TEXAS	§	
	§	**IN THE COUNTY CRIMINAL**
v.	§	**COURT AT LAW NO. 8**
	§	**HARRIS COUNTY, TEXAS**
OKWUEZE, EDWARD C.	§	
	§	
A/K/A :	§	

COURT DIRECTIVE ORDER

The Court Orders that the:

☐ Motion to Suppress is **GRANTED, CASE DISMISSED**

☐ Motion for New Trial is **GRANTED**

☐ INFORMATION is **DISMISSED**

☐ State's Motion to Revoke Probation is **DENIED**

☐ State's Motion to Adjudicate is **DENIED**

☐ INFORMATION is **QUASHED**

☐ Writ of Habeas Corpus is **DISMISSED**

☐ Restricted Drivers License is **REVOKED**
TDL:

☒ Other: **SHOW CAUSE ORDER IS SET ASIDE AND CAUSE HAS BEEN DISMISSED**

SIGNED AND ENTERED THIS DATE: **1/28/2020**

FRANKLIN BYNUM, JUDGE PRESIDING

IN THE MATTER OF JOHN CREUZOT

IN THE 204TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

IN THE MATTER OF:
CONTEMPT OF COURT OF JOHN CREUZOT

Ancillary to State of Texas v. Amber Renee Guyger
204th Judicial District Court of Dallas County, Texas
Cause No. F18-00737-Q

DALLAS COUNTY CRIMINAL DISTRICT ATTORNEY JOHN CREUZOT'S MOTION TO DISMISS SHOW CAUSE ORDER ENTERED BY JUDGE TAMMY KEMP

TO THE HONORABLE JOHN L. McCRAW, JR., JUDGE PRESIDING:

JOHN CREUZOT, Criminal District Attorney for Dallas County, Texas ["Judge Creuzot"], by and through his Counsel, BRIAN WICE, files this Motion to Dismiss the Show Cause Order Entered by Judge Tammy Kemp ["Respondent"], and in support will show this Court the following.

INTRODUCTION

> This is a classic example of a judge making a mountain out of a molehill. ... Too much time and effort has already been spent on this case.[1]

The underlying narrative in this contempt matter – what it is and will always be about – is Respondent's insistence on issuing a show cause

[1] *In re Greene*, 213 F.3d 223, 224-25 (5th Cir. 2000)(per curiam)(summarily vacating district court's contempt order against a public defender who had plausible reasons for being 10-12 minutes late for a hearing and declining to remand for a further hearing "regarding such a trivial matter").

order against Judge Creuzot, not because he even came close to violating her sua sponte void unconstitutional gag order, but because Respondent was offended by his brief, benign, and non-prejudicial comments to Fox 4-TV about the Amber Guyger trial. Period. But whether Judge Creuzot's comments offended Respondent is most assuredly not the test this Court is obligated to employ in determining if he is guilty of contempt of court. As the Court of Criminal Appeals has made clear:

> Whether applicant's statement offended the court is not the test in contempt actions but the act itself must be shown to be intentionally disrespectful. Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.[2]

Whatever doubt this Court may harbor as to whether Respondent confused Judge Creuzot's conduct as an offense to her sensibilities with obstruction to the administration of justice quickly evaporates given her unwarranted, unjustified, and undignified reaction captured by the pool camera that has launched scores of Internet memes. The same quantum and quality of partiality and unfairness warranting Respondent's recusal from this proceeding is itself compelling evidence that the allegations in

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[2] *Ex parte Taylor*, 807 S.W.2d 746, 749 (internal quotation marks omitted)(citation omitted).

her show cause order seeking to jail and/or fine Judge Creuzot for his alleged violation of her sua sponte void unconstitutional gag order are not merely unsupported and unsupportable. Respondent's show cause order is driven by her personal bias, prejudice, and animus that has absolutely no place in any judicial proceeding, let alone a show cause hearing. As the Court of Criminal Appeals cautioned trial judges almost six decades ago:

> There can be no doubt that the judge has the right to punish for contempt, and yet *this right is not given for the private advantage of the judge*. ... [I]ts exercise is in some sense the trial of a case in which the judge is personally interested, and *extreme caution is required that the judge in redressing a public wrong does not also find revenge for his private grievances*.[3]

For this reason, and for the reasons set out below, this Court should grant Judge Creuzot's motion to dismiss Respondent's show cause order.

A. RESPONDENT'S UNCONSTITUTIONAL SUA SPONTE GAG ORDER CANNOT FORM THE BASIS FOR RESPONDENT'S SHOW CAUSE ORDER

The Pandora's Box from which all of the evils that have spawned this show cause hearing is Respondent's *sua sponte* gag order that issued on January 8, 2019 in the Guyger murder trial.[4] That same day, and without

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[3] *Ex parte Davis*, 353 S.W.2d 29, 636 (Tex.Crim.App. 1962)(emphasis added).

[4] "RESTRICTIONS REGARDING PUBLICITY," Appendix Tab 3: Judge Creuzot's Supplemental Motion to Set Aside Judge Tammy Kemp's Void Order Disqualifying Judge Creuzot and his Office.

holding a hearing or taking testimony on the issue,[5] Respondent entered her "FINDINGS REGARDING PUBLICITY," taking "notice of the publicity concerning this case," the "extensive media coverage of this case" and "extensive news coverage of statements made by attorneys, politicians, and others associated with this case, as well as newspaper editorials and opinion pieces on television news programs."[6] Although Respondent's gag order prohibited the parties and counsel from "mak[ing] or authoriz[ing] the making of any statements in violation of Rule 3.07(a) of the Texas Disciplinary Rules of Professional Conduct,"*it did not prohibit Judge Creuzot or any other party from giving interviews to or discussing the case with the media.*[7] Respondent's gag order *only* prohibited the parties from making any extrajudicial statements prohibited by, but not limited to, Rule 3.07(b)(1-5)[8] that would have a substantial likelihood of materially prejudicing the Guyger trial pursuant to Rule 3.07(a).[9]

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[5] Tab 4.

[6] Tab 5.

[7] Tab 5 (emphasis added).

[8] Tab 5.

[9] Tab 6.

But, as explicated below, and, as amplified in the amicus curiae brief filed in this case by The Freedom of Information Foundation of Texas on Judge Creuzot's behalf on November 15, 2019,[10] Respondent's sua sponte gag order, entered eight months before jury selection in the Guyger case, violated Art. I, § 8 of the Texas Constitution and the First Amendment to the United States Constitution, and so was void at its inception because:

- her gag order was a clear abuse of her judicial discretion;[11]
- her gag order was a presumptively unconstitutional prior restraint;[12]
- a constitutional gag order is the exception, not the rule;[13]
- she was authorized to enter a gag order only if there was a substantial likelihood that "publicity, unchecked, would so distort the views of potential jurors that [enough] could not be found who would, under proper instructions, fulfill their sworn duty to render

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[10] A copy of this brief is attached hereto as an appendix.

[11] *See e.g., San Antonio Express-News v. Roman*, 861 S.W.2d 265, 267-268 (Tex.App.– San Antonio 1993)(entry of unconstitutional gag order was abuse of discretion); *In re Graves*, 217 S.W.3d 744, 749 (Tex.App.– Waco 2007)(same); *In re Clendennen*, 2018 WL 1415558 at *3 (Tex.App.– Waco March 21, 2018)(same)(not designated for publication); *In re Clendennen*, 2015 WL 4730554 at *1 (Tex.App.– Waco August 7, 2015)(not designated for publication)(same).

[12] *See e.g., Bantom Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963)(gag orders bear "a heavy presumption against its constitutional validity"); *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018)(gag order is presumptively unconstitutional because it is content based).

[13] *See Capital Cities Media, Inc., v. Toole*, 463 U.S. 1303, 1307 (1983).

a just verdict exclusively on the evidence presented in open court;"[14]

- her gag order violated Art. I, § 8 of the Texas Constitution[15] and the holding in *Davenport v. Garcia*,[16] that a gag order in a civil matter will withstand constitutional scrutiny "only where there are specific findings supported by evidence that (1) an *imminent and irreparable harm* to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents *the least restrictive means* to prevent that harm";[17]

- the rule in *Davenport* had been applied on at least three occasions in striking down gag orders entered in criminal proceedings;[18]

- she was not authorized to take "notice"of the quantum and quality of the pretrial publicity in the Guyger case under TEX. R. EVID. 201[19] because this record is silent as to whether she gave Judge Creuzot or any other party "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed";[20]

- Respondent never held a hearing where evidence was taken on the

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[14] *Nebraska Press Association v. Stuart*, 427 U.S. 539, 569 (1976).

[15] This provision provides, in pertinent part, that, "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

[16] 834 S.W.2d 4, 10 (Tex. 1992).

[17] *Id.* (emphasis added).

[18] *See San Antonio Express-News v. Roman*, 861 S.W.2d at 267-268; *In re Graves*, 217 S.W.3d at 749; *In re Clendennen*, 2018 WL 1415558 at *3; *In re Clendennen*, 2015 WL 4730554 at *1.

[19] "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) it is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

[20] *See* Rule 201(e); *Turner v. State*, 733 S.W.2d 218, 221-22 (Tex.Crim.App. 1987).

nature of pretrial publicity,[21] and her conclusory finding that this pretrial publicity presented "a serious and imminent threat to the constitutional right of the defendant herein to a fair trial exists"[22] is wholly unwarranted and unavailing;[23]

- Respondent's findings make no mention whatsoever of the words "irreparable" or "harm," as required by *Davenport* and the cases upon which it relies, her gag order was unconstitutional on its face;[24]

- Respondent's gag order contains a rote recital that "other, less

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[21] *See e.g., In re Benton*, 238 S.W.3d 587, 589-90 (Tex.App.– Houston [14th Dist.] 2007) (detailing hearing on State's request for a gag order where defense elicited detailed evidence and offered legal arguments in opposition to this request).

[22] Tab 3.

[23] *In re Benton*, 238 S.W.3d at 598 (rejecting trial court findings supporting its gag order that were even more detailed than Respondent's – finding "substantial publicity," "extensive media coverage and publicity," and the "extraordinary willingness [of defense counsel] to grant interviews to the media [because] ... there has been no showing that such [pretrial] publicity is materially prejudicial. Even pervasive and concentrated publicity is not prejudicial per se."); *see also Faulder v. State*, 745 S.W.2d 327, 339 (Tex.Crim.App. 1987)("Extensive knowledge in the community of either the crime or the defendant, without more, is insufficient to render a trial unconstitutional."); *Etheridge v. State*, 903 S.W.2d 1, 6 (Tex.Crim.App. 1994)(pretrial publicity about a case must be so "pervasive, prejudicial and inflammatory" that there is a substantial likelihood that prospective jurors' initial opinions cannot be set aside to warrant a change of venue).

[24] *See San Antonio Express-News v. Roman*, 861 S.W.2d at 268 ("The presumption that [the gag order] violate[s] article I, section 8 of our constitution has not been rebutted. The trial court's order contains no findings as required by *Davenport*."); *In re Graves*, 217 S.W.2d at 752 (gag order was unconstitutional under Art. I, § 8 of the Texas Constitution where "Respondent failed to make 'specific findings' detailing the nature or extent of the pretrial publicity in Graves's case or how the pretrial publicity or the record from his prior prosecution will impact the right to a fair and impartial jury."); *In re Clendennen*, 2018 WL 1415558 at *2 (gag order was unconstitutional where "Respondent made no true 'specific findings' as to whether pretrial publicity would truly impact the right to a fair and impartial jury and whether it was the [least restrictive means to prevent any harm."); *see also Nebraska Press Association v. Stuart,* 427 U.S. at 562 (gag order invalid where "the evidence before the trial judge when the order was entered" reveals no facts "support[ing] the entry of a prior restraint]"); *Grigsby v. Coker*, 904 S.W.2d 619, 620 (Tex. 1995)(gag order must be supported by "evidence and specific findings").

restrictive means will not adequately protect the defendant's right to a fair trial and the interest of the State and the defendant in a fair and impartial jury,"[25] a finding that lacks meaningful support;[26]

- Respondent's findings fail to offer any explanation or analysis as to why the irreparable harm to the judicial process her gag order failed to even mention, let alone identify, could not be cured by any or all of these remedial actions, especially considering that the gag order was not "a feasible and effective means" of preventing disclosure of already public information;[27] and

- Respondent's gag order was unconstitutional on its face even under the less protective First Amendment standard the court of appeals applied in *In re Benton* over a decade ago, striking down the trial court's gag order after a hearing and on findings that were far more specific than the threadbare findings in Respondent's gag order.[28]

Like Banquo's ghost,[29] Respondent's void unconstitutional *sua sponte* gag order has haunted Judge Creuzot since the ink was dry on her show

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[25] Tab 3.

[26] *See e.g.*, *In re Murphy-Brown*, LLC, 907 F.3d 788, 799 (4th Cir. 2018)("The law empowers trial courts to ensure fair jury trials using a number of tools short of gag orders. These tools include enlarged jury pools, *voir dire*, changes to a trial's location or schedule, cautionary jury instructions, and in more unusual circumstances, sequestration. The gag order failed to explain if and why these [less drastic] alternatives had proven to be ineffective.").

[27] *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 815 (2000); *see also In re T.T.*, 779 N.W.2d 602, 620 (Neb. Ct. App. 2009)("[A]t least some of the information restricted by the gag order is already in the public domain [so] this factor reduces the effectiveness of the gag order, as well as undercuts any claim that the danger of harm is imminent."). Indeed, Movant's comments for which he now faces punishment are already in the public record. Tabs 31 & 32.

[28] *In re Benton*, 238 S.W.3d at 598.

[29] WILLIAM SHAKESPEARE, *Macbeth*, Act III, scene 4 (1606).

cause order. Respondent's show cause order is the fruit of the poisonous tree she planted in January when her void unconstitutional gag order took root.[30] But Respondent's show cause order is not merely poisonous fruit, it is, as explained below, legal cotton candy: no doubt pleasing to her eye yet melting at the touch.

C. Respondent's Show Cause Order Fails on its Face To Allege a Violation of Her Void Unconstitutional Gag Order

> But the court cannot make contempt of that which is not contempt, and if upon a review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed in contempt will be released...[31]

It is a fundamental principle of Texas criminal jurisprudence that Judge Creuzot may not be found guilty of criminal contempt for violating Respondent's void unconstitutional gag order as alleged in her show cause order unless it is proven beyond a reasonable doubt that he willfully intended to do so.[32] Because the show cause order in a criminal contempt proceeding is akin to an indictment in a criminal case,[33] Respondent's

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[30] *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

[31] *Ex parte Vogler*, 9 S.W.2d 733, 734 (Tex.Crim.App. 1928)(quotation marks omitted).

[32] *In re Ryan*, 993 S.W.2d 294, 297 (Tex.App.– San Antonio 1999, no pet.).

[33] *In re Smith*, 981 S.W.2d 909, 911 (Tex.App.– Houston [1st Dist.] 1998, no pet.).

show cause order had to state in clear, precise, and unambiguous terms, probable cause to believe that Judge Creuzot violated a reasonably specific court order[34] that was not void.[35] The Texas Supreme Court has opined:

> Due process demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and *the show cause order ... must state when, how, and by what means the defendant has been guilty of the alleged contempt.*[36]

It is equally well settled that Respondent could not seek to punish Judge Creuzot for violating her void unconstitutional gag order if it did not order him to do or not do some specific act.[37] Respondent's show cause order is insufficient to support a judgment of contempt if its interpretation requires inferences or conclusions about which *reasonable* persons might differ.[38]

Viewed against this backdrop of authority, Respondent's show cause order fails to survive serious scrutiny on multiple levels, and so must be

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[34] *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

[35] *See e.g., Ex parte Lillard,* 314 S.W.2d 800, 804 (Tex. 1958)("Lillard cannot be legally held in contempt for violating a void decree.").

[36] *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)(emphasis added).

[37] *Ex parte Gray*, 649 S.W.2d 640, 642 (Tex.Crim.App. 1983).

[38] *Id.* at 260 (emphasis in original).

dismissed. A thorough and dispassionate analysis of the show cause order reveals it failed to allege Judge Creuzot violated any specific provision of her void unconstitutional gag order that instructed Judge Creuzot and all other parties not to:

> furnish any statement or information, or make or authorize the making of an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication, if the person making the statement knows or reasonably should know that *it will have a substantial likelihood of materially prejudicing the trial of this case, pose a serious threat to the constitutional guarantees to a fair trial, or impair the Court's ability to impanel a fair and impartial jury.*[39]

Even a cursory review of Respondent's unconstitutional sua sponte gag order readily reveals what it does and does not prohibit: it prohibited Judge Creuzot *only* from making an extrajudicial statement that he knew or reasonably should have known would have a substantial likelihood of materially prejudicing the Guyger trial in violation of TEXAS RULES OF DISCIPLINARY CONDUCT 3.07(a).[40] It *did not* prohibit Judge Creuzot from "granting an interview discussing the Amber Guyger case" *so long as his*

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[39] Tab 3 at 2 (emphasis added).

[40] Tab 6.

comments did not violate Rule 3.07.[41] Yet Respondent nonetheless saw fit to issue a show cause order animated by the very conduct that none of its 79 words reasonably, specifically, and unambiguously state was Judge Creuzot's violation of her void unconstitutional sua sponte gag order, to wit:

> *Granting an interview discussing the Amber Guyger case* which aired on KDFW Fox 4 television and online on September 22, 2019, and September 23, 2019, in direct violation of [Respondent's] order restricting publicity in the Amber Guyger case.[42]

But even if as recounted above, Respondent's void unconstitutional gag order can be charitably viewed as meeting this exacting standard, her show cause order does not. Indeed, Respondent's show cause order cannot survive this test because, as noted above, it wholly fails to state with any degree of certainty, clarity, and unambiguity that Judge Creuzot violated any term or provision of the gag order. Taking as true the allegation that Judge Creuzot "[g]rant[ed] an interview discussing the Amber Guyger case which aired on KDFW Fox 4 television and online...,"[43] Respondent's

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[41] Tab 3 at 2 (emphasis added).

[42] Tab 22 at 1 (emphasis added).

[43] Tab 22 at 1.

decision to initiate criminal contempt proceedings is both unjustified and unjustifiable because her void unconstitutional gag order did not *clearly and unambiguously prohibit Judge Creuzot from engaging in this very conduct.* Because Respondent could not seek to punish Judge Creuzot for violating her void unconstitutional gag order because it did not order him to not engage in the specific act alleged in her show cause order – giving an interview that aired on television discussing the Guyger case – her show cause order must be dismissed.[44]

D. No Rational Fact Finder Could Conclude Beyond a Reasonable Doubt that Judge Creuzot's Statements Violated Respondent's Sua Sponte Void Unconstitutional Gag Order or That His Conduct Obstructed the Administration of Justice And Impaired Respondent From Conducting Her Business With Dignity and in an Orderly and Expeditious Manner

> The power to punish for contempt should only be exercised with caution, and contempt is not to be presumed, but on the contrary, is presumed not to exist.[45]

Because this proceeding is criminal in nature and the allegations in Respondent's show cause order recite that Judge Creuzot's alleged actions constitute constructive and not direct contempt, he is entitled to the full

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[44] *See e.g., Ex parte Gray*, 649 S.W.2d at 642 (court may not find counsel in contempt for violating an order if it did not order him to do or not do some specific act).

[45] *Ex parte Taylor*, 807 S.W.2d at 748.

panoply of due process considerations in play in any criminal proceeding.[46] As recounted above, Judge Creuzot may not be found guilty of criminal contempt for violating Respondent's void unconstitutional gag order as alleged in her show cause order unless it is proven beyond a reasonable doubt that he willfully intended to do so and his conduct obstructed the administration of justice.[47]

Federal due process requires that the every element of the crime charged be proven beyond a reasonable doubt.[48] This Court, acting as the factfinder in this matter, may draw multiple inferences from the facts so long as the inferences are supported by the evidence presented at trial.[49] It may not, however, reach a conclusion based on a factually unsupported inference.[50] "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented."[51] In the context of this matter, this Court is tasked with ensuring "that the evidence presented actually

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[46] *Ex parte Avila*, 659 S.W.2d 443, 444 (Tex.Crim.App. 1983).

[47] *In re Ryan*, 993 S.W.2d 294, 297 (Tex.App.– San Antonio 1999, no pet.).

[48] *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

[49] *Merritt v. State*, 368 S.W.3d 516, 525 (Tex.Crim.App. 2012).

[50] *Hooper v. State*, 214 S.W.3d 9, 15 (Tex.Crim.App. 2007).

[51] *Id.*

supports a conclusion that [Judge Creuzot] committed the [conduct] that was charged [in the show cause order]."[52] "If the evidence establishes precisely what [Respondent] has alleged [in her show cause order], but the acts that [she] has alleged do not constitute a [violation of her gag order] under the totality of the circumstances, then that evidence, as a matter of law, cannot support a [finding of criminal contempt]."[53] The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the charged conduct.[54] In carrying out its responsibility to assess the sufficiency of the evidence to support the allegations in Respondent's show cause order, this Court must remain cognizant that "proof beyond a reasonable doubt" means "proof to a high degree of certainty."[55] If the evidence of a violation of Respondent's sua sponte void unconstitutional gag order "raised only a suspicion of [Judge Creuzot's] guilt, even a strong one, then that evidence

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[52] *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007).

[53] *DeLay v. State*, 465 S.W.3d 232, 235 (Tex.Crim.App. 2014).

[54] *Garcia v. State*, 367 S.W.3d 683, 687 (Tex.Crim.App. 2012).

[55] *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted).

is insufficient" to sustain a finding of criminal contempt.[56]

Viewed through this prism of precedent, Respondent's show cause order is fatally defective on its face and must be dismissed because the actual words spoken by Judge Creuzot in his brief television interview vitiate any rational finding that probable cause existed for her to issue a show cause order for violating her void unconstitutional sua sponte gag order. Respondent's show cause order is also fatally defective on its face because it fails to state how, when, where or why Judge Creuzot's conduct obstructed the administration of justice and impaired Respondent from conducting her business with dignity and in an expeditious manner.[57]

The sum and substance of what Judge Creuzot said in the minute or so of his actual statements consisted of the following:

- I've studied what we have and I feel comfortable that we're going forward on it, but I don't have any idea as to how it will end up;[58]
- Seems to me people were misinterpreting the facts of the case and what they meant legally. And so this issue of manslaughter, that it

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[56] *Herrin v. State*, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002).

[57] Tab 22.

[58] Tab 7.

> was manslaughter. I wrote,[59] no, this is more appropriately a murder case based on the facts as reported. And I've studied what we have, and I feel comfortable that we're going forward on it, but I don't have any idea as to how it will end up.[60]

Judge Creuzot was also quoted by Fox 4 reporters as saying:

- Botham Jean's family is anxious;"[61]
- He still feels [the victim's family's] pain and their anxiety as they head into trial;
- He maintains that this is appropriately a murder case;"[62] and
- Those days [of trial] go by quickly but those weeks are long."[63]

Simply put, no rational factfinder could conclude in the first instance that probable cause existed for Respondent to issue a show cause order based on any alleged violation of her sua sponte void unconstitutional gag order. More importantly, no rational factfinder could conclude beyond a reasonable doubt that Judge Creuzot's on-air comments or his ascribed

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[59] Judge Creuzot wrote an article on his Facebook page that appeared in the DALLAS EXAMINER on September 25, 2018, opining that murder, and not manslaughter, was the appropriate charge in the Guyger case, which he was extensively quoted on in both the print and electronic media, well before Respondent's gag order was entered in January 2019. Tabs 9, 10, 11, 12, 13.

[60] Tab 8.

[61] Tab 7.

[62] Tab 7.

[63] Tab 7.

quotations come close to violating the spirit and tenor of Rule 3.07(a), let alone the sub-set of prohibitions in Respondent's void unconstitutional gag order channeling Rule 3.07(b)(1-5). On their face, and viewed through the lens of Rule 3.07(b)(1-5), all of Judge Creuzot's brief on-air statements and quotations find safe harbor in this rule. Judge Creuzot's statements and quotations that murder and not manslaughter was the appropriate charge in the Guyger prosecution were not only in the public record but were the general nature of the claim in the case. Judge Creuzot's remaining benign quotations ascribed to him about the victim's family and expected length of the trial clearly constituted information contained in the public record or scheduling matters. No doubt because her stunning lack of impartiality and fairness clouded her judgment, Respondent elected to turn a blind eye to the inconvenient truth that there is no evidence in this record that any of Judge Creuzot's sound bites or ascribed quotations could be viewed by any rational factfinder as having *any likelihood*, let alone, the requisite degree of *a substantial likelihood*, of materially prejudicing the jury in the Guyger trial.

It is equally plain that no rational factfinder could conclude beyond a reasonable doubt that Judge Creuzot's conduct "obstruct[ed] or tend[ed]

to obstruct the proper administration of justice," an essential element of criminal contempt."[64] While Respondent was bound to hear the defense's predictable motion for mistrial in the wake of Judge Creuzot's interview, and individually poll the jurors to determine that none had been exposed to his sound bites or quotes, she did so in the time usually required for a mid-morning or mid-afternoon break.[65] Over the course of a two-week trial, it took Respondent comparatively little time to determine that jurors had neither seen nor heard Judge Creuzot's brief interview. No rational factfinder, therefore, could conclude beyond a reasonable doubt that his conduct hindered the forward progress of the Guyger trial, obstructed or tended to obstruct the proper administration of justice, or otherwise impaired Respondent from conducting her business with dignity and in an expeditious manner.[66] Accordingly, because no rational factfinder could

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[64] *Ex parte Jacobs*, 664 S.W.2d 360, 364 (Tex.Crim.App. 1984).

[65] Tab 16 at 57-83.

[66] *See Ex parte Jacobs*, 664 S.W.2d at 364 (while counsel's conduct in forcing a mistrial by refusing to participate in voir dire or proceed to trial "might have been irritating to the trial judge, it did not hinder the forward progress of the trial or obstruct the administration of justice."); *Ex parte Pink,* 746 S.W.2d 758, 762 (Tex.Crim.App. 1988)(while counsel's conduct in commenting on his inability to review offense report "might have been irritating or even exasperating to the trial court," it did not hinder the forward progress of the trial or obstruct, or tend to obstruct, the administration of justice); *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex.Crim.App. 1991)(counsel's conduct in writing letter to the court of appeals castigating it for their opinions failed to disrupt the orderly progress of the court, the administration of justice, or the proceedings in any fashion.).

conclude beyond a reasonable doubt Judge Creuzot willfully and flagrantly disregarded Respondent's sua sponte void unconstitutional gag order in a manner that obstructed or tended to obstruct the orderly administration of justice, this Court must grant this motion to dismiss.[67]

PRAYER FOR RELIEF

For these reasons, Judge Creuzot asks this Honorable Court to grant his motion to dismiss the show cause order entered by Respondent, Judge Tammy Kemp.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

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[67] *See Ex parte Taylor*, 807 S.W.2d at 750 (counsel's conduct in violating trial court's motion in limine "was not flagrant disregard of the court's order not an obstruction of administration of justice.").

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on opposing counsel, Ellis County District Attorney Patrick Wilson via electronic filing and/or e-mail on December 5, 2019.

/s/ BRIAN W. WICE

BRIAN W. WICE

CAUSE NO. 01-22-00312-CV

IN THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT AT HOUSTON, TEXAS

IN RE GARY DANG, RELATOR,

RELATOR'S MOTION FOR TEMPORARY RELIEF TO STAY PROCEEDINGS AND TO SET BOND

ANCILLARY TO
NATIONAL SHUTTER, LLC ET AL.,
VS.
SUPREME SHUTTERS COMPONENTS, INC., GARY DANG ET AL.
CAUSE NO. 2020-39704
55TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Gary Dang ("Relator"), by his counsel, Brian Wice, files this motion for temporary relief[1] to stay enforcement of an order entered by Judge Latosha Lewis Payne, 55th Judicial District Court of Harris County, Texas ["Respondent"], on March 31, 2022.[2]

1. This Court has jurisdiction over this original proceeding and request for temporary relief pursuant to Tex. Govt. Code, Sect. 22.221(d).[3]

[1] *See* Tex. R. App. P. 10.1(a) and 52.10.

[2] *See* Exhibit A.

[3] "Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained of his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of his liberty is by virtue of an order, process, or

2. Following a four-day hearing held on August 23, 2021, August 25, 2021, August 26, 2021, and November 1, 2021,[4] Respondent adjudged Relator guilty of criminal contempt for 16 separate violations of a Temporary Injunction ["TI"] issued in this proceeding on July 17, 2020 in a Contempt Order filed on March 31, 2022 ("Order").[5]

3. In her Order, Respondent sentenced Relator to 30 days in the Harris County Jail and a $500 fine for each violation, for a total fine of $8,000, with Relator's jail sentences to run concurrently.[6]

4. Following a hearing conducted on April 25, 2022 in connection with Relator's Emergency Motion to Vacate, Motion for Stay, and Emergency Motion to Clarify the Court's Order filed on April 19, 2022,[7] Respondent ordered Relator to return to court at 9:00 a.m. on April 26,

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commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted."

[4] Relator will file a copy of the Reporter's Record from these proceeding as well as other relevant documents not attached hereto when he files his petition for writ of habeas corpus no later than the close of business on April 26, 2022.

[5] *See* Exhibit A.

[6] *See id.*

[7] *See* Exhibit B.

2022 to surrender and be committed to the Harris County Jail to serve his 30-day jail sentence.[8]

5. Relator also asks this Honorable Court to set bond pending its resolution of this matter.[9]

6. On April 1, 2021, Real Parties in Interest National Shutters et al filed a "Request for Show Cause Hearing and Motion for Contempt and Sancations [sic] for Violations of this Court's July 17, 2020 Order ("Show Cause Request") setting out 16 instances where Relator allegedly violated Respondent's TI.[10] Notably, this pleading did not assert that any or all of these alleged violations occurred "on or about" a date certain but alleged specific dates of violations.

7. On July 6, 2021, Respondent signed a Show Cause Order in this matter ordering, inter alia, Relator to appear before her on August 23, 2021 at 2:30 p.m. to show cause why he should not be held in contempt for violating Respondent's TI.[11]

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[8] Because the court reporter failed to provide this portion of the record upon request after telling him she would do so, Relator will supplement it as soon as he obtains it.

[9] *See* Tex. Govt. Code, Sect. 22.221(d).

[10] *See* Exhibit C at p. 13 (chart of 16 alleged violations of Respondent's TI).

[11] *See* Exhibit D. Tellingly, Respondent's Show Cause Order did not set out in any detail or incorporate by reference the 16 instances in Real Parties in Interest's Show Cause Request where

8. The court held a hearing on August 23, 2021, August 25, 2021, August 26, 2021, and November 1, 2021, at which Real Parties in Interest presented evidence on each of Relator's 16 alleged violations of Respondent's TI and offered a chart setting out the dates and homeowners forming the basis for each of these 16 alleged violations.[12]

9. Respondent's Order adjudged Relator guilty of criminal contempt and expressly stated that each alleged violation occurred on or about July 25, 2020.[13]

10. As will be set out in greater detail in Relator's petition for writ of habeas corpus and appendix to be filed later no later than the close of business on April 26, 2022, Respondent's contempt order is void because it erroneously states that each of the 16 instances where she found Relator to have violated her TI allegedly occurred on or about July 25, 2020.

11. In reality, as reflected in Real Parties in Interest's Show Cause Request and the Reporter's Record, only four such claimed violations

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Relator allegedly violated Respondent's TI. Respondent also ordered Relator's wife, Stacy Tran, Joseph Ruley, and Supreme Shutters to appear at this hearing.

[12] *See* n. 9, supra.

[13] *See* n. 4, supra.

allegedly occurred on July 25, 2020. The remaining 12 claimed violations allegedly occurred on August 5 (two alleged violations), August 18, August 21 (two alleged violations), August 24 (two alleged violations), August 26, September 2, and September 3 (three alleged violations), 2020.[14]

12. For this Court to ultimately order Relator's release, he must demonstrate in his petition for writ of habeas corpus that Respondent's order is void, either because it was beyond the power of the court or because it deprived Relator of his liberty without due process of law.[15]

13. To satisfy the due process requirements necessary to support Relator's criminal contempt convictions, there must be proof beyond a reasonable doubt that (1) Respondent's TI was a reasonably specific order, (2) Relator violated her TI, and (3) Relator's violation was a willful act.[16]

14. In gauging evidentiary sufficiency, this Court must ensure "that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged."[17] Evidence is insufficient if "the

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[14] *See* n. 9, supra.

[15] *In re Smith*, 981 S.W.2d 909, 911 (Tex.App.–Houston [1st Dist.] 1998, orig. proceeding).

[16] *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995)(emphasis added).

[17] *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007).

record contains either no evidence of an essential element, merely a 'modicum' of evidence of one element, or if it conclusively establishes reasonable doubt."[18]

15. Because "the presumption of innocence lies at the foundation of our criminal law,"[19] this Court must remain cognizant that "proof beyond a reasonable doubt" means "proof to a high degree of certainty."[20] The standard of proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure, because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding."[21] By impressing upon the fact finder the need to reach a subjective state of near certitude of the accused, this standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.[22]

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[18] *Queeman v. State*, 520 S.W.3d 616, 622 (Tex.Crim.App. 2012).

[19] *Nelson v. Colorado*, 137 S.Ct. 1249, 1255-56 (2017).

[20] *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted).

[21] *Jackson v. Virginia*, 443 U.S. at 315 (citation omitted).

[22] Id.

16. Viewed through this lens, and as will be set out in his petition for writ of habeas corpus, Respondent's Contempt Order is void because 12 of the 16 instances in which she adjudged Relator guilty of criminal contempt are wholly unsupported by proof beyond a reasonable doubt. Specifically, Respondent's Contempt Order is void because there is a fatal and material variance[23] between the allegations in Real Parties in Interest's Show Cause Request, Respondent's Show Cause Order, and the proof adduced at the contempt hearing. There is not only no proof beyond a reasonable doubt that no more than four of Relator claimed violations of Respondent's TI allegedly took place on July 25, 2020, there is no proof whatsoever. This fatal and material variance fortifies the conclusion that Respondent's Contempt Order is void.[24]

17. Respondent's Contempt Order is also void to the extent that it erroneously orders Relator to pay his fine to Real Parties in Interest[25] and

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[23] *See generally Gollihar v. State*, 46 S.W.3d 243, 246-250 (Tex.Crim.App. 2001)(setting out what constitutes a fatal material variance that affects the accused's substantial rights).

[24] *See e.g.*, *Planter v. State*, 9 S.W.3d 156, 159 (Tex.Crim.App. 1999)(concluding there was a fatal material variance between the allegation and the proof at trial upon which jurors found the accused guilty beyond a reasonable doubt even though the court of appeals held that a hypothetically correct jury charge remedied this fatal material variance).

[25] *Galtex Prop Inv'rs, Inc. v. City of Galveston*, 113 S.W.3d 922, 924 (Tex.App.– Houston [14th Dist.] 2003, no pet.)("The law is well established in Texas that a court may not award a civil

to pay Real Parties in Interest an unspecified amount of attorneys' fees.[26] While these clearly erroneous findings in Respondent's Contempt Order do not directly impact her void findings adjudging Relator guilty of 12 claimed instances of contempt allegedly occurring on or about July 25, 2020 for which no proof, let alone, proof beyond a reasonable doubt exists, it bears directly on Respondent's failure to recognize and apply principles of law that are clearly well settled.

18. Granting a stay in this matter and setting bond for Relator will maintain the status quo and allow this Court to resolve the merits of this dispute before Relator suffers the immediate and irreparable injury of serving a 30-day jail sentence based on a contempt order that is void.[27] A stay is also warranted to avoid Relator's unconstitutional confinement in violation of due process and due course of law protections.

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judgment to a private litigant in a contempt proceeding."); *see also Cannan v. Green Oaks Apts.*, 758 S.W.2d 753, 754 (Tex. 1988)(per curiam)("in a contempt proceeding private parties cannot recover damages for a violation of a court order").

[26] *In re Martinez*, 377 S.W.3d 724, 726 (Tex.App.– San Antonio 2011, orig. proceeding) (a court may not award attorneys' fee "based on the preparation of and hearing on the motion for contempt").

[27] *See e.g., In re Kelleher*, 999 S.W.2d 51, 52 (Tex.App.– Amarillo 1999, orig. proceeding)("Simply put, Rule 52.12 exists to afford the court opportunity to address the dispute encompassed within [an original] petition ... by maintaining the status quo until it can address that dispute.").

Relator prays that this Court issue a stay of Respondent's Order and set bond pending its disposition of his Petition for Writ of Habeas Corpus.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), this document was served on opposing counsel and on Respondent by e-filing on April 25, 2022.

/s/ BRIAN W. WICE

BRIAN W. WICE

CERTIFICATE OF CONFERENCE

Pursuant to Tex. R. App. P. 52.10(a), I have personal knowledge that opposing counsel, Brian Trachtenberg, stated on the record in open court on April 25, 2022 that he opposed the relief sought herein.

/s/ BRIAN W. WICE

BRIAN W. WICE

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Affidavit Page from DANG EMERGENCY REQUEST FOR STAY.pdf

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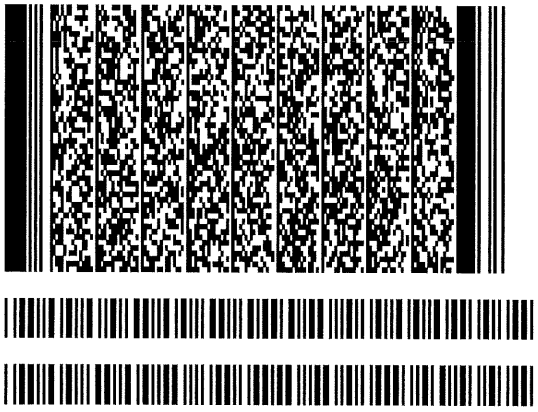
wicelaw@att.net (Principal)

E-Signature Notary: Michelle R Woods (mic)
April 25, 2022 18:25:58 -8:00 [909F77FFAC51] [73.232.92.125]
mwoods@andrewsmyers.com
I, Michelle R Woods, did witness the participants named above electronically sign this document.



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Who Judges the Judges? Judicial Qualification and Recusal

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BIOGRAPHICAL INFORMATION

EDUCATION

J.D. with highest honors, The University of Texas School of Law, 2001
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M.F.A. in Theater, The University of Texas at Austin, 1996

B.A. in Theater, with high honors, University of Florida, 1993

PROFESSIONAL ACTIVITIES

Partner, Locke Lord LLP, Houston, TX – Appellate Litigator specializing in complex commercial cases

Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization

Law Clerk to the Honorable Will Garwood, United States Court of Appeals for the Fifth Circuit

Recognized by Chambers USA for excellence in Texas Appellate law, and consistently named a Texas "Super Lawyer" and "Best Lawyer In America" in Texas Appellate Law

Named to the "Texas Appellate Hall of Fame" for Excellence in CLE Presentations at the SBOT Advanced Civil Appellate Seminars.

Member: SBOT Pattern Jury Charge Committee for Business, Consumer, Insurance & Employment
SBOT Appellate Section, Co-Chair of Law School Liaison Committee
Texas Bar Foundation
Texas Bar College

SELECTED RECENT PUBLICATIONS AND PRESENTATIONS

Judges as Historians: Bruen's *New Rules*, 2023 SBOT Advanced Civil Appellate course, published in *The Appellate Advocate* (January 2024).

The Ten Cases Every Trial Judge Should Know, 2022 Harris County Civil Judges Retreat, 2023 TACTAS meeting and 2023 Texas Association of Defense Counsel retreat.

Mandamus and Jurisdiction After Panda Power*,* 2022 SBOT Advanced Civil Appellate course.

Getting and Keeping Appellate Jurisdiction, 2021 SBOT Advanced Civil Appellate course and 2022 SBOT Advanced Civil Trial course, winner of the 2022 Helen Cassidy Award.

Anti-SLAPP in the Oil Patch, 2020 SBOT Oil and Gas Law course.

Charging the Jury on Piercing The Veil, 2020 SBOT Advanced Civil Appellate course, winner of the 2021 Helen Cassidy Award.

Mootness in Texas, 2019 SBOT Advanced Civil Appellate course, winner of the 2020 Helen Cassidy Award.

Crafting the Final Judgment, 2018 SBOT Advanced Civil Appellate course, published in *The Appellate Advocate* (Winter 2018), and winner of the 2019 Helen Cassidy Award.

Hot Topics In Interlocutory Appeals, 2017 SBOT Advanced Civil Appellate course and 2019 SBOT Texarkana Main Event course, winner of the 2018 Helen Cassidy Award.

Finding Our Way Through Findings Of Fact, 2013 SBOT Advanced Civil Appellate Practice Course

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WHO JUDGES THE JUDGES? JUDICIAL QUALIFICATION AND RECUSAL

By Chris Dove

Obscure yet detailed laws govern judicial conduct, disability, and recusal. There are no easy resources for understanding the federal nor the Texas state systems for judicial disqualification and disability, and yet these systems made nationwide news in recent years as certain judges and justices have defiantly fought against them. It is easy to ask "who judges the judges?" It is difficult to answer.

Nevertheless, litigators need to understand the rules that govern judges. These principles affect every part of the justice system, and become particularly relevant when litigants may have concerns about judges' actions or disability. They also need to know when and how to ask a judge to recuse herself.

This paper begins by explaining the federal and Texas judicial misconduct and disability systems, both substantively and procedurally. It uses the well-publicized story of Judge Pauline Newman of the Federal Circuit Court of Appeals to demonstrate how the system works (or doesn't), and then discusses how the United States Supreme Court drew attention to the judicial conduct system by insisting it is immune from it. Texas's state system avoids many of these problems by constitutionally empowering a state agency, but Texas history shows that some remarkable judges have bucked that system over the years.

The paper then turns to the subject of recusal; it discusses the legal standards requiring judges to recuse themselves and the procedures for getting them to do it. Here too, the federal and state systems are similar but have important distinctions, including Texas's insistence that "disqualification" and "recusal" are different things.

I. HOW THE JUSTICE SYSTEM PREVENTS JUDICIAL MISCONDUCT AND DISABILITY

To explain how the federal system polices the competence of federal judges, there can be no better illustration than the lengthy, public, and sad story of the Federal Circuit's efforts to get now-97-year-old Judge Pauline Newman to step down. The saga has been widely reported in the legal press and has even made its way into national newspapers. But to even understand the news articles about the long-running dispute, one must understand a group of institutions, statutes, and rules that most lawyers would seldom encounter. Fortunately, the United States court system has done good work to make the process understandable, implementing reforms to address earlier complaints that the process was unworkable and opaque. This paper hopes to illustrate how the federal system resolves an allegation of disability by showing how Judge Newman's alleged disability worked its way through this seldom-discussed system. In many ways, her extraordinary case is the exception that proves the rule.

A. Federal Law Governing Disability And Misconduct Challenges.

1. The Sources of Law

Who judges the judges? In the federal system, the answer is the "judicial council" of each federal circuit, and they use rules adopted in 2008 to enforce a statute enacted in 1980, the "Judicial Conduct and Disability Act of 1980," 28 U.S.C. §§ 351-364 ("the Act"). In the 2006 report issued by an investigative committee headed by Justice Steven Breyer ("The Breyer Report"), the committee introduced the Act this way:

> The Act creates a complex system that, in essence, requires the chief judge of a circuit to consider each complaint and, where appropriate, to appoint a special committee of judges to investigate further and to recommend that the circuit judicial council assess discipline where warranted. In a word, the Act relies upon internal judicial branch investigation of other judges, but it simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards.[1]

The Act allows the judicial councils and Judicial Conference to prescribe rules for handling judicial conduct and disability complaints.[2] The rules must allow notice to the judge and an opportunity for both the judge and complainant to appear.[3] In 1986, a committee of circuit chief judges promulgated the *Illustrative Rules Governing Complaints of Judicial Conduct and Disability*, which were adopted by most of the circuits verbatim.[4] The Breyer Committee recommended changes to the Illustrative Rules to prevent some of the

[1] The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* ("THE BREYER REPORT"), 239 F.R.D. 116 (Sept. 2006), *also available at* https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf.

[2] 28 U.S.C. § 358.

[3] *Id.*

[4] BREYER REPORT, 239 F.R.D. at 132.

problems it had identified.[5] The Committee on Judicial Conduct and Disability then promulgated rules based on the Illustrative Rules and the Breyer Committee's recommendations.[6] The Rules for Judicial Conduct and Disability Proceedings ("Rules") are mandatory and supersede previous rules.[7]

2. How the Federal Complaint System Works

a. Persons and Misconduct Subject to the Act.

The Act provides a process by which one may lodge a complaint about a "judge." The Act defines a "judge" as a circuit judge, district judge, bankruptcy judge, or magistrate judge[8]—which excludes the justices of the United States Supreme Court. This paper will return to this distinction with some gusto, as it has been the subject of much discussion recently.

Under the Act, any person may allege "that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability."[9] The Act does not define these concepts further.

Fortunately, the Rules provide detailed guidance about what constitutes "misconduct." Rule 4(a)(1) defines "misconduct" to include items already identified in the Code of Conduct for United States Judges,[10] including financial misconduct (like bribery or obtaining special favors), *ex parte* communications, partisan political activity, soliciting funds for organizations, or violating rules pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.[11] A separate provision of Rule 4 specifies that "misconduct" includes abusive or harassing behavior (including sexual harassment, hostile treatment of litigants and attorneys, and a hostile work environment), and intentional discrimination on the basis of a protected status.[12] Yet another part of Rule 4 protects the integrity of the complaint process by defining "misconduct" to include retaliation against persons for participating in the judicial complaint process, interference with the complaint process, and failure to report judicial misconduct or disability.[13]

The Rules explain that conduct outside of the judge's official duties can be misconduct if it will have a prejudicial effect on the administration of justice.[14] But "misconduct" is defined to exclude ordinary allegations about the merits of a judge's rulings or delay in rendering a decision.[15]

The Rules necessarily define "disability" more vaguely. Rule 4 defines "disability" as "a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office" and gives as examples substance abuse, the inability to stay awake during court proceedings, or "impairment of cognitive abilities that renders the judge unable to function effectively."[16] The commentary explains that a fact-specific approach would be necessary in all cases of disability.[17]

The federal judiciary publishes a table showing the judicial complaints filed in a given year, along with information about the nature of the complaints and how they were ultimately resolved. In the year ending September 30, 2023, there were 1,363 complaints filed against federal judges.[18] Of those complaints:

> 1,211 complained of the merits of a decision or ruling (which is no "conduct" complaint at all).
> 172 alleged discrimination based on a protected class.
> 123 alleged that the judge improperly delayed decision in a case.
> 64 alleged improper ex parte communications.
> 61 alleged "hostility toward a litigant, attorney, judicial employee, or other."
> 37 alleged retaliation for participation in the complaint process.
> 23 alleged a judge sought special treatment for a friend or relative.
> 20 alleged disability.

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[5] *Id*. at 238-46.

[6] RULES FOR JUDICIAL CONDUCT AND JUDICIAL DISABILITY PROCEEDINGS ("RULES") at § 320, Commentary on Rule 1, available at https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf

[7] RULE 2.

[8] 28 U.S.C. § 351(d)(1).

[9] 28 U.S.C. § 351(a).

[10] *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

[11] RULE 4(a)(1). All "judicial officers" and "judicial employees" must file financial reports under Title I of the Ethics in Government Act, 5 U.S.C. § 13101 *et seq*. These obligations are explained further in the *Judiciary Financial Disclosure Regulations*, which were written by the Committee on Financial Disclosure of the Judicial Conference of the United States, *available at* https://www.uscourts.gov/sites/default/files/guide-vol02d_1.pdf.

[12] RULE 4(a)(2), (3).

[13] RULE 4(a)(4)-(6).

[14] RULE 4(a)(7).

[15] RULE 4(b).

[16] RULE 4(c).

[17] RULE 4 commentary.

[18] https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

14 alleged bribery or improper acceptance of a gift.
7 alleged financial disclosure violations.
7 alleged partisan political activity.
6 alleged failure to participate in a complaint proceeding.
6 alleged "unwanted, abusive, or offensive sexual conduct."[19]

Generally speaking, these numbers and proportions are in line with reports from previous years. And before going any further in describing the process, the reader should note that 1,286 of 1,363 complaints were promptly dismissed for fundamental defects such as complaining about the merits of a ruling, making frivolous allegations, or offering insufficient evidence of the alleged conduct.[20] *Very* few meaningful complaints about federal judges are filed each year.

b. How the complaint process begins.

The complainant files a written complaint with the clerk of the circuit court, who will transfer it to the chief judge of the circuit and to the subject of the complaint.[21] While "any person" may file such a complaint, the court can also police itself *sua sponte*. The chief judge of the circuit may "by written order stating reasons therefor, identify a complaint for purposes of this chapter."[22]

Rules 6 and 7 provide basic guidance for what a complaint should look like and where it should be filed.[23] While the default is that a judge's home circuit will consider the complaint, Rule 7(b) allows the complaint to be transferred to another circuit if the alleged misconduct occurred while the judge was sitting by designation in that circuit.[24]

In practice, who files such complaints? The Breyer Report explained that almost all complaints are filed by prisoners or litigants, and allege misconduct instead of disability,[25] which remains true today.[26] To put the point more bluntly, a clear majority of complaints against federal judges are filed by disappointed litigants who complain about a judge's rulings on the merits of their case. In contrast, the proceedings against Judge Newman were begun by the chief judge of the Federal Circuit (rare) based on allegations of disability (also rare).

c. Initial review by the chief judge.

The chief judge must "expeditiously review" the complaint, and may make a limited inquiry to determine if some abbreviated process can resolve the issue—either because the issue has already been resolved through corrective action, or because the complaint is "plainly untrue" or otherwise not the sort of dispute that can be proven through an investigation.[27] In this limited inquiry, the chief judge may confer privately with the accused judge and the complainant.[28]

This process of informal resolution resolves most problems with the judiciary, according to the Breyer Report.[29] The main problems addressed through informal efforts were decisional delay, mental and physical disability, and complaints about judicial temperament.[30] "Delay, aging, and temperament" were the "primary problems" of the judiciary, one chief judge reported to the Breyer Committee, and "the really thorny problems are dealt with informally."[31] Another chief judge reported that he always tried to deal with the disability of an aging judge "with great delicacy, through family members."[32]

The chief judge can dismiss the complaint if she finds it fails to comply with statutory requirements, is "directly related to the merits of a decision or procedural ruling," or is frivolous or lacking sufficient evidence.[33] The chief judge may also conclude the proceedings if no action is needed in light of corrective action or intervening events.[34]

The Rules provide additional guidance on how the chief judge exercises this process of initial review. Rule 11 empowers the chief judge to decide whether allegations rise to the level of a "reasonable" dispute requiring an investigation by special committee.[35] The chief judge may communicate orally or in writing with the complainant, subject judge, and others, and may obtain and review relevant documents.[36] Of particular note, a commentary to Rule 11 explains that a complaint can be properly dismissed if the only eyewitness to the alleged misconduct refuses to come forward because he is an attorney who practices in federal court (and thus

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[19] https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf. There were many others as well. The numbers do not add up to 1,363, presumably because some complaints alleged multiple types of misconduct.
[20] *Id*.
[21] RULE 4(a), (c).
[22] 28 U.S.C. § 351(b).
[23] RULES 6 & 7.
[24] RULE 7(b).
[25] BREYER REPORT, 239 F.R.D. at 123.
[26] *See, e.g.*, Table S-22 for the year ending September 2023, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.
[27] 28 U.S.C. § 352(a).
[28] *Id*.
[29] BREYER REPORT, 239 F.R.D. at 201.
[30] *Id*.
[31] *Id*. at 203.
[32] *Id*. at 204.
[33] 28 U.S.C. § 352(b)(1).
[34] *Id*. at (b)(2).
[35] RULE 11(a), (b).
[36] *Id*.

implicitly fears reprisal); this means the chief judge may conclude the allegations are "incapable of being established through investigation."[37] This is both a shocking loophole and a concession to hard reality. The chief judge has four options: dismiss, conclude because of voluntary corrective action, conclude because intervening events have made action unnecessary, or to refer the matter to a special committee for factfinding.[38]

If the chief judge dismisses or concludes the proceeding, either the complainant or the subject judge can appeal the decision to the entire judicial council.[39] Rule 18 then explains how the complainant or subject judge can file a petition for the judicial council to review of the chief judge's order.[40] Fans of appellate rulemaking will be interested to note that the petitioner has 42 days to file the petition for review (an uncommon number of days), and must file it *on paper* in a sealed envelope labeled "Misconduct Petition" or "Disability Petition" that does not list the subject judge's name on it.[41] Rule 19(a) (titled "Rights of Subject Judge") expressly states that the subject judge may file a response to a petition filed by a complainant (with no particular due date), but does not expressly recognize a complainant's right to respond to a judge's petition in the highly unlikely event that a subject judge appeals a chief judge's decision to conclude the proceeding.[42] The remainder of Rule 19 explains how the judicial council shall dispose of the petition for review.[43] The options include denying the petition, returning the matter to the chief judge with instructions to conduct further inquiry, returning the matter with directions to appoint a special committee, or the judicial council can "in exceptional circumstances, take other action."[44] In the year ending 2023, the Chief Judge's determination was affirmed in all but one case, in which the Fifth Circuit returned the matter to the chief judge.[45]

The Breyer Report explains that "almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of the proceeding or is unsubstantiated."[46] These statistics generally remain true to this day.[47]

One should pause to consider the importance of these statistics. In 2006, the Breyer Report examined how the Act had been implemented and found what it described as an error rate of 2-3%, which it did not view as a *serious* problem, but which nevertheless led the Committee to make recommendations to improve the process.[48] A majority of those errors were simply that the chief judge dismissed cases that the Committee believed deserved a more thorough investigation, without expressing any opinion about whether the investigation would have changed the outcome.[49] But the vast majority of cases handled by the complaint system are meritless, a problem that is never covered in the national media. By contrast, the Breyer Report acknowledged an error rate of *30%* in those very few cases that had achieved notoriety in the press.[50] This is, of course, a chicken-and-the-egg problem. One wonders if these cases achieved notoriety because it is such a novelty that a party raises colorable claims of judicial misconduct.

d. Convening a special committee to investigate.

If the chief judge does not reject the complaint after the limited inquiry, she shall promptly convene a special committee consisting of the chief judge and an equal number of circuit and district judges, who shall investigate the allegations.[51] The committee "shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive report thereon with the judicial council of the circuit," which must recommend a course of action.[52]

Rules 13 through 15 provide particular details about how the special committee shall investigate the complaint.[53] The special committee has discretion to determine for itself the "appropriate extent and

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[37] RULE 11 commentary.

[38] RULE 11(a).

[39] 28 U.S.C. § 352(b), (c). If the judicial council denies review, the Act says the complaint cannot be further appealed. *Id*. at (c). But the judicial council can refer the appeal to a panel of five judges. *Id*. at (d).

[40] RULE 18.

[41] RULE 18(b). Thinking that this reference to a paper filing was surely out of date, I called the Fifth Circuit clerk's office and spoke to the clerk in charge of handling these petitions. She explained that the process still requires a paper filing in the envelope described in Rule 18, primarily because the vast majority of petitions for review are filed by prisoners who would not have access to ECF anyway. Moreover, the form requires the petitioner to file under penalty of perjury, which the clerk's office views as requiring a wet-ink signature.

[42] RULE 19(a).

[43] RULE 19.

[44] *Id*.

[45] https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

[46] BREYER REPORT, 239 F.R.D. at 132. Of the 20 cases (out of 593) the Committee found "problematic" for failure to follow the rules, eleven involved a chief judge's failure to undertake an adequate inquiry before dismissing the complaint as frivolous. *Id*. at 154-70.

[47] *See, e.g.*, Table S-22 for the year ending September 2023, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

[48] BREYER REPORT at 122. A previous investigation published in 1993 likewise found few instances where complaints were not treated seriously. *Id*. at 128-29.

[49] *Id*.

[50] *Id*. at 122.

[51] 28 U.S.C. § 353(a).

[52] *Id*. at (c).

[53] RULES 13-15.

methods" of its investigation.[54] It has subpoena power, can hold hearings, and must obtain evidence.[55] The subject judge has the right to counsel.[56] The judge has the right to receive notice, to present evidence, and to compel the attendance of witnesses and the production of documents.[57] The judge may also attend any hearings where the special committee receives evidence, but does not have the right to attend other hearings, including hearings where the committee reviews discovery or deliberates on the evidence.[58]

Rule 16 grants the complainant the right to notice and an opportunity to provide evidence and written argument, which is noticeably more circumscribed than the rights afforded to the subject judge.[59] Rule 17 explains how the special committee must present its written report.[60] The report must contain the special committee's findings and recommendations for council action, a statement of the committee's vote, and any special or dissenting statements from committee members.[61] In addition to being sent to the judicial council, the report must be sent to the Committee on Judicial Conduct and Disability, which monitors allegations of federal judicial misconduct nationwide.[62] In the year ending 2023, only 9 of 1,363 complaints were referred to a special committee.[63]

e. Review by the Judicial Council.

Once the special committee's report has been filed, the judicial council must act on it. The "judicial councils" of the circuits were created by 28 U.S.C. § 332(a). Each circuit's judicial council consists of the chief judge and an equal number of circuit judges and district judges, with the district judges evenly drawn from each district within the circuit.[64] The primary power of the judicial council is that "[e]ach judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," including many administrative matters that can be delegated to a circuit executive.[65] This power also includes duties associated with judicial conduct and disability.

The Act says the judicial council must act on the report.[66] Rule 20 provides the procedural details.[67] The subject judge has 21 days to file a written response to the report, and has the right to present argument, "personally or through counsel, written or oral, as determined by the judicial council."[68]

The judicial council can conduct an additional investigation, dismiss the complaint, or take appropriate action.[69] The Act explains that the judicial council can take actions including "ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint," a private censure or reprimand, or a public censure or reprimand.[70] The judicial council can only act through a written order, which should usually be accompanied by a memorandum setting forth any factual findings.[71]

When the disability of Article III judges is at issue, the judicial council may ask the judge to voluntarily retire.[72] Or the judicial council may certify the judge's disability to the President of the United States,[73] who may replace[74] the judge if he "finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business."[75] The judicial council *cannot* order an Article III judge removed from office.[76] However, the judicial council can refer matters to the Judicial Conference of the United States, including recommendations that the situation merits impeachment or (more cryptically) that the matter "is not amenable to resolution by the judicial council."[77]

This process is seldom used. In the year ending 2023, there was only one special committee report to a

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[54] RULE 13.
[55] RULE 14(a), (b).
[56] RULE 14(c) and 15(f).
[57] RULE 15.
[58] RULE 15 commentary.
[59] RULE 16.
[60] RULE 17.
[61] *Id*.
[62] *Id*.
[63] https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.
[64] 28 U.S.C. § 332(a)(1), (4). For example, the Judicial Council of the Fifth Circuit has nineteen members and two observers. https://www.ca5.uscourts.gov/other/judicial-council.
[65] 28 U.S.C. § 332(d), (e), (f), (h).
[66] 28 U.S.C. § 354(a).
[67] RULE 20.
[68] *Id*.
[69] 28 U.S.C. § 354(a)(1).
[70] 28 U.S.C. § 354(a)(2)(A).
[71] RULE 20(f).
[72] 28 U.S.C. § 354(a)(2)(B).
[73] 28 U.S.C. § 354(a)(2)(B).
[74] More precisely, the President appoints a second judge to "efficiently dispatch business" while the disabled judge remains alive, and when the disabled judge dies, that vacancy will not be filled. 28 U.S.C. § 372(b). The disabled judge also loses his or her seniority. *Id*. The distinction between appointing a second judge in parallel and simply replacing the first one will no doubt thrill fans of constitutional niceties, because it ensures the Article III judge still enjoys a lifetime appointment.
[75] 28 U.S.C. § 372(b).
[76] 28 U.S.C. § 354(a)(3)(A).
[77] *Id*. at (b).

judicial council—Judge Newman's.[78] In the year ending 2024, there will be another special committee report. Judge Roger T. Benitez of the Southern District of California was publicly reprimanded for handcuffing the crying 13-year-old daughter of a defendant in an attempt to scare her away from following her father's life of drug-related crimes.[79] The modest penalty of "public reprimand" took into account the fact that Judge Benitez took senior status and would not be assigned any new criminal cases.[80]

f. Final appeal to the Judicial Conference of the United States.

The aggrieved complainant or judge may make a final appeal of the judicial council's decision to the Judicial Conference of the United States, whose decision shall be final and cannot be reviewed on appeal or otherwise.[81] And if the process was begun by a Chief Judge instead of a filed complaint, the judicial council *automatically* sends its report to the Judicial Conference for further review.[82]

Who is this court of last resort? The Judicial Conference of the United States consists of the Chief Justice of the Supreme Court, the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each circuit.[83] The Judicial Conference of the United States mostly "submit[s] suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business."[84] However, the Judicial Conference also has a standing committee to address judicial conduct complaints, called the Committee on Judicial Conduct and Disability ("JC&D Committee").[85] In such matters, the Judicial Conference can (by majority vote) refer the judge to the House of Representatives for impeachment.[86]

Rules 21 and 22 explains this final step of the appeal process, in which the complainant or subject judge files a petition for review to the JC&D Committee.[87] Again, the petitioner has 42 days to file a petition of 20 pages or less, but this time the petition can be filed electronically.[88] The JC&D Committee can also act on its own power to review a judicial council order, through a process in which the JC&D Committee invites the judicial council to explain why the JC&D Committee should not appoint a special committee to review the decision.[89] The JC&D Committee will not conduct an additional investigation "except in extraordinary circumstances."[90]

The Act and Rule 22 say the JC&D Committee's decisions are final.[91] The United States Supreme Court has noted, in dictum, that any review of a JC&D Committee decision might present a "knotty jurisdictional problem" because the actions of the Judicial Conference may be considered more "administrative" than "judicial."[92]

g. Confidentiality.

One of the most important aspects of the entire process is that the entire resolution process remains confidential—except that the reports of special committees will be made public, as well as the orders implementing a judicial council's punishment.[93] These confidentiality provisions may be waived by the judge being investigated and the chief judge or standing committee.[94] Portions of the Breyer Report can be maddeningly vague, because the Committee was honoring these strict confidentiality requirements.

The Rules implement this same insistence on confidentiality. Rule 23 ensures the confidentiality of the entire complaint process, and identifies specific circumstances when information may be disclosed to further the process of review.[95] But Rule 24 states that all orders must be made public after final action has

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[78] https://www.uscourts.gov/sites/default/files/data_tables/jbs22_0930.2023.pdf.

[79] *Memorandum of Decision*, J.C. No. 09-23-90037 (JC&D Committee, Aug. 13, 2024), *available at* https://www.uscourts.gov/sites/default/files/c.c.d._no._24-01_august_13_2024.pdf.

[80] *Id*.

[81] 28 U.S.C. § 357.

[82] RULE 20(f). The commentary explains that this rule was created because there is no "complainant" to petition for review. *Id*. at Commentary. However, it is not self-evident that a system that requires the Chief Judge to file the complaint, prosecute the investigation, and sit in judgment, could not also make the Chief Judge an "appellant" for purposes of a rule governing further review. The better explanation for this sensible rule would be that a process initiated by the Chief Judge should have at least one layer of review in which the Chief Judge is not intimately involved.

[83] 28 U.S.C. § 331.

[84] *Id*.

[85] 28 U.S.C. § 331.

[86] 28 U.S.C. § 355.

[87] RULE 21.

[88] RULE 22(a)-(c).

[89] RULE 21(b)(2).

[90] RULE 21(d).

[91] 28 U.S.C. § 357(c); RULE 21(a), (g). The entire Judicial Conference can act as a sort of *en banc* court, in its sole discretion, "but a complainant or subject judge does not have a right to this review." *Id*.

[92] *Chandler v. Judicial Council*, 398 U.S. 74, 88 & n.10 (1970).

[93] 28 U.S.C. § 360.

[94] *Id*.

[95] RULE 23.

been taken, with certain exceptions.[96] Rule 24 thus requires a broader disclosure than the Act itself, adopting recommendations from the Breyer Report.[97] The remaining rules handle miscellaneous procedural matters, such as disqualification, transfer, and withdrawal of the complaint.[98]

3. The Saga Of Judge Newman.

These procedures were the battleground on which Judge Newman fought her colleagues on the Federal Circuit Court of Appeals. At virtually every step, the dispute followed the road less traveled—the subject judge rejected an informal process, fought the formal process, went public with her complaints, and even filed a lawsuit to assert her constitutional rights.

Because confidentiality guides the entire process, we can only glimpse the proceedings through certain published documents by the Federal Circuit and certain rhetoric from those who advocate for Judge Newman. The public can find the clearest guidance through the orders published by the Special Committee in July 2023 ("Special Committee Report"),[99] the Federal Circuit Judicial Council in September 2023 ("Judicial Council Order")[100] and the Judicial Conduct and Disability Committee in February 2024 ("Memorandum of Decision").[101] Judge Newman's lawsuit against the Federal Circuit Judicial Council ("Petition") provides her view of the same events.[102] For more incisive (and more inflammatory) reporting, one can also consult certain opinion articles written about the process—though they rely on the same facts already made public from other sources.

As befits one of America's foremost authorities on intellectual property law, Judge Pauline Newman holds a Ph.D. in chemistry from Yale (1952) and an LL.B. from NYU School of Law (1958). She worked as a research scientist for American Cyanamid (the only firm that would hire a woman, Judge Newman says)[103] before becoming in-house counsel for FMC Corporation.[104] She holds patents of her own,[105] and served as an intellectual property expert for the State Department from 1974 to 1984.[106] She advised President Jimmy Carter on the creation of the Federal Circuit, and then Ronald Reagan named her to that court in 1984.[107] In her forty years of service, she has been famous for her frequent dissents and praised as "the heroine of the patent system."[108] One reporter described her family life this way: "She never married; she has no grandchildren but many grandclerks."[109]

She is also 97 years old.[110] To put that into context, she was a teenager when Joe Biden was born. To put that into a different context, she is not even the oldest federal judge in current service—Senior Judge Leo Glasser is 100.[111] And her former Federal Circuit colleague Giles Rich was in active service until age 95, having never missed a court session until his final illness.[112]

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[96] RULE 24.

[97] RULE 24 commentary.

[98] RULES 25-28.

[99] Report and Recommendation of the Special Committee, *In re Complaint No. 23-90015*, July 31, 2023, *available at* https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/July%2031,%202023%20Report%20and%20Recommendation.pdf.

[100] Order of the Judicial Council of the Federal Circuit, *In re Complaint No. 23-90015*, Sept. 20, 2023, *available at* https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/September%2020,%202023%20Judicial%20Council%20Order.pdf.

[101] Memorandum of Decision, C.C.D. No. 23-01, Feb. 7, 2024, *available at* https://www.uscourts.gov/sites/default/files/c.c.d._no._23-01_february_7_2024.pdf.

[102] Petition for Declaratory and Injunctive Relief ("PETITION"), *Newman v. Moore*, Case No. 1:23-cv-01334 (D.D.C. May 10, 2023).

[103] Rachel Weiner, *Colleagues want a 95-year-old judge to retire. She's suing them instead*, Washington Post (June 6, 2023), *available at* https://www.washingtonpost.com/dc-md-va/2023/06/05/newman-federal-circuit-oldest-judge-retirement-fight/.

[104] https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/.

[105] Weiner, *supra*, WASHINGTON POST (June 6, 2023) ("She would later receive her own patents for colorful, dirt-resistant synthetic fabric she helped invent").

[106] *Id.*

[107] Michael Shapiro, *Newman, Oldest U.S. Judge, Feted Again in Non-Farewell Tour*, BLOOMBERG LAW (Oct. 12, 2023), *available at* https://news.bloomberglaw.com/ip-law/newman-oldest-federal-judge-feted-again-in-non-farewell-tour.

[108] JUDICIAL COUNCIL ORDER at 1, 44; *see also, e.g.*, Andrew Michaels, *Judge Newman's Recent Dissents Show She Is Fit For Service*, LAW360 (June 6, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4472679.

[109] Weiner, *supra*, WASHINGTON POST (June 6, 2023).

[110] https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/; Daryl Lim, *I Dissent: The Federal Circuit's "Great Dissenter," Her Influence On The Patent Dialogue, and Why It Matters*, 19 VAND. J. ENT. & TECH. 873 (2017), *available at* https://repository.law.uic.edu/facpubs/667/ ("The data confirms that Judge Newman is the Federal Circuit's most prolific dissenter and that her dissents resonate with the Supreme Court, her colleagues, and academic commentators more than those of any other Federal Circuit judge").

[111] Seth Stern & Suzanne Monyak, *Oldest US Judge Marks 100th Birthday, Then It's Back To Work*, BLOOMBERG LAW (Apr. 4, 2024), *available at* https://news.bloomberglaw.com/us-law-week/oldest-us-judge-marks-100th-birthday-then-its-back-to-work. The oldest judges to serve on the federal bench lived until 104. *Id*. Nevertheless, Judge Newman is the oldest judge in *active* service. Shapiro, *supra*, BLOOMBERG LAW (Oct 12, 2023).

[112] Bart Barnes, *Giles S. Rich Dies at 95*, WASHINGTON POST (June 10, 1999), *available at* https://www.washingtonpost.co

Accordingly, her age is extraordinary but not entirely unprecedented.

Objective truth is difficult to come by in this dispute (or indeed in *any* dispute), but it seems fair to say she is physically frail and (in some ways) remains a giant of the legal profession. Her paralegal testified she could not walk from her chambers door to the elevator without sitting down to rest.[113] Yet her former law clerk and a current professor of law at the University of Houston Law School wrote an article praising the incisive brilliance of the opinions she issued in 2022 and 2023.[114]

Her recent health history has been hotly disputed, and would be none of our business except that they became the starting point of the allegations of her disability. The proceedings originally alleged she had a "heart attack" in the summer of 2021, though her a doctor said it would be more accurately described as a "cardiac event."[115] She also denied an eyewitness report that she "fainted" after an oral argument in 2022.[116] She asked that her workload be reduced in 2021, and the court agreed—her caseload was half that of the other active judges, and she did not have to serve on motions panels.[117] She still fell far short of these reduced productivity goals.

a. The Informal Procedure.

On March 8, 2023, the Judicial Council met without Judge Newman present to discuss "concerns about her mental fitness" and "her abnormally large backlog in cases."[118] Without issuing a written order, the Council unanimously voted to preclude the assignment of new cases to Judge Newman until she addressed the backlog of cases to which she was already assigned.[119] Judge Newman challenged this action as unlawful.[120] The action was based on the general power conferred on Judicial Councils by 28 U.S.C. § 332(d) ("shall make all necessary and appropriate orders for the administration of justice within its circuit"), because there was no proceeding yet under the Act.[121] Broadly speaking, no one disputes that a Judicial Council has *some* power to change a judge's work assignments to address shortfalls in productivity, but Judge Newman challenged the order as *ultra vires* (because she was excluded from the meeting), and excessive in both scope (zero new cases) and duration (indefinite).

On that same date, more than half the judges of the Federal Circuit in active service met with Judge Newman to convey their concern that she was unable to perform the work of an active-service judge.[122] Still other judges reported that Judge Newman refused to communicate with them in response to their requests to meet.[123] Judge Newman met with the chief judge but said she would not retire,[124] and according to Chief Judge Moore, said instead that "she was the only person who cared about the patent system and innovation policy."[125]

Though an informal procedure is no doubt wise as a matter of human psychology, Judge Newman's story demonstrates how it can fail, or even backfire. Indeed, Judge Newman's later criticisms of the entire complaint process highlight how the "informal process" has no formal protections, at least as applied in her case.

b. The official complaint.

On March 23, 2023, Chief Judge Kimberly Moore took the next step in the process and issued an Order Identifying a Judicial Complaint ("Chief Judge's Order").[126] The Chief Judge's Order cites past concerns about Judge Newman's health, and reports of "impairment of her cognitive abilities" including making nonsensical statements from the bench.[127] But the Chief Judge's Order primarily relies on statistics proving that Judge Newman was far less productive than other members of the Court.[128] She wrote about one-fourth as many opinions as the next-least-productive judges, and was much slower in issuing her votes and opinions.[129] The Chief Judge also tersely refers to some personnel concerns involving her law clerk and disclosure of sensitive information about another employee.[130] For these reasons, the Chief Judge's Order explains, Chief Judge Moore took the highly uncommon

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m/archive/local/1999/06/11/giles-s-rich-dies-at-95/cef021c8-cddd-40f6-b647-ad37785e131c/.

[113] JUDICIAL COUNCIL ORDER at Affidavit 1, PDF page 276.

[114] Michaels, *supra*, Law360 (June 6, 2023).

[115] JUDICIAL COUNCIL ORDER at 57-58.

[116] *Id*.

[117] *Id*. at 4; SPECIAL COMMITTEE REPORT at 105. Judge Newman insisted she was on more panels during this time than most of her colleagues, but even if this is true, the Special Committee's report provides a wealth of data proving she was far less productive than any other member of the Federal Circuit. *Cf.* Petition at ¶ 18.

[118] *See* Memorandum Opinion and Order at 6, Doc. No. 43, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. Feb. 12, 2024).

[119] *Id*.; SPECIAL COMMITTEE REPORT at 14.

[120] *Id*.

[121] Memorandum Opinion and Order at 6, *supra,* Doc. No. 43.

[122] Order Identifying a Judicial Complaint ("CHIEF JUDGE'S ORDER"), *In re Complaint No. 23-90015*, at 2, 5-6, *available at* https://cafc.uscourts.gov/wp-content/uploads/March%2024,%202023%20Order.pdf.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 5.

[126] *Id*.

[127] CHIEF JUDGE'S ORDER at 2.

[128] *Id*. at 3-4.

[129] *Id*.

[130] *Id*.

step of making a complaint and empaneling a Special Committee to investigate these concerns.[131]

This process scrupulously followed the rules, but nevertheless was highly out of the ordinary. Recall that while the Act assumes that a complaint will typically be filed by a third party, and normally the Chief Judge performs the initial review of the complaint and thus serves as the first "judge" of the allegations.[132] But when the chief judge files an Order Identifying a Judicial Complaint, that process of review occurs before any official complaint is filed, and no second party "initially reviews" the chief judge's allegations before sending it to a special committee for further investigation. Judge Newman later criticized this feature of the rules as unfair.

c. The special committee investigation.

As the Rules contemplate, a special committee began its investigation of the chief judge's allegations. As the Act expressly requires,[133] Chief Judge Moore appointed herself to the special committee—though Judge Newman later criticized this rule as well, insofar as it meant Chief Judge Moore "selected herself to chair the special committee to investigate her own complaint."[134]

The special committee discovered a variety of concerns about Judge Newman's actions, with each revelation leading the committee to expand the scope of its own investigation. Between March and May 2023, the committee issued several letters making demands of Judge Newman, and Judge Newman retained counsel and responded defiantly.[135] To summarize the back-and-forth:

(1) Medical testing. The committee demanded that Judge Newman undergo detailed neurological and neuro-psychological testing and provide medical records.[136] Judge Newman responded the requests were unclear, she would only consider testing by doctors of her own choice, and would not provide medical records because they were irrelevant.[137] Subsequent orders attempted to provide more specifics about what testing would be necessary, but reiterated the insistence on a detailed neurological examination.[138] Judge Newman insisted on the right to subject the physicians to *voir dire* and *Daubert* review.[139]

(2) No transfer. Judge Newman demanded that the matter be transferred to another judicial council for decision, but the Judicial Council of the Federal Circuit refused because the Act says such transfers would be only under "extraordinary circumstances."[140] The Judicial Council said it would be willing to reconsider after Judge Newman complied with the orders requiring medical examinations and the production of medical records.[141]

(3) Interview. The special committee also asked for a recorded interview with Judge Newman "in part to provide her an opportunity to provide information, 'including correcting any error of fact' in the Committee's orders and to 'clarify these matters.'"[142] Judge Newman refused to comply.[143]

(4) Mistreatment of employees. The special committee received evidence that Judge Newman mistreated employees such as her judicial assistant, a law clerk, and IT personnel whom she accused of stealing her data.[144] This evidence would dramatically affect the tone of the committee's report.

(5) Gag order. The Judicial Council and Special Committee seem particularly loath to talk about one aspect of their May 3, 2023 order—it threatened Judge Newman with sanctions if she were to publicly disclose the ongoing investigation.[145] Judge Newman objected, pointing out that she had the right under Rule 23 to consent to disclosure, and that the Rule says the Chief Judge should withhold her consent to disclose "only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses."[146] Judge Newman made this order—which she described as a "gag order"—part of her lawsuit against the Federal Circuit. (*See infra.*) A May 16 order responded to Judge Newman's First Amendment concerns by insisting that it had only implemented Rule 23 as written and that the First Amendment's scope was muted while the

[131] *Id*. at 5-6.
[132] 28 U.S.C. § 352; RULE 11.
[133] 28 U.S.C. § 353.
[134] PETITION, supra, at ¶ 19.
[135] *See* SPECIAL COMMITTEE REPORT at 11-17.
[136] *Id*. at 12-13.
[137] *Id*. at 18-19.
[138] *Id*. at 19-21.
[139] *Id*. at 22.
[140] JUDICIAL COUNCIL ORDER at 14; SPECIAL COMMITTEE REPORT at 17-18.
[141] *Id*. (both citations).
[142] JUDICIAL COUNCIL ORDER at 17.
[143] *Id*.
[144] SPECIAL COMMITTEE REPORT at 15-16.
[145] PETITION at 10.
[146] *Id*. at 10-11 (quoting RULE 23 commentary).

> investigation was ongoing.[147] The order acknowledged that Judge Newman had the right to waive her confidentiality concerns, but nevertheless reminded her that while she could *make requests* for disclosure, she still could not do so unilaterally. The May 16 order published the prior orders in the case, as Judge Newman requested.[148] The subsequent orders resolving this dispute provide extremely detailed histories yet say nothing about this aspect of the process—and one may draw one's own conclusions from that conspicuous omission.[149]

d. Judge Newman filed suit.

Meanwhile, Judge Newman filed a lawsuit against Chief Judge Moore, the special committee, and the Federal Circuit Judicial Council, which brought the dispute into the public eye.

She filed suit in the D.C. District Court on May 10, 2023, represented by the nonprofit New Civil Liberties Alliance.[150] To broadly summarize her allegations, Judge Moore portrayed herself as being railroaded by an unfair process that was overly hasty and fundamentally unfair insofar as it was being managed by her prosecutor, Chief Judge Moore.[151] She alleged the Judicial Council violated the separation of powers by refusing to assign new cases to her before the investigation process was concluded, asserted due process challenges, argued the "gag order" preventing her from exercising the right to waive confidentiality was prior restraint in violation of the First Amendment (though this was dropped when the Judicial Council backed down), and made claims that the Act is unconstitutionally vague because it does not adequately define "disability" or define the proper scope of an investigation, and that Judge Newman's Fourth Amendment rights were violated through unconstitutional searches.[152]

It is *extremely* uncommon for a judge to respond to a misconduct or disability investigation by filing a lawsuit. Recall the Act expressly says that there shall be no judicial review of judicial council action.[153] But it is not unprecedented, insofar as the 1995 misconduct proceedings against Judge John McBryde of the Northern District of Texas resulted in a lawsuit and, in 2001, the key circuit court precedent on this issue.[154] The D.C. Circuit held due process allows a judge to file a lawsuit to challenge the *facial* unconstitutionality of the Act, but not the Act *as applied*.[155] As-applied challenges must go through the Act's process of review, in which the national Judicial Conference has the final word.[156]

When Judge Newman made her dispute public, sources outside the current court treated Judge Newman very favorably.[157] Former Chief Judge Paul Michel[158] and former Chief Judge Randall Rader[159] promptly wrote op-ed pieces in Judge Newman's favor, arguing that Judge Newman was not disabled, the investigation was embarrassing, and that Judge Newman's request for a transfer should be granted. Earlier this year, the Federalist Society presented a webinar that generally favors her complaints about the unfairness of the process.[160] In particular, interviewer David Lat said his four-hour interview with Judge Newman indicated she was not "disabled in any sense in which we might use the term" and his positive impression of her was "utterly inconsistent with this doddering and totally out-of-it judge that was painted in the special committee report."[161]

The Judicial Council could not respond in the

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[147] May 16, 2023 Order, available at https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/May%2016,%202023%20Order.pdf.

[148] *Id*.

[149] *Cf.* SPECIAL COMMITTEE REPORT, JUDICIAL COUNCIL ORDER. Additionally, I have been unable to locate the "gag order" among the documents the Federal Circuit has released online. It is described in Judge Newman's petition and in the Federal Circuit's May 16, 2023 order.

[150] PETITION at 1.

[151] *See generally id*.

[152] *Id*.

[153] 28 U.S.C. § 357.

[154] *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52 (D.C. Cir. 2001).

[155] *Id*. at 58.

[156] *Id*.

[157] *See, e.g.*, Weiner, *supra*, WASHINGTON POST (June 6, 2023) (sympathetically presenting Judge Newman's view, with some sympathy also toward Chief Judge Moore).

[158] Paul Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness*, IPWATCHDOG (July 9, 2023), available at https://ipwatchdog.com/2023/07/09/chief-judge-moore-v-judge-newman-unacceptable-breakdown-court-governance-collegiality-procedural-fairness/id=163181/.

[159] Randall Rader, *The Federal Circuit Owes Judge Newman an Apology*, IPWATCHDOG (July 12, 2023), *available at* https://ipwatchdog.com/2023/07/12/federal-circuit-owes-judge-newman-apology/id=163404/. Chief Judge Rader is entitled to his opinion, but his demand that the court apologize to Judge Newman for violating her medical privacy *completely* misapprehends the circumstances of the case. The special committee wanted nothing more than to keep the case completely private; Judge Newman was the one who fought the "gag order" preventing her from publicizing the medical allegations against her, and she would later enter medical evidence in the public record.

[160] https://fedsoc.org/events/justice-suspended-an-update-in-the-case-of-judge-pauline-newman.

[161] *Id*. (starting at 16:30). You can see video clips from this interview at https://davidlat.substack.com/p/6-video-clips-of-

media. But in its opinions, it expressed its frustration with Judge Newman's aggressive response. In its order affirming sanctions against her, the Judicial Council criticized her decision to go public with harsh accusations:

> Judge Newman and her counsel have aggressively sought to discredit this entire process by trying their case in the press while conjuring a narrative of "hostile," "disrespect[ful]," and "appalling" treatment marked by exercises of "raw power," all borne out of "personal animosity" toward Judge Newman.[162]

e. The critical shift in focus.

The special committee then made a strategic pivot that significantly affected how the dispute unfolded.

On June 1, 2023, the special committee determined that Judge Newman's refusal to cooperate prevented it from making an informed decision about whether she suffers from a disability.[163] So the Committee decided to "narrow the focus of its investigation"—to focus solely on a new charge that Judge Newman's refusal to cooperate was *misconduct* under the Act, not *disability*.[164] Because of this decision, the Committee concluded (and Judge Newman agreed) that the issue could be decided on the papers with no need for witness testimony, and a briefing schedule was issued.[165]

This order fundamentally changed the tone of the proceeding. It shifted focus away from Judge Newman's actual condition, such that evidence of her disability would not be judged on the standard "is this true" but instead "is this allegation sufficient to require Judge Newman to be evaluated by a neurologist." Whether she was actually disabled became legally irrelevant. And at a more basic level, the allegation was no longer a sympathetic claim of "disability" but a less-sympathetic claim of "misconduct."

Soon afterward, the Judicial Council reaffirmed its decision to refuse to assign new cases to Judge Newman, which was part of Judge Newman's complaints in her lawsuit.[166] This new order explained what had not been clear from its earlier, unwritten order—that its decision was based on the judicial council's general administrative power under 28 U.S.C. § 332, not under the Act.[167] This decision also narrowed the scope of the misconduct proceedings against Judge Newman in a way that made it harder for her to prevail (though perhaps justifiably so).

f. The special committee's report.

The special committee issued its 111-page report and recommendations on July 31, 2023, in compliance with 28 U.S.C. § 353 and Rule 17. The report begins with a detailed history of its fight with Judge Newman, which helps the reader understand the committee's view of how the dispute unfolded.[168]

The committee first concluded that it had the legal authority to issue an order requiring Judge Newman to participate in a neurological examination.[169] The special committee primarily relies on a 2017 precedent from the Judicial Conduct and Disability Committee, which affirmed that District Judge John R. Adams (of the Northern District of Ohio) committed misconduct when he refused the Sixth Circuit's order to be evaluated by a psychiatrist.[170] Judicial Councils do not have to yield to the subject judge's choice of doctor, the committee concluded.[171]

The committee then concluded that it had obtained sufficient evidence to justify its demand that Judge Newman be evaluated by a neurologist.[172] It drew from three categories of evidence.

First, the committee presented affidavit evidence from court personnel who attested to Judge Newman's "agitated," "paranoid," "bizarre," and "nonsensical" behavior.[173] These allegations are incredibly sad, especially to anyone who has ever experienced or studied the medical challenges caused by old age. But they are also upsetting because they focus on the victims of Judge Newman's behavior, and Judge Newman's only response to these allegations about the victims of her misconduct has been to call the accusations "petty" and unworthy of her time.

- She repeatedly claimed that IT staff were incompetent or that she was being "hacked," when in reality she did not understand how the computer network functioned, and was incapable of passing elementary training sessions on computer security.[174] She accusing the Clerk of Court of

judge-pauline-newman and draw your own impressions. For what it is worth, I would not characterize the Special Committee Report as portraying Judge Newman so negatively.

[162] JUDICIAL COUNCIL ORDER at 2 (quoting from her response to the Special Committee Report).

[163] SPECIAL COMMITTEE REPORT at 22.

[164] *Id*.

[165] *Id*.

[166] *Id*. at 23.

[167] *Id*.

[168] *Id*. at 11-25.

[169] *Id*. at 26-31.

[170] *Id*. at 26-27 (citing *In re Complaint of Judicial Misconduct*, C.C.D. No. 17-01 (U.S. Jud. Conf. 2017)).

[171] *Id*.

[172] *Id*. at 31-60.

[173] *Id*. at 33-50.

[174] *Id*. In an interview, Judge Newman claimed the committee's finding that she could not complete IT training

stealing her data despite several attempts to explain the distinction between a single laptop computer and the data-storage function of the entire network.[175] IT staff were careful to testify that she was more than capable of understanding the IT infrastructure well into her eighties, and only *recently* began making unreasonable claims out of inability to understand technology.

- Her judicial assistant had to keep repeating the same information about cases during telephone calls, and her staff had to go to great lengths to enable her to function at all due to her lack of stamina.[176]
- She did not properly manage a law clerk who was making plainly unreasonable demands on Judge Newman's assistant,[177] engaged in retaliation against employees who complained about mistreatment, and then incompetently managed the court's employee dispute resolution process.[178] A different law clerk repeatedly pleaded the Fifth Amendment to avoid testifying about Judge Newman's potential disability.[179] Judge Newman's consistent defense was that she had the right to run her chambers as she saw fit.

Second, the committee provided detailed data proving that she was incapable of expeditiously carrying out the duties of an active-duty judge.[180] Compared to her peers she wrote fewer opinions and took much longer to dispose of cases, even considering her reduced workload.[181] The committee pointedly rejected some reports in the legal media suggesting her productivity was not materially lower than her colleagues, by pointing to evidence that would not have been in the public domain before this proceeding.[182]

Third, the special committee relied on the opinion of its expert consultant, whose name and opinions have been redacted.[183] He opined that the recommended neurological testing was reasonable and necessary.[184]

The committee then explained its conclusion that Judge Newman had no good cause to refuse to cooperate with its orders.[185] The committee concluded the Act and Rules had given Judge Newman due process.[186] In particular, there was nothing unconstitutional or inappropriate about the Act's presumption that a subject judge's own peers would decide an allegation of misconduct or disability, and the recusal statute did not apply to proceedings of this nature because the Act expressly rejects any obligation for the judge's peers to disqualify themselves because they are the judge's peers.[187] Similarly, the presumption against transfer[188] not only worked against Judge Newman's request for another judicial council to decide her case, but the committee praised it as a laudable design because the members of the judicial council would be familiar with the witnesses and allegations.[189]

Most interestingly, the committee specifically rejected the favorable report from a neurologist that Judge Newman submitted.[190] Her physician had done a very short cognitive test instead of the full testing recommended by the committee's retained expert, and even then, had not fully performed the ten-minute test.[191] With an attention to detail one would expect from vigorous cross-examination, the special committee pointed out that the physician had not followed the published rules for administration of the test, and that if the rules were followed, Judge Newman would have failed (primarily because of a poor memory).[192]

Judge Newman also did herself no favors, in the committee's estimation, by refusing to even address most of the factual allegations against her.[193] She described the very troubling allegations by court personnel as "minutiae" and "petty grievances."[194]

The committee ultimately recommended that the judicial council issue a strong sanction to ensure that Judge Newman understood the gravity of the situation.[195] It recommended that she be removed from all case assignments until she complied with the

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without the trainer telling her how to answer a multiple-choice test was "a conspicuous, verifiable falsehood" because she never took the test in the first place. https://davidlat.substack.com/p/6-video-clips-of-judge-pauline-newman. Though Judge Newman does not provide details, one gets the impression that she could have simply forgotten the experience—not that she remembers the experience clearly and disagrees with the characterization of what happened.

[175] *Id*. at 46-49.

[176] *Id*.

[177] The law clerk called the judicial assistant at 3:00 AM and told him to give her a wake-up call at 6:00 AM. *Id*.

[178] *Id*. at 39-42.

[179] *Id*. at 41.

[180] *Id*. at 50-58.

[181] *Id*.

[182] *Id*. at 56-58.

[183] *Id*. at 58-59.

[184] *Id*.

[185] *Id*. at 60-111.

[186] *Id*. at 64-76.

[187] *Id*.

[188] Not only does the Act restrict transfer to "extraordinary cases," statistics show it is almost never done in practice. *Id*. at 90.

[189] *Id*. at 88-90.

[190] *Id*. at 98-104.

[191] *Id*.

[192] *Id*. at 102-03.

[193] *Id*. at 105-06.

[194] *Id*.

[195] *Id*. at 109-11.

orders.[196]

g. The Judicial Council Order.

On September 20, 2023, the Federal Circuit Judicial Council issued its Order accepting the special committee's findings and sanctioning Judge Newman.[197] It begins by recounting the evidence against Judge Newman in some detail—and for those interested, the Judicial Council Order is surely the most *readable* discussion of the sad conflict.[198] The Judicial Council rejects Judge Newman's allegations, raised in her response to the Special Committee Report, that she "can run her chambers as she sees fit" and had no opportunity to respond to the allegations against her.[199] It also rejects Judge Newman's renewed request for transfer to another circuit, especially because she bluntly conceded the purpose of the transfer would be to completely restart the process from the beginning.[200] A new medical report submitted with Judge Newman's Response was not persuasive because it once again depended on a simple test used "as a screening test for dementia" instead of the complex investigation merited by Judge Newman's conduct.[201] The test proved that Judge Newman has a sense of humor, in this author's opinion,[202] but the committee concluded it was too superficial to prove she was free from disability.[203]

The committee's pivot to an investigation of *misconduct* instead of *disability* provided the Judicial Council with a reason to dispose of Judge Newman's criticisms of the way the investigation began.[204] All that was in the past (though the Judicial Council admits no error), and the only question now was whether Judge Newman had good cause to disregard an order that she submit to the detailed neurological testing ordered by the special committee.[205]

The committee concluded that an appropriate sanction was to suspend her from any new cases on a one-year term, renewable by review at the end of that year, though Judge Newman could terminate that suspension by complying with the committee's order and allowing the committee to complete its investigation of her alleged disability.[206] Judge Newman petitioned for review.

h. The Judicial Conduct and Disability Committee Affirmed.

On February 7, 2024, the Judicial Conduct and Disability Committee of the Judicial Conference of the United States issued its Memorandum of Decision denying Judge Newman's petition for review.[207] The JC&D Committee discussed and accepted the sufficiency of the evidence that her disability justified the need for neurological examination,[208] but paid the most attention to the legal issues presented by Judge Newman's appeal.

The JC&D Committee rejected Judge Newman's arguments that the "personal knowledge" of the members of the special committee or Judicial Council required them to disqualify or recuse themselves.[209] The system does not typically require disqualification, the recusal rules do not apply, and the committee's decision to narrow its investigation to a *misconduct* allegation instead of a *disability* allegation squelched any concerns that the Council members would be witnesses.[210]

As for Judge Newman's contention that the Judicial Council erred by refusing to transfer her case, the JC&D Committee affirmed that transfers should be considered only in extraordinary circumstances.[211] The current posture of the proceeding—which focuses narrowly on the allegation of misconduct—did not support Judge Newman's argument.[212] However, if she were to comply and the members of the Judicial Council might be called as witnesses to testify about their personal knowledge of her capacity, the Judicial Council should give due consideration to that concern because extraordinary circumstances could include the situation where multiple members of the judicial council were disqualified.[213] The reader might see this portion of the opinion as a concession of sorts, or even an enticement for Judge Newman to undergo the necessary neurological evaluation so that she can proceed to the next stage of the process and obtain some of the relief she seeks.

Finally, the JC&D Committee rejected Judge Newman's argument that her suspension was excessive.[214] A one-year suspension was not out of line with previous penalties, and the fact that the suspension could be renewed annually was counterbalanced by the

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196 *Id*.

197 *See* JUDICIAL COUNCIL ORDER.

198 As befits the opinion of a sort of appellate court instead of the findings and conclusions of the factfinder, it strikes a better balance between detail and narrative readability.

199 *Id*. at 34-36.

200 *Id*. at 47-50.

201 *Id*. at 54.

202 Dementia tests often ask the subject to name the current and former Presidents, and Judge Newman is not a fan of Donald Trump. *See id*. at PDF page 157.

203 *Id*. at 54.

204 *Id*. at 57-68.

205 *Id*.

206 *Id*. at 70-71.

207 Memorandum of Decision, *In re Complaint No. 23-90015*, C.C.D. No. 23-01 (U.S. Jud. Conf. 2017).

208 *Id*. at 21-26.

209 *Id*. at 15-16.

210 *Id*.

211 *Id*. at 18-21.

212 *Id*.

213 *Id*. at 20-21.

214 *Id*. at 26-29.

fact that Judge Newman could end the suspension at any time by submitting to the required testing.[215] The fact that her suspension precluded her from serving in *en banc* sittings was justified by general language in the Act.[216]

i. The district court dismissed Judge Newman's lawsuit.

A few days after the JC&D Committee affirmed Judge Newman's suspension, the district court issued a Memorandum Opinion and Order in her lawsuit.[217] The Memorandum Opinion and Order denied Judge Newman's request for a preliminary injunction and granted the defendants' Rule 12(c) motion to dismiss many of her claims on the pleadings.[218]

The court first held that mootness barred Judge Newman's complaints about the Federal Circuit's unwritten order declaring that she would be assigned no new cases until she cleared her backlog of cases, which had been based on the Judicial Council's generic administrative power.[219] That order was lifted after she cleared the backlog—and it was therefore moot even though it was a Pyrrhic victory because she had already been suspended for misconduct.[220] The court rejected Judge Newman's attempt to plead exceptions to the mootness doctrine, such as "capable of repetition yet avoiding review," because Judge Newman had not shown that if she were assigned cases in the future she would be able to resolve them more promptly.[221]

The court next decided to follow the D.C. Circuit's precedent in *McBryde* holding that a subject judge could only make a facial challenge to the Act, not to the Act as applied.[222] It rejected Judge Newman's argument that *McBryde* was no longer good law in light of the Supreme Court's dim view of agency adjudication of constitutional issues in *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 195 (2023).[223] The court was required to follow *McBryde*, and at any rate, *McBryde* allowed the very sort of Article III review that *Axon* found necessary.[224] Thus, *McBryde* required the court to dismiss most of Judge Newman's claims.[225]

In July 2024, the court granted the defendants' motion for judgment on the pleadings as to Judge Newman's remaining claims, which asserted that the Act facially violates the Fourth Amendment and is unconstitutionally vague.[226] Judge Newman's Fourth Amendment challenge failed under the extremely deferential standards applied to facial constitutional challenges, because she had not shown that the Act was unconstitutional in all its applications, especially when one considers "only applications of the statute in which it actually authorizes or prohibits conduct."[227]

As for Judge Newman's claim that the Act is unconstitutionally vague, the court held that while Judge Newman argues "the statute is subject to multiple interpretations," nevertheless, "[A] statutory term is not rendered unconstitutionally vague because it do[es] not mean the same thing to all people, all the time, everywhere."[228] A statute is unconstitutionally vague only when it "specifies no standard of conduct at all," and not when it presents "an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask."[229]

Judge Newman promptly appealed to the D.C. Circuit Court of Appeals, where her appeal was docketed in July 2024.

j. Reflecting on Judge Newman's treatment.

Some libertarians have argued that Judge Newman has been railroaded, and other news organizations have thrilled to print each new development in her story because it is so uncommon and so *public*. The Federal Circuit Judicial Council has repeatedly emphasized its sadness at fulfilling its duty. No one cares what this author thinks, so he is free to offer some observations.

First, after listening to interviews with Judge Newman and reviewing the evidence against her (insofar as it has been made public), I have tremendous compassion for Judge Newman as a person, but absolutely *zero* compassion for her legal filings in the case. A tone of "more in sorrow than in anger" would have served her much better than the furious tone of her pleadings. Her dogged insistence upon dissent has been the hallmark of her four decades on the Federal Circuit, but she did not nimbly make the shift from judge to litigant. Most importantly, the allegations against her are neither "minutiae" or "petty grievances," as she insists. They are allegations of serious mental decline that

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[215] *Id*. at 28-29.
[216] *Id*.
[217] Memorandum Opinion and Order at 6, Doc. No. 43, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. Feb. 12, 2024).
[218] *Id*.
[219] *Id*. at 11-16.
[220] *Id*.
[221] *Id*. at 13-14. The court noted that Judge Newman was not asserting a facial challenge to the Judicial Council's "authority to issue case-backlog rules in the first instance." *Id*. at 14.
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] *Id*. at 22-25.
[226] Memorandum Opinion, Doc. No. 50, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. July 9, 2024).
[227] *Id*. at 4-5, *quoting City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415, 418 (2015).
[228] *Id*. at 11-12, *quoting United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017).
[229] *Id*. at 8, *quoting Bronstein*, 849 F.3d at 1107.

caused real harm to actual human beings. If even *one-fourth* of the allegations of her incapacity are true, then she had the moral obligation to retire from the bench immediately. Nevertheless, we must have some compassion for how incapacity can cause a brilliant mind to go so far astray.

Second, I have even less compassion for those who take Judge Newman's position at face value without informing themselves about the disability at issue. Perhaps the most infuriating aspect of the entire case are the opinion pieces from those who believe that Judge Newman cannot possibly be disabled because she can carry on an intelligent conversation about patent law, discuss old times on the Court, or can write an incisive opinion on the issues in a particular case. The tragedy of age-related decline is that a person can retain long-term memories long after serious impairment to their short-term memory, or can perform some tasks at a high level despite a significantly impairment to their mood and temperament.[230] For the special committee to present evidence that Judge Newman was unable to pass a simple IT training test after multiple attempts—even though the multiple-choice questions remained the same each time—and for Judge Newman to reject this accusation as completely groundless *because she evidently does not remember it happening*,[231] would be hilarious if it were not so terrifyingly sad.[232]

Third, the process generally demonstrates that in the real world, the Act and Rules do a good job of judging the judges. Judge Newman's particular situation is far outside the norm; every Chief Judge thanklessly reviews about a hundred meritless allegations a year from disgruntled prisoners or litigants. They do that task diligently, and the system strikes a good balance between transparency and confidentiality. Despite the heated rhetoric of Judge Newman's filings, the Federal Circuit Judicial Council proceeded on the basis of serious evidence and gave Judge Newman every chance to cooperate in a dignified manner.

Fourth, having said all of that, Judge Newman presents an incisive and troubling *structural* criticism, if not a valid case on her own behalf. At every step, the drafters of the Act, the Rules, and the Breyer Committee Report built their system on the assumption that everyone involved is acting in good faith. It makes sense to allow a Chief Judge to use an informal process to try to avoid embarrassment to a respected colleague; it makes sense that a judge should be judged by those who know her work and her interactions with the court's personnel (i.e. her "peers" on the federal bench); it makes sense that concepts like "disability" should be defined in ways that everyone understands but no two people would define in exactly the same way; it makes sense that the process should be shielded from judicial review because it is conducted by judges in the first instance.

And yet—once you go through the looking-glass and see this process through the eyes of someone who fears her accusers are acting in *bad* faith, the system suddenly looks very different. The kindly chief judge who seeks to resolve problems before they start has become prosecutor, witness, and judge. *Certainly*, from a litigator's point of view, it looks like Chief Judge Moore simply outmaneuvered Judge Newman. Consider these aspects of the proceeding:

- Judge Newman was stripped of new cases in an unwritten order issued at a meeting to which she was not invited (despite being a member of the Judicial Council), and then those same peers confronted her in person and urged her to resign, which I am sure felt to her like a coup (or maybe an intervention). When she finally got the chance to challenge that order in court, it was denied as moot because of the passage of time.
- The special committee ordered Judge Newman to keep the proceedings confidential in an order that she characterized as a "gag order," and after she defiantly filed her lawsuit and drew public attention to her plight, the committee backed down and omitted this part of the story from its narrative.
- By the time Judge Newman's legal team could lodge an objection to one order, the special committee had issued another and objections to the prior order were rejected as moot. As one experienced Federal Circuit litigator put it in a recent news story, "It's a problem Judge Newman resisted having any cognitive testing, and it's also a problem that the Federal Circuit has flopped about from one justification to another for removing an Article III judge against her will."[233]
- Judge Newman contended her unwillingness to cooperate with the required medical examination was based on her mistrust of how the process had unfolded so far, but by shifting the allegations from *disability* to *misconduct*, the various committees

[230] Citations on how aging affects short-term memory would fill many pages, Google suggests, and I am no medical expert. I will instead cite fiction: William Shakespeare, KING LEAR and Matthew Thomas, WE ARE NOT OURSELVES (Simon & Schuster 2015).

[231] *See supra*, https://davidlat.substack.com/p/6-video-clips-of-judge-pauline-newman.

[232] "The world is a comedy to those that think, and a tragedy to those that feel."—Horace Walpole.

[233] Michael Shapiro, *97-Year-Old Judge Newman to Appeal Loss in Suspension Suit*, BLOOMBERG LAW (July 9, 2024) (quoting Mitchell Epner of Kudman Trachten Aloe Posner LLP), available at https://news.bloomberglaw.com/ip-law/judge-axes-newman-suit-seeking-to-end-federal-circuit-suspension.

evaluated those prior actions under a more lenient standard (i.e. were the allegations "sufficient" instead of "true"). By analogy, this shift has the air of shifting the inquiry to whether the accused *resisted* arrest, and thus preventing an inquiry whether the police wrongfully initiated the arrest.

- While I understand the reasoning of those authorities that hold that a subject judge cannot file an as-applied challenge to the constitutionality of the Act in court—Congress rejected judicial review in some of the plainest words it has ever written—it still leaves me uneasy to leave any American without a path to asserting her constitutional rights.

Maybe my concerns about the whole sordid story can be summed up this way: one gets the sickening impression that this train could not be stopped *even if* Judge Newman proved it should never have left the station.[234]

Having said that, my concerns are structural and I do not criticize Chief Judge Moore or the special committee for using the system. At each step, they honored both the letter and the spirit of the rules. They gathered more than ample evidence to justify both initiating the process and the resolution of that process. And Judge Newman can return to service at any time, if she is fit. In the words often used to describe the contempt process, the contemnor "holds the keys to the jail in her pocket." If I think this flawed system nevertheless resulted in justice in this extraordinary case, then surely the system cannot be that flawed. Right?

Fifth, I wonder how the long-standing case law in this area will hold up to further appellate review. Judge Newman has indicated she will argue that *McBryde*'s deference to the Article III courts' ability to police themselves as an administrative matter has not survived recent United States Supreme Court cases that have challenged the propriety of agency adjudication. Judge Newman particularly cited *Axon Enter., Inc. v. Fed. Trade Comm'n*,[235] but I wonder whether subsequent cases like *SEC v. Jarkesy*[236] and *Loper Bright Enterprises v. Raimondo*[237] also signal a general distaste for governmental processes that prevent judges from reviewing constitutional rights. OF course, those opinions express distrust of Article I agencies, not the federal judiciary's ability to police itself. The Supreme Court is part of the Article III club—when it wants to be, that is—and has recently insisted on the virtues of self-policing.[238]

It is a curious problem. The Act and the Rules guarantee that federal judges decide the constitutionality of judicial misconduct proceedings, and federal judges regularly decide constitutional challenges. Does it matter that they make that decision in an "administrative" capacity, not a "judicial" capacity? *Why?* Does it matter *which* judges make the decision? Should subject judges be entitled to transfer their cases to a different set of judges than the ones they have known for years? *Why*? Why assume that federal judges will be prejudiced *against* the judge because of their personal knowledge? After all, one would expect the man-on-the-street to believe that the current system encourages favoritism in favor of judges, not mistreatment of them. But it turns out the judiciary can have what one commentator calls a "guild mentality," in which familiarity leads both to favoritism *and* contempt.[239]

4. The Supreme Court's Unique Situation.

a. The Supreme Court Is Not Governed By Existing Codes, But Is That A Good Idea?

The United States Supreme Court is exempt from the previous discussion. Why?

Congress. Or maybe the Constitution. Depends who you ask.

As mentioned above, the Act does not regulate the Justices of the United States Supreme Court; Congress conspicuously omitted them from the definition of a "judge."[240] And the Federal Code of Conduct for United States Judges likewise excludes Supreme Court Justices from its scope, again by omission.[241] Until recently, there was literally no code of conduct that even purported to bind the Supreme Court.

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[234] *See also, e.g.*, Donald E. Campbell, *Should the Rooster Guard the Henhouse: A Critical Analysis of the Judicial Conduct and Disability Act of 1980*, 28 MISS. C. L. REV. 381 (2009) (presenting a structural criticism of the Act before the issues with Judge Newman ever arose).

[235] 598 U.S. 175, 195 (2023).

[236] 603 U.S. ___, No. 22-859 (June 27, 2024) (holding the SEC could only obtain civil penalties in federal court and not in its own administrative court system, due to the Seventh Amendment's right of trial by jury).

[237] 603 U.S. ___, No. 22-451 (June 28, 2024) (overruling *Chevron* deference).

[238] On the subject of who judges the Supreme Court, *see infra*.

[239] Campbell, 28 MISS. C. L. REV. at 395-98 (noting that in the famous *McBryde* case, Chief Judge Politz warned Judge McBryde that by asking the Judicial Council to review the chief judge's decision to transfer two cases away from him, Judge McBryde was exposing himself to an investigation of his entire career on the bench, which resulted in a harsh sanction based on conduct committed piecemeal over many years).

[240] 28 U.S.C. § 351(d)(1).

[241] Code of Conduct for United States Judges ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate Judges"), *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

Congress is not always "hands off" with the Justices, however. The 1978 Ethics in Government Act includes the Justices among the "judicial officers" who must file financial reports.[242] And the primary recusal statute, 28 U.S.C. § 455, expressly applies to "justices" as well as "judges."[243] But does the Court agree that Congress had the power to include them within the scope of these laws?

In 2011, Chief Justice Roberts politely noted that the justices had never had to *insist* that Congress lacked the power to regulate the Supreme Court, and implied the Justices comply with Congressionally enacted rules only voluntarily. That is, in his 2011 Year-End Report, he observed that "[a]s in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested."[244] He then added, "[t]he Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court."[245] While Supreme Court justices consult the rules, he explained, the Court does not second-guess its members' decisions whether to recuse themselves, because the Court considers each member irreplaceable due to the Court's unique role in federal government.[246] In this author's opinion, Chief Justice Roberts may have meant his observations on Congressional power to seem moderate, but they instead resemble America's position on Taiwanese independence—menacing, vague, and sometimes contradictory.

That studied ambiguity went out the window in 2023 when Justice Alito told the Wall Street Journal editorial page that Congress *can't* regulate the Supreme Court.[247] He said, "no provision in the Constitution gives them the authority to regulate the Supreme Court — period."[248]

It is hard to square Justice Alito's broad opinion with the text of the Constitution. One might argue the Supreme Court has unregulated authority over cases within its original jurisdiction, but that jurisdiction extends only to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[249] As to all other cases that might reach the Supreme Court—that is, the vast majority of them—the Supreme Court "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, *and under such Regulations as the Congress shall make.*"[250] Accepting appellate jurisdiction has consequences, surely,[251] though general structural concerns about the independence of the branches of government also support Justice Alito's view.

Justice Alito made his defiant statement in response to a wave of unpleasant publicity that prompted some in Congress to publicly propose imposing ethics rules on the United States Supreme Court.[252] The issue came to public attention in 2022 when Justice Clarence Thomas refused to recuse himself from cases involving the events of January 2021, including Presidential immunity case *United States v. Trump*, despite pressure to do so.[253] Yet text messages show his wife advised Donald Trump's chief of staff to "pursue unrelenting efforts to overturn the 2020 election," among her many other actions favoring the so-called "Stop the Steal" movement.[254] Public concern was then amplified in 2023 by the disclosure that donors had paid Justice Clarence Thomas's travel expenses, tuition for a relative, and the price for a home where his mother had lived—and that Justice Thomas had not disclosed any of these gifts on his financial reports.[255] Critics realized there was no way to *make* a Supreme Court Justice obey

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[242] 5 U.S.C. § 13101(10) (defining "judicial officer" to include the Chief Justice and Associate Justices of the United States Supreme Court).

[243] 28 U.S.C. § 455.

[244] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[245] *Id*.

[246] *Id*. at 9.

[247] *See, e.g.*, Josh Gerstein, *Alito: Supreme Court can't regulate Supreme Court ethics*, POLITICO (July 28, 2023), *available at* https://www.politico.com/news/2023/07/28/alito-congress-supreme-court-ethics-00108830.

[248] *Id*.

[249] U.S. CONST., Article III, Section 2.

[250] *Id*. (emphasis added).

[251] An interesting thought experiment: imagine a world in which the Supreme Court refused to accept the appellate jurisdiction conferred by Congress and limited itself to its original jurisdiction to avoid Congressional oversight. One wonders whether it would have some of the same consequences as Texas's efforts to limit FERC regulation.

[252] *See, e.g.*, https://www.judiciary.senate.gov/supreme-court-ethics-reform.

[253] *See, e.g.*, https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2023.12.15-thomas-letter-final.pdf (a letter from several liberal United States Representatives urging Justice Thomas to recuse himself, citing news reports of his wife's involvement in the events at issue).

[254] Bob Woodward and Robert Costa, *Virginia Thomas urged White House chief to pursue unrelenting efforts to overturn the 2020 election, texts show*, WASHINGTON POST (March 24, 2022), available at https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/. Virginia Thomas told reporters she did not include Justice Thomas in her political efforts. *Id*.

[255] *See, e.g.*, Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), *available at* https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow. Justice Thomas released a statement that he had followed guidance from "colleagues and others in the judiciary" when omitting these and noted that he would follow the new

a statute or disqualify himself from a case. And these reports keep coming; in August 2024, the Senate Finance Committee disclosed that its investigations uncovered *still more* undisclosed largesse that Justice Thomas had received but not disclosed on his reports.[256]

And this year, Justice Alito became the subject of reporting that his homes have displayed flags showing sympathy for the so-called "Stop the Steal" movement.[257] He rejected calls to recuse himself because of these displays.[258] Investigations into undisclosed vacations and travel then expanded to include allegations that Justice Alito failed to disclose a valuable trip that was paid for by an individual who later had case pending before the Court.[259]

Because the two justices most obviously affected by these scandals are the two most conservative justices on the Court,[260] proposals to impose an ethics code have taken on a partisan character.[261] Yet Justice Sotomayor has also come under attack for using her staff to promote her books through helpful "recommendations" about how many copies public institutions should buy.[262] Reporters recently noted that both Justice Sotomayor and Justice Gorsuch had not recused themselves from cases involving their publishers.[263] And for what it's worth, the nonprofit Fix The Court keeps an ongoing tally of cases in which the Supreme Court justices across the political spectrum have not recused themselves despite a potential conflict of interest.[264]

b. The Supreme Court's "Statement."

On April 23, 2023, Chief Justice Roberts sent a letter to Senator Dick Durbin "respectfully declin[ing his] invitation" to testify before the Senate Committee on the Judiciary on the various allegations of unethical conduct at the Court.[265] However, Chief Justice Roberts attached a "Statement on Ethics Principles and Practices" to try to address the public concern. The Statement begins by declaring the Justices "reaffirm and restate foundational ethics principles" to "provide new clarity to the bar and to the public."[266] So what are these foundational ethics principles?

A self-enforced honor system, it turns out. The

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guidance issued by the Judicial Conference. https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23. Subsequent investigation by the Senate Committee on the Judiciary indicated that Justice Thomas still had not fully disclosed all the travel he had received as a gift. https://www.judiciary.senate.gov/press/releases/durbin-reveals-omissions-of-gifted-private-travel-to-justice-clarence-thomas-from-harlan-crow.

[256] Justin Jouvenal, *Sen. Wyden says Thomas took two more undisclosed flights on donor's jet*, WASHINGTON POST (Aug. 5, 2024), *available at* https://www.washingtonpost.com/politics/2024/08/05/supreme-court-clarence-thomas-harlan-crow/.

[257] To briefly summarize, and to strategically use the passive voice, an upside-down American flag was flown outside Justice Alito's home during the protests of January 2021, contrary to principles of judicial ethics that advise judges to avoid partisan activities. Jodi Kantor, *At Justice Alito's House, A "Stop The Steal" Symbol On Display*, N.Y. TIMES (May 16, 2024), available at https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html. Justice Alito said that his wife chose to fly the flag during a fight with a neighbor who displayed a sign opposing President Trump. *Id.* It was soon revealed that another partisan flag associated with the January 6 protests (the "Appeal to Heaven" flag) flew outside Justice Alito's beach home in 2023. Jodi Kantor, Aric Toler, and Julie Tate, *Another Provocative Flag Was Flown At Justice Alito's Home*, N.Y. TIMES (May 22, 2024), available at https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html. The "Appeal to Heaven" flag is now posted outside the office of House Speaker Mike Johnson. *Id.*

[258] *See, e.g.*, https://www.judiciary.senate.gov/press/releases/durbin-calls-on-justice-alito-to-recuse-himself-from-cases-related-to-the-2020-election-after-a-stop-the-steal-symbol-was-displayed-in-his-yard.

[259] Justin Elliott, Joshua Kaplan, and Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before The Court*, PROPUBLICA (June 20, 2023), *available at* https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court.

[260] Citation needed? Okay: https://www.axios.com/2023/07/03/supreme-court-justices-political-ideology-chart.

[261] *See, e.g.*, https://www.judiciary.senate.gov/supreme-court-ethics-reform (Senator Dick Durbin effusively praising himself for holding hearings about Justice Thomas's finances and a proposed ethics bill).

[262] *See, e.g.*, Brian Slodysko and Eric Tucker, *Supreme Court Justice Sotomayor's staff prodded colleges and libraries to buy her books*, AP NEWS (July 11, 2023), available at https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02. The Court released a statement defending the actions as coming within judicial ethics guidelines because her staff merely recommended how many copies an institution should buy. https://www.documentcloud.org/documents/23870397-supreme-court-statement.

[263] Devan Cole, *2 Supreme Court justices did not recuse themselves in cases involving their book publisher*, CNN (May 5, 2023), *available at* https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html.

[264] https://fixthecourt.com/2024/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/. These errors often are a Justice's failure to recall that they participated in the case at an earlier stage while a circuit judge or as Solicitor General, and failures to discover that they own stock in a corporate parent of a party before the Court that has a different name than the parent. *Id.*

[265] STATEMENT ON ETHICS PRINCIPLES AND PRACTICES (Apr. 25, 2023), *available at* https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf.

[266] *Id.*

Statement asserts the Justices are not subject to the authority of the Judicial Conference of the United States, but that in 1991, the Justices "voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations."[267] That included the (also voluntary) decision to follow the rules on financial disclosure imposed by Congress.[268] The Statement then explains the Court's rules for receiving payment for teaching: it follows the regulation allowing compensation for teaching "at an accredited educational institution," through a process by which each Associate Justice asks the Chief Justice for permission, and the Chief Justice asks the entire Court for permission.[269]

More interesting is the Court's explanation that it takes the position that the application of the recusal statutes "can differ due to the unique institutional setting of the Court,"[270] a point that Chief Justice Roberts made in 2011. Recusal must be counterbalanced by the concern that the Court cannot easily substitute other judges for a disqualified justice.[271] As a result, "Justices have a duty to sit that precludes withdrawal from a case as a matter of convenience or simply to avoid controversy." The Court then explains that it will maintain a hands-off attitude toward each Justice's decision to recuse:

> Individual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.[272]

Justices may, but need not, explain their reasons for recusing themselves in a particular case.[273] In practice, some have done so and others have not.[274]

c. The Supreme Court's New Code of Conduct.

If the Statement was meant to calm the storm, it did not. So the Supreme Court tried again.

In November 2023, the United States Supreme Court issued its own Code of Conduct.[275] The preamble explains that the Court has long considered itself guided by "the equivalent of common law ethics rules" drawn from a variety of sources, but issued this Code "to dispel th[e] misunderstanding" that the Justices Court "regard themselves as unrestricted by any ethics rules."[276] The Code "represents a codification of principles that we have long regarded as governing our conduct."[277] The Code is accompanied by a "Commentary" that is clearly a revised version of the April 25, 2023 Statement with some additions and deletions here and there.

Though the preamble claims the Justices modeled the Code on a sort of "common law," the Code of Conduct closely resembles the Code of Conduct for United States Judges.[278] This makes it fairly easy to identify where the Supreme Court made changes, though whether those changes are worrisome (or even significant) will be in the eye of the beholder.

Consider these possibly superficial distinctions between the two Codes:

> Canon 1: The Justices will "maintain and observe" high standards of conduct, but the Code omits any duty to "enforce" those conduct rules on others.
>
> Canon 3: The Justices do not require themselves to "take appropriate action" when they receive "reliable information of misconduct" by another judge or Justice, in contrast to Canon 3(B)(6).

These modest changes appear to reflect an institutional reality: the Justices cannot control each other, and there is no one to whom a Justice could report misconduct.

The section on disqualification amplifies the Justices' refusal to police each other, and represents the biggest departure from the former Code. Under the Code of Conduct for Federal Judges, a federal judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[279] The breadth of that standard is self-evident. But the Justices begin from a different starting

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[267] *Id*.
[268] *Id*.
[269] *Id*.
[270] *Id*.
[271] *Id*.
[272] *Id*.
[273] *Id*.
[274] *See* Joe Patrice, *Remember That New Supreme Court Ethics Code? Sam Alito Doesn't*, ABOVE THE LAW (Jan. 17, 2024), *available at* https://abovethelaw.com/2024/01/remember-that-new-supreme-court-ethics-code-sam-alito-doesnt/ (noting the difference in the recusal practices of Justices Kagan and Alito recorded in the Court's order list, and conceding that neither practice violates any part of the very lenient Code).
[275] CODE OF CONDUCT OF THE UNITED STATES SUPREME COURT, *available at* https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.
[276] *Id*. at 1.
[277] *Id*.
[278] The Commentary acknowledges its role as the primary source, while noting the Justices adapted the prior Code "to the unique institutional setting of the Supreme Court." Code of Conduct for the Supreme Court, Commentary at 10.
[279] CODE OF CONDUCT FOR FEDERAL JUDGES, Canon 3(C)(1).

point: "A Justice is presumed impartial and has an obligation to sit unless disqualified."[280] This does not appear in the Code of Conduct for Federal Judges; it was cited in the April 25, 2023 Statement and appears to be drawn from the ABA Model Rules.[281] And though the Commentary depicts the rule as merely restating a truism, it has the effect of starting the disqualification section off by distinguishing the Justices from other federal judges.

The Code then builds on that theme by stating that Justices "*should*"—not "shall"—disqualify themselves if their impartiality might reasonably be questioned.[282] The Canon then defines that "reasonably be questioned" standard as "where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[283] This definition appeared in the April 25, 2023 Statement, but the Court has never cited any predecessor for it, and this author cannot find it in prior sources. Perhaps it is just the Court's effort to define a troublesome term of art. Certainly, one cannot help but note that the purpose of the definition seems to be to foreclose the possibility that a Justice would have to disqualify himself to appease someone he regards as ignorant or prejudiced.

The Justices then write, "[t]he rule of necessity may override the rule of disqualification."[284] The Commentary explains this principle is adopted from the ABA Model Code of Judicial Conduct, and takes pains to explain that the "rule of disqualification" applies differently at the Supreme Court.[285] The "rule of necessity" is an ancient doctrine holding that sometimes a judge must sit on a case because there is no other judge who can take her place.[286] The Court cannot appoint substitutes for disqualified Justices, the Commentary explains.[287] And the Court emphasizes that *every single Justice* is indispensable to its function, both because the loss of a Justice would undermine "the fruitful interchange of minds" on the Court and could affect the ultimate vote on a case.[288] The message is clear—any Justice can refuse to disqualify him- or herself, and that decision will not be questioned.[289] The Commentary makes this explicit, using the same language as the Court's April 25, 2023 Statement: "Individual Justices, rather than the Court, decide recusal issues."[290] However, the Commentary omits the Statement's explanation that the rule is necessary to prevent justices from deciding the outcomes of cases by ordering other justices to recuse themselves.[291]

The next disqualification provision states that a Justice need not be disqualified because of "the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae*."[292] This is exactly the *opposite* of the rule found in the advisory opinions of the Judicial Conference.[293] The Justices' Commentary explains this is because the Court receives so many amicus briefs, and because it has a permissive practice that does not require *amici* to obtain permission before filing—thus depriving the Justices of other judges' ability to shield themselves from disqualification by refusing the *amicus* brief.[294]

Other differences:

- The Justices' Code of Conduct follows the same rule about public speaking but adds a lengthy list to provide additional guidance.[295] For example, Justices may attend fundraising events but "should not knowingly be a speaker, a guest of honor, or

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[280] CODE OF CONDUCT FOR THE SUPREME COURT, Canon 3(B)(1).

[281] *See* ABA MODEL CODE OF JUDICIAL CONDUCT, Rule 2.7 ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_7responsibilitytodecide/. Nevertheless, the Commentary does not cite this rule as authority.

[282] CODE OF CONDUCT FOR THE SUPREME COURT, Canon 3(B)(1).

[283] *Id*.

[284] *Id*. at Canon 3(B)(3).

[285] *Id*. at Commentary p. 11.

[286] *United States v. Will*, 449 U.S. 200, 213-14 (1980) (holding that the rule of necessity required the district judge and the Supreme Court to decide a case affecting all federal judges).

[287] CODE OF CONDUCT FOR THE SUPREME COURT, at Commentary p. 11. The Court's assertion that it has no way of replacing its members is tantalizing precisely because the Court cites *United States v. Will* in the Commentary. *Will* discusses the impact of 28 U.S.C. § 2109, which allows the Chief Justice to remand a case to the court of appeals if there is not a "quorum of qualified justices" to hear a direct appeal. "The original version of this section was designed to ensure that the parties in antitrust and Interstate Commerce Commission cases, which at that time could be appealed directly to this Court, would always have some form of appellate review." *Will*, 449 U.S. at 212 n.13. Does this mean Congress could authorize a process by which the Court could replace disqualified Justices with other members of the federal judiciary? Would the Supreme Court ever admit that Congress has that power, even if it were exercised?

[288] CODE OF CONDUCT FOR THE SUPREME COURT, at Commentary p. 11.

[289] *Compare id.*

[290] *Id*. at Commentary p. 11.

[291] *See id*.

[292] *Id*. at Canon 3(B)(4).

[293] *See, e.g.*, Advisory Op. 63 (June 2009), *available at* https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf.

[294] CODE OF CONDUCT FOR THE SUPREME COURT, Commentary at 11-12.

[295] *Id*. at Canon 4(A).

featured on the program of such event."[296]

- A Justice can allow his name and judicial designation to be on an organization's letterhead, "including when used for fundraising or soliciting members," if "comparable information and designations are listed for others."[297]
- The Justices deleted the Code's admonition that "the judge should divest investments and other financial interests that might require frequent disqualification."[298]
- The Justices state that "For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment."[299] The Commentary also explains that the Justices comply with current Judicial Conference regulations regarding financial disclosures.[300]

d. An enforcement mechanism?

The Supreme Court's adoption of a Code of Conduct fills in the gap left by the omission of "Justices" from the Code of Conduct for Federal Judges. But another gap remains—there is no enforcement mechanism. The Act still excludes the Justices, which means that the Rules exclude them as well.

This is no accident. The Justices carefully wrote the Code of Conduct to ensure that no one has the power to judge the Justices; each Justice is judge of him- or herself. As a result, there is no procedure short of impeachment for an outsider to address a Justice's misconduct. Indeed, articles of impeachment were recently introduced against Justices Thomas and Alito, for whatever that is worth.[301] But that requires Congress to determine that a Justice has committed "Treason, Bribery, or other High Crimes and Misdemeanors,"[302] which implements Article III's admonition that judges will "hold their office during good behavior."[303] That is a higher standard than the Code itself.

And even impeachment is no remedy for a justice's disability, insofar as it would be difficult to prove that incapacity is a "high crime" or a "misdemeanor." Historically, this has been a real headache for the nation when a Justice became disabled but declined to retire.[304] Early in the nation's history, federal judges faced with the infirmities of age sometimes declined to retire because they felt they could not give up their salary.[305] Congress resolved some early problems by offering particular judges a pension, and eventually enacted a pension for disabled judges who had served a minimum time in office so that they could retire voluntarily and not face financial difficulty.[306]

The biggest crisis came with the 1878 incapacity of Justice Ward Hunt, who had been appointed to the Court by President Ulysses S Grant.[307] Justice Hunt's situation presented none of the challenges of Judge Newman's situation—after a stroke, Justice Hunt was almost totally incapacitated and plainly unable to do any functions of his office.[308] But Hunt was a protégé of the famous politician Roscoe Conkling, and the two men did not trust that President Rutherford B. Hayes would name an acceptable successor.[309] Hunt continued as an Associate Justice for *four more years*, long enough for the Presidency to shift to Chester A. Arthur in 1881.[310] In 1882 Congress finally forced Hunt to resign by enacting a pension that he could only accept by resigning within thirty days—a bill that passed over Democratic political opposition and general concern that it was unseemly to so directly threaten a Justice of the Supreme Court.[311] But Hunt took the "offer," and four days later, President Arthur nominated Roscoe Conkling to the Court.[312] Conkling declined, choosing instead to pursue his own political ambitions and a lucrative career as a private lawyer.[313] President Arthur then nominated Samuel Blatchford, a judge on the Second Circuit and an expert in patent law, who served until 1893.

When Justice William Moody suffered from "rheumatism" in the early 1900s (probably Lou Gehrig's Disease), a much more friendly effort provided the deeply indebted Moody with a pension allowing him to cooperate with efforts to get him to retire.[314] By 1909, some of the rhetoric acknowledged that Moody had given up a successful law career to "get by" on the comparably modest salary of a justice.[315] Nevertheless,

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[296] *Id*. at Canon 4(A)(1)(d).
[297] *Id*. at Canon 4(C).
[298] CODE OF CONDUCT FOR FEDERAL JUDGES, Canon 4(D)(3).
[299] CODE OF CONDUCT FOR THE SUPREME COURT, Canon 4(H).
[300] *Id*. at Commentary, p. 13.
[301] Sarah Fortinsky, *Ocasio-Cortez files impeachment articles against Supreme Court Justices Thomas and Alito*, THE HILL (July 10, 2024), available at https://thehill.com/homenews/house/4764398-aoc-articles-of-impeachment-clarence-thomas-samuel-alito/. In this author's opinion, Representative Ocasio-Cortez's articles of impeachment, plus another six dollars, will buy you a coffee at Starbucks.
[302] U.S. CONST. Art. II, Section 4.
[303] U.S. CONST. Art. III, Section 1.
[304] *See* Judge Glock, *The Politics of Disabled Supreme Court Justices*, 45 J. SUP. CT. HIST. 151 (2020).
[305] *Id*.
[306] *Id*. at 153.
[307] *Id*. at 154-55.
[308] *Id*.
[309] *Id*.
[310] *Id*. at 156-57.
[311] *Id*.
[312] *Id*. at 157.
[313] *Id*.
[314] *Id*. at 158.
[315] *Id*. Justice Hunt had faced public shaming for continuing to accept a salary while bedridden. *See id*.

in a private letter President Taft claimed that Justice Moody had brought his illness upon himself through his shocking behavior of trying to remain a judge after the age of seventy.[316] Times have changed.

Since that time, there has been no meaningful progress on a process to force a reluctant Supreme Court Justice to acknowledge his or her incapacity. An effort during the Franklin D. Roosevelt administration failed, as it became entangled with the President's so-called "court-packing" plan.[317] The administration was successful in creating a new statute that allowed disabled judges to retire and receive a full pension even before they reached the full period of service necessary to retire "normally," avoiding the piecemeal efforts required for Justices Hunt and Moody.[318]

Several recent Justices retired before the end of their lives—Breyer, Kennedy, O'Connor, Souter, Stevens—thereby avoiding any concern that their capabilities might dim with age. Indeed, some seem to have understood the value of a calculated retirement,[319] while others have been criticized for throwing away that valuable opportunity.[320]

Justice Kagan recently made nationwide news for commenting on the lack of any Code enforcement mechanism at the Ninth Circuit's Judicial Conference.[321] She stated, "The thing that can be criticized is, you know, rules usually have enforcement mechanisms attached to them, and this one — this set of rules — does not."[322] She proposed that it was her opinion (and *only* her opinion) that "if the chief justice appointed some sort of committee of, you know, highly respected judges with a great deal of experience, with a reputation for fairness, you know, that seems like a good solution to me."[323] In a subsequent interview, Justice Gorsuch declined to comment on Justice Kagan's proposal, but in fairness he was reluctant to talk about anything *at all* except his new book.[324]

Public shaming seems to be the only other way to challenge the misbehavior of a Justice—and may explain the vitriol of the last two years. Those who are offended by the misbehavior of Justices Thomas and Alito have no other avenue to hold them to account, and appeals to civility will never succeed because they do not address the core problem—the structural failure that leaves public shaming as the only remedy.

Calls for Supreme Court reform continue, and President Biden and others have proposed that Congress issue a code of conduct and ethics rules that would bind the Justices.[325]

B. The Texas System of Disqualification and Disability

In Texas, who judges the judges? The answer is much clearer—the State Commission on Judicial Conduct. Well, unless the judge appeals, in which case the answer is "some justices of the courts of appeals, chosen by lot." Read on.

1. The Texas Constitution Prevents the Problems that Bedevil the Federal System.

a. The Texas Constitution Subjects All Judges To A Complaint Process.

Neither Chief Justice Roberts's studied ambiguity about separation of powers nor Justice Alito's brash defiance have any place in the Texas system. We the people of Texas prevented those arguments by amending the Texas Constitution in 1965 to include Article 5, Section 1-a.[326] The Texas Constitution creates a clear system for complaints about judicial disability and misconduct, and submits *all* Texas judges and

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[316] *Id*. at 157 ("It is an outrage that the four men on the bench who are over seventy should continue there and thus throw the work and responsibility on the other five. This is the occasion of Moody's illness.").

[317] *Id*. at 160-62.

[318] *Id*. at 161-62. *See* 28 U.S.C. § 372 (disabled justices who retire without having served ten years receive one-half their salary for the rest of their life, but receive the full salary if they served ten years).

[319] *Cf.* Christopher Cadelago, Nancy Cook, and Andrew Restuccia, *How a private meeting with Kennedy helped Trump get to "yes" on Kavanaugh*, POLITICO (July 9, 2018), *available at* https://www.politico.com/story/2018/07/09/brett-kavanaugh-trump-private-meeting-706137.

[320] *Cf.* Joan Biskupic, *U.S. Justice Ginsburg hits back at liberals who want her to retire*, REUTERS (July 31, 2014), *available at* https://www.reuters.com/article/world/us-politics/us-justice-ginsburg-hits-back-at-liberals-who-want-her-to-retire-idUSKBN0G12UZ/.

[321] *See, e.g.*, *Justice Elena Kagan says there needs to be a way to enforce the Supreme Court's ethics code*, THE ASSOCIATED PRESS (July 25, 2024), available at https://www.nbcnews.com/politics/supreme-court/justice-elena-kagan-enforcement-supreme-court-ethics-code-needed-rcna163756.

[322] *Id*.

[323] Devan Cole, *Justice Elena Kagan says Supreme Court's code of conduct needs an enforcement plan*, CNN (July 24, 2024), *available at* https://www.cnn.com/2024/07/25/politics/kagan-supreme-court-ethics-sacramento-conference/index.html.

[324] David French, *Neil Gorsuch Has a Few Thoughts About America Today*, N.Y. TIMES (Aug. 4, 2024), available at https://www.nytimes.com/2024/08/04/opinion/neil-gorsuch-supreme-court.html.

[325] *See, e.g.*, https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/.

[326] TEXAS CONST. Art. V, Sec. 1-a. Justice Martin Richter helpfully explained the history of the amendments to Section 1-a in a dissenting opinion he wrote in *In re Chacon*, https://www.scjc.texas.gov/media/8094/inquiry89.pdf.

justices to that system.

The Constitution creates an entity called the State Commission on Judicial Conduct, consisting of thirteen appointed individuals comprised of six judges from across the different types of courts, two members of the bar, and five members of the public.[327] Section 1-a then provides for the removal of "any Justice or Judge" who engages in enumerated types of misconduct, along with other punishments like discipline or censure.[328] It creates a framework for deciding complaints against judges through the State Commission, and instructs the Texas Supreme Court to promulgate a system of rules to govern those proceedings.[329] And the Constitution expressly states that the Legislature may promulgate laws "in furtherance of this Section that are not inconsistent with its provisions."[330] To that end, Chapter 33 of the Texas Government Code provides further guidance on the creation and operation of the Commission.[331]

All judges in Texas are also subject to being impeached for their misconduct,[332] but as best this author can tell, it has only happened once. District Judge O.P. Carillo was impeached in 1975 for a variety of fraudulent acts and judicial favoritism, and he spent three years in jail for tax fraud.[333]

b. Texas's system has additional protections to prevent judicial disability.

In addition to a constitutional process for challenging and removing judges, certain other structural elements of the Texas system effectively reduce or prevent judicial disability in ways that the federal system cannot.

First, judges in Texas do not hold lifetime appointments, like Article III federal judges do. They must answer to the voters at regular intervals to seek re-election.[334] While I fear the voters do not adequately inform themselves about the candidates who run for judicial office,[335] elective office remains a bulwark against misconduct to *some* degree. Surely the voters would not return a disabled or misbehaving official to office.[336]

Second, to the extent that the odds of disability increase with advanced age (as with the allegations against Judge Newman), the Texas system diminishes those concerns by imposing an age limit of seventy-five.[337] The judge cannot thwart this outcome by refusing to take action or through indifference because the Constitution says "the office of every such Justice and Judge *shall become vacant*."[338] It is surely possible for a judge to become disabled before age 75, and I am also certain that Texas has lost the benefit of some fine judges who could have continued to serve with excellence after age 75, but this constitutional age limit necessarily prevents many of the disputes that have arisen with elderly federal judges.

2. Sources of Texas Authority On Judicial Misconduct and Disability.

a. The Texas Code of Judicial Conduct

As with the federal system, Texas adopted a Code of Judicial Conduct that lays out the foundational rules for judicial conduct.[339] The Code applies to all judges in Texas, including the Justices of the Texas Supreme Court.[340] A 2023 statute applies the Code to candidates for judicial office as well.[341]

The Texas Code of Judicial Conduct closely resembles the Code of Conduct for Federal Judges and the ABA Model Code, and like those codes, prohibits all the things that you would expect a judicial code to prohibit. But there are some modest differences, which become more evident when one places them side-by-side:

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[327] *Id*. at Sec. 1-a(2). Judges are appointed by the Texas Supreme Court, lawyers by the Bar, and non-lawyers by the governor, with the advice and consent of the Senate.

[328] TEXAS CONST. Art. V, Sec. 1-a(6).

[329] *Id*. at Sec. 1-a(7)-(11).

[330] *Id*. at Sec. 1-a(14).

[331] *See* TEXAS GOV'T CODE Chapter 33.

[332] TEXAS CONST. Art. XV, Sec. 2.

[333] *See, e.g.*, *In re Carillo*, 542 S.W.2d 105 (Tex. 1976); Marc Duvoisin, *Texas' last impeachment trial had a very different ending*, SAN ANTONIO EXPRESS-NEWS (Sept. 18, 2023), available at https://www.expressnews.com/news/article/impeachment-south-texas-judge-fraud-favoritism-18126652.php.

[334] *See* TEXAS CONST. Art. V, Sec. 2(c), 4, 6(b), 7(c).

[335] This is not a partisan concern, it is borne from studying the election returns and concluding that national party politics play a far greater role in driving judicial election outcomes than the merits of any individual judge. *See, e.g.*, *Editorial: One of the worst Democratic judges just got reelected. So much for accountability.*, HOUSTON CHRONICLE (Nov. 17, 2022), *available at* https://www.houstonchronicle.com/opinion/editorials/article/texas-legislature-constitution-bonds-judicial-race-17590613.php.

[336] Insert your own national-politics joke here.

[337] TEXAS CONST. Art. V, Sec. 1-a(1). To be more precise, there is a formula involving the "expiration of the term" in which the judicial officer reaches 75. *Id*. In 2023, voters rejected a proposed constitutional amendment that would have changed the retirement age to 79. William Melhado and Pooja Salhotra, *Texas voters reject proposal to increase judges' retirement ages*, TEXAS TRIBUNE (Nov. 7, 2023), *available at* https://www.texastribune.org/2023/11/07/texas-judges-retirement-proposition-results/.

[338] TEXAS CONST. Art. V, Sec. 1-a(1) (emphasis added).

[339] TEXAS CODE OF JUDICIAL CONDUCT, *available at* https://www.txcourts.gov/media/1457109/texas-code-of-judicial-conduct.pdf.

[340] *Id*. at Canon 6.

[341] *See* TEX. GOV'T CODE § 33.02105.

- Texas generally provides more detail, e.g. by listing types of "bias or prejudice." Texas also explicitly states that "discussions, votes, positions taken, and writings of appellate judges" are confidential.[342] Because of this added detail, Texas's Code might seem somewhat more *wary* than the Code of Conduct for Federal Judges, which is written broadly.
- Texas incorporates the "duty to sit" that the U.S. Supreme Court added to its Code, *see supra*, though it does not draw attention in the same way.[343] Texas's version reads like a truism instead of a defiant "get off my lawn."
- The Texas Code's rules for financial activities are more detailed than the vague rules of the federal Code,[344] though *less* detailed than all the extensive regulations and opinions that the federal system has issued.
- Obviously, the Texas rules regarding "inappropriate political activity" are quite different from the federal system, because Texas judges are elected officeholders and not the beneficiaries of a lifetime appointment.[345] This provision—Canon 5—has been the subject of some controversy in Texas Supreme Court history.[346]
- The Texas Code has an entire section providing specific instructions and exceptions to adapt the Code for certain types of courts (e.g. allowing justices of the peace more leeway regarding administrative communications).[347]
- The Texas Code does not have rules about disqualification, as does the federal Code.[348] The Constitution already has these provisions in it, and they are implemented through Chapter 33 of the Texas Government Code.

b. Other sources of legal authority in Texas.

The other sources of authority in Texas are Chapter 33 of the Texas Government Code and the Procedural Rules for the Removal and Retirement of Judges,[349] both of which are promulgated under the express authority of provisions in the Texas Constitution.[350] As in the federal system, the Commission publishes opinions that it uses as precedent to guide later cases.[351] And insofar as judges are "state officers," they are subject to the same standards of conduct that apply to all state employees, including the obligation to avoid conflicts of interest.[352] They must also file financial statements as detailed in the Government Code.[353]

As someone who was previously unfamiliar with the Texas system for judging judges, this author will attest that it is very difficult for a researcher to feel confident he has understood how all the sources of Texas authority work together. Some concepts are explained only in the Texas Constitution itself and not the laws implementing the Constitution (e.g. the implementation of a "special master"), while other concepts require one to cross-reference the Constitution, Chapter 33, and the Procedural Rules to get a full picture. The Commission's annual reports do a good job of explaining how its staff do their work,[354] but in explaining that system, the Commission also reveals certain workaday procedures that are not found anywhere in the rules or statutes. This paper represents

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[342] TEXAS CODE OF JUDICIAL CONDUCT at Canon 3(B)(6), (7), (11). There does not seem to be any doubt that such information is confidential in the federal system as well, as evidenced by the brouhaha when ~~Justice Alito~~ some unknown miscreant leaked the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*. Amy Howe, *Supreme Court investigators fail to identify who leaked* Dobbs *opinion*, SCOTUSBLOG (Jan. 19, 2023), *available at* https://www.scotusblog.com/2023/01/supreme-court-investigators-fail-to-identify-who-leaked-dobbs-opinion/ (describing how a report of the thorough investigation of Court staff conspicuously did *not* say whether the justices themselves were investigated).

[343] *Id*. at Canon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.").

[344] *Id*. at Canon 4(D).

[345] *Id*. at Canon 5.

[346] In 1993, Justice Doggett (joined by Justices Gammage and Spector) wrote a lengthy dissent from a Supreme Court order postponing the adoption of amendments to the rest of the Code so that there could be further discussion on Canon 5. *See* https://txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/93/93-0233.pdf. In that dissent, Justice Doggett claims his colleagues exhibit an "overriding fear that a reform will be adopted that restricts the ability of members of the Texas Supreme Court to solicit contributions from litigants and law firms at the same time as their causes are being decided in this Court." *Id*. From the perspective of 2024, Justice Doggett's concerns seem quaint to this author. The current limits on campaign contributions are so low that it is hard to imagine a Justice of the Texas Supreme Court selling his or her soul for so little money. *See* https://www.ethics.state.tx.us/resources/judicial/JCOH_guide.php.

[347] TEXAS CODE OF JUDICIAL CONDUCT at Canon 6.

[348] *Cf.* CODE OF CONDUCT FOR FEDERAL JUDGES at Canon 3(C).

[349] PROCEDURAL RULES FOR THE REMOVAL AND RETIREMENT OF JUDGES ("PROCEDURAL RULES"), available at https://www.scjc.texas.gov/media/8115/procedure_rules.pdf.

[350] TEXAS CONST. Art. V, Sec. 1-a(11), (14).

[351] https://www.scjc.texas.gov/opinions/.

[352] TEXAS GOVERNMENT CODE § 572.051(a).

[353] TEXAS GOVERNMENT CODE § 572.021.

[354] State Commission on Judicial Conduct Fiscal Year 2023 Annual Report, at 4, *available at* https://www.scjc.texas.gov/media/46982/scjc-23-ar-final.pdf.

the culmination of efforts to cross-reference the various sources of authority.

c. Alleging a Texas judge engaged in misconduct.

Chapter 33 of the Texas Government Code explains the procedure for lodging a complaint against a Texas judge. One begins by filing a sworn complaint against the judge.[355] The State Commission on Judicial Conduct has an online form that complainants may use.[356] The Texas system does not have separate provisions for complaints filed by "ordinary people" and by Chief Judges, like the federal system does. When one judge becomes concerned about the behavior of another judge, she has a duty to report those concerns to the Commission[357]—but evidently a judge files a sworn complaint like everyone else.[358]

What behavior is "misconduct" in Texas? The Texas Constitution defines it as "willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."[359] Chapter 33.001 of the Texas Government Code then helpfully provides further guidance on one of these terms:

> For purposes of Section 1-a, Article V, Texas Constitution, "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" includes:
>
> (1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;
> (2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;
> (3) persistent or wilful violation of the rules promulgated by the supreme court;
> (4) incompetence in the performance of the duties of the office;
> (5) failure to cooperate with the commission; or
> (6) violation of any provision of a voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission.

A criminal conviction makes the process much simpler. Under Chapter 33, a judge is *automatically* removed from office upon conviction or deferred adjudication for a felony or "a misdemeanor involving official conduct."[360] Similarly, Procedural Rule 15 allows the Commission to immediately suspend a judge with or without pay "immediately upon being indicted" for such a crime.[361] The judge has the right to a hearing to show that he or she should be allowed to continue presiding over cases while the prosecution continues.[362]

There is no special definition of "incapacity" or "disability" in Chapter 33, though the statute refers to that concept in several places.[363] The Texas Constitution provides only slightly more guidance by stating that a judge can be removed "for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature."[364] That provision contemplates that a disabled judge will be *involuntarily retired* if eligible for retirement benefits, and *removed* if ineligible for retirement benefits.[365]

Broad confidentiality rules apply to the entire process, though specific rules require proceedings and certain documents to be made public at certain stages.[366] Public hearings and public sanctions are always public, obviously—and the further a subject judge appeals, the more public the process becomes.[367]

d. The Commission investigates.

After a complaint is filed, the Commission's staff investigate the allegations.[368] The staff have 120 days to file a report with each member of the Commission detailing the investigation and recommending action.[369]

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[355] TEXAS CONST. Art. V, Sec. 1-a(6); TEXAS GOV'T CODE § 33.0211.

[356] https://scjc.texas.gov/media/46893/scjc-complaint-form.pdf.

[357] TEXAS CODE OF JUDICIAL CONDUCT at Canon 3(D)(1).

[358] *See, e.g.*, Public Reprimand of the Honorable Ursula Hall, CJC Nos. 22-0101, 22-1257 & 23-0281, State Comm'n on Judicial Conduct (Apr. 15, 2024), *available at* https://www.scjc.texas.gov/media/47024/hall22-010-et-alfinal-pub-rep-signed.pdf (noting that one of the complaints against Judge Hall was filed by the Chief Justice of the Fourteenth Court of Appeals who explained how Judge Hall's delays had burdened the First and Fourteenth Courts of Appeals with mandamus proceedings).

[359] TEXAS CONST. Art. V, Sec. 1-a(6).

[360] TEXAS GOV'T CODE § 33.038. The subject judge is suspended without pay while pursuing an appeal of the conviction. TEXAS GOV'T CODE § 33.037.

[361] PROCEDURAL RULE 15.

[362] *Id*.

[363] *See, e.g.*, TEXAS GOV'T CODE § 33.023.

[364] TEXAS CONST. Art. V, Sec. 1-a(6)(B).

[365] *Id*.

[366] PROCEDURAL RULE 17; TEXAS GOV'T CODE § 33.032.

[367] *Id*.

[368] TEXAS GOV'T CODE § 33.0212.

[369] *Id*. at (a). This date can be extended by the Commission, but not later than the 270th day. *Id*. at (c). In extraordinary circumstances, the executive director can request another 120 days, but such extensions must be reported to the Legislature. *Id*. at (d), (e).

The Commission first performs a preliminary investigation "to determine if the allegation or appearance is unfounded or frivolous."[370] If the allegation is frivolous, the commission "shall terminate the investigation."[371] If it is not, the commission "shall conduct a full investigation" and notify the judge.[372] The commission has the power to order the judge to submit a written response or make an informal appearance,[373] and may order depositions or ask the complainant to appear before the commission.[374]

Note that because misconduct is defined to include "failure to cooperate with the commission," the Texas system directly resolves the issues presented in Judge Newman's case. But the Texas system goes much further. Section 33.023 of the Texas Government Code expressly authorizes the Commission to "order the judge to submit to a physical or mental examination by one or more qualified physicians or a mental examination by one or more qualified psychologists selected and paid for by the commission."[375] The judge is given notice of the examination, and the doctor's report is accepted by the commission and provided to the judge upon request.[376] Subsection (d) says "If a judge refuses to submit to a physical or mental examination ordered by the commission under this section, the commission may petition a district court for an order compelling the judge to submit to the physical or mental examination."[377] It is unclear why this provision is needed, insofar as "failure to cooperate with the Commission" is already defined as *per se* misconduct.[378] Perhaps the Texas rules prefer to use stronger persuasion before resorting to the harsher methods Judge Newman faced.

Once the staff have made their report, the Commission has 90 days to determine what action to take, if any.[379] Options include: "(1) a public sanction; (2) a private sanction; (3) a suspension; (4) an order of education; (5) an acceptance of resignation in lieu of discipline; (6) a dismissal; or (7) an initiation of formal proceedings."[380]

Though the various rules never explain this point with the clarity one would hope, it appears the Commission initiates a "formal proceeding" when it concludes it should seek the "removal or retirement" of the subject judge.[381] The formal proceeding affords the judge the necessary procedural protections for this serious punishment. While the rules allow the Commission to initiate a formal proceeding to seek a lesser sanction, they give the Commission no particular motivation to do so.

If the Commission dismisses the complaint, the complainant may ask the Commission to reconsider.[382] The complainant may seek reconsideration only once, and must provide additional evidence to support the request.[383]

At this point, the Texas Supreme Court has the power to "suspend the person from office with or without pay, pending final disposition of the charge," though it must first "consider[] the record of such appearance and the recommendation of the Commission."[384] The Supreme Court has done this in the past, though it appears to be rare (e.g. it happened only three times since 2010).[385]

e. Formal proceedings to remove or retire a judge.

If the Commission decides to initiate formal proceedings, it puts the complaint on a public docket and provides the judge with notice of the charges and the specific standards contended to be violated.[386] The judge may (and certainly should) file an answer.[387]

The Commission then holds a public hearing at which the Commission members preside.[388] The Commission's staff attorneys "serve as Examiners, or trial counsel, during formal proceedings and on appeals from Commission actions. The Examiner is responsible for all aspects of preparing and presenting a case before the Commission, Special Master, Special Court of Review or Review Tribunal."[389] The subject judge has a wide variety of procedural protections, including the

[370] TEXAS GOV'T CODE § 33.022(b); PROCEDURAL RULE 3.
[371] *Id*.
[372] TEXAS GOV'T CODE § 33.022(c); PROCEDURAL RULE 4.
[373] TEXAS GOV'T CODE § 33.022(c); PROCEDURAL RULE 6.
[374] *Id*. Section 33.022 says the Commission may get a district court order to enforce its subpoenas. *Id*. at (e); *see also id.* at § 33.025.
[375] TEXAS GOV'T CODE § 33.023.
[376] *Id*. at § 33.023(b), (c).
[377] *Id*. at § 33.023(d).
[378] A Westlaw search did not turn up any cases applying this law.
[379] TEXAS GOV'T CODE § 33.0212(b).
[380] *Id*.
[381] TEXAS CONST. Art. V, Sec. 1-a(8).
[382] TEXAS GOV'T CODE § 33.035.
[383] *Id*. at (a), (f).
[384] TEXAS CONST. Art. V, Sec. 1-a(6).
[385] The Supreme Court's administrative docket lists only a handful of orders suspending judges pending final disposition, most recently in 2017. https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02913800.pdf. *See also, e.g.*, shttps://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/93/93-0182.pdf; https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02913800.pdf.
[386] TEXAS GOV'T CODE § 33.022(g)-(i); PROCEDURAL RULE 10.
[387] PROCEDURAL RULE 10(b).
[388] PROCEDURAL RULE 10(d). At least seven members must be present. *Id*.
[389] State Commission on Judicial Conduct Fiscal Year 2023 Annual Report, at 4, *available at* https://www.scjc.texas.gov/media/46982/scjc-23-ar-final.pdf.

right to confront witnesses and the appointment of a guardian ad litem if he or she has been adjudged insane or incompetent.[390] The judge may elect to open the hearing to the public, and is not entitled to a jury trial.[391]

At the end of the formal proceeding, the Commission may decide to publicly order a censure, reprimand, warning, or admonition, or can dismiss the proceeding.[392] It may also find good cause to recommend the removal or retirement of the judge, in which case the Commission will ask the Supreme Court to form a Review Tribunal.[393] The constitution and rules do not really explain the distinction between "removal" and "retirement" of a judge, except for the potential unspoken implication for the judge's pension. But one rule seems to contemplate that "involuntary retirement" is what happens to a judge found to be disabled, while "removal" is the consequence of misconduct other than disability.[394] In another place, the Texas Constitution draws the distinction that a disabled judge should be *retired* if eligible for retirement benefits and *removed* if not.[395]

f. Appeal from a sanction other than removal or retirement.

If the Commission issues a sanction against a judge other than removal or retirement, the judge may appeal.[396] (A recommendation of removal or retirement automatically leads to a more rigorous "review tribunal" process described below.) Within 30 days, the judge must make a written request to the Chief Justice of the Supreme Court asking for appointment of a Special Court of Review.[397] A "Special Court of Review" consists of three justices of the Courts of Appeals that the Chief Justice of the Supreme Court selects by lot—which to a court of appeals justice must seem like being called for jury duty.[398] The Special Court of Review will file a charging document and the evidence relied upon by the Commission, thus making the allegations and evidence public.[399]

If the appeal is from an informal proceeding, the Special Court of Review is to conduct a "trial de novo" as that term is understood with relation to the county courts.[400] If the appeal is from a formal proceeding by the Commission, the Special Court of Review reviews the record and can consider additional evidence if it wishes.[401]

The Special Court of Review then holds a public hearing at which the usual civil rules of law, evidence, and procedure apply.[402] It can decide to dismiss the complaint, affirm the Commission's decision, impose a greater or lesser sanction, or order the Commission to begin formal proceedings to remove or retire the judge.[403] The Special Court of Review can also decide to publish its opinion if it meets enumerated standards for publication (e.g. "establishes a new rule of ethics or law" or "resolves an apparent conflict of authority").[404]

The rules governing Special Courts of Review make clear that appeal is a risky decision for judges. The penalty could be *increased*,[405] and the entire process becomes much more public.

There is no appeal from the Special Court of Review's decision.[406] One justice of the peace successfully filed a federal lawsuit to challenge the reprimand issued by a Special Court of Review for a letter he sent to the press complaining about unfair local practices in dismissing traffic tickets.[407] The federal courts took jurisdiction to address his First Amendment claim and held the sanction was unconstitutional.[408]

The Commission's opinions page provides links to 21 Special Court of Review opinions dating back to 2000.[409] Some of the more noteworthy are *In re Hecht*,[410] which held that Chief Justice Hecht did not "endorse" a political candidate by giving interviews to the press in which he talked about the general qualifications of Supreme Court nominee Harriet Miers; and *In re Slaughter*,[411] which held that Judge Michelle Slaughter (then judge of the 405th District Court in Galveston County) did not violate the Code of Judicial

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390 PROCEDURAL RULE 10(g).
391 TEXAS GOV'T CODE § 33.022(j).
392 PROCEDURAL RULE 10(m).
393 PROCEDURAL RULES 10(m) & 11.
394 PROCEDURAL RULE 12(h).
395 TEXAS CONST. Art. V, Sec. 1-a(6)(B).
396 TEXAS GOV'T CODE § 33.034; PROCEDURAL RULE 9.
397 TEXAS GOV'T CODE § 33.034(b).
398 TEXAS GOV'T CODE § 33.001(a)(11). The statute makes clear that service on a Special Court of Review is one of the duties of a justice and does not merit extra pay. *Id.* § 33.034(c).
399 PROCEDURAL RULE 9(b).
400 TEXAS GOV'T CODE § 33.034(e)(2).
401 *Id*. at (e)(1).
402 PROCEDURAL RULE 9(c).
403 PROCEDURAL RULE 9(d).
404 PROCEDURAL RULE 9(e).
405 PROCEDURAL RULE 9(d); *see, e.g.*, *In re Davis*, *available at* https://www.scjc.texas.gov/media/7934/In-re-Davis.pdf (finding that because the subject judge had persistently refused to admit any fault before the Special Court of Review, he should be subjected to the additional sanction of briefly working under the supervision of a mentor judge).
406 PROCEDURAL RULE 9(c).
407 *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).
408 *Id*. at 213. Judge Garwood dissented because he would hold the court had no jurisdiction to review the proceeding. *Id*. at 214-15.
409 https://www.scjc.texas.gov/opinions/.
410 213 S.W.3d 547 (Tex. Sp. Ct. of Review Oct. 20, 2006), https://www.scjc.texas.gov/media/7984/In-re-Hecht.pdf.
411 https://www.scjc.texas.gov/media/34159/In-re-Slaughter.pdf.

Conduct by describing certain public courtroom events on her Facebook page. In both cases, the Special Court's finding that no misconduct occurred made it unnecessary to reach the First Amendment concerns that would otherwise arise.

g. Special masters.

The Texas Constitution allows the Commission to ask the Texas Supreme Court to appoint "a Master to hear and take evidence in the matter, and to report thereon to the Commission."[412] The special master must be a current or former judge.[413] The special master has all the powers of a district judge "in the enforcement of orders pertaining to witnesses, evidence, and procedure."[414]

From the rules and the few opinions discussing the proceedings held by a special master, it appears the special master can take charge of the "full investigation" that would normally be done by the Commission's staff and then let the Commission decide, or can go further and replace the Commission entirely and become the judge in a formal proceeding in which the Commission's attorneys act as prosecutors.[415]

h. The Review Tribunal.

If the Commission decides to recommend the forced removal or retirement of the subject judge, it asks the Chief Justice of the Supreme Court to form a "review tribunal."[416] "Review tribunals" were first enacted by constitutional amendment in 1984,[417] and they consist of seven justices of the courts of appeals, drawn by lot from a list made by the courts of appeals.[418] The justice whose name is drawn first serves as chairperson.[419] The office of the Clerk of the Supreme Court "will serve as the Review Tribunal's staff."[420]

The Review Tribunal works as an appellate court. "The review tribunal shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence."[421] Because of this constitutional provision, review tribunals have concluded they review the Commission's findings of fact for legal and factual sufficiency of the evidence.[422]

In what must surely be one of the most peculiar aspects of Texas's system, at least on a first reading, the rules automatically form the Review Tribunal but *also* require the subject judge to file a verified petition asking the Review Tribunal to rule in the judge's favor by rejecting the recommendation for removal or retirement.[423] The subject judge has thirty days to do so, or the failure "may be deemed a consent to a determination on the merits based upon the record filed by the Commission."[424] This requirement actually reflects a very sensible distinction. Even if the judge decides not to fight the recommendation of removal, the Review Tribunal must nevertheless review the evidence and decide whether to accept the recommendation.[425] By filing a petition, the subject judge (1) declares an intent to keep fighting; (2) presents specific legal arguments that the Review Tribunal can consider; and (3) can address the Review Tribunal's discretion to accept additional evidence.[426] If the subject judge files a petition, the Commission has twenty days to file a response brief.[427] The briefs are governed by "Rules 4 and 74 of the Texas Rules of Appellate Procedure," which is an outdated reference that the Supreme Court should be fix before the next Review Tribunal.[428]

The subject judge has the right to oral argument, which "shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days

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412 TEXAS CONST. Art. V, Sec. 1-a(8).

413 *Id*.

414 *Id*.

415 *Id*.

416 TEXAS CONST. Art. V, Sec. 1-a(9); PROCEDURAL RULE 12. This is another quirk of the rules governing judicial conduct—review tribunals are mentioned in TEXAS GOV'T CODE Chapter 33, but the actual process of convening and running a review tribunal process is not described there.

417 *In re Chacon*, 138 S.W.3d 86, 97 (Tex. Rev. Trib. 2004) (Richter, J., dissenting). Before that, the Supreme Court itself did the work of reviewing a Commission recommendation that a judge be removed or retired. *Id*.

418 TEXAS CONST. Art. V, Sec. 1-a(9); PROCEDURAL RULE 1(h), 12(a). Unlike the process for selecting a "Special Court of Review," the members of a "review tribunal" are selected from a list of justices in which "[e]ach Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made." *Id*. No justice who serves on the Commission may serve on a Review Tribunal. PROCEDURAL RULE 12(a).

419 PROCEDURAL RULE 12(a).

420 PROCEDURAL RULE 12(a).

421 TEXAS CONST. Art. V, Sec. 1-a(9).

422 *In re Thoma*, 873 S.W.2d 477, 484–85 (Tex. Rev. Trib. 1994). A dissenting opinion later criticized the reasoning of *Thoma*, using the history of the constitutional amendments to persuasively argue that the standard should be *de novo*. *In re Chacon*, 138 S.W.3d 86, 97 (Tex. Rev. Trib. 2004) (Richter, J., dissenting).

423 PROCEDURAL RULE 12(c).

424 PROCEDURAL RULE 12(d).

425 TEXAS CONST. Art. V, Sec. 1-a(9).

426 PROCEDURAL RULE 12(c), (f).

427 PROCEDURAL RULE 12(d).

428 PROCEDURAL RULE 12(e). Current Rule 38 on the formatting of briefs was formerly Rule 74, and is surely what was originally intended. But there is now a Rule 74 addressing "Review of Certified State Criminal-Law Questions," which could be very confusing if someone wanted to be very literal in trying to enforce the rule as currently written.

from the date of receipt thereof."[429] Argument shall "be governed by Rule 172, Texas Rules of Appellate Procedure," which is another outdated reference that ought to be fixed.[430]

The Review Tribunal has ninety days to "order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation."[431] If ordering retirement or removal, it can also prohibit the subject judge from holding judicial office in the future.[432] The Review Tribunal can decide to publish its opinion if it meets enumerated standards for being precedential.[433]

Review Tribunals are rare, and I found no opinion published since 2004. To broadly characterize the very few opinions since 1965[434] in which judges have been removed from office:

- Two justices of the peace behaved like tyrants;[435]
- A justice of the peace failed to keep accounts of the court's finances to such a mind-boggling degree that it garnered international attention;[436]
- Two district judges engaged in outrageous sexual harassment;[437]
- Police caught two judges accepting bribes;[438]
- A district judge engaged in widespread fraud;[439]
- A justice of the peace failed to engage in the mentor training ordered by the Commission for previous misconduct, then asked his mentor judge to lie to the Commission and say he *had* completed the mentor training, and then engaged in subsequent misconduct where he called a parking lot attendant a racial slur, which the Review Tribunal held was a pattern of misconduct that deserved the extreme penalty of removal from office when viewed collectively.[440]

i. Further Appeal to the Supreme Court.

The Review Tribunal is not the final step. The Texas Constitution says, "[a] Justice, Judge, Master, or Magistrate may appeal a decision of the review tribunal to the Supreme Court under the substantial evidence rule."[441] Procedural Rule 13 says the same thing.[442]

It is not clear whether anyone has ever resorted to this rule; Westlaw has no record of it, and I did not find any indication in the Court's administrative docket. It is difficult to imagine a hypothetical situation in which a subject judge might believe the Court would have an appetite to reverse the decision of a Review Tribunal. Perhaps an earnest disagreement over precedents on a constitutional issue.

j. Motion for Rehearing.

Procedural Rule 14 allows for a minimal process of seeking rehearing of the Review Tribunal or Supreme Court's final disposition of the appeal.[443] The Review Tribunal or Supreme Court can order that no motion for rehearing will be allowed.[444] But if they do not, the subject judge can present the clerk of the Supreme Court with a motion for rehearing *along with a motion for leave* to seek rehearing.[445] The tribunal will take "such action as the appropriate body deems proper."[446]

II. RECUSAL—REMOVING THE JUDGE FROM THIS CASE, NOT THE BENCH.

The previous discussion examined the standards and procedures for asserting that a judge should be removed from *office*. A different process and set of standards apply when one believes the judge should be removed from *this particular case*, but not removed from the bench altogether. This process is called "recusal" in the federal system, but "disqualification" is another term used in the Code of Conduct. In contrast, the Texas system uses the terms "recusal" and "disqualification" to mean slightly different things that have different consequences.

A. Recusal in the Federal courts.

1. Sources of recusal law in the Federal system.

Two statutes govern the federal system for removing a judge from a case—28 U.S.C. § 144 and § 455. Section 455 broadly applies to a variety of potential issues confronting all federal judges and

[429] PROCEDURAL RULE 12(g).
[430] *Id*.
[431] PROCEDURAL RULE 12(h).
[432] PROCEDURAL RULE 12(h).
[433] PROCEDURAL RULE 12(i).
[434] Before 1984, the Supreme Court itself was responsible for doing the work now performed by a Review Tribunal, so two of the opinions are from the Texas Supreme Court itself.
[435] *In re Chacon*, 138 S.W.3d 86 (Tex. Rev. Trib. 2004); *In re Bartie*, 138 S.W.3d 81 (Tex. Rev. Trib. 2004).
[436] *In re Rose*, 144 S.W.3d 661 (Tex. Rev. Trib. 2004).
[437] *In re Barr*, 13 S.W.3d 525 (Tex. Rev. Trib. 1998); *In re Canales*, 113 S.W.3d 56 (Tex. Rev. Trib. 2003).
[438] *In re Thoma*, 873 S.W.2d 477 (Tex. Rev. Trib. 1994); *In re Bates*, 555 S.W.2d 420 (Tex. 1977).
[439] *In re Carillo*, 542 S.W.2d 105 (Tex. 1976). In this remarkable case, Judge Carillo was both impeached by the Texas Senate *and* removed from office through the judicial misconduct system.
[440] *In re Lowery*, 999 S.W.2d 639 (Tex. Rev. Trib. 1998).
[441] TEXAS CONST. Art. V, Sec. 1-a(9).
[442] PROCEDURAL RULE 13.
[443] PROCEDURAL RULE 14.
[444] *Id*.
[445] *Id*.
[446] *Id*.

justices.[447] Section 144 is much narrower, because it applies only to the contention that a district judge has an actual personal bias. A third statute, 28 U.S.C. § 47, stands for the limited proposition that an appellate judge may not hear an appeal in a case that he tried as a trial judge.

The Due Process Clause also governs the recusal process in some sense, insofar as the Supreme Court held it provides the "outer boundaries of judicial disqualifications."[448] Nevertheless, the Due Process Clause was the *only* basis for requiring recusal in a shocking 2009 case that received national attention, *Caperton v. A.T. Massey Coal Co*.[449] In that case, the CEO of A.T. Massey Coal Company anticipated an appeal from a $50 million jury verdict to the Supreme Court of West Virginia, so he spent $3 million to support the campaign of a candidate who was challenging one of the justices.[450] The candidate, Brent Benjamin, won the election narrowly and then was a swing vote in A.T. Massey's favor when the case was decided.[451] Justice Benjamin decided he did not have to recuse himself, but the U.S. Supreme Court held (5-4) that this was the very rare circumstance where the "outer boundaries" of the Due Process Clause itself required Justice Benjamin to recuse himself, even if West Virginia law did not.[452] The "probability of bias" was just too great in these extraordinary circumstances.[453] The dissenting justices would have held the Due Process Clause applies to only those situations where the judge has a direct financial interest in the case, or is sitting in judgment of his own decision to find a litigant in contempt.[454]

2. When must a judge recuse?

Section 455 describes the situations in which a federal judge must recuse, and it tracks Canon 3C of the Code of Conduct for Federal Judges. Plentiful case law interprets these statutory requirements, so instead of reinventing the wheel, any attorney writing a motion to recuse should begin by referring to the detailed discussion in *Federal Practice and Procedure* or the section in *O'Connor's Federal Rules.*[455] Having said that, this paper will briefly review the statute and identify some interesting case law explaining the standards.

A federal judge must recuse him- or herself:

(1) In any case where "his impartiality must reasonably be questioned."[456]

This standard is obviously vague, and intentionally so. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."[457]

Scienter is not an element of this broad test, and a judge can be required to recuse himself even if he does not know of the circumstances giving rise to the appearance of impropriety.[458] This may seem impossible, but the Supreme Court explained that this principle can require a judge to vacate prior orders once he finally recognizes the circumstances requiring recusal.[459]

The standard must be applied from the standpoint of a reasonable and well-informed person, not an uninformed critic. The test is "if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge."[460] "The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."[461]

Disqualification under this subsection is the *only* type of disqualification that can be waived by the parties, after full disclosure of the relevant facts.[462] The other grounds for disqualification listed below cannot be waived by the parties.[463]

(2) The judge has a personal bias or prejudice against a party or about the subject matter of the suit.[464]

Courts have held that the bias or prejudice must come from an "extrajudicial source" instead of through information gleaned from the proceeding itself, though in its influential *Liteky* opinion, the Supreme Court took pains to explain that the concept is more subtle than that.[465] It merely reflects the implication that "bias" and

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[447] Remember that the Justices of the Supreme Court claim they follow Section 455 only voluntarily, and each Justice decides whether he or she shall recuse. *See supra*.

[448] 556 U.S. 868, 889 (2009) (quoting *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 828 (1986)).

[449] *Id*.

[450] *Id*. at 873.

[451] *Id*. at 873-74.

[452] *Id*.

[453] *Id*. at 887-89.

[454] *Id*. at 890 (C.J. Roberts, dissenting, joined by Justices Scalia, Thomas, and Alito).

[455] Wright and Miller et al., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS ("WRIGHT AND MILLER") § 3541 *et seq.* (3d ed.).

[456] 28 U.S.C. § 455(a).

[457] *Liljeberg v. Health Svcs. Acq. Corp.*, 486 U.S. 847, 865 (1988) (citing S.Rep. No 93-419, at 5; H.R.Rep. No. 93-1453, at 5).

[458] *Id*. at 859-60.

[459] *Id*. at 860-62.

[460] *Sao Paulo State of Fed. Rep. of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232-33 (2002) (quoting *Liljeberg*, 486 U.S. at 861) (emphasis in *Sao Paulo*).

[461] *Liljeberg*, 486 U.S. at 864-65.

[462] 28 U.S.C. § 455(e).

[463] *Id*.

[464] 28 U.S.C. § 455(b)(1); *see also* 28 U.S.C. § 144.

[465] *Liteky v. United States*, 510 U.S. 540, 551-52 (1994).

"prejudice" can sometimes be perfectly reasonable (as in the case of a negative view of Adolf Hitler).[466] In an effort to provide more practical advice, the Court explained that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[467] And "opinions formed by the judge on the basis of" the events in the current proceeding "ordinarily do not support a bias or partiality challenge."[468] Opinions developed during the proceedings are only a basis for bias or prejudice if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[469]

(3) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.[470]

To illustrate the fine line this rule can draw, consider *United States v. State of Alabama*.[471] That case concerned claims of racial discrimination in Alabama's public higher education system, and it was assigned to Judge U.W. Clemon.[472] Some parties demanded that Judge Clemon recuse himself, and the Eleventh Circuit reluctantly held he should have been recused.[473] The court emphatically rejected the contentions that Judge Clemon was biased because of his long service as an African-American civil rights lawyer or because his children were entitled to attend the public schools; such arguments had no merit and came offensively close to arguing that all minority judges must disqualify themselves from civil rights cases.[474] But Judge Clemon had personal knowledge about some of the specific, disputed facts about school funding because of his experience as an Alabama state legislator passing school funding bills, and also through his work as an attorney for plaintiffs in a prior school desegregation case.[475] This was "personal knowledge of disputed evidentiary facts" and disqualified him from serving as judge over this particular dispute.[476]

As with allegations of bias or prejudice, a judge is not disqualified for personal knowledge he gains in the course of the proceeding. For example, a criminal defendant who fights with the marshals in the courtroom cannot then demand the judge recuse himself from his probation revocation hearing because he witnessed the altercation.[477]

(4) The judge served as a lawyer in the case, or the judge was associated with a lawyer who served as a lawyer in the case during the time the judge was associated with that lawyer, or the judge or lawyer has been a material witness.[478]

A recent Fifth Circuit case presented an interesting dispute under this rule.[479] In 2022, District Judge Barry Ashe ruled in the defense's favor on a *Daubert* issue in the longstanding and wide-ranging *Deepwater Horizon* litigation.[480] The unhappy defendants then demanded that Judge Ashe recuse himself because he was a partner at the Stone Pigman law firm when that firm represented a party in the *Deepwater Horizon* morass back in its first phase, in 2012 and 2013.[481] Judge Ashe denied the motion to disqualify himself, concluding the motions were (1) untimely, and (2) meritless because the issues ten years earlier were distinct from the issues still being tried in 2022.[482] The Fifth Circuit affirmed, holding that any failure to recuse was harmless under the facts of the case.[483] Judge Ashe had not personally worked on the case, and every other judge working on the *Deepwater Horizon* hydra had come to the same conclusion on this particular *Daubert* issue.[484] Nevertheless, the opinion concludes with an admonition that the appeal "is fair warning to each of us of the importance of assuring the reality and appearance of that impartiality."[485]

The gap in time can be even greater than that. In *Williams v. Pennsylvania*, a judge was required to recuse himself from an appeal seeking post-conviction relief 26 years after sentencing, because he had been the district attorney who originally sought the death penalty.[486]

(5) While in government employment, the judge served as counsel, adviser or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.[487]

This rule created significant headaches for the

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466 *Id*.
467 *Id*. at 555.
468 *Id*.
469 *Id*.
470 28 U.S.C. § 455(b)(1).
471 828 F.2d 1532 (11th Cir. 1987).
472 *Id*. at 1535.
473 *Id*. at 1541-46.
474 *Id*. at 1543.
475 *Id*. at 1545.
476 *Id*.
477 *United States v. Melton*, 738 F.3d 903 (8th Cir. 2013).
478 28 U.S.C. § 455(b)(2).
479 *Street v. BP Exploration & Production, Inc.*, 85 F.4th 466 (5th Cir. 2023).
480 *Id*. at 270.
481 *Id*.
482 *Id*. at 271-72.
483 *Id*. at 272-73.
484 *Id*.
485 *Id*. at 273.
486 579 U.S. 1 (2016). The decision rested on the Due Process Clause and not Section 455, because Pennsylvania law had applied to the judge's obligations to recuse. *Id*. Nevertheless, it provides a useful illustration of how these issues can arise after many years.
487 28 U.S.C. § 455(b)(3).

Supreme Court Justices who joined the Court while serving as Solicitor General—Justices Kagan and Marshall. Because the Solicitor General is listed as "counsel" in many lawsuits involving the United States government, even if he or she acts in a mostly administrative role, both Kagan and Marshall recused themselves from many lawsuits in their first years on the Court.[488]

Nevertheless, this rule is narrower than other subparts of the statute. It is narrower than the previous rule regarding service as a lawyer, insofar as it requires *personal* involvement and not merely an associational connection.[489] And unlike the broad prohibition on sitting in a case where the judge has "personal knowledge," this rule requires involvement with the *proceeding* and not merely the subject matter.[490] For this reason, judges have read the rule very narrowly. For example, while on the D.C. Circuit, Judge Kavanaugh wrote an opinion explaining that he refused to recuse himself from a case despite concerns that he provided policy advice to President Bush on the issue in the case (a lumber dispute with Canada).[491] Judge Kavanaugh thoughtfully gathered examples to show that federal judges have often presided over cases despite knowledge of certain subjects or statutes gained through their prior governmental service, and cited cases supporting his observation that this subpart of the statute is conspicuously more narrow than other parts.[492]

Having said that, courts have generally held that the United States Attorney always personally serves "as counsel" on all matters prosecuted during her term of service, even if there is no allegation that she had any personal involvement in the proceeding.[493] Because that rule arises from the US Attorney's role as a Presidential appointee, an Assistant United States Attorney is not subject to the same rule and is only disqualified if he was personally involved in the proceeding.[494]

(6) "He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."[495]

Section 455 defines a "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."[496] However, the same definition excludes interests in investment funds or mutual companies, service as an office in a civic or charitable organization, or the ownership of government securities (unless the proceedings could substantially affect the value of those securities).[497] It also contains another provision allowing the judge to divest herself of the financial interest if it came to light after "substantial judicial time has been devoted to the matter."[498]

Judges' financial interests are often targeted in news coverage. For example, a 2021 Wall Street Journal investigation claimed that 131 federal judges violated this rule by hearing cases in which they or a family member owned stock.[499] This seems remarkable; my own experience has been that federal judges quickly (even *eagerly*) recuse themselves based on potential issues arising from stock ownership.[500] Nevertheless, as discussed above, some have criticized Supreme Court Justices for failing to recuse themselves from cases in which they hold a financial interest.[501]

Others have criticized Section 455 in recent years because it does not require the judge to disqualify himself if one of the parties is his spouse's client, if the spouse's work does not *directly* connect to the dispute before the court.[502] An advisory opinion explains that the only rule that would apply in such situations is the

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[488] *See* Tom Goldstein, *Elena Kagan and Recusal—UPDATED*, SCOTUSBLOG (Apr. 18, 2010), *available at* https://www.scotusblog.com/2010/04/elena-kagan-and-recusal/.

[489] *Compare* 28 U.S.C. § 455(b)(2) and (3).

[490] *Compare* 28 U.S.C. § 455(b)(1) and (3).

[491] *Baker & Hostetler, LLP v. U.S. Dep't of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006).

[492] *Id*.

[493] *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994).

[494] *United States v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001).

[495] 28 U.S.C. § 455(b)(4).

[496] 28 U.S.C. § 455(d)(4).

[497] 28 U.S.C. § 455(d)(4).

[498] 28 U.S.C. § 455(f).

[499] James V. Grimaldi, Coulter Jones and Joe Palazzolo, WALL STREET JOURNAL (Sept. 28, 2021), *available at* https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421.

[500] I have never found any judge willing to go on the record about the persistent rumor among private-practice litigators that judges deliberately purchase stock in certain companies to avoid having to preside over certain types of cases.

[501] *See, e.g.*, https://fixthecourt.com/2024/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ (discussing specific instances of recent failures to recuse, including *inter alia*, a possible discrepancy between the way Justice Jackson and Justices Roberts, Kagan, and Gorsuch viewed the need to recuse due to ownership of an interest in a Charles Schwab fund).

[502] *See, e.g.*, Noah Pransky, Brooke Williams and Andrew Botolino, PROPUBLICA (July 16, 2024), *available at* https://www.propublica.org/article/judges-ethics-codes-recusal-conflict-of-interest-families (gathering reports of spousal connections that made the news).

general rule to avoid the appearance of conflicts of interest.[503]

The judge has an affirmative duty to "inform himself about his personal and fiduciary financial interests," and must "make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."[504]

(7) The judge or his spouse, or a person "within the third degree of relationship to either of them," or the spouse of such a person, is a party (or officer, director, or trustee of a party), is acting as a lawyer in the proceeding, is known by the judge to have an interest that could be substantially affected by the outcome, or to the judge's knowledge is likely to be a material witness in the proceeding.[505]

The statute explains that the "civil law system" determines the "third degree of relationship."[506] In this system, one makes a "family tree" and then counts the steps up the tree to the nearest common ancestor, and then back down to the individual in question. For example, a judge's sibling is a relative in the second degree (one step up to their parent, one step down to the sibling), and a judge's aunt is a relative in the third degree (two steps up to the judge's grandparent and one step down to the aunt). Federal law lumps spouses together, whereas Texas has a separate rule for "affinity." *See infra*.

3. Procedure for a Recusal Motion.

a. Filing a Motion.

Under Section 455, judges should monitor their own interests and recuse themselves without being asked. But if there has been some lapse or oversight, a party seeks recusal by filing a motion asking the judge to recuse himself. Though the ordinary rules of motion practice apply, there are two types of motions:

Section 144. Motions under 28 U.S.C. § 144 are limited in scope: they challenge (1) the actual bias or prejudice of (2) a district judge.[507] Such motions are also subject to strict procedural requirements. The motion must include an affidavit stating the facts and reason for the belief that bias or prejudice exists, and the court must accept the allegations of the affidavit as true.[508] The attorney must also include a certificate stating that the motion is made in good faith.[509] The motion must be filed at least ten days "before the beginning of the term at which the proceeding is to be heard."[510] A party may only file one Section 144 motion per case.[511]

Section 455. Section 455 is not written in terms of a motion to be filed (as with Section 144), but instead describes the circumstances in which a judge has the obligation to recuse him- or herself. Accordingly, section 455 motions can be filed in any court and on any basis listed above, so they apply in many more situations. They do not require an affidavit or a certificate, but they are permitted, and it would be a good idea to be diligent when alleging the reasons why a federal judge should recuse herself. The judge does not have to accept the truth of the facts alleged in an affidavit offered by a section 455 movant, unlike section 144.[512]

Section 455 does not have any deadline for filing a motion to recuse, and this was an intentional decision by Congress.[513] Nevertheless, most courts have read a vague timeliness requirement into the statute, not unlike the concept of laches, and many courts conclude that a party can waive or forfeit the right to ask a judge to recuse.[514]

b. Deciding the Motion.

Who decides the recusal motion? The subject judge judges himself, though she can refer the issue to another judge. The procedure differs slightly between Section 144 and Section 455 motions.

In a Section 144 motion, the challenged judge decides the threshold question of whether the motion complies with Section 144's requirements,[515] and if it does, the challenged judge is immediately recused and "another judge shall be assigned to hear such proceeding."[516]

In a Section 455 motion, the challenged judge decides both the procedural and substantive elements of the motion.[517] The judge may refer the motion to be decided by another judge, but federal law does not

[503] Advisory Opinion 107, Committee on Codes of Conduct, *available at* https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf.
[504] 28 U.S.C. § 455(c).
[505] 28 U.S.C. § 455(b)(5).
[506] 28 U.S.C. § 455(d)(2).
[507] 28 U.S.C. § 144.
[508] *Id*.
[509] *Id*.
[510] *Id*.
[511] *Id*.
[512] *See, e.g.*, *Phillips v. Joint Committee on Performance and Expenditure Review of the State of Miss.*, 637 F.2d 1014, 1020 n.6 (5th Cir. 1981).
[513] WRIGHT AND MILLER § 3550.
[514] *Id*. *See, e.g.*, *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) (litigants did not raise potential grounds for disqualification when they were discovered, but instead held them back to use as grounds for a later Rule 60 motion).
[515] WRIGHT AND MILLER § 3551; *Berger v. United States*, 255 U.S. 22, 32 (1921).
[516] 28 U.S.C. § 144.
[517] WRIGHT AND MILLER, § 3550.

require him to do so.[518]

c. Appellate review of the recusal decision.

The proper procedural mechanism for reviewing a judge's decision on a recusal motion is shockingly unsettled, so if the reader needs to appeal an adverse recusal decision, you should carefully review Section 3553 of *Federal Practice and Procedure*.[519] That text explains the circuits have split on all the following issues:

- Is it *ever* proper to appeal the judge's decision to recuse? After all, the litigants suffer no harm from having their case assigned to another federal judge.
- What is the proper procedural vehicle for appeal?
    - Can a litigant ask a judge to certify the decision under Section 1292(b) (i.e. can recusal ever be a "controlling question of law as to which there is substantial ground for difference of opinion" that will "materially advance the ultimate termination of the litigation")?
    - Can a litigant seek mandamus review? After all, courts ordinarily say the judge has discretion to decide whether to recuse. How deferential should the reviewing court be?
- What is the standard of review, abuse of discretion or *de novo*?
- Can the right to appeal be waived by proceeding to trial?[520]

Because you will be interested in the local rules, the Fifth Circuit acknowledges mandamus as the procedure for reviewing the denial of a disqualification motion, though it remains highly deferential to the challenged judge.[521] It has also accepted one appeal from a 1292(b) certification.[522]

Some older cases held a judge must not take any action to respond to a petition for writ of mandamus challenging the judge's refusal to recuse himself, but should remain an inactive party, because the alternative would be to align the judge with some of the parties in the case.[523] These cases appear quaint in light of the historical movement toward judges remaining inactive in mandamus proceedings *generally*. It is hard to imagine a modern case in which a judge would actively participate in drafting the response to a mandamus petition, but that is what happened in the foundational case in the Third Circuit in 1964.[524]

B. Recusal in Texas state courts.

As with the judicial conduct rules discussed above, the Texas recusal rules resemble the federal system but are more rigorous.

1. Sources of Texas law on recusal and disqualification.

Texas has many laws that govern the recusal or disqualification of its judges. Texas Constitution article 5, section 11 contains some basic rules requiring the disqualification of judges: "No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case." Rule of Civil Procedure 18b lists many other grounds for recusal.

Rules of Civil Procedure 18a governs the procedure for recusal and disqualification motions in trial courts, and Rule of Appellate Procedure 16 governs procedure in the appellate courts. However, there are exceptions to these procedural rules. Statutory probate courts are governed instead by Texas Government Code chapter 25, justice courts are governed by Rule of Civil Procedure 528, and municipal courts are governed by Texas Government Code chapter 29. Texas Civil Practice & Remedies Code Section 30.016 also imposes certain rules and penalties for the "third and subsequent" motion filed by a party in a case.

2. Distinguishing "disqualification" from "recusal."

Texas recognizes an important distinction between the concepts of "disqualification" and "recusal."[525] This is not merely nomenclature—it affects the judge's power and the proper appellate remedy.

Judges are disqualified when they violate one of the three prohibitions in the Texas Constitution: being interested in a case, having been counsel in the case, or being related to a party.[526] Their orders are completely void and without effect.[527] A party may challenge a judge's refusal to disqualify herself by seeking a writ of mandamus, and because the issue is a constitutional

[518] *Id*.

[519] WRIGHT AND MILLER § 3553.

[520] *See, e.g.*, *United States v. Glavin*, 580 F. App'x 482, 484 (7th Cir. 2014) (holding the right is waived because the harm is to the judicial system as a whole, not just the litigants).

[521] *See In re Chevron, U.S.A., Inc.*, 121 F.3d 163 (5th Cir. 1997).

[522] *Davis v. Bd. of School Comm'rs of Mobile Cty.*, 517 F.2d 1044, 1047 (5th Cir. 1975).

[523] *Rapp v. Van Dusen*, 350 F.2d 806, 813 (3d Cir. 1964) (en banc); *General Tire & Rubber Co. v. Watkins*, 363 F.2d 87, 88-89 (4th Cir. 1966).

[524] *Rapp*, 350 F.2d at 813.

[525] *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

[526] *Id*.

[527] *Id*.

infirmity, the petitioner need not show he lacks an adequate remedy by appeal.[528]

Judges are recused under the conditions described in Rule 18b.[529] Their orders are not automatically void, and recusal can be waived if not properly raised.[530] Rule 18a(j) allows a party to appeal an order denying recusal "on appeal from the final judgment," and prohibits any appeal of any kind from an order granting recusal.[531] Because a party has an appeal from the final judgment, the Texas Supreme Court held in 1998 that a litigant cannot seek mandamus review of the denial of a recusal motion,[532] and one can still find cases citing that decision to refuse mandamus relief. However, in 2007 the Texas Supreme Court noted that "our mandamus standards have evolved" since that decision.[533] "We now ask whether 'any benefits to mandamus review are outweighed by the detriments.'"[534] So it is theoretically possible to obtain mandamus review in extraordinary circumstances.[535] In reality, mandamus relief has issued only in two circumstances. First, mandamus is proper when the court determines the basis for recusal was proven as a matter of law—a truly unusual state of affairs.[536] Second, mandamus is proper when the subject judge fails in the ministerial task required by Rule 18a: to either recuse himself or refer the motion to the administrative judge for decision.[537]

In contrast to the U.S. Supreme Court's view that its members are irreplaceable, *see supra*, the Texas Constitution expressly empowers the Governor to commission a substitute justice when a Supreme Court justice is disqualified.[538] Texas Government Code section 22.005 provides further details. In 2022, the Texas Supreme Court rejected the argument that this process of commissioning a substitute justice violated the Due Process Clause by allowing the state to sit in judgment of its own case against other parties.[539]

3. Grounds for Disqualification and Recusal.

The grounds for disqualification and recusal resemble the grounds in the federal system, discussed above. Indeed, in many instances the standards appear to have been modeled on the federal system or on the same model judicial codes that led to the federal rules.

a. Grounds for disqualification.

The Texas Constitution states three reasons for disqualifying a judge, and Rule 18b(a) repeats them with some slight elaborations. They are:

(1) "The judge has served as a lawyer in the matter in controversy; or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter."[540]

Rule 18a(1) seemingly goes further than the Constitution by requiring "vicarious disqualification" if a former fellow lawyer served as a lawyer on the matter, which is not expressly stated in the Constitution itself. Nevertheless, the Texas Supreme Court held that the Rule "was intended to *expound* rather than *expand* the Constitution," so Rule 18a(1) is the same thing as the Constitutional text.[541] "Vicarious disqualification" has limits, though—it only applies if the judge practiced law with another person who was a lawyer in the case *while they were at the same firm*.[542]

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[528] *Id.*

[529] *Id*.

[530] *Id*.

[531] *Id*.; *see also* TEX. R. CIV. P. 18a(j).

[532] *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

[533] *In re McKee*, 248 S.W.3d 164, 165 (Tex. 2007).

[534] *Id*. (quoting *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 136 (Tex. 2004)).

[535] *Id*.

[536] *DeLeon v. Aguilar*, 127 S.W.3d 1, 5-6 (Tex. Crim. App. 2004); *In re State ex rel. Durden*, 587 S.W.3d 78, 80-81 (Tex. App.—San Antonio 2019, no pet.).

[537] *McLeod v. Harris*, 582 S.W.2d 772, 774-75 (Tex. 1979); *In re Thompson*, 330 S.W.3d 411, 417-18 (Tex. App.—Austin 2010, orig. proceeding) (gathering cases); *In re Norman*, 191 S.W.3d 858, 860 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[538] TEX. CONST. art. V, § 11.

[539] *State v. Volkswagen Aktiengesellschaft*, ___ S.W.3d ___, 66 Tex. Sup. Ct. J. 82 (Tex. Nov. 18, 2022). The case has not been released for publication, probably because Volkswagen sought an extension of time to appeal to the United States Supreme Court but never actually filed the petition for writ of certiorari.

[540] TEX. R. CIV. P. 18b(a)(1).

[541] *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 553 (Tex. 2006) (court of appeals justice was disqualified because she had been at Baker Botts while another attorney at the firm served as counsel in the case). *Tesco American* offers several reasons for this conclusion, which you may or may not find persuasive. I think the holding is somewhat out of step with current dogma about textual interpretation, but the result is very sensible. *See id*. As a side note, O'CONNOR'S TEXAS CIVIL PROCEDURE and MCDONALD & CARLSON TEXAS CIVIL PRACTICE both find it significant that one of the court of appeals' opinions in this case relied on the comment to TRAP 16, which highlighted that the disqualification of appellate judges is governed by the Constitution and not Rule 18b. *F.S. New Products, Inc. v. Strong Industries, Inc.*, 129 S.W.3d 594, 598 (Tex. App.—Houston [1st Dist.] 2003, no pet.). These excellent treatises overlook the fact that when that case finally made its way to the Texas Supreme Court, the Court held there was no way to know whether this change to the rule was substantive or nonsubstantive. *Tesco Am.*, 221 S.W.3d at 553 n.11.

[542] *See, e.g.*, *Denton v. Wiggins*, No. 07-19-00127-CV, 2020 WL 5666948, at *3 (Tex. App.—Amarillo Sept. 23, 2020, no pet.).

It does not matter whether the judge remembers serving as a lawyer in the matter; if the record shows that he did, then he is constitutionally disqualified.[543]

(2) "The judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy."[544]

A direct financial or personal interest, "however small," will disqualify a judge.[545] However, a disqualifying interest does not include an interest that is the same as any other member of the bar or citizen of Texas.[546] Obviously, outright bribery is an "interest" in the case that disqualifies the judge.[547]

(3) "Either of the parties may be related to the judge by affinity or consanguinity within the third degree."[548]

This concept is explained in the section above on federal recusals. "Affinity" is relationship by marriage, "consanguinity" is relationship by blood.[549] The Texas Supreme Court held that a judge was not disqualified because his brother was an attorney in the case, reasoning that an attorney is not a "party" for purposes of the Texas Constitution.[550]

b. Grounds for recusal.

Rule 18b has many more grounds for recusing a Texas judge, and again, these concepts are nearly identical to the principles discussed above for federal judges. For that reason, the reader might find more guidance in FEDERAL PRACTICE & PROCEDURE than a Texas hornbook.

The grounds for recusal are:

(1) "The judge's impartiality might reasonably be questioned."

Texas seems to have adopted the "reasonable person" standard from federal law, *see supra*, even if the Texas Supreme Court has not said so. Justice Enoch advocated that standard in an influential concurrence in 1995 in *Rogers v. Bradley*,[551] and the courts of appeals have generally accepted his reasoning and the United States Supreme Court's opinion in *Liteky*.[552]

In a remarkable holding, the Corpus Christi-Edinburg Court of Appeals held that a movant stated a *prima facie* case for recusal by showing that opposing counsel represented the judge in an unrelated matter and was his campaign manager, but because of the reasonable person standard, the movant must nevertheless provide sufficient facts about the nature of these relationships to show that recusal was mandated.[553]

(2) "The judge has a personal bias or prejudice concerning the subject matter or a party."

Here too, Texas has adopted the "extrajudicial source" requirement from *Liteky* and federal law, which is to say that the rule is more subtle than simply saying the bias or prejudice must have come from somewhere other than the judicial proceeding itself.[554] "'Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,' and opinions the judge forms during a trial do not necessitate recusal 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'"[555]

(3) "The judge has personal knowledge of disputed evidentiary facts concerning the proceeding."

Texas follows the "extrajudicial source" rule from *Liteky*, so "personal knowledge" gained during the proceeding does not require a judge to recuse herself.[556] The question is whether the personal knowledge was either wrongfully obtained or led to a wrongful disposition of the case.[557]

(4) "The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding."

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[543] *Williams v. Kirven*, 532 S.W.2d 159, 160-61 (Tex. App.—Austin 1976, writ ref'd n.r.e.) (disqualifying a trial judge who did not recall writing the title opinion on the property at issue in the lawsuit).

[544] TEX. R. CIV. P. 18b(a)(2).

[545] *Sun Oil Company v. Whitaker*, 483 S.W.2d 808, 823 (Tex. 1972).

[546] *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979).

[547] *Freedom Comm'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012) (trial judge took bribe of $8,000 to make favorable rulings, which meant he was disqualified when he denied a summary judgment motion, which meant the order was void, which meant the Texas Supreme Court had no jurisdiction to review that order).

[548] TEX. R. CIV. P. 18b(a)(3).

[549] *See, e.g.*, TEXAS GOVERNMENT CODE Chapter 573 (defining these concepts for purposes of the statute prohibiting nepotism). By statute, adoption is the same as a blood relationship. *Id*. at § 573.022(b).

[550] *Winston v. Masterson*, 87 Tex. 200, 27 S.W. 768 (Tex. 1894).

[551] 909 S.W.2d 872, 878-84 (Tex. 1995) (Enoch, J., concurring) (responding to Justice Gammage's decision to recuse himself due to unsavory political advertising).

[552] 510 U.S. at 555-56; *see supra*.

[553] *Lueg v. Lueg*, 976 S.W.2d 308, 311 (Tex. App.—Corpus Christi-Edinburg 1998, pet. denied).

[554] *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001).

[555] *Id*. (quoting *Liteky*, 510 U.S. at 555).

[556] *See Kniatt v. State*, 239 S.W.3d 910, 919-20 (Tex. App.–Waco 2007, no pet.) (per curiam).

[557] *Id*. (quoting *Sommers v. Concepcion*, 20 S.W.3d 27, 43–44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

(5) "The judge participated as counsel, advisor, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service."

(6) "The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

As with the federal rules, Rule 18b has a special definition of "financial interest" that excludes specific types of interests like ownership in a mutual or investment fund, service in a civic organization, an interest in a mutual company, or ownership of government securities.[558] And like the federal rules, Rule 18b allows a judge to divest herself of a problematic financial interest if it is discovered "after the judge has devoted substantial time to the matter."[559]

Despite these narrowing definitions, it is evident that "financial interest" as a ground for recusal in Rule 18b(b) must be broader than "interest" as a ground for disqualification in the Texas Constitution and Rule 18b(a), or else it would be surplusage. The most obvious difference is that the recusal rule applies to the judge's spouse and minor children, whereas the disqualification rule applies only to the judge. Another difference is that a financial interest the judge shares in common with the public is not disqualifying, but it *can* require the judge to recuse himself.[560]

(7) "The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (A) is a party to the proceeding or an officer, director, or trustee of a party; (B) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (C) is to the judge's knowledge likely to be a material witness in the proceeding."

This rule appears to go further than other parts of Rule 18b because it applies to relatives of the judge, and also clarifies that the rule applies to those who serve as an "officer, director, or trustee" of a party. One treatise notes that this rule reaches farther than the rule requiring disqualification because it can apply where the judge is separated from the party by two marriages, which would otherwise escape the disqualification rules governing "affinity."[561] Also, note the rule requires the judge to have knowledge of the situation requiring recusal.

(8) "The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding."

Here too, the recusal rule is somewhat broader than the disqualification rule. Though an attorney may not be a "party" for the disqualification rule, this rule requires a judge to recuse when his brother is an attorney in the case.[562]

4. Procedure for recusal and disqualification motions.

a. Procedures in the trial court.

A party seeks recusal or disqualification by filing a motion with the court.[563] A trial court motion must be verified, state one or more of the grounds for disqualification, must not be based solely on the judge's rulings in the case, and must "state with detail and particularity facts that: (A) are within the affiant's personal knowledge, except that facts may be stated on information and belief if the basis for that belief is specifically stated; (B) would be admissible in evidence; and (C) if proven, would be sufficient to justify recusal or disqualification."[564]

The motion must be filed promptly after learning the basis for recusal or disqualification.[565] Moreover, a trial court motion to recuse (not disqualify) must not be filed later than the tenth day before the date set for trial or other hearing, unless the movant either did not know the judge would be presiding, or did not know the basis for the motion.[566] Any other party may file a response to the motion,[567] but the judge cannot.[568]

The respondent judge cannot deny a motion to recuse or disqualify. When the motion is filed in a trial court, the clerk must immediately forward it to the respondent judge and to the "presiding judge of the administrative judicial region in which the court is located."[569] The trial judge then has only *three days* to

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[558] TEX. R. CIV. P. 18b(d)(4).

[559] TEX. R. CIV. P. 18b(f).

[560] *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631, 638-39 (Tex. App.—Corpus Christi-Edinburg 1997, pet. dism'd w.o.j.) (holding that an order removing a judge from a case must have been based on recusal instead of disqualification, because the alleged interest was that all citizens of his city might enjoy reduced property taxes).

[561] Roy W. McDonald & Elaine A. Grafton Carlson, MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 3:78 (2d ed.).

[562] *Cf. Winston*, 27 S.W. at 768; *see* MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 3:79.

[563] TEX. R. CIV. P. 18a(a).

[564] TEX. R. CIV. P. 18a(a).

[565] TEX. R. CIV. P. 18a(b)(1)(A).

[566] TEX. R. CIV. P. 18a(b)(1)(B).

[567] TEX. R. CIV. P. 18a(c)(1).

[568] TEX. R. CIV. P. 18a(c)(2).

[569] TEX. R. CIV. P. 18a(e)(1).

either (1) recuse or disqualify himself, or (2) sign an order referring the motion to the regional presiding judge.[570] Unlike the federal system, the respondent judge has no power to make a threshold determination that the motion fails to comply with Rule 18a, because the rule says the judge must either grant the motion or refer it "regardless of whether the motion complies with this rule."[571]

Whether the respondent judge can continue to act depends on the timing of the motion. If the motion is filed before evidence is offered at trial, the respondent judge must take no further action in the case "except for good cause shown stated in writing or on the record."[572] If evidence has been offered, the judge may proceed, subject to stay by the presiding regional judge.[573]

Once the motion has been referred, the regional presiding judge must either rule on the motion or assign a judge to rule on it.[574] Motions to recuse may be summarily denied for noncompliance with Rule 18a, but not motions to disqualify.[575] The motion must be heard "as soon as practicable" with notice to all parties, and the hearing can be conducted by telephone.[576] The regional presiding judge can either deny the motion or grant the motion and reassign the case to a new judge.[577] The regional presiding judge can also order sanctions against the party filing the motion, their attorney, or both, if the judge determines the motion was either groundless and filed in bad faith or for the purpose of harassment, or "clearly brought for unnecessary delay and without sufficient cause."[578]

Appellate review of motions depends on whether the motion was to recuse or disqualify,[579] and those options are discussed above. To summarize, a refusal to disqualify can be challenged through mandamus, but the standard is very high. A refusal to recuse can only be challenged through an appeal from the final judgment.

A special set of rules applies when a party files three or more motions to recuse or disqualify a district court or statutory county court judge.[580] A judge challenged by a third or subsequent motion must continue to follow Rule 18a, but can continue to preside over the case as though the motion had never been filed.[581] If the motion is denied, the judge hearing the motion "shall award reasonable and necessary attorneys' fees and costs to the party opposing the motion."[582] The movant and his attorney are jointly and severally liable for the award, and it must be paid before the 31st day after the motion is denied, unless superseded.[583] If the motion is granted, the judge must vacate all orders entered by the respondent judge since the motion was filed.[584]

b. Procedures in the appellate courts.

In the appellate court, a party seeks recusal or disqualification by filing a motion. TRAP 16.3 does not have any specific requirements, unlike TRCP 18a,[585] but a movant should carefully consider how to state and prove the serious allegations being made. The motion must be filed promptly.[586]

The appellate judge can either (1) grant the motion, or (2) refer the motion to the court for decision *en banc*.[587] A majority vote will prevail, and the challenged judge must not vote or participate in deliberations.[588] The respondent judge must not take any action before referring the matter for decision by the court.[589] A Texas Supreme Court case explains that when a movant asks multiple justices to disqualify themselves, the *en banc* court decides the motion against each justice individually, not as a group.[590] Each challenged justice refrains from the vote regarding the motion to disqualify him personally, but can vote on the motion to disqualify the other justices.[591]

A decision to recuse or disqualify an appellate justice cannot be reviewed by further appeal. A decision to *deny* the motion can be reviewed,[592] though this author was unable to locate any opinion that exercised this power. *O'Connor's* reasonably hypothesizes that review would be through a petition for review in the case of a court of appeals justice, or a motion for rehearing in the case of a Supreme Court justice.[593]

If a justice is disqualified after writing the opinion in a case, the opinion and judgment must be vacated—

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570 TEX. R. CIV. P. 18a(f)(1).

571 *See In re Marshall*, 515 S.W.3d 420, 422 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

572 TEX. R. CIV. P. 18a(f)(2)(A).

573 TEX. R. CIV. P. 18a(f)(2)(B).

574 TEX. R. CIV. P. 18a(g)(1). If the regional presiding judge is the one being challenged, she can assign a judge to decide the motion, or may refer the matter to the Chief Justice for consideration. *Id*.

575 TEX. R. CIV. P. 18a(g)(3).

576 TEX. R. CIV. P. 18a(g)(6).

577 TEX. R. CIV. P. 18a(g)(7).

578 TEX. R. CIV. P. 18a(h).

579 TEX. R. CIV. P. 18a(j).

580 TEX. CIV. PRAC. & REM. CODE § 30.016.

581 *Id*.

582 *Id*.

583 *Id*.

584 *Id*.

585 TEX. R. APP. P. 16.3(a).

586 *Id*.

587 TEX. R. APP. P. 16.3(a)

588 TEX. R. APP. P. 16.3(b).

589 *Id*.

590 *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984).

591 *Id*.

592 TEX. R. APP. P. 16.3(c).

593 Alexandra Ziek Beavers, ed., O'CONNOR'S TEXAS CIVIL APPEALS, at Chapter 3-I, § 10.1 (2022 ed.).

but the remaining members of the panel may proceed to decide the case.[594]

CONCLUSION

This paper attempts to provide a useful procedural guide by gathering together legal resources that are not clearly cross-referenced or well-explained. And it attempts to illustrate the issues by using Judge Newman's story, as well as some recent drama.

In conclusion, I hope the reader will remember these points:

1. Complaints about judicial misconduct are common, but *valid* complaints are highly uncommon. The court system has developed an elaborate process for dealing with largely meritless objections.

2. There is no easy way to deal with the disability that comes when nature, being oppressed, commands the mind to suffer with the body.

3. The federal judicial misconduct and disability system may have a systemic problem, insofar as it depends on federal judges to police themselves in good faith—but *any* system would end up depending on federal judges. It's federal judges all the way down.

4. The Texas judicial misconduct and disability system and the Texas recusal rules avoid many of the structural problems with the federal system by taking power away from the challenged judges, for good or ill.

5. It really is astonishing what happens when a federal judge doubles down and says, "you can't make me." Sometimes you find out that they can, indeed, "make you." And sometimes nothing happens at all.

[594] *Tesco Am.*, 221 S.W.3d at 556-57.

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Casteel, Scalia, and the Case of the Missing Yield Sign: *Horton v. Kansas City Southern Railway*

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- Jim D. Bowmer Professionalism Award, College of the State Bar of Texas (2007)
- Gene Cavin Continuing Legal Education Award, State Bar of Texas (2002)
- Dan Price Memorial Award, Texas Bar Foundation (2002)
- Recognized as one of the Top 10 Texas Lawyers by Thompson Reuters for the last 17 years and ranked No. 1 for seven of those years
- Chambers USA – Star Individual (2020-2024); Band 1 ranking for the last 19 years
- American Inns of Court James E. Coleman Jr. Award for Professionalism in the Fifth Circuit (2023)

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CASTEEL, SCALIA, AND THE CASE OF THE MISSING YIELD SIGN: *HORTON v. KANSAS CITY SOUTHERN RAILWAY*

I. INTRODUCTION

Anyone who has done much Texas civil appellate work will have run across the doctrine that lawyers in the Lone Star State call Casteel, in honor of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

This doctrine deals with what can be called a rotten apple problem. The problem arises when a broad-form jury question mixes a valid "theory" with an invalid one. If the reviewing court concludes that one such "theory" is valid whereas another one is not, does the rotten apple spoil the whole barrel?

A. Until *Griffin*, the Federal experience was muddled.

Texas has never had a monopoly on the problem of reviewing multi-claim jury verdicts. The U.S. Supreme Court first grappled with it back in the days before the Erie doctrine, when federal courts in diversity cases applied "general federal common law" while also following the procedural rules of the forum state. The U.S. Supreme Court did so in *Maryland v. Baldwin*, 112 U.S. 490 (1884), and it did so again in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). Notably, *Wilmington Star* is the only case in which the U.S. Supreme Court extended the doctrine of presumed harm to an issue of evidentiary insufficiency. Influenced at least in part by the decisions in *Baldwin* and *Wilmington Star*, the federal courts then muddled inconsistently through an unhappy history for about a century.

B. Justice Scalia cleared the waters.

Justice Antonin Scalia finally brought order out of the chaos. His opinion in *Griffin v. United States*, 502 U.S. 46 (1991), explained that the proper harm analysis depends heavily on what made the apple rotten: law error or fact error? If the charge contained an error of law, harm was more likely, because jurors do not have any special training in law and are more likely to be led astray by mistakes of law. On the other hand, if the error in the charge rests merely on a lack of supporting evidence, that is another kettle of fish, because jurors can be presumed to pay attention to the evidence and not to find a fact that lacks adequate support in the evidence.

C. The Fifth Circuit agreed.

Justice Scalia's approach inspired the Fifth Circuit to overhaul its jurisprudence. Since *Griffin*, the Fifth Circuit began upholding verdicts that it once would have overturned. *See, e.g.*, *WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 359 (5th Cir. 2021); *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 878 n.4 (5th Cir. 2013); *Advocare Int'l LP v. Horizon Labs.*, 524 F.3d 679, 696 n.67 (5th Cir. 2008); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 (5th Cir. 2001).

D. Texas was slow to come around.

Texas considered the Scalia approach back at an early moment of the Casteel era in *Harris County v. Smith,* 96 S.W.3d 230 (Tex. 2002). There a divided court split 5-3 in rejecting Justice Scalia's view as unpersuasive. The dissenters would have sided with the Scalia view, but the *Harris County* majority did not. The majority took the Casteel presumption of harm for instances of law error (where it makes excellent sense) and extended it to instances of fact error (where it makes very little sense). This led inevitably to doctrinal incoherence and line-drawing problems. *E.g.*, What exactly is a theory? What followed was two decades of the trouble that the federal courts managed to avoid. Thus, after seeing how the rotten apple problem has played out in the real world, the Texas Supreme Court returned to the issue in a case about a railroad crossing that lacked a yield sign. *See Horton v. Kansas City S. Ry*, 67 Tex. Sup. Ct. J. 1235, 2024 WL 3210468 (June 28, 2024).

E. Horton adopts Scalia's theory without naming it.

The *Horton* majority opinion never cites *Griffin* or the recent Fifth Circuit cases that have applied *Griffin* in civil cases. Interestingly, the dissent mentions *Griffin* repeatedly. It goes on to state that the majority is "effectively adopting the Supreme Court's approach in *Griffin*." *Horton*, _ S.W.3d _, 2024 WL 3210468 at *50 (Young, J., dissenting). Additionally, Justice Young concludes that the majority's approach aligns with some federal decisions (such as Fifth Circuit), and suggests that "perhaps Texas cares more about the integrity of jury verdicts." *Id*.

II. THANKS

As with many CLE papers, this paper takes some of its inspiration from previous papers drafted by selfless volunteer lawyers who gave their time to enhance continuing legal education. A year ago, we covered some of this material in a paper about the jury charge in general. *See* David E. Keltner & David M. Gunn, *The Court's Charge*, State Bar of Texas, Advanced Civil Trial Course (2023). There we acknowledged prior papers that we consulted, such as:

- David M. Gunn, *Casteel: To Infinity and Beyond*, University of Texas, Annual Conference on State and Federal Appeals (2018).
- Wright, Hollenbeck, Taylor, and Tindall, *Jury Charges*, State Bar of Texas, Advanced Civil Appellate Practice Course (2014).

- Daryl L. Moore, *Jury Charge*, State Bar of Texas, Advanced Civil Appellate Practice 101 (2014).
- David M. Gunn and Constance H. Pfeiffer, *Preserving Error and Crafting the Jury Charge*, State Bar of Texas, Advanced Personal Injury Course (2013).

This paper narrows the focus to the Casteel problem, so we have taken much of what we wrote in 2023 and have used it as a jumping off point. But we have also expanded on the subject after studying the briefing and oral argument in the *Horton* case. We have also drawn on the three amicus briefs submitted in connection with the rehearing motion in *Horton*. You should do likewise.

Note: If you do not read the three amicus briefs in *Horton*, you will miss the full spectrum of the arguments and authorities that the Supreme Court had before it when it issued its final opinion on rehearing. Read those briefs before you dive into your next Casteel debate. Read them in the order in which they arrived at the court. First, start with the amicus brief by Hon. Harvey Brown and Hon. Daryl Moore, supporting petitioner. Second, read the brief by the TADC and the American Trucking Association supporting respondent. Finally, read the brief by David M. Gunn and Russell S. Post, supporting petitioner. Once you do that, you will stand a better chance of fully appreciating the Court's rehearing opinion in *Horton*.

III. HORTON

A brief setup of the *Horton* case will frame the issue. Ladonna Sue Rigsby lost her life at a railroad crossing when an oncoming train collided with her car. Her adult children sued the railroad. They accused the railroad of being negligent in two respects: (1) letting the crossing itself be too steep, and (2) not installing a yield sign to go along with the standard crossbuck sign. Query: How many apples does this negligence case involve: one theory or two?

A. The trial judge submits a simple negligence question.

The trial judge submitted the negligence question in standard form right out of the PJC:

> QUESTION NO. 1
>
> Did the negligence, if any of those named below proximately cause the occurrence in question?
>
> Answer "Yes" or "No" for each of the following:
>
> Ladonna Sue Rigsby *yes*
>
> KSC Railroad *yes*

The defendant railroad wanted the question broken up into two parts, one for the steep crossing allegation, and one for the missing yield sign allegation. The judge suggested to railroad counsel that this simple negligence question did not combine valid and invalid theories the way the question did in Casteel. The judge asked the railroad counsel whether he had any authority to applying the Casteel doctrine to a simple negligence question. Counsel said no. Hearing that answer, the judge declined to split the negligence submission into two parts.

The jury found both sides negligent. It found negligence by the railroad, found contributory negligence by the plaintiffs' decedent, and assessed 50% responsibility against each.

B. The court of appeals finds preemption of the steep crossing complaint and then sends the yield sign complaint back for a retrial.

The railroad appealed. Much of the energy on appeal went to the complaint about the steep crossing. That allegation had plenty of support in the evidence, but it also faced a complaint about federal preemption. The railroad insisted that federal law preempted that complaint. The Dallas court of appeals agreed and found preemption by the Interstate Commerce Commission Termination Act of 1995 (42 U.S.C. § 10501(b)), so it ordered the case to be retried without the steep crossing allegation. *Kansas City S. Ry. v. Horton*, 666 S.W.3d 1 (Tex. App.—Dallas 2021). A dissenting member of the panel (Carlyle, J.) perceived no preemption.

But given holding of the panel majority, the court of appeals rejected the steep crossing allegation as a basis for recovery. The majority's removal of the steep crossing allegation left only the matter of the missing yield sign. The railroad argued that under its view of the Casteel doctrine, the reviewing court had to presume harm from inclusion of the yield sign complaint in the broad-form negligence question.

The railroad's Casteel argument persuaded the majority: "KCSR argues that if sufficient evidence supported the absence of a yield sign as a cause of the accident to support submission to the jury, the trial court erred in submitting both theories in one broad-form question. It asserts the manner of submission was harmful, given preemption of the humped crossing theory of the claim. We agree." *Id.* at 15.

"We cannot determine whether the jury rested its liability determination on appellees' preempted humped crossing theory, which should not have been submitted, or the missing yield sign theory. Accordingly, we follow *Casteel's* holding." *Id.* at 18; *see id.* at 19 ("Because we conclude submission of the single broad-form liability question encompassing both the humped crossing and the missing yield sign theory was harmful error, we also sustain KCSR's third issue and remand

the case for further proceedings consistent with this opinion.").

The Dallas Court recognized that this ruling was inconsistent with *Columbia Medical Center of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835, 857-859 (Tex. App.—Fort Worth 2003, pet. denied). The Fort Worth Court had held that when the theories were factual bases for a valid legal theory, *Casteel* was not implicated. But the Dallas Court ruled that the humped crossing preemption was a legal rather than factual theory. *Kansas City S. Ry*, 666 S.W.3d at 18. And the Court declined to interpret *Bush* as conflicting with *Casteel*. *Id*.

Neither side was 100% happy with the result. Each side went to the Supreme Court, which granted review. The two sides clashed over whether federal law preempted the steep crossing allegation, but they also disagreed about what to make of the yield sign allegation and how to do a proper *Casteel* harm analysis.

C. Oral argument in the Supreme Court.

1. The opening part of the argument ignored *Casteel*

Plaintiffs were the petitioners, so they argued first. They spent every minute of the opening argument on preemption. The Casteel issue did not come up at all.

Nor did *Casteel* come up as part of the railroad's oral argument until time had run out and the Chief Justice asked whether there were any other questions.

2. Justices Young and Busby raised *Casteel*

At this point, Justice Young asked about the yield sign and *Casteel*. The railroad responded that there was no evidence that the yield sign had a causative role in the accident. The Chief Justice asked again, "Any other questions?"

Justice Busby pressed the point about *Casteel*, whereupon the railroad described the trial as being 90% about the humped crossing and only involving a "half mention" of the yield sign:

***

> JUSTICE BUSBY: If we agree with you on that, we get to an interesting *Casteel* point that we haven't directly addressed. And I wonder if you might say something about that. If, if we agree with you—if, if we were to hold that this is *Casteel* error, wouldn't we go—be going back to the days of having to give the jury separate instructions on failure to keep a lookout, control speed, apply the brakes, provide a warning, instead of just asking if the negli—if there was negligence?
>
> ATTORNEY: No, because what you're talking about is, I guess, different components to a negligent case. These are two completely separate theories with completely separate facts. So …
>
> JUSTICE BUSBY: But there's theories of negligence just like failure to keep a lookout and failure to apply the brakes.
>
> ATTORNEY: But all of those facts go—and I, I guess, you can granularly sup—supply that but the difference here is you've got a completely separate theory with completely separate facts where this jury here—heard a trial with 90 percent of the testimony dealing with the humped and a half mention of the yield sign. And they were allowed to make a verdict on a humped crossing sign that's clearly preempted. A humped crossing sign that's not fairly good. A humped crossing claim was clearly preempted. And what the whole purpose of *Casteel* is if we don't know—if one of the legal theories is not legally sufficient, then there's a harmful error. And that's—
>
> JUSTICE BUSBY: What if there—
>
> ATTORNEY: —exactly the case here.
>
> JUSTICE BUSBY: What if negligence is only one theory? And there's different—there's different facts that can give rise to negligence but what, what's that argument that, that we should—how do we decide whether the facts are separate or not. I mean this is a, you know, this is an accident and it—if these are different theories about the same accident.
>
> ATTORNEY: Well, and, and certainly, I'm glad on – you're on that side and I'm over here because that is a, you know, a difficult theory where you—where you . . .
>
> JUSTICE BUSBY: No, I'm just asking for your help.
>
> ATTORNEY: But I'm—but I'm . . .
>
> JUSTICE J. BRETT BUSBY: But it is a difficult theory.
>
> ATTORNEY: I'm focusing on what *Casteel* said and what *Casteel* said is when you have two different separate legal theories and one of them is not good on the law and the other one is, and you don't know which one the jury based it on, then that's a harmful error.

***

D. The Court's first opinion remanded based on *Casteel*.

On original submission, the Supreme Court affirmed the judgment (reversal and remand for a new trial) but gave different reasons. The Supreme Court found no preemption, but it held that the yield sign allegation lacked evidence to support it and thus constituted a rotten apple for purposes of *Casteel*. The Supreme Court ordered a new trial.

E. The Plaintiff's Motion for Rehearing focused on *Casteel*'s harm analysis.

On rehearing, the plaintiffs asked the court to take a second look at the holding of harmful error. Former Judges Harvey Brown and Daryl Moore submitted an amicus brief to say that *Casteel* and *Harris County* have resulted in a slippery slope that threatens to make cases impossible to try correctly.

On December 15, 2023, the Supreme Court issued an order stating that the plaintiffs' motion for rehearing was granted. The court invited supplemental briefing on the issue to occur by January 19, 2024. At that point, two new (and lengthy) amicus briefs came in on the issue, taking diametrically opposed views about the proper analysis. This paper will not repeat the contents of all the amicus briefing, but it will examine the history of harmless error analysis in Texas because the Supreme Court has tried to take guidance from its prior decisions.

IV. THE HARMLESS ERROR RULE'S ARRIVAL IN 1912 AND ITS DEVELOPMENT DURING THE 20TH CENTURY.

The Texas harmless error rule traces back to 1912, when the Titanic set off on its fateful journey. The history of the harmless error rule in Texas deserves at least some attention, because several of the modern Supreme Court cases point back to the jurisprudence from a century ago as supportive of today's *Casteel* doctrine.

A. Harmless Error swept across the country: Don't sweat the small stuff.

Any appellate system worth its salt will necessarily have rules about harm analysis. The twentieth century saw the concept of harmless error spread throughout American courts. Congress began with a harmless error statute in 1919. *See* Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, repealed by Act of June 25, 1948, ch. 646, § 39, 62 Stat. 892, 998. Many of the states enacted their own version at about the same time, so that the harmless error rule became the general American rule by the second half of the century. *See* Roger J. Traynor, The Riddle of Harmless Error (1970); 28 U.S.C. § 2111; *Hedgpeth v. Pulido*, 555 U.S. 57 (2008); *Kotteakos v. United States*, 328 U.S. 750 (1946); *Yates v. Unites States*, 354 U.S. 298 (1957).

B. Texas clings to the old ways.

Texas largely followed the path taken by the rest of the country. That is, Texas warmed to the idea of harmless error, but only very slowly. In the early days—*i.e.*, the nineteenth century—the Texas appellate courts treated errors as presumptively harmful. Courts would reverse in the event of error unless someone affirmatively persuaded them otherwise. *Missouri, K. & T. R. Co. v. Hannig*, 91 Tex. 347, 348, 43 S.W. 508, 509 (1897); *Texas & P. Ry. Co. v. McCoy*, 90 Tex. 264, 38 S.W. 36 (1896). Consider this language from the Civil War era case of *Bailey v. Mills*:

> It is the practice of this court to reverse a judgment whenever there is an erroneous instruction upon a material point which may have influenced the jury in finding a verdict, although the evidence may appear to us to be sufficient to sustain the verdict; and the reason of the rule is, that it is impossible to know what effect the instruction had upon the minds of the jury; how much the verdict is due to the instruction, and how much to the evidence; and in a case of conflicting evidence, it is impossible to know that it would lead the minds of the jury to the same conclusion as the minds of this court. The judgment of the court below is reversed and the cause remanded.

27 Tex. 434 (1864). The Court declined to explore whether the error probably caused harm, because such an analysis would be "impossible." *Id.*

1. Burden was on appellee—not the appellant

Thus, the burden was not on the appealing party to show harm, but on the opposing side to show that the error was harmless. The following language illustrates the prevailing attitude: "The true rule is that in such a case, in order to hold that the error does not require reversal of the judgment, it ought clearly to appear that no injury could have resulted from the admission of the evidence. Since it does not so appear with reference to the testimony in question, the judgment must be set aside, and a new trial awarded." *Hannig*, 91 Tex. at 348, 43 S.W. at 509; *see Greenman v. City of Fort Worth*, 308 S.W.2d 553, 556 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) ("Before the adoption of Rule 62a, which has been incorporated in part in Rule 434, T.R.C.P., it was generally held that the admission of incompetent evidence on a material issue was ground for a reversal.").

2. The "calculated" to cause harm test

But around the start of the twentieth century, the analysis began to shift. Courts started speaking of error as being "calculated" to cause harm. *See Western Union Tel. Co. v. Waller*, 96 Tex. 589, 74 S.W. 751, 752 (1903)

("We are of the opinion that the testimony was irrelevant, and was calculated to excite unduly the sympathies of the jury, and to cause them to lose sight of the true inquiry, which was the effect produced upon plaintiff himself by defendant's negligence."); *Kellogg v. McCabe*, 92 Tex. 199, 47 S.W. 520, 522 (1898) ("unless it appears to the trained judicial mind that it is reasonably calculated to properly influence the jury in reaching a verdict, it should be excluded").

The phrase "reasonably calculated" ended up in rules of court, as part of the original harmless error rule in Texas practice. It first appeared in Rule 5a for the Supreme Court (found at 142 S.W. viii-ix) in early 1912. Later in 1912, this phrase surfaced in Rule 62a for the courts of civil appeals (found at 149 S.W. x). Rule 62a eventually became Tex. R. Civ. P. 434, the predecessor of today's Tex. R. App. P. 44.1.

3. 1912: SCOT adopts harmless error for the COA in Rule 62a

At any rate, the world of presumed harm turned upside down on November 15, 1912, when the Supreme Court promulgated Rule 62a for the courts of civil appeals. It had previously been "the practice of the appellate courts, when it appeared that a trial court had committed error in the trial of a cause, to reverse the judgment, unless it also appeared from the record that injury to the appellant had not resulted from the error." *Morris Cty. Nat. Bank v. Parrish*, 207 S.W. 939, 940 (Tex. Civ. App.—Texarkana 1918, no writ). Simply put, harm was assumed, "unless the contrary appeared in the record." *Id.*

"The effect of rule 62a was to change this practice." *Id.* The Rule introduced a two-prong test for harmless error. Its effect was to "forbid the reversal of a judgment by a Court of Civil Appeals, unless it appeared from the record, not only that error was committed in the trial, but also that the error 'amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, ***or*** was such as probably prevented the appellant from making a proper presentation of the case to the appellate court.'" *Id.* (emphasis added).

4. 1912: If the error probably prevented the appellant from making a proper appellate presentation, there is harm.

Make a note of the disjunctive—"or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court." This second prong of the harmless error rule would jump unexpectedly to the forefront nearly a century later, when the Supreme Court decided *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). In the early years, however, all eyes were on the first prong of the rule, which put the onus on the appellant to demonstrate probable harm.

5. Acceptance of the harmless error rule was not instantaneous.

One of the early cases to confront Rule 62a decided that the new harmless error rule was "not a panacea" for appellees who hoped to gloss over errors below:

> Appellee, in the concluding remarks of his brief, insists that while there may be errors, the "substantial justice" rule is an "antidote," and should be applied to this judgment, and the same affirmed. If, pathologically considered, this case is sick-desperately sick-and saturated with the poison injected into it via the errors discussed above, a careful diagnosis convinces us that even a drastic dose of Rule 62a (149 S.W. x), the substantial justice rule, would not neutralize the venom of the noxious elements with which it has been inoculated in the trial court. Besides, we are not veterinarians, and must decline to administer the remedies according to that pharmacopia. During this clinic, we will advise the bar that Rule 62a is not a panacea for all the ills which afflict cases brought here for treatment. The rule is an anesthetic and a sedative, rather than an antitoxin or a purgative. It is concocted to render the patient insensible to the scarification during the process of bloodletting, rather than to remedy the condition requiring cupping; and it is especially efficacious in cocaining bodies corporate when it is desired to remove several hundred dollars' worth of cuticle.
>
> The rule has reacted in this case, however, and substantial justice demands that the judgment be reversed, and the cause remanded, and it is so ordered.

Quanah, A. & P. Ry. v. Galloway, 154 S.W. 653, 654 (Tex. Civ. App.—Amarillo 1913, no writ).

6. The Courts of Civil Appeals finally got the message.

But before long, the intermediate courts got the message. They began to affirm judgments that they once would have reversed. This 1914 opinion from Texarkana is typical: "Under the facts, we do not think it probable that the admission of the evidence complained of caused the rendition of an improper judgment. . . . It occurs to us that if the provisions of rule 62a (149 S.W. x) mean anything, and are to have any practical application in the determination of questions on appeal, this is a case in which they may properly find a place." *Wells Fargo & Co. v. Benjamin*, 165 S.W. 120, 126 (Tex. Civ. App.—Texarkana 1914),

aff'd, 107 Tex. 331, 179 S.W. 513 (1915).

The Texarkana court recognized the drastic change. Although it acknowledged the old rule that "injury will be presumed unless the contrary clearly appears," the court concluded that "the promulgation of rule 62a is the positive announcement by our Supreme Court of a change of judicial policy in respect to such matters; that the presumption in favor of injury, if not shifted, is abolished; that hereafter no case should be reversed because of errors in such rulings unless it should be made to appear 'that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.'" *Id.* at 127.

The intermediate courts spent the decade after Rule 62a was enacted applying it to more and more cases. Oddly, however, the very Supreme Court that had promulgated Rule 62a said nothing about it until the 1920s. *See Burrell Engineering & Construction Co. v. Grisier*, 111 Tex. 477, 240 S.W. 899 (1922). The first mention came from a dissenting Supreme Court justice in 1920. *See Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 218 S.W. 361, 363 (1920) (Hawkins, J., dissenting) ("However, even if that was the effect of the charge, the error was favorable to the railway company, and, under the evidence, could not have harmed it. Rule 62a (149 S.W. x).").

C. The *Lancaster* Dictum (1923): the forerunner to *Casteel*?

1. The events that led to *Lancaster*.

As noted, the commingling problem had come up in American law by the 1920s. *See, e.g.*, *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79 (1907); *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884); *Am. Sugar Refining Co. v. J.E. Jones & Co*., 293 F. 560, 562-63 (5th Cir. 1923). It was now about to surface in Texas practice, starting with dictum in *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015 (1923). But before we address the *Lancaster* dictum, let us look briefly at the overall procedural context.

First, during this era, Texas did not favor broad-form submission in jury charges. The opposite was true. Hence, in an ordinary negligence case, the trial court had to "submit each issue distinctly and separately, avoiding all intermingling." *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). This requirement of submitting questions "distinctly and separately" would eventually give way to broad-form submission, in a shift that started with amendments to Tex. R. Civ. P. 277 in the 1970s and culminated in 1988.

Second, as just discussed, Texas practice after World War I experienced significant changes because of the new harmless error rule—Rule 62a. Appeals that once would have been reversed were being rubber-stamped by the courts of civil appeals. In this regard, the harmless error rule started to run into headwinds in the next several years. The most significant development occurred when the Supreme Court decided that the harmless error rule did not apply if the error was statutory. *Golden v. Odiorne*, 112 Tex. 544, 249 S.W. 822 (1923). Although it later fell into disrepute, the *Golden* decision had a major impact on the law because statutes underpinned so much of Texas procedure.

2. Lancaster: The problem of the "angle cock."

The key decision of the early years was *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W.1015 (1923). This decision matters because some of its language—dictum, let's not deny it—would resurface decades later in the *Casteel* line of cases.

The *Lancaster* case involved ordinary negligence. A railroad brakeman named Ben Fitch suffered a leg injury on the job, so he sued on allegations of negligence. Plaintiff Fitch prevailed at all three levels of the Texas court system. Hence, nobody can say that the jury charge contained reversible error. So it may seem surprising that the case is now seen as part of the foundation for a doctrine that requires retrials. Be that as it may, the important part of the case comes from the fact that Plaintiff Fitch alleged three separate "grounds" of negligence.

Start with the pleadings. According to the Supreme Court, Plaintiff Fitch "pleaded three separate acts of negligence as the proximate cause of his injury: (1) That a spike in the track, which protruded above the ties, caught his foot and caused the train to run over his leg; (2) that while he was between the cars the engineer negligently caused the train to move and to run over his leg; (3) that the angle cock which he was endeavoring to turn on one of the cars was defective and out of repair, and that while he was engaged in an effort to turn same in such defective condition he was caught by the train moving upon him, and his injury caused." *Lancaster*, 246 S.W. at 1015-16.

Defendant Lancaster argued that ground #3 did not belong in the jury charge. According to defense counsel's argument, "The condition of the angle cock was not the proximate cause of the injury." *Lancaster v. Fitch*, 239 S.W. 265, 271 (Tex. Civ. App.—Texarkana 1922). This contention caused the Texarkana court of civil appeals to flip-flop several times.

First, the majority held that the rusty angle cock—"by itself alone" —did not cause the leg injury. *Id*. So there would seem to be a sufficiency problem with including it in the charge. Nevertheless, that fact did not require reversal, given the obvious interaction between the rusty angle cock and the other circumstances: "But the question of 'proximate cause' as submitted by the court's charge was properly submitted to the jury for decision, we think, when, as here, the injury could correctly be said to be the result of concurring causes."

Id.

The majority trusted the jury to sort through the facts and decide the case on the theory that was actually supported by evidence: "If the evidence conclusively showed that the angle cock and its condition did not of and by itself alone cause appellee the injury to the leg, then clearly a jury of ordinarily sensible men would not find to the contrary, and the court could not reasonably say that they did so find and found their verdict thereon. And we think that the error complained of did not cause injury or the rendition of an improper judgment." *Id.* (citing Rule 62a).

But on rehearing, the Texarkana court changed tunes. It held it had to reverse because of the rotten apple problem with the charge. *Id*. at 271-72. But on yet another rehearing, the court retreated to its original position and affirmed in light of the harmless error rule. *Id.* at 272. "There are two grounds here on which the plaintiff was entitled to recover, there being evidence to support them, that were properly submitted; and as to these two grounds the appellants' rights and defenses were in no wise restricted or affected by the third ground or charge in respect to it. Is it to be concluded that the jury found against the plaintiff on the two issues legally submitted, and in his favor on the one issue on which he could not legally recover? The three issues are distinct. It is believed that rule 62a has application." *Id.*

3. Chief Justice Willson believed the charge was correct and the angle cock question was correctly left for the jury.

Significantly, the opinion adds that Chief Justice Willson perceived ***no error*** in the charge whatsoever. In other words, instead of finding that the angle cock language in the charge was erroneous (on sufficiency grounds) but harmless (under Rule 62a), Chief Justice Willson felt that there was no error at all. In his view, "It was a jury question." *Id.*

Keep your eyes on Chief Justice Willson's position—for when the Supreme Court affirmed the judgment for Plaintiff Fitch, it expressly agreed with Chief Justice Willson's take on the evidence. 246 S.W. 1015, 1019 ("We concur with the view expressed by Chief Justice Willson.").

4. SCOT: No charge error and C.J. Willson was right.

According to the Supreme Court, the evidence was sufficient, and there was ***no charge error*** at all: "It is reasonable to conclude from the testimony that in the discharge of his duties the defective condition of the angle cock caused defendant in error to advance further in between the cars, to remain longer, and to place his body in a strained position. But for the strain in the use of great force and strength, and the position necessarily assumed in order to turn the angle cock, as shown by the testimony, defendant in error might not have been injured by the moving train." *Id.* at 1018. In other words, "the faulty condition of the angle cock may have been the proximate cause of his injury, as the jury was authorized by the charge to find." *Id*. at 1018.

5. The Lancaster dictum haunts Texas courts to this day.

This holding—*i.e.*, that there was no error—should have been enough to dispose of the case. But curiously, it is buried in the second half of the opinion. Before even addressing the error issue, the Supreme Court first took issue with the Texarkana court's view about harm analysis and Rule 62a. *Id.* at 1016-17. "[Plaintiff Fitch] pleaded specifically the negligence in respect to the defective angle cock as a separate and distinct cause of action, and that it was the proximate cause of the injury. He introduced the proof of its defective condition and the circumstances attendant upon his effort to turn same and his resulting injury. This issue of negligence was specifically submitted to the jury by the court as being of itself alone sufficient ground of recovery. We think it is impossible to say that the jury did not find for defendant in error upon this issue alone." *Id.* at 1016.

Of course, this language was utterly unnecessary to the Supreme Court's decision. The Court's choice to discuss the issue suggests a sincere concern about the way the analysis should work. But dictum often leads to mischief, because it is more likely to be wrong. The reality is that Plaintiff Fitch was flatly entitled to win. The evidence at trial supported submission of the charge language about the angle cock, so it was a complete frolic for the court to hypothesize about how he might have deserved to lose if the evidence had not supported that part of the charge.

6. Nonetheless, the Lancaster dictum is one of the foundations of *Casteel*.

Be that as it may, *Casteel* points back to *Lancaster* as part of its explanation for the eminently correct holding that there was harmful error in the *Casteel* charge: "On appeal, the defendant [Lancaster] established that the trial court should not have submitted one of the theories." *Casteel*, 22 S.W.3d at 389. One could have a conversation about how far *Lancaster* ought to extend. But there is no denying that the *Lancaster* dictum—about what kind of harm would have resulted if the charge had in fact contained an error—became the face that launched a thousand ships.

D. Rule 434 replaced former Rule 62a

The next chapter came around the time of World War II, when Texas adopted the modern rules of civil procedure. Old Rule 62a became renumbered as Tex. R. Civ. P. 434. In substance, of course, the harmless error rule remained the same. An appellant could win a reversal by doing one of two things: (1) make a showing of probable harm, or (2) make a showing that the error probably "prevented a proper presentation of the case."

But two points deserve mention. First, even though the wording of the harmless error rule remained the same with the adoption of the 1941 rules, the original tendency to presume harm did not die quickly. Chief Justice Calvert chronicled the transformation in his law review articles. Robert W. Calvert & Susan G. Perin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. Tex. L.J. 1 (1979); Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 Texas L. Rev. 1 (1952). Justice Pope wrote about this in 1979, noting that even after the promulgation of Rule 62a, the doctrine of presumed harm "tenaciously regained its former stature." *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 n.2 (Tex. 1979).

1. "Prevented a proper presentation" is unique to Texas

The other point has to do with the second prong of the Texas harmless error rule, which (until recently) has always been both obscure and unimportant. That prong appears to be unique to Texas, in that it does not seem to exist in the federal system or other jurisdictions. Curiously, the second prong of the rule appeared only in old Rule 62a. It had no counterpart in old Rule 5a, the harmless error rule for the Supreme Court. That the language originally appeared only in the rules for the courts of civil appeals (but not the Supreme Court) suggests that it aimed at process breakdowns, the sort of things that one would expect to see at an appeal's beginning, but not its end. That is, the second prong of the harmless error rule seemed to contemplate a problem with the physical creation and transmission of the record to the appellate court, as opposed to dealing with how to do a harm analysis on a complete record. But in time, the courts would come to hold a different view about that.

2. Texas Transitions from Narrow "special issues" to Broad-Form Questions, Leading to a Rise in Rotten Apple Scenarios.

If your goal is to study the ability of one rotten apple to spoil an entire barrel, consider moving to a neighborhood where everyone loves barrels and where you are encouraged to use barrels as much as possible.

Texas moved to such a neighborhood in the latter part of the twentieth century by adopting an official preference for broad-form submission. This move grew out of several decades of experience with narrow jury questions, known as "special issues." Lawyers and judges felt frustrated that a simple car wreck case could generate dozens of jury questions. Longer charges seemed to increase the risk of mistakes in composing the charge, while also creating more opportunities for conflicting answers.

3. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551 (Tex. 1986).

There is no perfect system of submitting jury questions, and the tradeoff in going to a broad-form world was that it increased the potential for the rotten apple scenario by lumping good and bad theories all together in a single question. Or, eliminating a cause of action entirely—like in *Island Recreational*, when the defense of waiver did not appear in the charge at all, although it was raised by evidence. In its zeal to adopt broad form, the Supreme Court, nonetheless, approved the charge. History has not been kind to *Island Recreational*. It will almost certainly be overruled someday, because its underpinnings are impossible to square with the most basic axioms of charge practice.

V. THE DAWN OF THE CASTEEL DOCTRINE.

As the twentieth century came to a close, the courts seemed to be trending more and more in favor of broad-form submission and away from special issue practice. But the final decade of the century would prove fateful.

A. Broad-form questions create rotten apple situations.

1. *Tex. Dep't of Human Services v. E.B.* (1990): broad form questions must be used whenever feasible.

E.B. was a parental termination case. In that case, the State sought to terminate a mother's parental rights based on alleged violations of two separate parts of Section 15.02 of the Family Code and, additionally, on the ground that the termination would be in the best interest of the children. 802 S.W.2d 647, 648 (Tex. 1990). The trial court submitted a single, broad-form question for each child. *Id.* (citing Rule 277). The Court held that this was not error:

> The history and struggle to recognize broad-form submission is a long one. The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions.

Id. at 649.

Parental rights cases would not receive any exception (at least not until the Supreme Court finally created on in the 2020 amendments to Rule 277). The "controlling question," according to the Court, was not which "specific ground or grounds" the jury relied on, but whether the parent-child relationship should be terminated. *Id.* Each of the jurors agreed that the mother's parental rights should be terminated on at least one of the grounds. *Id.* Thus, the broad-form submission—even if the jurors did not all agree as to any one of the theories—was not error. *Id.* The Court did not create any special exceptions for cases where one of several commingled theories turns out to be invalid. *See*

id.

2. Post-*E.B.* and pre-*Casteel*

Given the rise in broad-form submissions, it became common to see a damage question with a single blank despite containing multiple components. Thus, if a plaintiff sued to recover damages for A, B, and C—*e.g.*, pain, mental anguish, and disfigurement—the charge could properly combine all three in a single question with a single blank.

Of course, some plaintiffs preferred to granulate the damage components separately, on the theory that a larger number of blanks will lead to a larger total recovery, but schools of thought have always varied on this point. What was clear—before the *Casteel* line of cases—was that if the charge combined several damage elements into a single question, the appellate courts would uphold the verdict as long as there was enough evidence to support the aggregate recovery.

The appellant could not prevail merely by shooting down one specific element as lacking in evidentiary support: "To attack successfully on appeal a multi-element damages award, an appellant must address all of the elements and show that the evidence is insufficient to support the entire damages award considering all the elements." *G.T. Management, Inc. v. Gonzalez*, 106 S.W.3d 880, 885 (Tex. App.—Dallas 2003, no pet.); *see also Price v. Short*, 931 S.W.2d 677, 688 (Tex. App.—Dallas 1996, no writ) (similar).

An illustrative case is *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579 (Tex. App.—Corpus Christi 1993, writ denied). The actual damage question contained five distinct components, funneled into a single blank. On appeal, the defendant argued that the evidence did not support the jury's finding. But the appellate court did not concern itself with whether the barrel contained a single rotten apple.

Instead the court simply looked to see whether the verdict could be upheld in any fashion: "The only way that a defendant can successfully attack a multi-element damages award on appeal is to address each and every element and show that not a single element is supported by sufficient evidence. If there is just one element that is supported by the evidence, the damages award will be affirmed if it is supported by the evidence." *Id.* at 589. "Accordingly, we will determine whether the cumulative weight of the evidence supporting these elements is sufficient to support the jury's assessment of $175,000 in damages." *Id.* at 590.

B. The Supreme Court begins sorting rotten apples out of the barrel.

1. *Crown Life Ins. Co. v. Casteel* (2000): mixing legally invalid and valid liability theories is presumed to be harmful error.

Traditional harmless error analysis—in conjunction with the broad-form submission doctrine—meant that plaintiffs might get away with smuggling invalid theories into the charge, so long as they mixed it with a valid theory in the same broad-form question. It would be difficult (if not impossible) to show harm; to any harm argument, the easy answer would be that the jury could just as easily have decided the case using the valid theory.

But in 2000, the Supreme Court announced a new rule for these situations. For the first time, it held that it was reversible error to submit a broad-form question that mixed valid and invalid liability theories. *Casteel*, 22 S.W.3d at 389. To be sure, the Court pointed to some language from its decades-old decision in *Lancaster*—but as already discussed, that was only dictum. *See id.*

Importantly, the court did not confine its decision in the usual first prong of the harmless error test. Instead, it also mentioned the second prong, concluding that "it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding" in such a situation. *Id.* On that view, the error was harmful because the way the charge was written prevented appellate courts from policing whether the jury relied on the valid or invalid theory of liability. Accordingly, granulated submission should be used when a trial court is uncertain whether a liability theory is valid. *Id.* at 390.

From the beginning, the limits of this holding were unclear. *Casteel* involved ***legally*** invalid liability theories that were mixed with other valid theories. More specifically, the Court held that Casteel had standing to pursue certain statutory claims, but not others, rendering the entire broad form question defective. *See id.* at 387-88. The standing question was a legal issue that depended on the interpretation of a statute, and the Court obviously did not trust the jury to choose the legally viable theories.

The problem turned to factual matters. What to do with commingled theories that are (in principle) legally valid—but still flawed because they lack support in the evidence? Can the jury be trusted to decide liability based on the alternative theory that is supported by the evidence? Or does the presence of a factually unsupported theory raise the same rotten apple problem as a legally invalid theory? The Supreme Court tackled this next question in *Harris County v. Smith*.

2. *Harris County v. Smith* (2002): commingling factually unsupported damage elements.

Not long after *Casteel*, the Supreme Court extended that doctrine to a commingled damages question. In *Harris County v. Smith*, one jury question on damages allowed the jury to award a single number for four different damages elements (physical pain and mental anguish, loss of earning capacity, physical impairment, and medical care) to one plaintiff and three damages elements (physical pain and mental anguish, physical impairment, and medical care) to the second.

Harris Cty. v. Smith, 96 S.W.3d 230, 231–32 (Tex. 2002). The court of appeals held that although there was no evidence of loss of earning capacity for the first plaintiff and no evidence of physical impairment to the second, the error was still harmless. *Id.* at 232.

The Supreme Court disagreed. It applied *Casteel* to the factually unsupported damage elements. In other words, the error was harmful under the second prong of the harmful error test because "it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id.* at 234 (quoting *Casteel*, 22 S.W.3d at 388).

The Court explicitly refused to follow the U.S. Supreme Court's reasoning in *Griffin* (*id.* at 234), which held that giving jurors "the option of relying upon a factually inadequate theory" is not in and of itself reversible error "since jurors *are* well equipped to analyze the evidence." 502 U.S. at 59. The Texas Supreme Court preferred to follow the path staked out by the *Lancaster* dictum. *See also Eastern Electric Co. v. Baker*, 254 S.W. 933 (Tex. Comm'n App. 1923, holding adopted) (similar result). Thus, *Casteel* was extended from liability disputes to damage disputes, and it was extended from legal flaws to factual flaws.

C. The Court has refused to extend Casteel in several circumstances.

1. *Bed Bath and Beyond, Inc. v. Urista* (2006): presumed harm does not extend to inferential rebuttal defensive theories.

A few years later, the Court again was asked to extend *Casteel*. In *Bed Bath and Beyond v. Urista*, the Court had to decide whether *Casteel*'s presumed harmful error rule governs defensive inferential rebuttal theories. *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 756 (Tex. 2006). It does not.

More specifically, the Court held that the defendant's "unavoidable accident" theory was not subject to *Casteel*. *Id.* at 757. "[W]hen a defensive theory is submitted through an inferential rebuttal instruction, *Casteel*'s solution of departing from broad-form submission and instead employing granulated submission cannot apply." *Id.* Thus, the Court specifically limited *Casteel* "to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements." *Id.* at 756. "Unlike alternate theories of liability and damage elements, inferential rebuttal issues cannot be submitted in the jury charge as separate questions and instead must be presented through jury instructions." *Id.* at 757.

The Court reiterated this approach several years later in *Thota v. Young*: "While appellate courts may presume harm when meaningful appellate review is precluded because the submitted charge mixes valid and invalid theories of liability or commingles improper damage elements, the courts do not presume harm because of improper inferential rebuttal instructions on defensive theories." 366 S.W.3d 678, 693 (Tex. 2012).

In sum, sorting out whether an inferential rebuttal instruction improperly nudged the jury in the wrong direction is entirely distinct from the *Casteel* analysis that controls when distinct liability theories or damages elements are combined in a single question.

2. *Ford Motor Co. v. Castillo* (2014): *Casteel* does not apply when legally valid elements are commingled.

The Court spent just a paragraph discussing the Casteel doctrine in *Ford Motor Co. v. Castillo*, and the precise meaning of this paragraph is open to debate. *See* 444 S.W.3d 616 (Tex. 2014) (per curiam). The defendant asserted fraudulent inducement as a defense to the plaintiff's breach of contract action, and the jury was therefore instructed on the elements of fraudulent inducement. *Id.* at 621.

To satisfy the second element, the defendant had to show the misrepresentation was "sent by ***or*** at the direction of the plaintiffs or their agents or representatives with knowledge it was false." *Id.* (emphasis added). The plaintiffs argued that the "or" in the instruction presented a *Casteel* problem. *See id.* In other words, they emphasized that no evidence existed that the misrepresentation was sent directly by the plaintiffs (as opposed to their agent), and the jury should not be instructed to consider this possibility. *See id.*

The Court disagreed. It said that "*Casteel* issues do not arise in every situation where a jury has more than one legal theory to choose from when answering a single question." *Id.* at 621. It is limited to situations in which "when one of the choices presented to the jury on a single, indiscernible question is legally invalid." *Id.* Because the defendant did "not argue the legal invalidity of the element . . . *Casteel* does not apply." *Id.*

The meaning of this holding is not entirely clear. In a vacuum, it might be read to suggest that *Casteel* only applies when legally (as opposed to factually) flawed theories are commingled in the charge. But ever since *Harris County v. Smith*, it seemed settled that *Casteel* applies to both factually insufficient theories and damage elements. *See* 96 S.W.3d at 231-32.

Alternatively, the *Ford Motor* paragraph might suggest that the Court wishes to prevent individual elements (as opposed to distinct legal theories) from being sliced and diced into separate subparts within the charge. But this reasoning is not entirely satisfactory either. Why should error in the wording of a discrete element be any less significant than error in the wording of other parts of the charge? The precise meaning of the *Ford Motor* holding remains to be seen.

D. The matrix problem.

Practitioners are not always able to accurately predict what theories a court of appeals will hold are not supported by evidence on appeal. Accordingly, *Casteel* and its prohibition on broad form submission of questions for factually unsupported liability theories can cause enormous practical problems.

The case of *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005), provides a good example. In that case, the court of appeals held that the only way to prevent reversal is to submit separate apportionment and damages questions on every liability theory. The plaintiff, in its briefing to the Supreme Court, noted the enormous practical difficulties of such a rule:

> It is no Chicken-Little prediction to say this is the end of broad form submission in Texas. The end of broad form jury charges may be a good or a bad thing. But it should not occur without considering the policy implications posed by the two alternatives.
>
> From now on, the only safe way for trial courts and opposing lawyers to respond to no-evidence objections will be to submit multiple liability, apportionment, and damages questions. Every theory of liability, every combination of theories, and every combination of defendants will have to be separately submitted with its own apportionment and damages questions. This means lengthy jury charges in even "routine" cases.

Petitioner's Brief on the Merits at 31.

The plaintiffs submitted an appendix to their petition for review to demonstrate the practical effect. In that case, "involving five plaintiffs, two non-settling defendants, two settling defendants, negligence theories against each defendant, and a malice theory against one defendant," the dictates of *Casteel* meant "the jury charge would have needed to include more than 175 questions." *Id.*

The Court gallantly shrugged off this problem. It acknowledged the plaintiffs' contention but concluded that "[t]his is simply untrue." *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 230 (Tex. 2005). The correct solution, according to the Court, was to submit "one less question . . . for which there was no evidence." *Id.* (Translation: *Just don't commit any error! Then you'll be in fine shape*.).

"The reversible error rule of *Casteel* and *Harris County* neither encourages nor requires parties to submit separate questions for every possible issue or combination of issues; the rule *does* both encourage and require parties not to submit issues that have no basis in law and fact in such a way that the error cannot be corrected without retrial." *Id.* Thus, "[i]f at the close of evidence a party continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether." *Id.* According to the Court, "[n]othing in [its] review of thousands of verdicts" suggests the plaintiffs' argument is correct. *Id.*

Practice Note: Do not be fooled. The *Romero* Court's comments are well intentioned but do not reflect the reality of practice in the trenches. In the real world, it is extremely common to get to the charge stage of a trial with at least some doubts about the viability of some legal theories. The result of *Romero* is precisely what the petitioners in *Romero* predicted—lengthy charges that granulate not only the separate theories, but also every subsequent charge question predicated on those theories.

For a real-world example, consider the 80+ page charge in *Chevron Phillips Chemical Co. v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). With multiple parties and theories, the granulated charge grows exponentially.

E. What is a "theory"?

The *Casteel* doctrine applies when a flawed liability theory or damage element is commingled with other valid theories or damage elements in a single jury question. But this only begs the question—does *Casteel* apply just to invalid legal theories and elements, or also to alternative factual stories that prop up a single theory of liability? The precedent here is nuanced and deserves careful review.

1. *City of Fort Worth v. Zimlich* (2000): Court punts on whether *Casteel* should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission.

The same year that *Casteel* was decided, the Court declined to determine whether to extend *Casteel* to different factual theories under a single legal theory. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 68 (Tex. 2000). In that case, there was one legal theory—employment discrimination—but three different factual theories—whether the employer discriminated by changing the plaintiff's "job duties, failing to promote him to senior deputy (sergeant), or failing to promote him to chief deputy." *Id.* But the defendant did not argue "that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability," so the question of whether *Casteel* applied was not before the Court. *Id.* at 69 n.1.

2. Most intermediate appellate courts have declined to extend *Casteel* to different factual bases for a single liability theory.

Several intermediate courts have refused to extend *Casteel* to situations where parties dispute the validity of different factual bases supporting a single liability theory. Consider *Columbia Medical Center v. Bush*, where the plaintiff "pleaded one theory of liability against Nurse Crain and one theory of liability against the Medical Center: negligence." 122 S.W.3d 835, 858 (Tex. App.—Fort Worth 2003, pet. denied). Although the plaintiff "pleaded specific negligent acts by Nurse Crain and by the Medical Center," those acts "are not separate theories of liability." *Id.* Instead, the trial court "properly submitted one theory of liability and recovery—negligence--in a single broad-form question." *Id.* at 858–59.

Several other courts have agreed. *See Powell Elec. Sys., Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 123-24 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (Bland, J.) (concluding that *Casteel* did not apply because the liability questions submitted only a single theory of liability even though each was supported by several factual bases); *Rough Creek Lodge Operating, L.P. v. Double K Homes, Inc.*, 278 S.W.3d 501, 507-09 (Tex. App.—Eastland 2009, no pet.) (no *Casteel* error in submission of single contract question; "Merely because this [question] required the resolution of multiple fact questions does not convert it into multiple theories of liability"); *Formosa Plastics Corp., USA v. Kajima Int'l, Inc.*, 216 S.W.3d 436, 455 (Tex. App.—Corpus Christi 2006, pet. denied) (affirming submission of single liability question on fraud: "*Casteel* does not require a granulated submission as to multiple acts under a single theory of liability").

The San Antonio Court, however, declined to take this approach in *Laredo Medical Group v. Mireles*, 155 S.W.3d 417, 427 (Tex. App.—San Antonio 2004, pet. denied). On the other hand, the El Paso court has followed the *Columbia Medical Center v. Bush* decision. *Shelby Distributions, Inc. v. Reata*, 441 S.W.3d 715 (Tex. App.—El Paso 2014, no pet.) (single liability question based on Tex. Labor Code 451.001, which prohibits retaliation).

The Fourteenth Court's decision in *Memon v. Shaikh* illustrates the majority rule at work. *See* 401 S.W.3d 407, 421 (Tex. App.—Houston [14th Dist.] 2013), judgment withdrawn on other grounds, No. 14-12-00015-CV, 2014 WL 6679562 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.) (mem. op.).

In *Memon*, the majority saw a single theory of liability, and it therefore rejected the appellant's premise that *Casteel* applied: "This argument is based on the assumption that each statement listed in the charge constituted a separate liability theory, at least one of which was invalid. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). When a plaintiff alleges that multiple instances of the same kinds of acts committed by the same defendant result in liability for the same cause of action, it is an open question as to whether the acts constitute multiple theories of liability or simply multiple factual allegations supporting a single theory of liability. We conclude that on the facts of this case, in which each factual allegation required proof of the same elements and resulted in the same injuries, only one theory of liability was presented." *Memon*, 401 S.W.3d at 416. One justice, however, disagreed and perceived *Casteel* error. *See id.* at 424 (Frost, C.J., concurring).

3. A single damages question based on several liability theories is not subject to *Casteel* error when each theory results in the same damages.

When an actual damage finding can rest on either of two liability findings, a flaw in one liability finding will be immaterial as long as the other liability finding can stand. That is the lesson of the *Dutschmann* / *Durban* line of cases. *See Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993); *Union Pac. R.R. Co. v. Loa*, 153 S.W.3d 162, 173 (Tex. App.—El Paso 2004, no pet.); *Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 820-21 (Tex. App.—Dallas 2003, pet. denied); *Durban v. Guajardo*, 79 S.W.3d 198, 207 (Tex. App.—Dallas 2002, no pet.); *Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 549 (Tex. App.—El Paso 2001, no pet.); *Colonial Cty. Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-20 (Tex. App.—Corpus Christi 2000, no pet.).

Such a situation does not come within the *Casteel* doctrine of presumed harm. *See Z.A.O.*, 50 S.W.3d at 549 ("The jury was given separate liability questions on breach of contract, trespass, and nuisance. Although we have determined that the trespass and nuisance findings lack sufficient evidence, we are not left wondering on which of several theories of liability the jury based its award. The only remaining theory is breach of contract, which the jury resolved in favor of Appellee in a separate question. Thus, we find this case to be distinguishable from *Casteel*.").

The decision in *Dutschmann* is typical. There, a single actual damage finding rested on alternate liability findings. "The jury awarded $20,000 in actual damages based on the findings of retaliatory discharge and breach of contract, and $50,000 in punitive damages based on the breach of duty of good faith and fair dealing." 846 S.W.2d at 283.

The Court found a flaw in one liability finding, but that did not matter because the damage finding could stand on the other liability finding: "the jury' s award of actual damages and attorney's fees was based on both breach of contract and retaliatory discharge. These damages are supported as statutory damages by the finding of retaliatory discharge, even though no contract existed as a matter of law. Tex. Rev. Civ. Stat. Ann. art.

5221k § 5.05. Therefore, we affirm the award of actual damages and attorney's fees." *Dutschmann*, 846 S.W.2d at 284.

A helpful reaffirmation of the *Dutschmann* / *Durban* line of cases is *Eagle Oil & Gas Co. v. Shale Exploration, LLC*, No. 01-15-00888-CV, 2018 WL 1870081 (Tex. App.—Houston [1st Dist.], no pet.). That case had a "single damages question for multiple theories of recovery." *Id.* at *17. The defendant argued "that the damages question impermissibly commingles theories of recovery for breach of contract, promissory estoppel, and misappropriation of trade secrets as well as including its statute of frauds affirmative defense as a possible ground of recovery." *Id.*

The First Court, however, rejected that argument. "The charge included a single question on damages; however, Shale sought recovery for the same damages under each of its theories of liability, and the two distinct elements of its alleged damages—two categories of lost profits—were submitted separately within the damages question. Thus, even if one or both of these elements of damages were invalid, they likewise were not commingled." *Id.* "Because we have held that the evidence supports both a valid legal theory and the damages awarded, we hold that Eagle has failed to demonstrate harmful *Casteel* error." *Id.*

4. *Columbia Rio Grande Healthcare v. Hawley (2009): a single negligence question based on negligent acts* of different actors is subject to *Casteel.*

In *Columbia Rio Grande Healthcare v. Hawley*, the "only theory of liability submitted" against a hospital was negligence. 284 S.W.3d 851, 864 (Tex. 2009). The plaintiff, however, complained of the acts of several people affiliated with the hospital. *Id.* "[T]he liability question effectively submitted four negligence questions: (1) were the hospital's employees negligent, (2) were the hospital's agents negligent, (3) were the hospital's nurses negligent, and (4) were the hospital's servants negligent." *Id*.

But the defendant hospital was concerned that the jury might find that a fifth person—Dr. Valencia—was negligent, and attribute that negligence to the hospital. "A hospital ordinarily is not liable for the negligence of an independent contractor physician," so the defendant sought an instruction spelling this out. *Id.* at 862. The trial court refused the instruction.

On appeal, the defendant hospital pressed the same point, emphasizing that without the limiting instruction, the jury could have wrongly grounded the hospital's liability in Dr. Valencia's negligence. *See id.* at 862-63. The Supreme Court agreed that the refusal of the instruction was error. *Id.* at 864.

Turning to the harm analysis, the Court distinguished the case from both *Casteel* and *Bush*. "[T]he harm question presented in *Casteel* is different from that presented here because here the charge did not submit an invalid theory to the jury." *Id.* at 865. But the case differed from *Bush* because the four commingled questions were not merely different factual theories under the umbrella of a single liability theory. *Id*. Here, the defendant hospital argued that "the charge affirmatively told the jury that the hospital acted through its employees, agents, nurses, and servants and allowed the jury to speculate whether Dr. Valencia was an agent of the hospital." *Id.* at 864.

Thus, the Court chose to extend *Casteel*'s logic to this situation: "although in most cases where a trial court errs by refusing to give a proposed instruction the harm analysis will be based on whether the refusal probably caused the rendition of an improper judgment, the harm analysis of Rule 61.1(b) applies here because the jury could have found Columbia liable based on Dr. Valencia's acts or omissions under the charge as given, and there is no way for Columbia or an appellate court to tell if it did so." *Id.* at 865 (internal citation omitted).

VI. BACK TO HORTON ON REHEARING.

Such was the state of play when *Horton* came to the high court. In its original opinion, the court unanimously found harmful error because of what it perceived as the inclusion of a rotten apple—*i.e.*, it viewed the yield sign "theory" as invalid. So the court pointed to cases like *Romero*, *Hawley*, and *Benge* as authority for overturning the recovery and ordering a new trial on rehearing, the court took a closer look and ultimately found no harm. First, was there legally sufficient evidence to support a causal connection between the lack of a yield sign and the accident? No. In the court's view, "no evidence supports a finding that, more likely than not, Rigsby would have approached the crossing any more cautiously or intently had the yield sign been present or that the absence of the yield sign more likely than not caused Rigsby to drive into the train's path." (*Horton*, __ S.W.3d __, 2024 WL 3210468 at *16). This observation ended part III of the opinion.

A. The Court's harm analysis holds that *Casteel* created a presumption.

The court then moved to part IV of the opinion, which constitutes the crown jewel of the decision for those who find harm analysis more significant than preemption analysis. "To recap, we have rejected KC Southern's argument that the ICCT Act preempts liability on Horton's humped-crossing allegation, but we have agreed with KC Southern that no evidence supports liability on Horton's missing-yield-sign allegation. Horton attempted to prove that allegation and argued to the jury that she had done so, and the trial court's single broad-form question permitted the jury to find liability under either allegation. Because no evidence supported the yield-sign allegation, the trial

court erred by submitting a question that allowed the jury to find liability based on that allegation." *Id*. at 17.

The court went through the classical steps of harm analysis. "To determine whether an error was harmful under either of the two prongs, the appellate court must consider the entire record of the case as a whole." *Id*. at 17-18. Next, the court stated that the *Casteel* doctrine provides for a rebuttable presumption of harm in certain instances: "As explained, the error in this case involves the trial court's submission of both of Horton's negligence allegations through a single broad-form jury question." *Id*. at 18. The discussion bears quoting:

> We held in *Casteel* that the use of a broad-form question to submit multiple "theories of liability" was not feasible and in fact constituted error when one or more of the theories was legally "invalid." *Id*. at 381.
>
> We also held that the error in *Casteel* was harmful under the harm test's second prong because we could not determine "whether the jury based its verdict on one or more of the invalid theories." *Id*. At best, we could conclude only "that some evidence could have supported the jury's conclusion on a legally valid theory." *Id*. We held that when a trial court erroneously submits a broad-form liability question that includes multiple theories, the error is harmful and a new trial is required if an appellate court "cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Id*.

Id. at 19.

The court then expressly reaffirmed the notion of a presumption of harm: "We have since clarified that *Casteel* creates a presumption that the erroneous submission of valid and invalid theories in a broad-form question is harmful and requires reversal. *See Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 728 (Tex. 2016) ('In some cases, such as preserved *Casteel* error, harm may be presumed.')."

Id. at 19.

B. The presumption, however, does not apply when a "theory" lacks evidentiary support.

There is more nuance to the opinion than this paper will detail, but the bottom line is this: the presumption of harm under *Casteel* no longer applies in all rotten apple situations. If the thing that makes the apple rotten is merely a lack of evidence to support one of multiple submissions, that will not trigger the presumption: "We hold that *Casteel's* presumed-harm rule (1) applies when a broad-form jury charge commingles valid and invalid theories or allegations and permits the jury to make a finding based on either one but (2) does not apply when a theory or allegation is 'invalid"' merely because it lacks legally sufficient evidentiary support. We emphasize, however, that this rule merely governs whether harm will be presumed. If the presumption does not apply (or is rebutted), the reviewing court must determine in light of the entire record whether the error was in fact harmful." *Horton*, 2024 WL 3210468 at 21.

C. The presumption does not end the inquiry.

The court made another point that bears emphasis. Regardless of whether it applies or not, the presumption is not the end-all and be-all of harm analysis. The presumption merely supplies a starting point. If the presumption applies, it can still be rebutted, and if it does not apply, there might still be harm anyway: "we reiterate that the effect of our holding here is merely that appellate courts should not presume harm in such a case. Just as the applicability of the presumption does not compel the conclusion that the error was harmful, the fact that the presumption does not apply does not compel the conclusion that the error was not harmful. Whether the presumption applies (because a broad-form charge commingled legally valid theories or allegations with legally invalid theories or allegations) or does not apply (because the charge commingled valid theories or allegations with theories or allegations that were invalid only because the evidence did not support them), the parties may rely on the record to demonstrate that the error was or was not harmful." *Id*. at 23.

To put this point another way, analyzing for harm is not like analyzing for itemized deductions. It requires judgment. It might even take some work.

In the Supreme Court's view, "courts and parties should not be unduly distracted by the issue of whether the presumption applies. After determining whether it applies, and assuming the parties point to the record to support their conflicting positions, reviewing courts should focus on the ultimate question of whether "a review of the entire record provides [a] clear indication that the contested charge issues probably caused the rendition of an improper judgment." *Thota*, 366 S.W.3d at 687. Focusing on that ultimate issue, reviewing courts should explain in their opinions why the record as a whole does or does not establish harm in each particular case." *Horton*, 2024 WL 3210468 at *24.

D. Instead, harm is determined from the record.

With this explanation of legal principles now on the table, the court turned to the record to do a harm analysis. It ultimately held that the yield-sign allegation had not been shown to cause harm. "In reaching this conclusion, we consider it important that Horton's counsel focused his trial presentation primarily on the humped-crossing allegation, comparatively neglecting

the yield-sign allegation. During his opening statement, in fact, he acknowledged to the jury that "the worst thing [KC Southern] did wasn't the yield sign," it was the failure to maintain the hump to "no more than three inches high." The evidence and arguments Horton offered to support the yield-sign allegation, in addition to being legally insufficient to support causation, were also minimal in comparison to her presentation regarding the humped crossing. As KC Southern's counsel characterized the trial during oral argument in this Court, '90% of the testimony' dealt with the humped-crossing allegation and there was only a 'half mention of the yield sign.'"

E. The dissent would reject a presumption and apply *Casteel* to both legal and factual charge appeals.

Justice Young dissented. Whereas the majority supported its position by pointing out that defense counsel admitted that 90% of the testimony at trial dealt with the steep crossing complaint and not the yield sign, the dissent argued that the reversible error glass was 10% full, not 90% empty: "According to the parties, the simple missing-yield-sign theory was fully 10% of the evidence at trial." *Id*. at 49.

In fact, the dissent rejected the whole notion of presumed harm. In the dissent's view, "this kind of error is not *presumed* harmful. It just *is* harmful." *Id*. at 45 (emphasis by the dissent). According to the dissent, the Texas Supreme Court never really fashioned a presumption of harm, and all the Texas cases that speak of such a presumption simply used loose language: "The Court cites each of our '*Casteel* cases' that has used the English word 'presumption.' But the use in those cases suggests little more than loose language." *Id*. at 46.

The dissent stated that the majority was "effectively adopting the Supreme Court's approach in *Griffin*." *Id*. at 50. Although the majority had never even used the word "*Griffin*," the dissent cheerfully did so. In the dissent's view, Texas had already rejected *Griffin* back in *Harris County*, and the dissent approved of that message. "And we rejected the analogy for good reason, too. Criminal cases involve much greater protections against an erroneous verdict. Jurors must be certain of guilt beyond a reasonable doubt; they cannot vote to convict based on a mere preponderance of the evidence. And a judgment of acquittal is final—no matter what, there will be no new trial." *Id*. at 50. The dissent acknowledged that the majority's approach aligned with some federal decisions, but the dissent suggested that "perhaps Texas cares more about the integrity of jury verdicts." *Id*. at 51. Thus, the dissent worried that the majority decision "dishonors the role of Texas juries." *Id*. at 52. "Today's approach is anything but deferential to a jury." *Id*.

F. KUDOS to the Court!

Again, there is much more that could be said. But it suffices to say that the Supreme Court has taken a very large step in the direction taken by the U.S. Supreme Court, the Fifth Circuit, and the Court of Criminal Appeals. The court deserves enormous credit for its decision in *Horton*. That decision goes a long way toward reconciling inconsistent lines of authority in the Texas Supreme Court's jurisprudence. There will still be close calls from time to time. That is a fact of life in any system willing to draw a line between errors that cause harm and errors that do not. Unless we are to retry every case where there was an error, close calls simply cannot be eliminated. What can be done is to ask reviewing courts to read the record as a whole and to exercise some good judgment in separating cases that need a retrial from cases that do not. *Horton* does a superb job of explaining why.

Asking for a world where no such judgment calls take place would be the equivalent of asking for baseball without a way to distinguish balls from strikes. Or perhaps a better analogy would be to football's rule against pass interference. If a defender blasts into the receiver while the ball is in the air, that normally constitutes pass interference; but if the ball is clearly uncatchable, there will not be a penalty. The referee will necessarily have to exercise some judgment about whether the ball was catchable. So be it. That is what referees do.

The Supreme Court deserves great praise for how it handled the *Horton* case. First, during oral argument, the court made a point of asking questions about *Casteel* doctrine even after the red light had come on. Second, on rehearing, the court paid attention to the rehearing motion and the lone amicus brief before it at the time. To the court's credit, it asked for supplemental briefing on the *Casteel* issue and laid out a timeline for submitting that supplemental briefing. Third, the Court diligently worked through the complicated caselaw and the record before it. No matter which side you yourself may choose when it comes to the 90%-10% dividing line that separated the seven justices in the majority from the two in dissent, everyone should agree that the court treated the case very seriously and laid out written reasons that every appellate lawyer should study.

VII. BACK TO THE FUTURE.

The last word on the *Casteel* doctrine has yet to be written. Meanwhile, other questions remain.

A. Does *Casteel* apply in an appeal from a non-jury trial?

The Supreme Court has not decided the issue, but one court of appeals says yes. *See Zaidi v. Shah*, 502 S.W.3d 434, 440 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). "Although the *Casteel* line of cases arose in the context of jury trials, the parties have

assumed that the same reasoning applies to nonjury trials. Other courts have relied on *Casteel* when reviewing appeals from judgments rendered after a bench trial, although none have reversed on that basis, and we agree that the *Casteel* principles apply here. *Casteel* and its progeny are intended to remedy the trial court's error in failing to eliminate—or at least to segregate—the factfinder's consideration of invalid claims. The error is harmful when it results in a broad-form finding that prevents the reviewing court from determining whether the finding is based on valid claims. The same error can arise, with the same resulting harm, when the trial court is the factfinder." *Id.* (footnote omitted); *see also Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 268 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (similar: "We cannot be sure that reliance on invalid bases of liability exerted no significant influence on the trial court's damages award.").

Another court has at least expressed sympathy for the idea of applying *Casteel* logic to a bench trial: "The corollary to that rule in bench trials is a party must ask for additional findings of fact and conclusions of law asking for a detailed apportionment of findings between the permissible and impermissible bases for liability. Failure to request additional specific findings will waive any error, and any sufficiency analysis is limited to the determination as a whole." *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Tagle v. Galvan*, 155 S.W.3d 510, 516 (Tex. App.—San Antonio 2004, no pet.)).

Whether this extension of Casteel doctrine to bench trials makes good sense could be debated, at least in cases where the same trial judge "continues to serve" in office and could thus simply be asked to make additional findings if need be. *See Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989) ("Because the trial judge continues to serve on the district court, we believe the error in this case is remediable. We therefore reverse the judgment of the court of appeals and remand to that court, with instructions for it to direct the trial court to correct its error.").

B. How should Casteel impact the apportionment of liability under Chapter 33?

As many readers will be aware, Chapter 33 of the Civil Practice and Remedies Code provides for apportionment of responsibility:

> (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
> (2) each defendant;
> (3) each settling person; and
> (4) each responsible third party who has been designated under Section 33.004.
>
> (b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

Tex. Civ. Prac. & Rem. Code § 33.003.

Subsection (a) requires apportionment for "each cause of action. *Id.* at § 33.003(a). A plain reading of the statute seems to require a separate apportionment question for each claim. *See Isaacs v. Bishop*, 249 S.W.3d 100, 109 (Tex. App.—Texarkana 2008, pet. denied) ("The statute explicitly requires proportionate responsibility to be determined as to each cause of action.").

This process, however, could be cumbersome. In a concurrence, former Chief Justice Jefferson wrote that "in most cases, the parties could agree to submit a single apportionment question to cover multiple theories of liability, provided that each theory has a common factual basis to which the questions refer." *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 709-710 n.2 (Tex. 2008) (Jefferson, C.J., concurring). The Court, however, has not given express guidelines on when a single apportionment question can be used, or how the *Casteel* doctrine would impact the decision to do so.

C. Does *Casteel* require separate entries in the apportionment question for vicarious liability?

Another issue involves apportionment of responsibility in a case involving both direct and vicarious liability. In such a situation, the charge will have separate questions for the direct theories and vicarious liability theories. But it is not clear whether *Casteel* requires the charge to include separate entries in the apportionment question for the entity and the party for which the entity is vicariously liable. Courts have reached conflicting conclusions. *See Bedford v. Moore*, 166 S.W.3d 454, 462-63 (Tex. App.—Fort Worth 2005, no pet.); *Rosell v. Central W. Motor Stages, Inc.*, 89 S.W.3d 643, 657 (Tex. App.—Dallas 2002, pet. denied). The careful practitioner should keep a watch out for such scenarios.

D. What is a "theory"?

Over the years, causes of action have been confused with theories of recovery. The term "causes of action" generally speaks to the elements that make up a legally recognized ground of recovery or defense. The Court has come to use the term "theory" as relating to various factual scenarios that give rise to a cause of action.

For example, in *Horton*, the cause of action was negligence. But underneath that broad umbrella of negligence there lay two separate factual "theories": (1) the lack of a yield sign and (2) the humped crossing. The *Horton* opinion on rehearing made a point of referring to "theories" and "allegations." The opinion took pains to emphasize that trial courts may have a duty to break out a question into granulated form if the case involves multiple theories or allegations; and this may be true even within a single cause of action such as negligence. Which takes us back to the past. Will a routine car wreck case need separate questions for brakes, speed, lookout, and horn? Perhaps. Will the same approach apply in business cases, such as cases with complicated contracts and multiple allegations of breach? Justice Bland tackled that problem in *Powell Elec. Sys., Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 123-24 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Is her decision still good law? The Supreme Court did not say. The *Horton* majority opinion declined to mention *Powell* one way or the other, just as it declined to mention Justice Scalia's *Griffin* opinion. Like the yield sign at the crossing, they are missing from our view, but they have not left our thoughts.

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Emergency Motions in Federal Appellate Courts

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EMERGENCY MOTIONS IN FEDERAL APPELLATE COURTS

By Dana Livingston

I. INTRODUCTION

> *It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.*

Nken v. Holder, 556 U.S. 418, 421 (2009) (citations omitted).

The need to file a motion for a stay or a motion seeking some other type of expedited relief arises often in certain types of federal appellate proceedings. For civil cases, the most common ones include: (1) interlocutory appeals as of right from temporary-injunction orders under 28 U.S.C. § 1292(a)(2); (2) mandamus proceedings under the All Writs Act, 28 U.S.C. § 1651; (3) petitions for review of an administrative agency decision; and (4) petitions for permission to appeal (usually under 28 U.S.C. § 1292(b), but also ones under Federal Rule of Civil Procedure 23(f) for orders granting or denying class-action certification, 28 U.S.C. § 1453(c) for orders granting or denying a motion to remand a class action to state court, or 28 U.S.C. § 158(d)(2) for bankruptcy cases). But the need can also arise in final-judgment appeals and collateral-order appeals under 28 U.S.C. § 1291 and in arbitration appeals under 9 U.S.C. § 16.

When you are headed to the Fifth Circuit, there are at least five written sources you should check: (1) the Federal Rules of Appellate Procedure; (2) the Fifth Circuit Local Rules; (3) the Fifth Circuit published Internal Operating Procedures; (4) the Practitioner's Guide available on the Fifth Circuit's website (https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf), and (5) the Fifth Circuit's Guide to Filing Emergency Motions (https://www.ca5.uscourts.gov/docs/default-source/forms/guide-to-filing-emergency-motions.pdf).

This paper synthesizes those resources to help guide you through what you need to know to file a stay motion or other emergency motions in civil cases in the Fifth Circuit.

II. LEGAL STANDARDS GOVERNING STAY MOTIONS

A. Stay Motions Are Governed by a Four-Factor Test

In deciding whether to grant a stay pending appeal, federal circuit courts consider four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
(2) whether the applicant will be irreparably injured absent a stay;
(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
(4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2023) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *accord SEC v. Barton*, 79 F.4th 573, 581 (5th Cir. 2023) (quoting *Nken*, 556 U.S. at 434). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Adams v. Thaler*, 670 F.3d 312, 318 (5th Cir. 2012). But, in opposing a stay motion, a responding party's failure to address one of the factors waives or forfeits any argument in it. *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 722 (5th Cir. 2010); *accord State v. U.S. Dep't of Homeland Sec.*, 88 F.4th 1127, 1135 (5th Cir. 2023), *vacated*, 144 S. Ct. 715 (2024).

The first two factors of this standard—likelihood of success on the merits and irreparable harm—are "the most critical." *Nken*, 556 U.S. at 434. As to the first requirement, although a stay motion asks an appellate court to make a preliminary determination, it is not enough that the chance of success on the merits be "better than negligible." *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999) (cleaned up). Thus, more than a mere 'possibility' of relief is required. Similarly, for the irreparable-harm requirement, simply showing the "possibility of irreparable injury," *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998), is not good enough. *See Nken*, 556 U.S. at 434-35. As the U.S. Supreme Court has clarified, the "possibility" standard is "too lenient." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Instead, the party seeking a stay must demonstrate a "likelihood" of irreparable injury. *Id.* at 21.

"Federal courts have long recognized that, when 'the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for the purposes'" of a stay. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Enter. Int'l, Inc. v. Corporacion Estatal*

Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985)). Thus, for example, when a private party is challenging an agency-compliance order, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, No. 16-60118, 2016 WL 3878180, at *19 (5th Cir. July 15, 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment)). Nonrecoverable compliance costs, thus, satisfy the required showing of a likelihood that the stay movant will suffer some irreparable harm in the absence of a stay. *Winter*, 555 U.S. at 22 (citing 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1, at 139 (2d ed. 1995)); *Wages & White Lion Invs, LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (in any suit against the government, plaintiff's "costs [incurred to comply] are likely unrecoverable," in part due to the sovereign immunity).

As to the public-interest factor, the Fifth Circuit has recently said that "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022). An agency is obligated to comply with the regulations that it promulgates with the force and effect of law. *Texas v. EPA*, 91 F.4th 280, 291 (5th Cir. 2024); *Gulf States Mfrs. Inc. v. NLRB*, 579 F.2d 1298, 1308 (5th Cir. 1978). So there is "substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Texas v. United States*, 40 F.4th 205, 209 (5th Cir. 2022). At the same time, the Fifth Circuit has denied motions for a stay pending appeal under the third factor (which merges with the fourth factor concerning public interest when the government is the opposing party, *Nken*, 556 U.S. at 435) in part because of safety concerns if the court were to stay an agency compliance order. *See, e.g.*, *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, No. 16-60448, at 9 (Aug. 11, 2016) (unpublished order).

B. Similarities Between Stays and Preliminary Injunctions.

The factors governing stays substantial overlap with the factors governing preliminary injunctions. *See id.* at 24. When a court employs "the extraordinary remedy of injunction," *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982), "it directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken*, 556 U.S. at 428 (citing BLACK'S LAW DICTIONARY 784 (6th ed. 1990) (defining "injunction" as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury")). "'In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*.'" BLACK'S LAW DICTIONARY 800 (8th ed.2004) (quoting 1 H. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1, at 2–3 (1909)). Essentially, whether the injunction is preliminary or final, the order is directed at someone and governs that party's conduct.

In contrast to an injunction's directing the conduct of a particular actor, "a stay operates upon the judicial proceeding itself." *Nken*, 556 U.S. at 428. A stay does so "either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id*. (citing BLACK'S LAW DICTIONARY 1413 (6th ed.1990) (defining "stay" as "a suspension of the case or some designated proceedings within it")).

Thus, a stay pending appeal has some functional overlap with an injunction—particularly a preliminary one. "Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct." *Nken*, 556 U.S. at 428-29. A stay, therefore, "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); *see also Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) ("[A]pplicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute"); *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (same) ("By seeking an injunction, applicants request that I issue an order altering the legal status quo").

C. Inherent Power to Stay

An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent." It derives from and is preserved in the grant of authority to federal courts under the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *Nken*, 556 U.S. at 426 (citing *In re McKenzie*, 180 U.S. 536, 551 (1901)). As the U.S. Supreme Court noted in its 2009 decision in *Nken*, this power's historic pedigree and importance were highlighted in *Scripps–Howard*, 316 U.S. 4, where the Court held that Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power. *Nken*, 556 U.S. at 426.

D. Stays Are Necessary for Administration of Justice and to Allow an Appellate Court Time Needed to Determine Merits

Scripps described the power to grant a stay pending review as part of a court's "traditional equipment for the administration of justice." *Scripps-Howard*, 316 U.S. at 9-10. As the Court explained, that authority was "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Id.* at 13.

A court can rarely make a full merits determination "on the fly." Instead, "[t]he authority to hold an order in abeyance pending review allows an appellate court to act responsibly." *Nken*, 556 U.S. at 427. As *Nken* explains, a reviewing court "must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review." *Id.* "The choice for a reviewing court should not be between justice on the fly," *id.*, or participation in what may be an "idle ceremony." *Scripps-Howard*, 316 U.S. at 10. The ability to grant interim relief is accordingly not simply "[a]n historic procedure for preserving rights during the pendency of an appeal," id., at 15, but—importantly—is also a means of "ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Nken*, 556 U.S. at 427.

E. A Stay Is Discretionary, Not Automatic

While the ability to grant a stay is necessary for responsible decision making, at the same time, a stay "is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926). Instead, the "issuance of a stay is left to the court's discretion." *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 188 (5th Cir. 2023). "The propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry.*, 272 U.S. at 672-73; *see Hilton*, 481 U.S. at 777 ("[T]he traditional stay factors contemplate individualized judgments in each case").

But "a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at 427. As the U.S. Supreme Court has explained, "a stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.' *Id.* (cleaned up) ("The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.")

The fact that the issuance of a stay is left to the court's discretion, however, "does not mean that no legal standard governs that discretion . . . . [A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (cleaned up). A federal appellate court's ruling on a motion for stay will be guided by the four factors listed under Section II.A., above.

III. MECHANICS FOR EMERGENCY MOTIONS

Make sure you know which rules apply to the type of motion you are filing. Federal Rule of Appellate Procedure 8 governs motions for stay or injunctions while an appeal is pending, Federal Rule of Appellate Procedure 18 governs stays pending review of an order of an administrative agency, board, commission, or officer, and Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27 govern other requirements for motions generally. FED. R. APP. P. 8(a)(1)(C), 27; 5TH CIR. R. 27.1.

A. A Stay Must Ordinarily Be Sought From the District Court or Administrative Agency First

If you are seeking a stay of a judgment or order of a district court, Rule 8 provides that a party must ordinarily move first in the district court for three types of relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an "order suspending, modifying, restoring, or granting an injunction" while an appeal is pending. FED. R. APP. P. 8(a)(1). If a stay has not first been sought from the district court, then the stay motion in the court of appeals "must: (i) show that moving first in the district would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." FED. R. APP. P. 8(a)(2)(i)–(ii).

A similar provision applies in petition for review proceedings from an order of an administrative agency, board, commission, or officer. Stay motions in those are governed, not by FRAP 8, but FRAP 18. Similar to Rule 8, it too provides that a "petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." FED. R. APP. P. 18(a)(1). If a stay has not first been sought from the agency, then the stay motion in the court of appeals "must: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action." FED. R. APP. P. 18(a)(2)(i)–(ii) .

B. For Motions Seeking a Ruling in 14 Days or Less, Heed the Fifth Circuit Rule's Special Rule Governing Emergency Motions

The Fifth Circuit has a special local rule governing the filing of emergency motions. That rule defines any motion that seeks relief before the expiration of 14 calendar days after its filing as an "emergency motion." The rule also lists the Fifth Circuit's own curated requirements, some of which may overlap with the requirements of other rules (both in the FRAPs and in local rules), but many of which are unique to "emergency" motions.

> **27.3 Emergency Motions in Cases Other Than Capital Cases.**
> Parties should not file motions seeking emergency relief unless there is an emergency sufficient to justify disruption of the normal appellate process. In cases not governed by 5th Cir. R. 8.10, motions seeking relief before the expiration of 14 days after filing must, subject to the penalties of FED. R. APP. P. 46(c), be supported by good cause and must:
>
> - Be preceded by a telephone call to the clerk's office and to the offices of opposing counsel advising of the intent to file the emergency motion. If time does not permit the filing of the motion by hand delivery or by mail, the clerk may permit filing by facsimile or by other electronic means. In an extraordinary case, the clerk may permit the submission of an oral motion by telephone. If the motion is filed by means other than hand delivery or mail, counsel should also later file the motion by hand delivery or by mail.
> - Be labeled "Emergency Motion."
> - State the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted.
> - Certify that the facts supporting emergency consideration of the motion are true and complete.
> - Provide the date by which action is believed to be necessary.
> - Attach any relevant order or other ruling of the district court as well as copies of all relevant pleadings, briefs, memoranda, or other papers filed by all parties in the district court. If this cannot be done, counsel must state the reason that it cannot be done.
> - Be served on opposing counsel at the same time and, absent agreement to the contrary with opposing counsel, in the same manner as the emergency motion is filed with the court.
> - Be filed in the clerk's office by 2:00 p.m. on the day of filing.

5TH CIR. R. 27.3.

The Fifth Circuit's "Guide to Filing Emergency Motions" has a similar but not identical list, but there are a few notable nuances. First, it reminds counsel that the 2 p.m. deadline is Central Standard Time. It also lists the following extra items:

- Must include the original court case number, District and Division.
- Must include the names of counsel representing the parties, including contact information of all counsel.
- Must provide a Certificate of Interested Persons
- Must provide a cover letter explaining the urgency, the irreparable harm the party will suffer if ruling is not made by a certain date, and provide the date by which a ruling is needed.

See Fifth Circuit Guide to Filing Emergency Motions (https://www.ca5.uscourts.gov/docs/default-source/forms/guide-to-filing-emergency-motions.pdf).

As to the 2 p.m.-filing requirement, the clerk of the Fifth Circuit mentioned at a CLE program earlier this year that hardly any of the emergency motions make it by the 2 p.m. (CST) deadline.

The Fifth Circuit's local rule on motions seeking "emergency" relief is not the only rule you'll need to comply with; the regular rules governing motions also apply. *See* FED. R. APP. P. 27; 5TH CIR. R. 27. The next section discusses the other requirements.

C. Contents and Requirements for "Emergency" Motions in the Fifth Circuit—The Rules Provide Limited Guidance

Synthesizing the requirements in the rules, internal operating procedures, practitioners' guide, and other online guidance from the Fifth Circuit—mixed with some practical experience—the following list contains the required contents—and my suggested ordering of those contents—of the filing packet for an emergency motion to be filed in the Fifth Circuit:

Rule 8, for example, is not particularly descriptive in listing what must be included in a stay motion. First, it says that a stay must ordinarily be sought in the district court first, but if it has not first been sought from the district court, then the stay motion in the court of appeals "must: (i) show that moving first in the district would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." FED. R. APP. P. 8(a)(2)(i)–(ii).

Apart from that, Rule 8 has a sparse list of what's required for any stay motion filed in the court of appeals—whether a stay was or was not sought in the district court in the first instance—must also include:

(i) the reasons for granting the relief requested and the facts relied on;
(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
(iii) relevant parts of the record.

FED. R. APP. P. 8(a)(2)(B); *accord* FED. R. APP. P. 18(a)(2)(B) (similar list governing stays pending review of agency decision or order). Those rules align with the general rule governing motions:

(2) **Contents of a Motion.**

(A) **Grounds and Relief Sought**. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.
(B) **Accompanying Documents.**

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.
(ii) An affidavit must contain only factual information, not legal argument.
(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) **Documents Barred or Not Required**.

(i) A separate brief supporting or responding to a motion must not be filed.
(ii) A notice of motion is not required.
(iii) A proposed order is not required.

See FED. R. APP. P. 27(a)(2). Beyond that paltry list, below are the contents I recommend for an emergency motion.

D. Checklist of Contents for Emergency Motions

1. Cover Letter

The Fifth Circuit's Guide to Filing Emergency Motions says that counsel filing an emergency motion "must provide a cover letter explaining the urgency, the irreparable harm the party will suffer if ruling is not made by a certain date, and provide the date by which a ruling is needed." This requirement overlaps with the requirement in Fifth Circuit Rule 27.3 to include that information in the motion itself. 5TH CIR. R. 27.3.

I recommend that your cover letter include headings for each of those items to make it easy for a court to quickly scan the document to locate that information. Besides explaining the urgency and the irreparable harm the party will suffer if ruling is not made by a certain date, explain with clarity and precision what the court should be staying and why you need action by that date. Because that narrative explanation may list other dates, consider listing the date by which action is "needed" in bold or other conspicuous typeface.

2. Cover Page of Motion

"A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed." FED. R. APP. P. R. 27(d)(1)(B). For the case caption of your motion, use the case caption the Fifth Circuit clerk's office created and attached to its docketing letter. Per Fifth Circuit Rule 27.3, the motion must be labeled "Emergency Motion." The Fifth Circuit's Guide to Filing Emergency Motions also says the motion "must include the original court case number, District and Division." https://www.ca5.uscourts.gov/docs/default-source/forms/guide-to-filing-emergency-motions.pdf.

As for the bottom of the "cover," it matters not if it looks like the cover page of a brief (with addresses of counsel representing the movant occupying the bottom part of the page) or like a motion.

3. Certificate of Interested Persons

Because a motion for stay or injunction is not merely a "procedural motion," it must contain a certificate of interested persons. *See* 5TH CIR. R. 27.4. (Recall that instead of a Corporate Disclosure Statement under Fed. R. App. P. 26.1, the Fifth Circuit uses a Certificate of Interested Persons. *See* 5TH CIR. R. 28.2.1) Consult that rule for the certificate's required certification language and form. Make sure your certificate of interested persons also satisfies the requirement mentioned in the Fifth Circuit's Guide to Filing Emergency Motions that the motion include the names of counsel representing the parties, including contact information of all counsel. https://www.ca5.uscourts.gov/docs/default-source/forms/guide-to-filing-emergency-motions.pdf.

4. Table of Contents

If your motion is long enough, consider including a Table of Contents. The court has not formalized any rule for motions about when a table is required, so use your best judgment. Most emergency motions I see do not include tables.

5. Table of Authorities

Like a Table of Contents, if your motion is long enough, consider including a Table of Authorities. The court has not formalized any rule for motions about when a table is required, so use your best judgment.

Again, most emergency motions I see do not include tables.

6. Introduction

Consider including an optional introduction that is brief, to the point, and effective. But time is short, and space is at a premium. If you opt to include an introduction, consider skipping the "comes now" boilerplate stuff that hogs up valuable real estate, in favor of a short (no more than one page, if possible) introduction. Make it crisp

7. Nature of the Emergency and the Irreparable Harm the Movant Will Suffer If the Motion Is Not Granted

Fifth Circuit Rule 27.3 requires that the motion "[s]tate the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted." This requirement overlaps with some of the information required in the prescribed cover letter that must accompany the emergency motion. You might consider this section as serving double duty to provide an introduction or overview.

Fifth Circuit Rule 27.4 says that if a motion falls outside the need for a ruling within 14 days, such that the motion is not technically an "emergency" motion governed by Fifth Circuit Rule 27.3, if "but the party has a serious need for the court to act within a specified time, the motion must state the time requirement and describe both the nature of the need and the facts that support it." 5TH CIR. R. 27.4.

8. Address If a Stay Was First Sought Below and, If Not, Provide the Explanation the Rule Requires

Federal Rule of Appellate Procedure 8 says that a stay must ordinarily be sought in the district court first, but if it has not first been sought from the district court, then the stay motion in the court of appeals "must: (i) show that moving first in the district would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." FED. R. APP. P. 8(a)(2)(i)–(ii).

Similarly for stay motions filed in petition for review proceedings from the order of an administrative agency, board, commission, or office, if a stay has not first been sought from the agency, then Federal Rule of Appellate Procedure 18 requires that the stay motion in the court of appeals "must: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action." FED. R. APP. P. 18(a)(2)(i)–(ii).

Consider satisfying the requirements in these rules in its own section captioned appropriately so that the court does not have to hunt for it.

9. Date by Which Action Is Believed To Be Necessary

This information is required to be listed in the cover letter accompanying the emergency motion, but it must also be in the motion itself. Consider using the words from the Fifth Circuit's emergency motion rule to name this section: "Date by Which Action Is Believed To Be Necessary." 5TH CIR. R. 27.3. Explain with clarity and precision what the court should be staying and why you need action by that date. Because that narrative explanation may list other dates, consider listing the date by which action is "necessary" in bold or other conspicuous type.

Two additional notes:

- As always, poor planning is not the court's emergency. The Fifth Circuit's "Guide to Filing Emergency Motions" puts it in concrete terms: "Please note that PROCEDURAL MOTIONS, such as extensions of time, etc., and the FILING OF BRIEFS are NOT considered emergency matters." https://www.ca5.uscourts.gov/docs/default-source/forms/guide-to-filing-emergency-motions.pdf.
- Fifth Circuit Rule 27.4 indicates that even when "a party's motion is not an Emergency Motion covered by 5th Cir. Rule 27.3, but the party has a serious need for the court to act within a specified time, the motion must state the time requirement and describe both the nature of the need and the facts that support it."

10. Fifth Circuit Rule 27.3 Certificate Certifying the Facts Supporting the Motion as True and Complete

Add a heading for this certificate and draft some language—to be signed by counsel of record—certifying that the facts support the motion are true and complete.

11. Facts Relied on to Support Motion

You can call this section "Statement of Facts," "Statement of Facts and Procedural History," "Background," or something similar, but I suggest that it be separate from your argument. It need not contain numbered paragraphs. But if your motion is being filed in an appeal with an electronic record on appeal (if one is already filed with the Fifth Circuit), cite to it, the district court record, and/or an appendix you create for attaching to the motion.

12. Summary of Reasons

This section is optional. Time is often short, and space can be at a premium. Don't delay filing your motion just to hone the world's best summary.

13. Reasons for Granting the Relief Requested

This is your argument section. If moving for a stay, make sure to cover all four factors governing stay motions.

14. Prayer for Relief

Explain with clarity and precision what judgment, decision, order, proceedings, or parts thereof you are asking the court to stay or other requested emergency relief.

15. Electronic Signature & Signature Blocks

Like all filings in federal court, your motion must be signed. FED. R. APP. P. 32(d) ("Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys."). The Fifth Circuit Local rules also address this requirement: "The signature requirement is interpreted broadly, and the attorney of record may designate another person to sign the brief for him or her. Where counsel for a particular party reside in different locations, it is not necessary to incur the expense of sending the brief from one person to another for multiple signatures." 5TH CIR. R. 28.5. The Fifth Circuit Rules elsewhere say:

> Signatures. The user log-in and password required to submit documents in electronic form serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the FED. R. APP. P. 32(d) and 5TH CIR. R. 28.5, and any other purpose for which a signature is required in connection with proceedings before the court.
>
> The Filing User's name under whose log-in and password the document is submitted must be preceded by an "s/" and be typed in the space where the signature otherwise would appear.
>
> No Filing User or other person may knowingly permit or cause to permit a Filing User's login and password to be used by anyone other than an authorized agent of the Filing User.
>
> Documents which require more than one party's signature must be filed electronically by:
>
> - submitting a scanned document containing all necessary signatures;
> - showing the consent of the other parties on the document;
> - or any other manner approved by the court.
>
> Electronically represented signatures of all parties and Filing Users described above are presumed valid. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must file a notice within 10 days setting forth the basis of the objection.

5th Cir. R. 28.5.

16. Certificate of Service

Remember that the Fifth Circuit's emergency-motion local rule requires that the motion "[b]e served on opposing counsel *at the same time* and, absent agreement to the contrary with opposing counsel, in *the same manner as the emergency motion* is filed with the court." 5TH CIR. R. 27.3.

17. Certificate of Conference

Similarly, if you are moving for a stay (whether it's an emergency motion or not), Federal Rule of Appellate Procedure 8 and 18 both require that the moving party must give reasonable notice of a stay motion to all parties. And Fifth Circuit Rule 27.4 reminds that "*[a]ll motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed*." 5TH CIR. R. 27.4 (bold emphasis in original changed to italics). A certificate of conference isn't proof of service, but it does certify that you've advised your opponent of the nature of the motion you are filing and whether they will oppose it. Opposing a motion is one thing, but filing an opposition is distinct. When you confer, remember to specifically ask if an opposition will be filed so that you can include that information in the certification of conference. Virtually all motions require a certificate of conference; counsel should generally consult FED. R. APP. P. 27(a) and (d), 5TH CIR. R. 27.4, and the Internal Operating Procedure following 5TH CIR. R. 27.5 concerning the requirements and format for motions.

18. Certificate of Compliance

Yes, there are length limits for all motions, so that means you need a certificate of compliance. The length of motions is limited to 5,200 word (if produced using a computer) or 20 pages (if handwritten or typewritten), exclusive of the corporate disclosure statement (in the Fifth Circuit, the certificate of interested persons) and any "Accompanying Documents" authorized by Rule

27(a)(2)(B) (or, in the specific context of a motion for stay or injunction, by Rule 8(a)(2)(B)). FED. R. APP. P. 27(d)(2)(A)–(B). The length of replies motions is limited to 2,600 words (if produced using a computer) or 10 pages (if handwritten or typewritten). FED. R. APP. P. 27(d)(2)(C)–(D).

19. Appendix or Exhibits

You will need to compile an appendix for your motion of the portions of the record needed to support the motion. Fifth Circuit Rule 27.3 governing "emergency" motions requires that the motion "[a]ttach any relevant order or other ruling of the district court as well as copies of all relevant pleadings, briefs, memoranda, or other papers filed by all parties in the district court. If this cannot be done, counsel must state the reason that it cannot be done." 5TH CIR. R. 27.3.

For stay motions in particular, Federal Rule of Appellate Procedure 8(a)(2)(B) and 18(a)(2)(B) require that relevant parts of the record be attached to a stay motion. That aligns with the Federal Rule of Appellate Procedure governing motions generally. *See* FED. R. APP. P. 27.

(B) **Accompanying documents.**

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.
(ii) An affidavit must contain only factual information, not legal argument.
(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) **Documents Barred or Not Required**.

(i) A separate brief supporting or responding to a motion must not be filed.
(ii) A notice of motion is not required.
(iii) A proposed order is not required.

See FED. R. APP. P. 27(a)(2)(B).

When time is short, as with many circumstances that give rise to the need to move for stay with a federal appellate court, consider using declarations if any are needed to support the stay motion.

IV. OTHER STUFF TO KNOW

A. Formatting

Most of the usual formatting rules apply. Fifth Circuit Rule 27.4 directs us to some of those other rules:

> **27.4 Form of Motions**. Parties or counsel must comply with the requirements of FED. R. APP. P. 27 including the length limits of FED. R. APP. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5TH CIR. R. 28.2.1. Where a single judge or the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies. *All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.* Where a party's motion is not an Emergency Motion covered by 5th Cir. Rule 27.3, but the party has a serious need for the court to act within a specified time, the motion must state the time requirement and describe both the nature of the need and the facts that support it.

5TH CIR. R. 27.4 (bold emphasis in original changed to italics).

Thus, motions must comply with the usual, now-familiar typeface and type style requirements of FED. R. APP. P. 32(a)(5) and (6). That means that motions must be in no smaller than 14 point proportional typeface (or not more than 10½ characters per inch in monospaced typeface). FED. R. APP. P. 27(d)(1)(E).

The length of motions is limited to 5,200 words (if produced using a computer) or 20 pages (if handwritten or typewritten), exclusive of the corporate disclosure statement (in the Fifth Circuit, the certificate of interested persons) and any "Accompanying Documents" authorized by Rule 27(a)(2)(B) and, in the specific context of a motion for stay or injunction, by Rule 8(a)(2)(B). FED. R. APP. P. 27(d)(2)(A)–(B).

The length of replies in support of motions is limited to 2,600 words (if produced using a computer) or 10 pages (if handwritten or typewritten). FED. R. APP. P. 27(d)(2)(C)–(D).

B. Give Your Opponent Advance Notice

The Federal Rules of Appellate Procedure also require that the moving party give reasonable notice of the motion to all parties, including when, where, and to whom the application for stay or injunction is to be presented. FED. R. APP. P. 8(a)(2)(C).

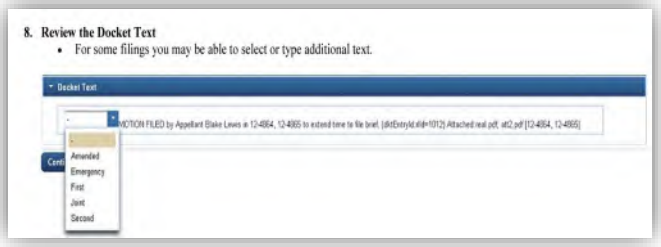
TIP: While you are conferring with your opponent on the emergency motion, consider whether you also need to confer with your opponent about anything else. For instance, in some actions—including in the preliminary stages of some actions—service will not be accomplished via the court's electronic case filing system ("CM/ECF"). Under the Federal Rules, you may serve by email (usually the fastest way to give "reasonable notice of the motion to all parties," FED. R. APP. P. 8(a)(2)(C)), but only if the party consents to that method of service. *See* FED. R. APP. P. 25(c)(2) ("Electronic service of a paper may be made (A) by

sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing."); *see also* FED. R. APP. P. 25(c)(3) ("When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.").

C. Docketing Your Motion

Don't just docket an emergency filing without telling the emergency duty clerk. Any party filing a matter outside the court's normal business hours (Monday through Friday, 8:00 a.m. to 5:00 p.m.) that may require the court's immediate attention should call the emergency duty deputy and inform them of the filing, even if the matter does not qualify as an emergency under Fifth Circuit Rule 27.3. The Fifth Circuit's emergency duty deputy can be reached at (504) 442-0252.

When e-filing an emergency motion in CM/ECF, keep your eye out for a drop-down menu that allows you to docket it as an "emergency" motion. For instance, in reviewing the description of the motion, something CM/ECF allows you to add "Emergency" to the docket text:



Doing so does not, however, obviate the need to call the clerk's office in advance.

D. Correcting Deficiencies

And while the Fifth Circuit clerk's office is very helpful and will advise you of any deficiencies that need to be corrected, over-reliance on the clerk's office as a backstop, though, may delay processing of the motion requesting urgent relief.

E. Filing Fees

There is no separate filing fee for filing a motion for stay or injunction in the court of appeals, but all required fees must have been paid in the Fifth Circuit action (e.g., appeal, mandamus, petition for review of agency action, etc.) before the court of appeals will act on the motion. Because the Fifth Circuit's CM/ECF system now allows you to e-file a case-originating document, the system collects the fee (unless you are exempt or mistakenly file as exempt). The Miscellaneous Fee Schedule for the U.S. Courts of Appeals—promulgated by the judicial conference and authorized by 28 U.S.C. 1913—sets appellate court fees and exemptions. Fees are paid to the clerk of the appellate or originating court at the time of the transaction.

F. Responses and Replies

1. Response to motion for stay

Federal Rule of Appellate Procedure 8 governing motions for stay is silent about responses and replies. The general rule for motions provides that any party may file a response in opposition to a motion within 10 calendar days (formerly 8 business days) "after service of the motion unless the court shortens or extends the time." FED. R. APP. P. 27(a)(3)(A).

Because the court may act on motions authorized by Rule 8 (for stay or injunction) before the 10 calendar-day period runs by giving reasonable notice that it intends to act sooner, FED. R. APP. P. 27(a)(3)(A), if a party intends to respond to a motion for stay or injunction, it is a good idea to notify the clerk's office as soon as possible and e-file your response. All responses received by the clerk before action on the motion are presented to the court for consideration.

Any response is limited to 5,200 words (if prepared using a computer) or 20 pages (if handwritten or typewritten) and, like the motion, must comply with the typeface and type style requirements of FED. R. APP. P. 32(a)(5) and (6). FED. R. APP. P. 27(d)(1)(E), (d)(2).

2. Reply

Although FED. R. APP. P. 27(a)(4) permits a reply to a response within 7 calendar days after service of the response, the Fifth Circuit's website warns that the court looks upon replies with great disfavor. Not surprisingly, then, the court does not—as a general rule—grant extensions of time to file a reply to a response.

Any reply is limited to 2,600 words (if prepared by a computer) or 10 pages (if handwritten or typewritten). FED. R. APP. P. 27(d)(2).

G. Internal Processing

For stay motions asking the Fifth Circuit to stay the district court proceedings or an order or judgment of the district court, a motion for stay filed in the court of appeals normally will be considered by a panel of the court. FED. R. APP. P. 8(a)(1)(D). "But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge." FED. R. APP. P 8(a)(1)(D).

So too for stay motions filed in petition for review proceedings of an order of an administrative agency, board, commission, or officer. Rule 18 says that the motion "must be filed with the circuit clerk and normally will be considered by a panel of the court."

FED. R. APP. P. 18(a)(1)(D). "But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge." FED. R. APP. P. 18(a)(1)(D).

Note that the Fifth Circuit will sometimes grant an administrative stay to give it time to consider whether it will grant a stay during the full pendency of your appeal or other appellate proceeding. Other times, the motions panel will decide that a motion for administrative stay and for stay pending appeal or review should be decided by the argument panel and order them carried with the case. *See, e.g.*, *MCR Oil Tools, LLC v. U.S. Dep't of Transp.*, No. 24-60230 (5th Cir. May 23, 2024) (unpublished order); *see also Woodlands Pride, Inc. v. Paxton*, No. 23-20480 (5th Cir. Feb. 20, 2024) (unpublished order) (carrying stay motion with the case to be decided by the merits panel and noting that the motion for a stay of the injunction pending appeal does not request either emergency relief or expedited consideration; instead, multiple briefing extensions have been sought to file the opening brief).

And in ruling on a stay motion (whether granting, denying or carrying it with the case), the Fifth Circuit sometimes expedites the case, shortening the briefing schedule, bypassing screening, and sending the case directly to be calendared for the next available oral argument session. *See, e.g.*, *MCR Oil Tools, LLC v. U.S. Dep't of Transp.*, No. 24-60230, at 3 (5th Cir. May 23, 2024) (unpublished order) (Ho, J., concurring).

The treatment of administrative stays and stays pending appeal or review turns on the facts of each case and can understandably, then, vary from panel to panel. Professor Stephen Vladeck recently noted two Fifth Circuit cases in which the "length of time prior to those decisions during which an 'administrative stay' had been in effect" was "8.5 months in one, and over a year in the other." "One First" weekly newsletter, https://www.stevevladeck.com/p/84-justice-barretts-sb4-concurrence ("Folks might remember Justice Barrett's warning, back in March, that 'administrative stays' (as opposed to stays pending appeal) should last no longer than is necessary to allow the court to resolve a stay pending appeal.").

1. Bond

The court of appeals may condition relief on the filing of a bond or other appropriate security. FED. R. APP. P. 8(a)(2)(E); FED. R. APP. P. 18(b).

2. Non-Emergency Motions

Non-emergency motions "requiring judges' consideration are assigned in rotation to all active judges on a routing log. The clerk assembles a complete set of the motion papers, and any other necessary material, and submits them with a routing form to the initiating judge. In single-judge matters the judge acts on the motion and returns it to the clerk with an appropriate order. For motions requiring panel action, a single set of papers is prepared, but the initiating judge transmits the file to the next judge with a recommendation. The second judge sends it on to the third judge, who returns the file and an appropriate order to the clerk." 5TH CIR. I.O.P. FOLLOWING 5TH CIR. R. 27.

3. Emergency Motions

If the motion is an emergency motion, the clerk's office immediately assigns the motion to the next initiating judge in rotation on the court's administrative routing log and to the panel members, and the clerk's office simultaneously forwards a complete set of the motion papers to all members of the panel. 5TH CIR. I.O.P. FOLLOWING 5TH CIR. R. 27. Motions are ordinarily considered without oral argument. FED. R. APP. P. 27(e).

4. Expediting

In ruling on a stay motion (either granting it or denying it, and whether it is merely an administrative stay or a stay pending appeal), the Fifth Circuit sometimes directs the clerk's office to issue an expedited briefing schedule, specifies a date certain by which the briefing should conclude, and directs that the case proceed directly to the oral argument calendar. When that happens, the compressed briefing schedule more than likely will severely limit any briefing extensions. Sometimes the order specifies that "[n]o extensions will be granted."

Independently of any stay motion, though, parties are always free file a motion requesting that the case be expedited.

H. Appellate Court Jurisdiction to Rule on a Motion for Stay or Injunction

Practitioners should note that neither a motion for stay nor a motion for injunction transfers jurisdiction to the appellate court. For the court of appeals to have jurisdiction to consider a motion for stay or for injunction, the court of appeals' jurisdiction must first be properly invoked by the filing of a notice of appeal, in the case of a collateral-order appeal or section 1292(a)(1) appeal for example, or by the pendency of an original proceeding, a petition for permission to appeal, or a petition for review from an agency decision. The motion for stay can be filed concurrent with a document invoking the appellate court's jurisdiction, but it cannot precede the invocation of the appellate court's jurisdiction.

Depending on how urgent the stay motion is, you will need to work closely with the clerk's office. That's because just to open an appellate proceeding, the court needs not just the case-opening filing, but also must have adequate time to input all of the information needed to docket the case with the Fifth Circuit—

including all of the party names and other information on a certificate of interested persons. The court needs that information to run a check for disqualifications and recusals.

I. Reconsideration

A party aggrieved by the court's ruling on a motion may file a "motion for reconsideration" (not a motion or petition for "rehearing"). A motion for reconsideration of action on a motion must be filed within 14 calendar days (unless the United States is a party in a civil case). 5TH CIR. R. 27.1. Reconsideration requests are limited to 3,900 words (if prepared using a computer) or 15 pages (if typewritten or handwritten).

Note: While you can seek reconsideration, from the court's ruling on a motion, there is no en banc review available.

V. OTHER PRACTICE TIPS

A. Appearance Forms

To comply with Federal Rule of Appellate Procedure 12(b)'s requirement for filing an attorney representation statement, the Fifth Circuit has created its own "Notice of Appearance Form." *See* 5TH CIR. R. 12. The form—which has been updated to remove blanks requiring information that would have needed to be redacted anyway—can be found here: https://www.ca5.uscourts.gov/docs/default-source/forms/formforappearanceofcounsel.pdf

When a ruling is urgent, I advise that you get that form on file ASAP. Filed Notice of Appearance Forms (also called Appearance of Counsel Forms in some resources) are not processed immediately; it takes the Fifth Circuit a day or so. The advice to file them ASAP when an emergency motion has been filed will ease the filing of any response or reply. If you have filed a Notice of Appearance Form but are not yet listed as counsel of record and are trying to e-file something in that case, CM/ECF will advise that "you must contact the Clerk's office and request to be added to the case before you will be allowed to file." And because emergency motions, responses, and replies often require working beyond business hours, planning ahead—including any phone calls to the clerk's office during its hours of operation—will avoid last-minute panic that no one for your side is an approved e-filer authorized to file in the particular case.

Anyone filing a Notice of Appearance Form must be logged in using their own e-filing credentials. You cannot e-file someone else's appearance form while logged in under your own e-filing credentials. As the e-filing system warns: "You may submit a Notice of Appearance Form on your behalf ONLY Attaching appearance forms on behalf of other attorneys will result in rejection." And each attorney representing a party must complete a separate form; you can't just list multiple attorneys from the same firm on a single form. That much will become obvious when you fill out the form.

Most of the form requires very basic information. When more than one attorney represents a single party or group of parties, you will need to designate on that form which one is lead counsel. If the Fifth Circuit grants oral argument, only lead counsel will receive via email a copy of the court's docket and oral-argument acknowledgment form. Other counsel must monitor the court's website for the posting of oral argument calendars.

Make sure you carefully answer the questions at the bottom of the form about any related matters or cases with similar issues pending before the Fifth Circuit, a district court, or agency that are likely to be appealed to the Fifth Circuit:

> Inquiry of Counsel. To your knowledge:
>
> (1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?
> (2) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?
> (3) Is there any case such as (1) or (2) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?
> (4) Does this case qualify for calendaring priority under 5th Cir. R. 47.7? If so, cite the type of case
>
> And if your answer to (1), or (2), or (3), is yes, please give detailed information. Number and Style of Related Case in the space provided below or attached additional sheets if necessary.

Those attorneys who've filed their Notice of Appearance Forms will also start getting the Notice of Docket Activity generated by CM/ECF for that case. If for any reason not all lawyers involved in a case will be filing Notice of Appearance forms, as long as they are admitted to practice before the Fifth Circuit and have e-filing credentials, they can log into CM/ECF's document filing system for the Fifth Circuit, click the "Utilities" tab, choose "Notice for Cases of Interest," and sign up to received Notice of Docket Activity for a particular Fifth Circuit case by its case number, choosing the frequency of the notices (either each transaction or a daily summary).

TIP: After you fill out the Fifth Circuit's Appearance of Counsel form, use the "print" function. But rather than printing a paper copy of it, when choosing a "printer," select "Adobe PDF." That will

capture everything you type in. As with everything else I file, I recommend opening the PDF you attached in the e-filing window before you finish the e-filing. That will allow you to double-check that the version of the form you uploaded for e-filing captured everything you typed in.

B. Get Admitted to the Fifth Circuit and Authorized to E-file

Only attorneys admitted to the Bar of the Fifth Circuit may practice before the Court.

It can take the Fifth Circuit up to three days to process an application for admission or a renewal. So if you're not yet admitted to the Fifth Circuit and an authorized e-filer, get that in the works as soon as possible and in advance. Or ensure that at least one lawyer on your team is admitted, an authorized e-filer, and is fully available to handle filings on short notice.

VI. ADDITIONAL (LIGHT) READING

For information about the standards for seeking stays and other emergency relief in the U.S. Supreme Court, I recommend the following resources:

- *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (discussing U.S. Supreme Court standards for stays)
- Note, *Role of Certiorari in Emergency Relief*, 137 Harv. L. Rev. 1951, 1953-57 (2024) (Explaining the tests for stays and injunction in the Supreme Court and explaining that certworthiness has historically been relevant for one but not the other)
- Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 129 (2019)
- Emergency Docket for the Current U.S. Supreme Court Term ("The Supreme Court's emergency docket, also known as the shadow docket, consists of applications seeking immediate action from the court. Unlike the merits docket, these cases are handled on an expedited basis with limited briefing and no oral argument, and the court often resolves them in unsigned orders with little or no explanation. This page shows significant emergency applications that have been filed during the current term."), *available at* https://www.scotusblog.com/case-files/emergency/emergency-docket-2024-25/
- STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023)

VII. CONCLUSION

In preparing to file a stay motion or some other emergency motion, the best piece of advice is to make sure you are demonstrating to the court that you are acting expeditiously. Don't burn a lot of time off the clock before the date by which you need a ruling, leaving the court to decide the issue on a short fuse. While the Fifth Circuit will sometimes grant an administrative stay while it takes longer to decide whether to grant a stay during the full pendency of your appeal or other appellate proceeding, leave the court as much time as you can to make its decision.

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There's a Judgment, Now What?

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HERE'S A JUDGMENT, NOW WHAT?

INTRODUCTION

The trial judge has signed a judgment. You represent the plaintiff. What can you do to make sure the judgment is ultimately collected? You represent the defendant. What steps can you take to protect your client as you pursue post-judgment relief in the trial court and on appeal? This paper addresses these questions, with an eye towards what can be done immediately upon entry of judgment and what must wait. Timing is important for any number of reasons. Perhaps most important in the post-judgment context, the availability of these remedies plays an important role in assessing when a judgment debtor should post a supersedeas bond. Because a supersedeas bond is such an important tool in the judgment enforcement context, this paper also provides a general overview of the rules governing supersedeas bonds, and issues that frequently arise in posting a bond or other appellate security.

I. IMMEDIATE JUDGMENT ENFORCEMENT STEPS

A. Abstracting the Judgment

The first step for creating a judicial lien on a judgment debtor's non-exempt real property is obtaining an abstract of the judgment. *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied). The reason for this is simple: the mere rendition of a judgment does not create a lien on any of the judgment debtor's real property. *See id.* Instead, the judgment creditor must comply with the requirements of Chapter 52 of the Texas Property Code to create such a lien. *See* Tex. Prop. Code § 52.001 *et seq*. "[T]he purpose of an abstract of judgment is to create a lien against the debtor's property and to provide notice to subsequent purchasers and encumbrancers of the existence of the judgment and the lien." *Wilson v. Dvorak*, 228 S.W.3d 228, 233 (Tex. App.—San Antonio 2007, pet. denied).

This judgment enforcement tool is immediately available upon the signing of a final judgment. Unlike many other tools, the mere filing of a supersedeas bond does not remove the liens created by a judgment abstract. Tex. Prop. Code § 52.0011(a). Instead, the court that rendered the judgment must also determine that the "creation of the lien would not substantially increase the degree to which a judgment creditor's recovery under the judgment would be secured when balanced against the costs to the defendant after the exhaustion of all appellate remedies." *Id.* Thus, judgment abstracting is a quick and powerful tool that can endure through any appeals the debtor may seek regardless of whether bond is posted.

To acquire a judgment lien, a judgment creditor must substantially comply with the statutory requirements. *Murray v. Cadle Co.*, 257 S.W.3d 291, 296 (Tex. App.—Dallas 2008, pet. denied). Thus, Texas courts will allow "for a minor deficiency in a required element of the abstract of judgment" but not for the "complete omission of a required element." *Gordon v. W. Houston Trees, Ltd.*, 352 S.W.3d 32, 39 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While the clerk of the court typically prepares the abstract, creditors should be mindful that it is their responsibility to ensure the clerk abstracts the judgment properly. *Id.* To properly abstract the judgment, the abstract must show the following:

(1) the names of the plaintiff and defendant;
(2) the birthdate of the defendant, if available to the clerk or justice;
(3) the last three numbers of the driver's license of the defendant, if available;
(4) the last three numbers of the social security number of the defendant, if available;
(5) the number of the suit in which the judgment was rendered;
(6) the defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation;
(7) the date on which the judgment was rendered;
(8) the amount for which the judgment was rendered and the balance due;
(9) the amount of the balance due, if any, for child support arrearage; and
(10) the rate of interest specified in the judgment.

Tex. Prop. Code § 52.003. The statute also states that the abstract may show a mailing address for each judgment creditor, but it is important to note that Section 52.0041 requires these mailing addresses and imposes a penalty filing fee if an abstract fails to do so. *Compare id. with id.* § 52.0041. Thus, it is always best to include this information to avoid paying the penalty fee.

Once the abstract of judgment has been prepared, the clerk must immediately record it in the county real property records and at the same time enter on the records' alphabetical index the name of each plaintiff and defendant in the judgment and the volume and page or instrument number in the record in which the abstract is recorded. *Id. §* 52.004. An abstract of judgment that is recorded in accordance with the statutory requirements "constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing." *Id.* § 52.001. "When properly recorded and indexed, an abstract of judgment creates a judgment lien that is superior to the rights of subsequent purchasers and lien holders." *Wilson*, 228 S.W.3d at 233.

Moreover, once a judgment lien is created, it remains in effect for 10 years from the date it was recorded unless the judgment is satisfied or the creditor releases the lien. Tex. Prop. Code Ann. § 52.006(a). But once the 10-year period ends, the lien ends cannot be extended. *Olivares v. Nix Tr.*, 126 S.W.3d 242, 249 (Tex. App.—San Antonio 2003, pet. denied). Should a creditor wish to extend its lien, it must obtain and record a new abstract of judgment before the previous lien expires, which will thereby extend the lien for 10 years from the date the application for renewal is filed. Tex. Civ. Prac. & Rem. Code Ann. § 34.001.

B. Post-Judgment Discovery

Another powerful tool a judgment creditor has at its disposal upon the entry of a judgment is post-judgment discovery. Under Texas Rule of Civil Procedure 621a, a judgment creditor may use the same discovery tools available pre-trial to conduct discovery for two purposes: (1) to obtain information to aid in the enforcement of a judgment or (2) to obtain information relevant to the adequacy of security posted in connection with a supersedeas bond. *Huff Energy Fund, L.P. v. Longview Energy Co.*, 510 S.W.3d 479, 487 (Tex. App.—San Antonio 2014), *aff'd*, 464 S.W.3d 353 (Tex. 2015). Unlike many other judgment enforcement tools, post-judgment discovery is available "[a]t any time after rendition of judgment," so a judgment creditor may seek such discovery immediately. *See id.* These proceedings are governed by the same rules and procedures as pre-trial discovery, and the trial court has continuing jurisdiction over these proceedings even after its plenary jurisdiction expires. Tex. R. Civ. P. 621a; *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982). Further, discovery to aid in the enforcement of a judgment remains available to a creditor so long as the judgment has not been suspended by a supersedeas bond or court order. Tex. R. Civ. P. 621a. But even if debtor posts a supersedeas bond, the creditor is still entitled to discovery on the adequacy of security for the bond. *In re Emeritus Corp.*, 179 S.W.3d 112, 115 (Tex. App.—San Antonio 2005, no pet.).

While the tools permitted under Rule 621a are quite broad, the information that may be obtained through them is quite narrow. Texas courts forbid judgment creditors from using post-judgment discovery to either re-open issues that were litigated in the main case or to independently join additional claims or parties. *Butler v. Stonewall Bank*, 569 S.W.2d 542, 544 (Tex. Civ. App.—Corpus Christi 1978, no writ). Additionally, Rule 621a explicitly limits discovery to information that will aid in the enforcement of the judgment. Tex. R. Civ. P. 621a.

Parties seeking to challenge any discovery request from judgment creditors may do so on the same grounds they would in the pre-trial context. *See Collier Services Corp. v. Salinas*, 812 S.W.2d 372, 376–77 (Tex. App.—Corpus Christi 1991, no writ). Thus, parties may challenge requests on relevancy grounds and may seek protection from "unduly burdensome or expensive discovery, from harassment or annoyance, and from discovery of privileged matters." *Id.* at 376. Because Texas courts consider post-judgment discovery proceedings to be ancillary proceedings, any rulings on discovery requests are not final, appealable orders in themselves. *See Collier Services Corp. v. Salinas*, 812 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1991, no writ); *Arndt*, 633 S.W.2d at 500 n.5. Instead, such rulings may be challenged through mandamus proceedings. *Salinas*, 812 S.W.2d at 375.

C. Texas Turnover Statute

One of the most powerful tools judgment creditors have at their disposal is the Texas turnover statute, which "provides judgment creditors with a procedural device to assist them in satisfying their judgment debts." *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 581 (Tex. 2018). Under the turnover statute, a judgment creditor can ask a court to order a judgment debtor to turn over property to a sheriff or constable that is (1) owned by the debtor, (2) not exempt from attachment, execution, or seizure, and (3) is in the debtor's possession or subject to its control. Tex. Civ. Prac. & Rem. Code § 31.002(a)–(b).

1. Procedures for Obtaining a Turnover Order

Texas law is largely silent on the procedures surrounding turnover proceedings. One procedure that is specifically discussed though is that turnover orders may be sought either "in the same proceeding in which the judgment is rendered or in an independent proceeding." *Id.* § 31.002(d). Further, the judgment creditor may obtain a turnover order *ex parte* without providing notice to the debtor or an opportunity to be heard at a hearing. *Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983). In fact, the turnover statute does not require a hearing at all or for the judgment creditor to present additional evidence at all so long as the record already contains sufficient evidence. *See Tanner v. McCarthy*, 274 S.W.3d 311, 322 n.21 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (stating the turnover statute does not require the trial court to "conduct an evidentiary hearing prior to granting relief").

Unlike many other judgment enforcement tools, a judgment creditor may seek a turnover order as soon as a judgment is signed. *See Scheel v. Alfaro*, 406 S.W.3d 216, 224 (Tex. App.—San Antonio 2013, pet. denied) (acknowledging that "that there is no requirement that a plaintiff wait any period of time before seeking a turnover order"). Further, a creditor need not exhaust other methods of collecting its judgment. *Universe Life Insurance Company v. Giles*, 982 S.W.2d 488 (Tex.App.—Texarkana 1998, pet. denied). While any

turnover order issued before the underlying judgment has become final and all appeals have been exhausted can be nullified if the underlying judgment has been invalidated, *see Alfaro*, 406 S.W.3d at 224, practitioners must be ready to act quickly to avoid the potential of an immediate turnover order, especially when dealing with an aggressive plaintiff. The best way to do this is to have a supersedeas bond ready to file with the court in the event of an adverse judgment. Merely appealing an adverse judgment will not prevent a judgment creditor from seeking a turnover order. *Texas Employers' Ins. Ass'n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1990, no writ).

Much like many of the other procedures associated with turnover proceedings, the statute is largely silent on the evidentiary requirements for obtaining a turnover order. The Texas Supreme Court has acknowledged that a lack of evidence supporting a turnover order is "a relevant consideration in determining if the trial court abused its discretionary authority in issuing the order." *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). But courts have been largely silent on the subject. The only relevant provision in the statute itself is §31.002(h), which states a turnover order need not identify the specific property that is subject to turnover. Tex. Civ. Prac. & Rem. Code § 31.002(h). This offers little guidance on how much evidence a plaintiff must produce other than suggesting the bar is relatively low regarding the required specificity.

Thus, while there obviously must be some evidence that the judgment debtor has non-exempt property, the turnover statute "does not specify, or restrict, the manner in which evidence may be received in order for a trial court to determine whether the conditions of [the turnover statute] exist, nor does it require that such evidence be in any particular form, that it be at any particular level of specificity, or that it reach any particular quantum before the court may grant aid." *Gillet v. ZUPT, LLC*, 523 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Therefore, all that can be said with certainty on the subject of evidence is that the judgment creditor must show the conditions specified in the turnover statute exist. *Tanner*, 274 S.W.3d at 322.

2. Requirements for Obtaining a Turnover Order

Turning now to the conditions required to obtain a turnover order, it is important to first highlight a recent change to the turnover statute. Before the Texas legislature amended the statute in 2017, it required the judgment creditor to show that the property could not "readily be attached or levied on by ordinary legal process." Tex. Civ. Prac. & Rem. Code § 31.002 (Vernon 2008). But the legislature has now taken out this requirement, which means all that is required is that the property be (1) owned by the debtor, (2) non-exempt, and (3) in the debtor's possession or subject to its control. *Id.* § 31.002(a)–(b) (Vernon 2017). Because of this change, all previous cases that based their holdings on the requirement that the property "cannot readily be attached or levied on by ordinary process" are no longer good law.

As a result of this new change, the turnover statute may now be used to reach significantly more nonexempt property so long as it is owned by the judgment debtor and in its possession or subject to its control. *See id.* § 31.002(a)–(b). This includes property located both within and outside of Texas. *See, e.g.*, *Lozano v. Lozano*, 975 S.W.2d 63, 68 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding Texas court could order turnover of real property in Mexico); *Reeves v. Fed. Sav. & Loan Ins. Corp.*, 732 S.W.2d 380, 381 (Tex. App.—Dallas 1987, no writ) (applying the turnover statute to real property held in Portugal). Also, as stated in the statute, both present and future property rights are subject to turnover. Tex. Civ. Prac. & Rem. Code § 31.002(a). Further, the turnover statute can be used to reach property that is held by a third party so long as it is owned by the judgment debtor and subject to its control. *See Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 349 (Tex. App.—San Antonio 1985, no writ).

3. Limitations on Turnover Orders

One notable limitation on the property a turnover statute can reach is that Texas courts generally do not apply the turnover statute against third parties. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991). But as with all general rules, there are exceptions. One such exception is if the third party is actually an alter ego of the judgment debtor. This exception is logical because if a third party is actually an alter ego of the judgment debtor it is not a third party at all but is rather the judgment debtor itself and therefore liable to the same degree as the judgment debtor. However, because the turnover statute is "purely procedural in nature" it cannot be used to determine "the substantive rights of the parties." *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 439 (Tex. App.— San Antonio 1994, no writ). Thus, the creditor must have already attained an alter ego finding in order to use the turnover statute against an alleged alter ego. *See In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) ("[A]n alter ego finding in a post-judgment . . . proceeding may not be used to enforce the judgment against . . . [a] nonjudgment debtor.").

Another possible exception to the general rule forbidding the use of the turnover statute against third parties is if the property possessed by the third party is under the control of the judgment debtor. The Texas Supreme Court has noted that in limited circumstances a court may use the turnover statute to reach assets owned by and subject to the control of a judgment debtor even if those assets are held by a third party. *See*

Schultz v. Fifth Judicial District Court of Appeals, 810 S.W.2d 738, 740 (Tex. 1991). But the Court has given little guidance as to what it meant in *Schultz* beyond a concurrence from two justices in *Ex parte Swate* stating that the turnover statute is not a substitute for other remedies and cannot be used against third parties without other initial proceedings. 922 S.W. 2d 122, 126 (Tex. 1996) (Gonzalez, J. joined by Owen, J., concurring).

One way courts have interpreted this is to conclude that while the court may not directly order third parties to turn over the property, it may issue such an order against the judgment debtor. *See, e.g.*, *Bay City Plastics, Inc. v. McEntire*, 106 S.W. 3d 321, 325–26 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Mitchell v. Turbine Res. Unlimited, Inc.*, 523 S.W. 3d 189, 199 (Tex. App. – Houston [14th Dist.] 2017, pet. denied). But others have concluded that the turnover statute can be used to compel third parties to turn over the debtor's property. *See Norsul*, 703 S.W.2d at 349. Thus, Texas courts are divided on this issue, and creditors seeking to apply the turnover statute would do well to investigate the precedent in their own jurisdiction. *See Maiz v. Virani*, 311 F.3d 334, 343 n.9 (5th Cir. 2002) (listing opinions on both sides of the issue).

4. Turnover Receiverships

Another remedy available under the turnover statute is the creation of a turnover receivership. Under the turnover statute, the court may appoint a receiver to take possession of the debtor's non-exempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). As with general turnover relief, a turnover receivership may be sought immediately upon the signing of a judgment. *Scheel*, 406 S.W.3d at 224. Also, the elements for obtaining a receivership are the same as any other turnover relief. Unlike other receiverships that exist under Texas law, which focus on running a business or preserving property, a turnover receivership seeks to liquidate property. *Compare id.* § 31.002 *with id.* § 64.001. Further, turnover receiverships are distinct from other receiverships in that no bond is usually required to appoint the receiver absent extraordinary circumstances. *Childre v. Great Sw. Life Ins. Co.*, 700 S.W.2d 284, 289 (Tex. App.—Dallas 1985, no writ). Once a receivership is created, all property subject to seizure through the turnover statute comes into the constructive possession of the court through the receivership and may not be transferred without the approval of the court of receiver. *First Southern Properties. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976). While this does not destroy a third party's liens or other rights to a particular piece of property, it does mean third parties must come before the court to exercise their rights or enforce their lien. *Id.* at 343.

Once a receiver has taken possession of the property, it is authorized to sell the property upon providing notice to the affected parties. *Scheel*, 406 S.W.3d at 222. This notice provides the debtor an opportunity to satisfy the judgment and avoid the sale of its property. *See id.* at 223. A failure to provide sufficient notice can result in the sale being set aside. *Gibson v. Smith*, 511 S.W.2d 327, 328 (Tex. Civ. App.—Tyler 1974, no writ). After the sale is made, it is not effective until the receiver confirms the sale with the court, who must decide if the bids on the property were fair and reasonable. *Salaymeh v. Plaza Centro, LLC*, 258 S.W.3d 236, 240 (Tex. App.—Houston [1st Dist.] 2008, no pet.). But the court will not set aside the sale based only on a low price and instead must also find fraud or material irregularities in the sale or that the price was so low as to shock the conscience. *Id.* One notable wrinkle in receiver sales is that the turnover statute authorizes the receiver to sell property worth more than the value of the underlying judgment. *Id.* at 242. In such situation's the debtor's remedy is to file a motion to receive the surplus funds from the sale. *Id.*

5. Possible Remedies for Debtors

Unlike some of the other judgment enforcement tools, there are only a limited number of actions a debtor can take once it becomes aware of the existence of a turnover order against it. First, and perhaps most obvious, the debtor can pay the judgment to avoid the seizure of any property. Also, as discussed above, the debtor may post a supersedeas bond to suspend all enforcement actions for the duration of an appeal. Additionally, a debtor may seek to quash execution of the turnover order if there are defects in the form of the order, or it may seek to modify the turnover order. *See Ex parte Johnson*, 654 S.W.2d at 418 (recognizing a motion to modify as the proper method to challenge a turnover order); Judge David Hittner, Texas Post-Judgment Turnover and Receivership Statutes, 45 Tex. Bar J. 417, 420 (Apr.1982). Grounds for modification can include if the order improperly compels the seizure of exempt property or property not owned by the debtor or subject to its control, orders the direct turnover of property to the creditor, or requires a third party to turn over the debtor's property (at least in some jurisdictions). *See* Tex. Civ. Prac. & Rem. Code § 31.002(a)–(b); *Ex parte Johnson*, 654 S.W.2d at 418–19; *Bay City Plastics*, 106 S.W. 3d at 325–26. The debtor may also seek to enjoin the execution of the turnover order on similar grounds. Hittner, Texas Post–Judgment Turnover and Receivership Statutes, 45 Tex. Bar J. at 420. However, debtors should be mindful that any attempts to enjoin execution of a turnover order are subject to the usual time constraints and requirements for direct and collateral attacks. *See* Tex. R. Civ. P. 680;

Schliemann v. Garcia, 685 S.W.2d 690, 693 (Tex. App.—San Antonio 1984, no writ).

D. Attachment

Another judgment enforcement tool that is available before the entry of a final judgment is attachment. Attachment is a statutory remedy creditors may use to secure a debt by seizing a defendant's property before or after obtaining a judgment. *See In re Argyll Equities, LLC*, 227 S.W.3d 268, 271 (Tex. App.—San Antonio 2007, orig. proceeding); *see also* Tex. Civ. Prac. & Rem. Code § 61.003 (stating a plaintiff may seek an attachment "any time during the progress of a suit"). For this reason, Texas courts consider pre-judgment attachment to be a "particularly harsh, oppressive remedy," and parties seeking attachment must strictly comply with all statutory requirements to assure that the attachment proceedings fulfill constitutional due process requirements. *Id.* at 271, 273. In order to obtain an attachment, the plaintiff must show: (1) the defendant is justly indebted to the plaintiff; (2) the attachment is not sought for the purpose of injuring or harassing the defendant; (3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and (4) specific grounds for the writ exist under Texas law. Tex. Civ. Prac. & Rem. Code § 61.001.

1. Procedures for Obtaining Attachment

The rules and procedures for obtaining attachment are listed in Chapter 61 of the Texas Civil Practice and Remedies Code and in Rules 592 through 609 of the Texas Rules of Civil Procedure. The plaintiff must support its application for an attachment with an affidavit from a person having knowledge of relevant facts. Tex. R. Civ. P. 592. The affidavit must include the following information: (1) the general grounds for issuance under Section 61.001 of the Texas Civil Practice and Remedies Code; (2) the amount of the plaintiff's demand; and (3) the specific grounds for issuance as listed in Section 61.002 of the Remedies Code. "The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence." Tex. R. Civ. P. 592. However, the validity of a writ of attachment does not depend on the truthfulness of the allegations, but on compliance with the statute in making the affidavit. *21 Turtle Creek Square, Ltd. v. New York State Teachers' Ret. Sys.*, 425 F.2d 1366, 1369 (5th Cir. 1970) (citing *Gimbel v. Gomprecht*, 35 S.W. 470 (Tex. 1896)). Thus, it is possible for a writ of attachment to be released upon incorrect information, but as discussed below, defendants have remedies available to defeat a wrongfully-issued writ of attachment.

After the plaintiff has applied for a writ of attachment, the court must hold a hearing to determine if the application should be granted. Tex. R. Civ. P. 592. While this can be done *ex parte*, this is a matter left to the court's discretion. *See id.* At the hearing, the plaintiff is given an opportunity to prove that each of the elements for attachment is satisfied, and the court will then decide the maximum value of property that may be seized along with the amount of bond that must be posted to execute the writ. *Id.* Should the judge agree that attachment is appropriate, the plaintiff must post a bond for the attachment. *Id.*; Tex. Civ. Prac. & Rem. Code § 61.023(a). The purpose of this bond is to compensate the defendant in the event that it can successfully prove its property was wrongly attached. *See Gossett v. Jones*, 123 S.W.2d 724, 725 (Tex. App.—Galveston 1939, no writ) (stating "[i]f a writ of attachment is issued and levied on the property of a defendant when the grounds upon which it is issued do not in fact exist, then the attachment is wrongfully sued out and the defendant is entitled to recover whatever damages he has sustained by the levy"). The bond must have two or more sureties, be payable to the defendant, be equal to the amount of property the court authorizes to be attached, and be conditioned on the plaintiff prosecuting his suit and paying all damages and costs adjudged for any wrongful attachment. Tex. Civ. Prac. & Rem. Code § 61.023(a).

After the bond is posted, the court must issue a writ of attachment directing the sheriff or constable to take into his possession as much of the defendant's property within the county of the issuing court as is necessary to satisfy the amount fixed by the court and to keep it subject to further orders of the court, unless it is replevied. *See* Tex. R. Civ. P. 593. The plaintiff may simultaneously obtain multiple writs of attachment to be executed in different counties if needed to satisfy the amount listed in the writ. Tex. R. Civ. P. 595. Once the sheriff or constable receives the writ, he must immediately execute it and seize the defendant's property. Tex. R. Civ. P. 597. Additionally, once the writ has issued, the defendant must be served with a copy of the writ, the application and accompanying affidavits for the writ, and the court's order authorizing the attachment. Tex. R. Civ. P. 598a. The copy must advise the defendant of its right to regain possession through filing a replevy bond and motion to dissolve the writ. *Id.*

2. Requirements for Obtaining Attachment

Turning back to the requirements for obtaining an attachment, the requirements generally break down into general and specific requirements. The general requirements are that (1) the defendant is justly indebted to the plaintiff; (2) the attachment is not sought for the purpose of injuring or harassing the defendant; and (3) the plaintiff will probably lose his debt unless the writ of attachment is issued. Tex. Civ. Prac. & Rem. Code § 61.001. Regarding the first element, debt in the context of an attachment proceeding is defined as an obligation

to pay a liquidated sum on a contract. *In re Argyll*, 227 S.W.3d at 271. Thus, if a trial is required to determine the final amount of damages, the court is unlikely to find this element satisfied. *See id.; S.R.S. World Wheels, Inc. v. Enlow*, 946 S.W.2d 574, 575 (Tex. App.—Fort Worth 1997, no writ). The second element is a more fact-specific inquiry that will depend upon the conduct of the parties in the proceeding.

As to the third element, courts essentially require the plaintiff to prove the defendant will be unable to pay any judgment entered against it once the judgment becomes final. *See MBank New Braunfels, N.A. v. FDIC*, 721 F. Supp. 120, 127 (N.D. Tex. 1989) (requiring the creditor seeking attachment to prove the judgment debtor will "abscond with any judgment which may ultimately be entered on [the creditor's] behalf, or that . . . [the debtor] will be unable to satisfy any [final] judgment"); *In re Argyll*, 227 S.W.3d at 272 (same). This is usually shown through providing evidence that a debtor is or will become insolvent or that the debtor is currently struggling to pay its other creditors. *See E.E. Maxwell Co., Inc. v. Arti Decor, Ltd.*, 638 F. Supp. 749, 752 (N.D. Tex. 1986) (finding an affidavit was sufficient to support attachment when it expressly stated the defendant was insolvent or imminently insolvent and unable to pay any judgment rendered in favor of the plaintiff). But merely stating concern about a judgment debtor's financial viability without additional facts is insufficient to prove this element. *In re Argyll*, 227 S.W.3d at 272. Thus, the plaintiff must have some sort of factual basis to support its allegations beyond its own beliefs.

Even if a plaintiff can satisfy all of the general requirements, it must also prove that specific grounds for the issuance of the writ of attachment exist. There are nine specific grounds to justify the issuance of a writ of attachment:

(1) the defendant is not a resident of this state or is a foreign corporation or is acting as such;
(2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;
(3) the defendant is in hiding so that ordinary process of law cannot be served on him;
(4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;
(5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;
(6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors;
(7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors;
(8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or
(9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Tex. Civ. Prac. & Rem. Code § 61.002. Failure to prove that one of these grounds apply is fatal to an attachment application.

3. Limitations on Attachment

Assuming the plaintiff is able to satisfy all of these elements, there are some limitations on the property subject to attachment. A writ of attachment may be levied only on property that by law is subject to levy under a writ of execution. Tex. Civ. Prac. & Rem. Code § 61.041. Thus, a writ of attachment likely cannot be used to seize property outside of Texas. While no Texas courts have explicitly held this, a Texas federal court has reached this conclusion. *GM Gold & Diamonds LP v. Fabrege Co., Inc.*, 489 F. Supp. 2d 725, 727–29 (S.D. Tex. 2007). Moreover, there are cases suggesting Texas courts would reach the same conclusion. *See Garland v. Shepherd*, 445 S.W.2d 602, 606 (Tex. App.—Dallas 1969, no writ) (stating the property at issue was subject to attachment because it was located in Texas); *Bruyere v. Liberty Nat'l Bank of Waco*, 262 S.W. 844, 846 (Tex. App.—Waco 1924, no writ) ("The [court's] clerk would have no authority to issue such writ to any officer outside of the state, nor would any officer outside of the state have authority to execute such writ, even if directed to him. Generally speaking, statutes of a state have no extraterritorial force, and a writ, the creature of them, can rise no higher.").

Moreover, the Texas attachment statute likely does not apply to a property interest a party has contracted for but not yet acquired. *Texas Oil & Gas Corp. v. United States*, 466 F.2d 1040, 1048 n.9 (5th Cir. 1972) (stating attachment "cannot be levied upon after-acquired property); *Smith v. Whitfield*, 2 S.W. 822 (Tex. 1886) (holding attachment cannot apply to an interest in property that is contingent but not yet acquired). Thus, should a judgment creditor wish to attachment payments or property is knows a debtor will receive in the future, it must wait until the debtor actually receives that property to seek a writ of attachment.

Texas courts have also stated that property is not subject to attachment unless the debtor has the power to pass the interest in property to another party on its own. *E-Sys., Inc. v. Islamic Republic of Iran*, 491 F. Supp. 1294, 1299 (N.D. Tex. 1980) (stating "'[n]o property or interest in property is subject to sale under execution or like process unless the debtor, if sui juris, has power to

pass title to such property or interest in property by his own act'") (quoting *Moser v. Tucker*, 26 S.W. 1044, 1045 (Tex. 1894)). While Texas courts have not really explored the contours of this seemingly broad rule, it appears to at a minimum apply to any property interests that are remote or contingent. *See In re Howerton*, 21 B.R. 621, 623 (Bankr. N.D. Tex. 1982) (noting the cases addressing this issue dealt with remote and contingent interests). But it is unclear how courts might address other property that potentially falls within this broad rule, so it is possible the rule could be narrowed in the future. *See id.* (holding IRA accounts were subject to attachment even though they were nonassignable).

4. Potential Remedies for Debtors

Debtors have several options when responding to a writ of attachment. One such option is to replevy the attached property. Tex. R. Civ. P. 599. Any time before the entry of judgment, this may be accomplished through posting a bond equal to the value of the property the debtor seeks to replevy, plus one year's interest at the legal rate from the date of the bond. *Id.* A replevy bond is essentially a surety bond that takes the place of the property that would otherwise be seized. *See id.* Such a bond must be conditioned on the debtor satisfying any judgment that might be rendered against it. *Id.* Additionally, after giving reasonable notice to the creditor, a debtor may replevy property through substituting property of equal value to the attached property. *Id.* Once the court has made findings regarding the value of the property to be substituted, it may authorize the substitution and the return of the property originally attached. *Id.*

A debtor may also file a sworn motion seeking to vacate, dissolve, or modify a writ of attachment. Tex. R. Civ. P. 608. The motion must, admit or deny each of the court's finding, and the court must rule on it within ten days of the motion's filing unless the parties agree to an extension. *Id.* Further execution of the writ is stayed until a hearing is held on the motion where the plaintiff must prove the grounds for the writ's issuance were proper. *Id.* At the hearing, the creditor bears the burden of proving the writ was properly issued, but as noted above, the writ's validity does not depend on the truthfulness of the allegations, but on compliance with the statute. *See 21 Turtle Creek Square, Ltd.*, 425 F.2d at 1369. Should the creditor fail to prove strict compliance with the statutory requirements, the writ is dissolved. Tex. R .Civ. P. 608.

Finally, the debtor may file a suit for wrongful attachment if: (1) the creditor's factual allegations to support the writ are false; (2) the debtor's due process rights have been violated; or (3) other defects appear in the attachment pleadings, proceedings, or bond. *See Capitol Barber & Beauty Supply, Inc. v. Realistic, Inc.*, 611 S.W.2d 137, 138 (Tex. Civ. App.—Waco 1980, no writ); *Gossett*, 123 S.W.2d at 725. Notably, the debtor need not show malice or a lack of probable cause to prove its claim. *See Galloway v. Morris & Co.*, 249 S.W. 284, 285 (Tex. Civ. App.—Fort Worth 1923, no writ); *Farrar v. Talley*, 4 S.W. 558, 560 (Tex. 1887). To recover damages, the debtor must prove actual damages, such as evidence that the wrongful attachment disturbed the debtor's use, possession, or enjoyment of real or personal property or that it defeated a pending sale of real property that later depreciated in value. *Farmers & Merchants Nat. Bank of Nocona v. Williams*, 129 S.W.2d 268, 269–70 (Tex. 1939). Additionally, exemplary damages are recoverable when the debtor's harm results from fraud, malice, or gross negligence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003. A victim of wrongful attachment may recover from either the creditor or the surety on the creditor's attachment bond. *Alvarez v. Smith*, 417 S.W.2d 292, 295 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); *see also* Tex. Civ. Prac. & Rem. Code § 61.023.

E. Garnishment

Yet another powerful tool available to a judgment creditor is garnishment of the judgment debtor's property. "Garnishment is a statutory proceeding whereby the property, money, or credits of a debtor in the possession of another are applied to the payment of the debt." *Bank One, Texas, N.A. v. Sunbelt Sav., F.S.B.*, 824 S.W.2d 557, 558 (Tex. 1992). Much like attachment, garnishment is a particularly powerful judgment enforcement tool because it can be obtained either before or after the rendering of a judgment. The relevant rules and procedures governing garnishment can be found in Chapter 63 of the Texas Civil Practice and Remedies Code and in Rules 657 through 679 of the Texas Rules of Civil Procedure. However, unlike other judgment enforcement tools, a garnishment action is docketed as a separate action from the underlying suit usually consisting of three parties: (1) the plaintiff, (2) the debtor, and (3) the garnishee that holds the property or funds for the benefit of the debtor. *See* Tex. R. Civ. P. 659. Because Texas courts consider garnishment to be a "summary and harsh" remedy, they require "strict compliance" with all statutory requirements." *In re Texas American Exp., Inc.*, 190 S.W.3d 720, 725 (Tex.App.—Dallas 2005).

1. Procedures for Obtaining a Writ of Garnishment

Regardless of whether it is sought pre-judgment or post-judgment, the procedure for garnishing a debtor's money or property begins with filing an application for a writ of garnishment. Tex. R. Civ. P. 658. The application must "state the grounds for issuing the writ" along with the specific facts that prove the statutory grounds for the writ. *Id.* Additionally, the application must be supported by affidavits of a person with personal knowledge of the relevant facts stating such facts as would be admissible in evidence, but notably,

Rule 658 allows for the application and affidavit to be based on information and belief if they specifically state the grounds for such beliefs. *Id.*

Texas law provides specific grounds upon which a pre-judgment writ of garnishment may issue. Pre-judgment garnishment is only available if: (1) a writ attachment has been issued; or (2) "the plaintiff sues for a debt and makes an affidavit stating" that (a) "the debt is just, due, and unpaid," (b) "within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt, and (c) the garnishment is not sought to injure the defendant or the garnishee." Tex. Civ. Prac. & Rem. Code § 63.001(1)–(2). Also, the debt must be liquidated, not contingent, which means garnishment may not be used for tort claims or for future property interests. *See Fogel v. White*, 745 S.W.2d 444, 446–47 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding). Moreover, pre-judgment garnishment is a somewhat limited remedy in that the creditor has no right to the property or funds that have been garnished until a final judgment is entered. *Owens v. Neely*, 866 S.W.2d 716, 720 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Thus, while many of the proceedings described herein may occur before a final judgment, the creditor will not receive the funds in question until entry of a final judgment in the underlying action.

When seeking a pre-judgment writ of garnishment, a creditor must obtain a written court order after a hearing. Tex. R. Civ. P. 658. Much like attachment, such a hearing may be *ex parte*. The order granting the writ must include (1) "specific findings of facts to support the statutory grounds found to exist"; (2) "the maximum value of property or indebtedness that may be garnished"; (3) the amount of bond required of the creditor; and (4) the amount of bond required of the debtor to replevy. *Id.* The creditor's bond must be sufficient to compensate the debtor should the creditor fail to prosecute its case or a court later hold the writ was wrongfully issued, and the debtor's bond must equal the value sought by the creditor plus one year's interest and an estimate on court costs. Tex. R. Civ. P. 658–658a; *see also* Tex. R. Civ. P. 14c (stating cash may be deposited with the court in lieu of a bond).

To receive a writ of garnishment in the post-judgment context, all a creditor must show is that it "has a valid, subsisting judgment and "that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment." Tex. Civ. Prac. & Rem. Code § 63.001(3). Courts consider a judgment to be valid under Section 63.001(3) so long as it has been signed and no supersedeas bond has been filed. Tex. R. Civ. P. 657. Thus, a judgment is final for the purposes of garnishment before the waiting period required for other judgment enforcement tools.

2. The Garnishee's Role in Garnishment Proceedings

After the writ has issued, it is executed by delivering the writ to a sheriff or constable, who in turn must then deliver the writ to the garnishee. Tex. R. Civ. P. 662–63; *see Moody Nat. Bank v. Riebschlager*, 946 S.W.2d 521, 523 n.1 (Tex. App.—Houston [14th Dist.] 1997, no writ) (stating a private process server may not be used for a garnishee). Please note that a writ of garnishment naming a financial institution as the garnishee must be served on the institution's registered agent. Tex. Civ. Prac. & Rem. Code § 63.008; Tex. Fin. Code § 59.008. Execution of a writ of garnishment on the garnishee impounds the funds held by the garnishee and any additional ones deposited through the date the garnishee is required to answer. *See Rome Indus. v. Intsel Sw.*, 683 S.W.2d 777, 779 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

When a garnishee receives the writ, it is required to answer three questions in a signed response: (1) what, if anything, does the garnishee owe to the debtor; (2) which of the debtor's effects, if anything, does the garnishee possess; and (3) whether the garnishee knows of any other persons who are indebted to the debtor or possess the debtor's effects. Tex. R. Civ. P. 659, 665. The garnishee's answer may also seek reimbursement for any costs incurred in responding to the writ. Tex. R. Civ. P. 677. The issuing court may enter a default judgment if the garnishee does not respond within the time stated in the writ. Tex. R. Civ. P. 667. Further, if the creditor is unsatisfied with the garnishee's answer, it may challenge it by filing an affidavit stating the particular grounds that give it a good reason to believe the garnishee's answer is incorrect. Tex. R. Civ. P. 673. The practical effect of such a challenge is to turn the garnishment proceedings from a process to aid in collection of debt into a justiciable suit by the creditor against the garnishee where the creditor must prove the grounds of its challenge. *See* Tex. R. Civ. P. 674; *Subscribers to Fid. Lloyds of Am. v. Lyday*, 5 S.W.2d 553, 556 (Tex. Civ. App.—Texarkana 1928, writ dism'd).

If no such challenge is made, the court must enter a judgment discharging the garnishee if its response includes: "(1) a denial that the garnishee is indebted to the defendant; (2) a denial that the garnishee has effects of the defendant; and (3) a denial of knowledge of third persons who may be indebted to the defendant or have effects of the defendant, or the names of such persons." *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Tex. R. Civ. P. 666. A garnishee can recover its costs and attorneys' fees from the creditor if the action is dismissed solely on the garnishee's answer. *Rowley*, 976 S.W.2d at 721.

Conversely, if the answer or evidence presented by the creditor shows the garnishee is or was indebted to the debtor, the court must enter a judgment for the

creditor equal to the amount of the underlying judgment plus interest and costs from the main suit and garnishment proceedings so long as that amount does not exceed the extent of the garnishee's indebtedness. Tex. R. Civ. P. 668; *Healy v. Wick Bldg. Sys., Inc.*, 560 S.W.2d 713, 717 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). It is important to note that such a judgment is not self-executing though and that the creditor must seek to enforce the judgment using through normal judgment enforcement processes. Tex. R. Civ. P. 668; *Baytown State Bank v. Nimmons*, 904 S.W.2d 902, 906 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

No such action from the creditor is required when the garnishee's answer or creditor's evidence show that it possesses some of the debtor's property. Instead, the court may enter a judgment ordering the delivery and sale such effects as is necessary to satisfy creditor's judgment. Tex. R. Civ. P. 669. Sales under a garnishment judgment are subject to the same procedures as all other sales of personal property pursuant to a writ of execution, and the officer making the sale must transfer the property with a brief recital of the judgment of the court under which the sale was made. Tex. R. Civ. P. 672. Any refusal by the garnishee to deliver the debtor's property can result in the garnishee being fined or imprisoned for contempt absent a "good and sufficient excuse" for the refusal. Tex. R. Civ. P. 670. Moreover, the creditor may respond to such a refusal by suing for conversion of the garnished property in either an ancillary action or a separate suit. *Willis v. Yates*, 12 S.W. 482 (Tex. 1889).

Any funds or property collected from a garnishee may be used to satisfy the creditor's judgment against the principal debtor. Similarly, because garnishment allows the creditor to step into the shoes of the debtor, the garnishee has the right to offset any debt it owes to the debtor in an amount equal to what is taken by the creditor. *Rowley*, 976 S.W.2d at 719. Thus, once the property or funds originally owed to or belonging to a judgment debtor have been used to satisfy a writ of garnishment, the garnishee is protected against the debtor up to the amount collected pursuant to the writ of garnishment. *First Nat. Bank v. Little*, 6 S.W.2d 819, 823 (Tex. Civ. App.—Dallas 1928, no writ).

3. Judgment Debtor's Role in Garnishment Proceedings

Turning now to the judgment debtors role in garnishment proceedings, it is important to note that while a judgment debtor is not a necessary party to a garnishment action, Texas law still requires the debtor to be served with a copy of the writ of garnishment, the application, accompanying affidavits, and court's orders. *See* Tex. R. Civ. P. 663a. This service may be accomplished using any manner of service permitted by Texas law. *Id.*; Tex. R. Civ. P. 21a. The copy served on the debtor must also prominently advise the debtor of its right to regain possession of its garnished property by filing a replevy bond and motion to dissolve the writ in ten-point font. *Id.* Texas courts strictly construe the debtor notice requirements, and any failure to properly serve the debtor will prevent the creditor from gaining control or custody of the debtor's property. *Walnut Equip. Leasing Co. v. J-V Dirt & Loam, a Div. of J-V Marble Mfg., Inc.*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied).

A judgment debtor may respond to notice of a writ of garnishment in several ways. First, as mentioned above, a defendant may seek to replevy the property (or the proceeds from any subsequent sale of the property) by filing a surety bond. Tex. R. Civ. P. 664. The surety bond must be equal to either an amount fixed by the court or an estimated value of the property the debtor seeks to replevy, and it must include a year's interest from the date of the bond. *Id.* A debtor may also challenge the garnishee's answer to a writ of garnishment using the same procedures available to the creditor. *See* Tex. R. Civ. P. 673.

Additionally, the debtor may file a sworn motion seeking to vacate, dissolve, or modify the writ and order directing its issuance, for any grounds or cause. See Tex. R. Civ. P. 664a. The procedures governing such a motion are similar to those governing similar motions in the attachment context. The motion must, admit or deny each of the court's finding, and the court must rule on it within ten days of the motion's filing. *Id.* Further, the execution of the writ is stayed until a hearing is held on the motion where the plaintiff must prove the grounds for the writ's issuance were proper. *Id.* Notably, the creditor is not required to prove the garnishee is indebted to the debtor or that the debtor's Texas assets are insufficient to satisfy the debt. *Thompson v. Harco Nat. Ins. Co.*, 997 S.W.2d 607, 613 (Tex. App.—Dallas 1998, pet. denied); *Black Coral Investments v. Bank of the Sw.*, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). Instead, the inquiry is more focused on the existence of a debt or judgment and the creditor's *knowledge* of the debtor's Texas assets. *See Black Coral*, 650 S.W.2d at 136. A failure to prove these elements will result in the court dissolving the writ. *Id.*

Another option for the debtor is to move for substitution of the property equal in value to what has been garnished. Tex. R. Civ. P. 664. To prove a substitution is proper, the debtor must prove the existence of sufficient property to satisfy the writ and that the property being offered does not have any liens attached to it. *Id.* The court must also find the value of the substituted property equals the value of the garnished property. *Id.* Once the court allows the substitution to move forward, the garnished property must be released to the debtor free of any liens created by the garnishment and the garnishment lien on the substituted property will relate back to the original garnishment action. *Id.*

Finally, a debtor may bring a wrongful garnishment suit against the creditor. A garnishment is wrongful if the factual allegations in creditor's initial affidavit are false. *Jamison v. Nat'l Loan Inv'rs, L.P.*, 4 S.W.3d 465, 468 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). In such situations, a judgment creditor is liable for wrongful garnishment even if it has probable cause for its beliefs and is not acting out of malice. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942). But a garnishment that was initially proper cannot later become wrongful merely because the underlying judgment is reversed or set aside. *Westerman v. Comerica Bank-Texas*, 928 S.W.2d 679, 682 (Tex. App.—San Antonio 1996, writ denied). Damages for a wrongful garnishment claims include all actual damages proximately caused by the wrongful garnishment, or in the absence of such damages, the "legal rate of interest on money for period of its wrongful detention." *Beutel v. Paul*, 741 S.W.2d 510, 513 (Tex. App.—Houston [14th Dist.] 1987, no writ). Exemplary damages are also available if the garnishment lacked probable cause and was brought with malice, but attorney's fees are unavailable. *Id.* at 514.

II. REMEDIES THAT MUST WAIT

A. Execution

The purpose of a writ of execution is to enforce a court's judgment. Once a writ of execution has been properly obtained and delivered to a sheriff or constable, he is authorized to seize the debtor's nonexempt real and personal property within the official's county, up to the amount of the judgment plus costs of execution, sell it, and deliver the proceeds to the creditor to be applied toward satisfaction of the judgment. *See* Tex. R. Civ. P. 621, 622, 629, 637. The procedures for obtaining and executing a writ of execution are governed by Texas Rules of Civil Procedure 621 through 656.

1. Requirements for Obtaining a Writ of Execution

If a judgment debtor has not filed a supersedeas bond, a judgment creditor may apply for a writ of execution, and such a writ will normally issue either 30 days from the time a final judgment is signed, or after the order overruling a motion for new trial is signed. Tex. R. Civ. P. 627. However, a creditor may obtain a writ of execution before the 30 days required by Rule 627 upon the filing of an affidavit stating that (1) the defendant is about to remove his nonexempt personal property from the county or, (2) the defendant is about to transfer or hide such personal property in order to defraud his creditors. Tex. R. Civ. P. 628. Thus, while a creditor is normally required to wait until a judgment becomes final before executing its judgment, it may do so early if it can show a good cause exists.

It has long been the rule in Texas that the judgment creditor bears the burden of proving that a writ of execution has been issued on its judgment within the statutory period. *Boyd v. Ghent*, 95 Tex. 46, 64 S.W. 929, 930 (1901). This means that the creditor must prove "not only that the execution was clerically prepared by the clerk but also that delivery was made to the proper officer." *Ross v. Am. Radiator & Standard Sanitary Corp.*, 507 S.W.2d 806, 809 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Thus, courts expect creditors to work diligently to ensure that writs of execution are properly prepared and issued by the clerk in a timely manner. As discussed in more detail below, the failure to do so could lead to the judgment becoming dormant and unable to be executed without being revived.

Texas Rule of Civil Procedure 629 states the requirements for a writ of execution. The Rule states that every writ must:

1. be styled "The State of Texas";
2. be directed to "any sheriff or any constable within the State of Texas;
3. be signed officially by the clerk or justice of the peace;
4. bear the seal of the court if issued out of a district or county court;
5. require the officer "to execute it according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ";
6. describe the judgment by stating (a) the court in which it was rendered, (b) the time when it was rendered, and (c) the names of the parties in whose favor and against whom it was rendered;
7. contain a correct copy of the bill of costs taxed against the defendant in execution;
8. require the officer to return it within 30, 60, or 90 days as directed by the plaintiff or his attorney.

Tex. R. Civ. P. 629. The Rules list additional requirements for executions on a money judgment, for the sale of particular property, for delivery of personal property, and for possession or value of personal property. *See* Tex. R. Civ. P. 630 (money judgments); 631 (sale of particular property); 632 (delivery of personal property); 633 (possession or value of personal property). Also, any writs issued after a judgment creditor is successful on appeal must include the costs of appeal. *Walston v. Walston*, 971 S.W.2d 687, 697 (Tex. App.—Waco 1998, pet. denied).

Please note that while it is advisable for creditors to obtain an abstraction of judgment in addition to a writ of execution, such action is not a prerequisite for a valid

execution sale. *Won v. Fernandez*, 324 S.W.3d 833, 834–35 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Instead, these judgment enforcement tools work together so that the date of the execution lien relates back to the date upon which the creditor obtained the judgment lien. *Id.* 835 n.3. Thus, by obtaining an abstraction of judgment, a judgment creditor can assure that its claim has priority over all other creditors whose claims arise after the judgment lien. *Id.*

2. Selection of Property to be Levied

Once the judgment creditor delivers a properly-issued writ of execution to the sheriff or constable, the levying official must proceed without delay—unless the judgment creditor directs otherwise—to seize the defendant's property within the official's county. Tex. R. Civ. P. 637. But before levying upon any property, the officer must first ask the judgment debtor to designate which of his property will be subject to levy. *Id.* Thus, judgment debtors at least have control over which of their property is seized. But in pointing out items to be seized, the debtor may not select items that do not belong to the defendant or that have otherwise been sold, mortgaged, or conveyed to another party or property that is otherwise exempt from execution. Tex. R. Civ. P. 638. If a defendant cannot be found, the officer may ask a known agent to make the designations on behalf of the defendant. Tex. R. Civ. P. 637. But should the officer conclude the items specified by the defendant will not satisfy the judgment, the debtor must designate additional property. *Id.* If the debtor does not do so, the officer may levy on any property subject to execution. *Id.* Notably, Texas courts consider an officer's failure to ask the debtor or its agent to designate property to be levied upon to be an irregularity in the sale of the property that can help support an action by the debtor to set aside the sale. *Collum v. DeLoughter*, 535 S.W.2d 390, 393 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

3. Procedures for Levying and Selling Real Property

Texas law provides specific instructions for how to levy and sell real property. To make a levy on a piece of real estate, the officer need not go upon the grounds or take possession of the property; rather, all the officer must do is indorse the levy on the writ. Tex. R. Civ. P. 639. After the property has been levied upon, it must be sold at a public auction located at the door or the county courthouse—absent a court order indicating otherwise—on the first Tuesday of the month between 10:00 am and 4:00 pm. Tex. R. Civ. P. 646a. *But see* Tex. Civ. Prac. & Rem. Code § 34.041 (stating the sale will be on the first Wednesday of the month if the first Tuesday falls on January 1st or July 4th). Before the auction takes place, the officer is required to publish an ad in a local newspaper describing the auction and property to be sold at least once a week for three consecutive weeks before the auction, with the first ad appearing at least 20 days before the auction. Tex. R. Civ. P. 647.

The ad must be in English and must contain: (1) a statement of the authority by which the sale will be made; (2) the time of levy; (3) the time and place of sale; (4) a brief description of the property to be sold, including the number of acres, original survey, location in the county, and (5) the name by which the land is most generally known. *Id.* Additionally, the officer must give written notice of the sale to the defendant or its attorney—either in person or by mail—that substantially conforms to the requirements listed above. *Id.* Any creditors seeking to sell city lots or rural property should note the differing requirements listed in Sections 34.042 and 34.043 of the Remedies Code. Tex. Civ. Prac. & Rem. Code §§ 34.042–34.043.

4. Procedures for Levying and Selling Personal Property

Turning next to personal property, the general requirements differ based upon whether the judgment creditor has a right to possess the property. If the creditor is entitled to possession, the officer levies on the personal property by taking possession of it. Tex. R. Civ. P. 639. Otherwise, a levy is made by giving notice to the party entitled to possession. *Id.* Additionally, there are separate rules in place if the property to be seized is livestock or stock. *See* Tex. R. Civ. P. 640 (listing procedures for levying on livestock); Tex. R. Civ. P. 641 (stating stock is levied on by taking possession of the stock certificates). Should the personal property be too large for the officer to move, the officer may levy on it simply by entering the debtor's premises, assuming dominion over the property, and forbidding its removal by the debtor. *See Beaurline v. Sinclair Refining Co.*, 191 S.W.2d 774, 777 (Tex. Civ. App.—San Antonio 1945, writ ref'd n.r.e.). Also, an officer may levy on personal property being used as security for another debt or contract. Tex. R. Civ. P. 643. In such instances, the property is sold subject to the previously-existing lien. *Beil v. Lebo*, 74 S.W.2d 187, 187 (Tex. Civ. App.—San Antonio 1934, no writ).

Unlike real estate, personal property may be auctioned off in numerous places, including the premises where it was taken in execution, the county courthouse door of the county, or at some other place where it would be more convenient to exhibit the property to purchasers based on its nature. Tex. R. Civ. P. 649. Notice of the impending sale must be given for ten consecutive days before the sale either "at the courthouse door of any county and at the place where the sale is to be made." Tex. R. Civ. P. 650. After the notice provisions have been properly satisfied, the officer may proceed with the sale of the levied items.

5. Auction and Post-Auction Procedures

At the auction, it is important to note that any party that successfully bids on an item must pay the amount bid. Should the bidder be unable to comply with the terms of its bid, the officer must try to resell the property either on the same day or after re-advertising the property. Tex. R. Civ. P. 653. But even the resale of an item does not let the initial bidder off the hook, and a failure to pay the amount bid will result in the bidder being liable for 20 percent of the value of its bid, costs, and any losses sustained as a result of the subsequent sale of the property. Tex. R. Civ. P. 652. Conversely, once the bidder has complied with the terms of the sale, the officer must execute and deliver all the right, title, and interest previously held by the judgment debtor. Tex. Civ. Prac. & Rem. Code § 34.045. If the auction fails to provide enough money to satisfy the judgment, the officer must continue seizing and selling property until the judgment is satisfied. Tex. R. Civ. P. 651.

Once a writ of execution has been issued, it must be returned within 30, 60, or 90 days as requested by the judgment creditor. Tex. R. Civ. P. 621. At such time, the levying officer must return a signed writ to the clerk (or justice of the peace) that includes a concise statement detailing what the officer has done pursuant to the writ. Tex. R. Civ. P. 654. When execution of the writ satisfies the judgment, it must be returned immediately. *Id.* Should the writ be delivered to an officer in a country other than where the judgment is rendered, it may be returned by mail, but money collected through the writ may not be sent through the mail absent direction by the judgment creditor. Tex. R. Civ. P. 655. Also, the Rules place duties on the clerk to maintain an execution docket containing important information on all writs of execution issued by the clerk. Tex. R. Civ. P. 656.

6. Possible Remedies for Debtors

Judgment debtors wishing to prevent the seizure of their property have a couple of options. The first, and likely best, action a debtor can take is to immediately file a supersedeas bond. This prevents not only the issuance of future writs of execution, but also causes the clerk to issue a writ of supersedeas to suspend all further proceedings under a previously-issued writ of execution. Tex. R. Civ. P. 627, 634. However, a supersedeas bond will not prevent a creditor from obtaining funds from property levied upon before the filing of a supersedeas bond, so debtors are advised to move quickly in filing a bond to prevent any risk that their property will be seized before a supersedeas bond is in place. *See Texas Employers' Ins. Ass'n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1990, no writ) (holding that a judgment creditor had a right to receive funds from a judgment debtor's bank account where the supersedeas bond was filed after a sheriff levied on the bank account but before the funds were disbursed).

Another option for judgment debtors is to obtain a stay on the execution of judgments. Rule 635 allows a justice court to stay the execution of its judgment for three months from the date of the judgment if the judgment debtor appears before the justice, acknowledges itself bound to pay the judgment creditor the full amount of the judgment with interest and costs, and files sufficient sureties with the court.. Tex. R. Civ. P. 635. Before applying for such relief, the judgment debtor must also file an affidavit stating it does not have the money to pay the judgment and that enforcing it now would cause hardship and sacrifice that would not occur if the judgment were stayed. *Id.* The debtor's acknowledgment constitutes a judgment against the debtor that authorizes execution on its sureties if the judgment is not paid off during the three-month stay. *Id.* This type of relief is not only available in justice courts though, as Texas law also empowers trial courts to use its equitable powers stay the execution of a judgment up to a year. Tex. Civ. Prac. & Rem. Code § 65.013–65.014. But such relief is only available in the court where the judgment was rendered. *Id.* § 65.023(b). *But see Shor v. Pelican Oil & Gas Mgmt., LLC*, 405 S.W.3d 737, 747 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that Section 65.023 does not apply to non-parties seeking an injunction to protect their assets from execution).

A judgment debtor also has the right to replevy any property that has been seized. Under Rule 644, an executing officer may return previously-seized property to the judgment debtor in exchange for a bond that is: (1) payable to the plaintiff; (2) secured by two or more sureties; and (3) conditioned that the property must be delivered to the officer at the time and place named in the bond and sold according to law or for the payment to the officer of a fair value thereof, which must be stated in the bond. Tex. R. Civ. P. 644. Once the debtor has replevied the property, it may sell it and pay the officer the amount of the bond. Tex. R. Civ. P. 645. Should the debtor fail to comply with the terms of the bond, the bond is forfeited, and the clerk will then issue execution against the bond's sureties. Tex. R. Civ. P. 646.

Finally, a debtor is entitled to take back any property that has been seized through a writ of execution on a judgment that is later reversed or set aside so long as the property has not already been sold. Tex. Civ. Prac. & Rem. Code § 34.021. In the event that the property has already been sold, the debtor may seek restitution to recover the fair market value of the property at the time it was sold. *Id.* § 34.022. Likewise, the debtor may recover any money collected from a vacated judgment as restitution. *J & J Container Mfg., Inc. v. Cintas-R U.S., L.P.*, 516 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Moreover, while it is normally the policy of Texas to sustain execution sales, the debtor may also seek to set aside an

execution sale based on an irregularity "calculated to affect the sale" if it resulted in "a grossly inadequate price." *See generally Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 828 (Tex. App.—Texarkana 1999, no pet.).

B. Post Judgment Injunction

When a judgment debtor posts capped or otherwise reduced appellate security, judgment creditors typically seek injunctive relief to prevent the transfer of assets pending appeal. *See* TEX. R. APP. P. 24.2(d); Tex. Civ. Prac. & Rem. Code § 52.006(e). Texas law permit a court to "enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment" so long as it does not interfere with "the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business." TEX. R. APP. P. 24.2(d); *see also* Tex. Civ. Prac. & Rem. Code § 52.006(e). Much like a normal injunction, the purpose of a post-judgment injunction is to preserve the status quo for the duration of the appeal. *Emeritus Corp. v. Ofczarzak*, 198 S.W.3d 222, 226–27 (Tex. App.—San Antonio 2006, no pet.). Normally, to obtain a temporary injunction, the applicant must prove "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim," but the inquiry is somewhat different in the post-judgment context. *Nelson v. Vernco Const., Inc.*, 367 S.W.3d 516, 521 (Tex. App.—El Paso 2012, no pet.).

Because the judgment creditor has already succeeded in proving its claim, the first two elements are necessarily met. *Id.* As to the third element, Rule 24.2(d) and Section 52.006(e) provide the relevant standard by requiring the trial court to determine "whether the judgment debtor is likely to dissipate or transfer its assets to avoid satisfaction of the judgment. *Emeritus Corp.*, 198 S.W.3d at 227. To prove this third element, the applicant should provide evidence of the judgment debtor's assets along with any previous efforts made by the debtor to transfer or dissipate those assets to avoid paying a judgment. *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 314 (Tex. App.—El Paso 2009, no pet.). Previous efforts to avoid paying a judgment are particularly important to this inquiry, and a failure to provide evidence showing such efforts likely precludes the judgment creditor from obtaining injunctive relief in the absence of other evidence showing a lack of candor with the court. *See Nelson*, 367 S.W.3d at 523; *Clayton*, 293 S.W.3d at 314; *see also Emeritus Corp.*, 198 S.W.3d at 227–28 (holding a debtor's pre-trial efforts to avoid full disclosure of information provided sufficient evidence to justify a post-judgment injunction).

III. REVIVING A DORMANT JUDGMENT

If a court does not issue a writ of execution within 10 years of the date a judgment is rendered, the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code § 34.001(a). A dormant judgment may not be executed unless it is revived. *Id.* Texas courts define the term issue to mean "more than the mere clerical preparation and attestation of the writ" and instead require the writ to "be delivered to an officer for enforcement." *Hawthorne v. Guenther*, 461 S.W.3d 218, 221 (Tex. App.—San Antonio 2015, pet. denied). Thus, even if a creditor obtains a writ of execution, it can still become dormant if the creditor fails to deliver the writ to a law enforcement officer. *Id.* Notably, the dormancy statute does not limit the number of times a creditor may renew its judgment by obtaining a new writ of execution. *See* Tex. Civ. Prac. & Rem. Code § 34.001(b). Thus, because each renewal provides for the same 10-year span for executing on a judgment, it appears judgments may be renewed indefinitely. *Cadle Co. v. Jenkins*, 266 S.W.3d 4, 6 (Tex. App.—Dallas 2008, no pet.).

As to what type of action qualifies as a writ of execution that are capable of extending the life of a judgment, there is a split among Texas courts. Some courts apply a more generous standard, and will consider the use of judgment enforcement tools other than an official writ of execution to be sufficient to prolong a judgment. *See, e.g.*, *Harper v. Spencer & Associates, P.C.*, 446 S.W.3d 53, 55 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (holding that a "writ of execution" can be read to "encompass multiple forms of judicial enforcement of a judgment," including a writ of garnishment). Others, however, read the statute much narrower by holding that only the issuance of a writ of execution, as opposed to a turnover order, may prevent a judgment from becoming dormant. *See, e.g.*, *Keith M. Jensen, P.C. v. Briggs*, 02-14-00096-CV, 2015 WL 1407357, at *6 (Tex. App.—Fort Worth Mar. 26, 2015, no pet.); *Raymond K. Oukrop, DDS, P.C. v. Tatsch*, 03-12-00721-CV, 2014 WL 3734192, at *4 (Tex. App.—Austin July 23, 2014, no pet.). Accordingly, practitioners must be mindful of which rule applies based on the jurisdiction in where the judgment was rendered. The author advises all practitioners to maintain a reliable calendar system to assure that official writs of execution have been issued before the 10th anniversary of the judgment to avoid any issue with dormancy.

But if a judgment does becomes dormant, it may be revived by a writ of scire facias, which asks the court that originally rendered the judgment to revive the judgment, or by an action of debt as long as the action is brought within two years of the date that the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code § 31.006. Thus, combining Sections 31.004 and 31.006, there is essentially a 12-year residual limitations period

for final judgments. *Harper v. Spencer & Associates, P.C.*, 446 S.W.3d 53, 55 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). A scire facias proceeding is not a new suit but rather a continuation of the original suit in which the judgment was rendered with the purpose of obtaining execution on the judgment as rendered. *Hawthorne*, 461 S.W.3d at 222 n.2. Conversely, an "action of debt" is a "new and independent suit" that "seeks recovery of the full amount of the debt owed under the former judgment." *Id.* at 222. An action of debt can take various forms, including intervening in a personal injury suit and applying for turnover relief, *id.* at 222–23, or filing a petition to foreclose on the judgment lien, *Churchill v. Russey*, 692 S.W.2d 596, 597 (Tex. App.—Fort Worth 1985, no writ). Thus, in the event that a judgment does go dormant, there are multiple ways to revive it so long as appropriate action is taken within two years of the judgment going dormant.

IV. SUPERSEDEAS BOND AND OTHER APPELLATE SECURITY

A supersedeas bond operates to suspend judgment enforcement pending appellate review. A question that often arises is when should the judgment debtor post the bond? As discussed earlier, some post-judgment remedies are immediately available: discovery; garnishment; and turnover. Because garnishment or turnover relief may be pursued immediately, it is advisable to supersede the judgment as soon as possible following its entry. The supersedeas bond may be filed at any time the appellant desires to suspend enforcement of the judgment. *Jones v. Banks*, 331 S.W.2d 370, 371 (Tex. Civ. App.—Dallas 1960, no writ).

If these immediately available post-judgment remedies are not in play, a writ of execution may not be issued until thirty days after the date the judgment is signed or, if a timely motion for new trial is filed, thirty days after the date the motion is overruled by written order or by operation of law. Rule 628, however, provides that a writ of execution may be issued at any time prior to the thirtieth day if the judgment creditor or his attorney submits an affidavit stating that the judgment debtor is about to hide its personal assets. If the bond or deposit is filed before the writ of execution is issued, it is timely to prevent execution on the judgment by the issuance of a writ of execution.

If a writ of execution has already been issued before the supersedeas bond is filed, the clerk will issue a writ of supersedeas ordering suspension of further execution efforts. TEX. R. CIV. P. 634; TEX. R. APP. P. 24.1(f).

A. General Framework and Timing

The procedures for superseding enforcement of a judgment in Texas are set forth in Rule 24 of the Texas Rules of Appellate Procedure and in Chapter 52 of the Texas Civil Practice and Remedies Code. A judgment debtor may supersede a judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;
(2) filing with the trial court clerk a good and sufficient bond;
(3) making a deposit with the trial court clerk in lieu of a bond; or
(4) providing alternate security ordered by the court.

TEX. R. APP. P. 24.1(a). Timely filing of one of the above alternatives (within 30 days after a timely filed motion for new trial is overruled) prevents the issuance of execution writs and orders. *See*, *e.g.*, TEX. R. CIV. P. 627 (execution).

B. Amount of the Bond, Deposit or Security

1. Judgment for money

A supersedeas bond, deposit or security to suspend enforcement of a money judgment must equal "the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." TEX. R. APP. P. 24.2(a)(1). However, the amount must not exceed the lesser of (i) 50 percent of the judgment debtor's current net worth, or (ii) 25 million dollars. TEX. R. APP. P. 24.2(a)(1)(A), (B). The appellant may obtain an order pursuant to Rule 24.2(b) for a lesser amount of security to "an amount that will not cause the judgment debtor substantial economic harm" if the court finds after notice and a hearing that "posting a bond, deposit, or security in the amount required by [Rule 24.2(a)] is likely to cause the judgment debtor substantial economic harm." TEX. R. APP. P. 24.2(b).

2. Judgment for recovery of an interest in real or personal property

The trial court must determine the type of security when the judgment is "for the recovery of an interest in real or personal property." TEX. R. APP. P. 24.2(a)(2). If the property interest is real, the amount of security must be at least "the value of the property interest's rent or revenue." TEX. R. APP. P. 24.2(a)(2)(A). If the property interest is personal, the amount of the security must be at least "the value of the property interest on the date when the court rendered judgment." TEX. R. APP. P. 24.2(a)(2)(B).

3. Judgment for something other than money or an interest in property

The scope of the trial court's authority to permit or deny supersedeas of a judgment that does not award money damages or an interest in real or personal

property is set out in Texas Rule of Appellate Procedure 24.2(a)(3), which states:

> (3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

TEX. R. APP. P. 24.2(a)(3).

4. Judgment for a governmental entity

Different rules apply to a judgment in favor of a governmental entity. If the judgment in favor of the governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine "whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended." TEX. R. APP. P. 24.2(a)(5). If security is required, the governmental entity's recovery is limited to "actual damages resulting from suspension of the judgment." *Id*.

5. Judgment against a governmental entity or officer

Chapter 6 of the Civil Practice and Remedies Code exempts a broad range of federal, state and local governmental entities and officers from the supersedeas requirement. Section 6.001 provides that governmental entities or officers listed in that section "may not be required to file a bond . . . for an appeal or writ of error taken out by the entity or officer and is not required to give a surety for the issuance of a bond to take out a writ of attachment, writ of sequestration, distress warrant, or writ of garnishment in a civil suit." TEX. CIV. PRAC. & REM. CODE § 6.001(a). Section 6.001(b) identifies the following entities and officers as exempt:

(1) this state;
(2) a department of this state;
(3) the head of a department of this state;
(4) a county of this state;
(5) the Federal Housing Administration;
(6) the Federal National Mortgage Association;
(7) the Government National Mortgage Association;
(8) the Veterans' Administration;
(9) the administrator of veterans affairs;
(10) any national mortgage savings and loan insurance corporation created by an act of congress as a national relief organization that operates on a statewide basis; and
(11) the Federal Deposit Insurance Corporation in its capacity as receiver or in its corporate capacity.

TEX. CIV. PRAC. & REM. CODE § 6.001(b). *See also In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (as a county official sued in his official capacity, a district clerk's notice of appeal in an appeal from an injunction operates as a supersedeas bond).

Section 6.002 provides that municipalities "may appeal from judgment without giving supersedeas or cost bond." TEX. CIV. PRAC. & REM. CODE § 6.002. Section 6.003 extends the exemption to water improvement districts; water control and improvement districts; irrigation districts; conservation and reclamation districts; water control and preservation districts organized under state law; levee improvement districts organized under state law; drainage districts organized under state law; and entities "created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution." TEX. CIV. PRAC. & REM. CODE § 6.003. Section 6.004 provides a supersedeas exemption for school districts. TEX. CIV. PRAC. & REM. CODE § 6.004.

C. Other Requirements

In addition to the proper amount, a "good and sufficient" bond must meet several other requirements. *See* TEX. R. APP. P. 24.1(b).

(A) The bond must be in the amount required by Rule 24.2;
(B) The bond must be payable to the judgment creditor;
(C) The bond must be signed by the judgment debtor or the debtor's agent;
(D) The bond must be signed by a sufficient surety or sureties as obligors; and
(E) The bond must be conditioned as required by Rule 24.2(d).

TEX. R. APP. P. 24.1(b)(1). To be effective, a bond must be approved by the trial court clerk, who will review the bond on motion of any party. TEX. R. APP. P. 24.1(b)(2).

The conditions of liability are set out in Rule 24.2(d), which provides that the surety or sureties on a bond, deposit in lieu of bond, or alternate security are subject to liability up to the amount of the bond, deposit or other security if:

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment;
(2) the debtor does not perform an adverse judgment final on appeal; or
(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.

TEX. R. APP. P. 24.2(d).

D. Alternative Appellate Security

Rather than filing a supersedeas bond, an appellant may make a deposit in the amount required for a surety bond. TEX. R. APP. P. 24.1(c). The appellant must, however, actually transfer the deposit to the clerk. The deposit may be (i) cash, (ii) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings and loan association, or, with leave of court, (iii) a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings and loan association. TEX. R. APP. P. 24.1(c).

CONCLUSION

This paper has provided an overview of the available post-judgment remedies and important tools to suspend judgment enforcement pending appealing. Focusing on when the remedies can be invoked—either immediately after judgment or within a specified number of days—can inform strategic decisions about seeking enforcement and when to post a supersedeas bond.

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Appealing Trial Court Sanctions Orders and Avoiding Appellate Court Sanctions Orders

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BACKGROUND, EDUCATION AND PRACTICE

Scott Rothenberg is a sole practitioner trial and appellate attorney from Houston, Texas. Scott is a member of the Law Practice Management Committee of the State Bar of Texas. Scott has twice served as Director of the State Bar of Texas, as chair of the State Bar of Texas Appellate Section, as chair of the Houston Bar Association Appellate Section, as chair of the State Bar of Texas Continuing Legal Education Committee, as a two-time appointee to the State Bar of Texas Board of Directors Executive Committee, as Small Section Representative to the State Bar Board of Directors, as a multi-term appointee to the State Bar of Texas Continuing Legal Education Committee, as a multi-term chair of the State Bar of Texas Continuing Legal Education Committee, as a multi-year member of the State Bar of Texas Appellate Section Council, as a multi-year member of the Houston Bar Association Appellate Section Council, as a multi-year member of the Texas Bar College, and is a Sustaining Life Fellow of the Texas Bar Foundation. In recent years, Scott served as multi-term panel chair of the District 4-6 grievance committee in Harris County, Texas and as committee chair over all six grievance panels in District 4 (Harris County).

Scott earned his B.A. in Political Science from the State University of New York at Albany in 1982 and his J.D. from the University of Houston College of Law in 1986. To pay for law school, Scott drove a taxicab during the day and parked cars at Astroworld (now a really big patch of grass south of IH-610 and Kirby Drive) at night. He also served as a certified tester of new Nintendo games prior to their release to the public.

Scott has been board certified in civil appellate law by the Texas Board of Legal Specialization since December of 1992. Scott has been designated a Texas Appellate Super Lawyer (© 2024 Super Lawyers®, part of Thomson Reuters) many times, most recently from 2009 through the present.

In September of 2021, Scott was awarded the Gene Cavin Award for Excellence in CLE by the State Bar of Texas. In June of 2020, Scott was awarded a Presidential Certificate of Merit by the State Bar of Texas for his many contributions in the areas of continuing legal education and social media communication. In May of 2019, Scott received the 2019 Pat Nester Innovation in Professional Development Award from the State Bar of Texas Continuing Legal Education Committee. In 2012, Scott received the State Bar of Texas Continuing Legal Education Department's Standing Ovation Award for his lifetime contributions to continuing legal education in the State of Texas. In 1999, Scott received the State Bar of Texas President's Award in Appreciation for Outstanding Contributions through Distinguished Service to the Lawyers of Texas. In 1994, Scott was honored by the College of the State Bar of Texas for writing the Outstanding Continuing Legal Education Article of the Year, "Advanced Legal Research - 15 Tips and 20 TRAPs."

Despite authoring and/or presenting all or part of over 160 continuing legal education articles, Scott's proudest accomplishment is the loving relationship that he has with Lisa, his wife and life partner of 37 years, and their four sons– Daniel, Associate Director of Proteomics at BioNTech SE in Cambridge, Mass., and a PhD graduate from the David H. Koch Institute for Integrative Cancer Research at the Massachusetts Institute of Technology; Jared, a mathematics teacher and assistant varsity baseball coach at Spring Branch Memorial High School; Benjamin, Manager of Marketing Communications at OppFi; and Jacob, a graduate of the University of Houston, employed in the hospitality industry at the River Oaks Country Club in Houston, Texas.

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APPEALING TRIAL COURT SANCTIONS ORDERS AND AVOIDING APPELLATE COURT SANCTIONS ORDERS

I. WHY THIS TOPIC IS SO TIMELY FOR TRIAL & APPELLATE ATTORNEYS?

During the first half of my 38 year career as a trial and appellate attorney, it was rare to see substantial sanctions orders against attorneys or their clients. Awards of $250, or $500, or even $1,000 would occasionally be issued, but usually nothing exceptionally large. The second half of my career has been very different. Since the turn of the century, the undersigned has been counsel either post-judgment in the trial court, or on appeal, or both, in litigation involving sanctions orders that awarded $150,000, $1.35 million, and $1.37 million. Clearly, the importance of properly avoiding, obtaining, appealing, and keeping on appeal, sanctions orders, has never been more important.

The trend of Texas trial courts to issue six figure (or more) sanctions orders appears to be accelerating in recent months.

On September 13, 2023, a Harris County District Court signed an order requiring a litigant and two lawyers to pay $250,000, $250,000, and $25,000 as sanctions pursuant to Chapter 10 of the Texas Civil Practice & Remedies Code. Additionally, the court ordered the two attorneys to complete **TEN EXTRA** hours of ethics continuing legal education **EACH YEAR** for the next **FIVE YEARS** (a total of 50 extra hours of ethics CLE).

On October 17, 2023, a Harris County Civil Court at Law signed a final judgment ordering the client, the lawyer, and the lawyer's firm, jointly and severally, to pay sanctions of $137,000, plus as much as $48,500 in conditional appellate attorney's fees.

On January 23, 2024, a Galveston County District Court signed a final judgment ordering the client, the lawyer, and the lawyer's firm, jointly and severally, to pay sanctions of over $114,000 in trial court fees and costs, plus as much as $95,000 in conditional post-judgment and appellate attorney's fees.

Each of these sanctions orders was appealed. Nevertheless, the mere signing of these orders, even if ultimately reversed, can have devastating consequences for attorneys, law firms, and clients, alike. Damage to professional reputation, loss of clients, the time, effort, and financial resources necessary for mounting an effective appeal, the potential for attorney disciplinary action, damage to ability to obtain professional liability insurance, may all follow from the mere signing of a substantial sanctions order. And that is to say nothing of the financial devastation that can follow in the event the sanctions orders are ultimately upheld.

II. AVOIDING SANCTIONS ORDERS - KNOW WHAT IS EXPECTED

The first step in avoiding sanctions orders is knowing what is expected of us and our clients. Simply put, it is hard to avoid committing (or representing a client who is committing) sanctionable conduct if we do not periodically refresh our recollection about what is expected of us in the conduct of trial and appellate litigation. You would not run your vehicle without performing periodic maintenance. Similarly, we should not run our law licenses without doing the same thing.

Quick. Tell me the legal bases for the imposition of sanctions. Of course, Texas Rule of Civil Procedure 215 pertaining to discovery sanctions will likely come to mind. By and far, it is the most used sanctions rule based upon number of sanctions appeals over the past quarter century. However, Rule 215 is not the only basis for sanctions. Far from it. In fact, in the past decade, it has become possible for attorneys or their clients (or both) to commit sanctionable conduct without violating any rule or statute at all. More on that in a moment.

If you ask attorneys about sanctions, typically Texas Rule of Civil Procedure 215 (pertaining to discovery sanctions), and the Texas Citizens Participation Act (chapter 27 of the Texas Civil Practice & Remedies Code) will come to mind. But those are only a few of the sanctions available under Texas and federal practice.

What follows is a listing of the most frequently used sanctions rules and statutes in the state and federal trial and appellate courts of Texas. It is not meant to be an exhaustive list. It is meant as a starting point for lawyers to refresh their recollection regarding the professional standards that must be met in order to avoid the imposition of sanctions – some of which can be financially and professionally ruinous.

- Texas Rule of Civil Procedure 215.
- Texas Rule of Civil Procedure 13.
- Texas Rule of Civil Procedure 18a(h).
- Texas Rule of Civil Procedure 21b.
- Texas Rule of Civil Procedure 166a(h).
- Texas Civil Practice & Remedies Code Chapter 9.
- Texas Civil Practice & Remedies Code Chapter 10.
- Texas Civil Practice & Remedies Code section 27.009.
- Texas Civil Practice & Remedies Code Chapter 105.
- Texas Rule of Appellate Procedure 45.
- Federal Rule of Civil Procedure 11.
- Federal Rule of Civil Procedure 37.

– 28 U.S.C. section 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

One might think that with this multiplicity of rules-based, and statute-based sanctions, it would be unnecessary for courts to be able to impose sanctions based upon conduct that is not found to have violated any rule, statute, regulation or other written guideline. But you would be wrong.

"Various rules and statutes imbue courts with authority to sanction attorneys for professional lapses of one kind or another with or without bad faith. Courts also possess inherent powers that aid the exercise of their jurisdiction, facilitate the administration of justice, and preserve the independence and integrity of the judicial system. A court's inherent authority includes the "power to discipline an attorney's behavior."" *Brewer v. Lennox Hearth Prod., LLC*, 601 S.W.3d 704, 717–18 (Tex. 2020).

"With the understanding that inherent powers must be used sparingly, our appellate courts have consistently held that a court's inherent power to sanction "exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process ...." Bad faith is not just intentional conduct but intent to engage in conduct for an impermissible reason, willful noncompliance, or willful ignorance of the facts. "Bad faith" includes "conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose." Errors in judgment, lack of diligence, unreasonableness, negligence, or even gross negligence—without more—do not equate to bad faith. Improper motive, not perfection, is the touchstone. Bad faith can be established with direct or circumstantial evidence, but absent direct evidence, the record must reasonably give rise to an inference of intent or willfulness." *Brewer v. Lennox Hearth Prod., LLC*, 601 S.W.3d 704, 718–19 (Tex. 2020).

A new fertile ground for sanctions rules or orders may be found in courts' internal operating procedures and local rules. By way of example, only, Judge Brantley Starr issued the following mandatory certification regarding the use of generative artificial intelligence in matters before his Court in the United States District Courts for the Northern District of Texas:

> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT or Harvey.AI) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

Judge Starr provides attorneys and pro se litigants with a template certificate regarding this new requirement. It needs to bear the case number and style of the case, be signed by the attorney in charge, must be filed upon the first appearance of all counsel and pro se litigants, and contain the following language:

> I, the undersigned attorney, hereby certify that I have read and will comply with all judge-specific requirements for Judge Brantley Starr, United States District Judge for the Northern District of Texas.

> I further certify that no portion of any filing in this case will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence – including quotations, citations, paraphrased assertions, and legal analysis– will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court. I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.

This requirement – or one like it – has been or is in the process of being adopted by other judges and courts in other jurisdictions, and may well end up as part of an amendment to the Texas procedural rules or the Federal Rules of Civil Procedure. The cautious and careful attorney will check with each court practiced in to ascertain whether this requirement exists in other jurisdictions.

The standard for imposition of Rule 11 sanctions in federal court was recently summarized by the Fifth Circuit Court of Appeals as follows:

> Rule 11 requires attorneys certify that their papers are not filed "for any improper purpose" and any "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b). In doing so, attorneys certify that they "have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not interposed for any improper purpose." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (quotation marks and citation omitted). An attorney's conduct is judged under an objective standard of reasonableness governed by the "snapshot" rule, which focuses on the "the instant the attorney affixes his signature to the document." *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 528 (5th Cir. 2016) (*quoting Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 444 (5th Cir. 1992)). "[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus ... streamline the administration and procedure of the federal courts." *Cooter & Gell*, 496 U.S. at 393, 110 S.Ct. 2447.

Cordova v. Univ. Hosp. & Clinics, Inc., 92 F.4th 266, 273 (5th Cir. 2024), *cert. denied*, — S.Ct. —, 2024 WL 2805773 (Mem) (June 3, 2024).

In *Cordova*, a panel of the Fifth Circuit Court of Appeals not only affirmed the trial court's imposition of almost $30,000 in sanctions, it remanded the case to the district court to determine the appropriate sanctions, attorney fees, and costs for the lawyer's sanctions appeal. *Cordova v. Univ. Hosp. & Clinics, Inc.*, 92 F.4th 266, 277 (5th Cir. 2024), *cert. denied*, — S.Ct. —, 2024 WL 2805773 (Mem) (June 3, 2024).

III. AVOIDING SANCTIONS - DOES THE TCPA APPLY TO SANCTIONS MOTIONS?

Let's say you form a good faith belief that opposing counsel or its client has committed clearly sanctionable conduct. You have tried to resolve the problem informally through telephone calls and e-mails all to no avail. You decide that the only realistic option left is to file a motion for sanctions. So you do. Fifty-nine days later, a motion to dismiss the sanctions motion based upon the Texas Citizens Participation Act, section 27.003 of the Texas Civil Practice & Remedies Code, comes screaming through your e-file portal. Is your opposing counsel correct? May a trial court motion for sanctions form the basis of a motion for dismissal under the TCPA? As of now, there is a conflict in recent authorities on this issue.

On one end of the spectrum is the Beaumont Court of Appeals' opinion in *Thuesen v. Scott*, 667 S.W.3d 467 (Tex. App.– Beaumont 2023, no pet.). The Beaumont Court of Appeals held that a motion for sanctions is not a "legal action" for purposes of the TCPA, and therefore may not form the basis of a motion to dismiss under the TCPA. In doing so, the Court provided an excellent summary of the conflict in Texas intermediate appellate court jurisprudence on this issue through early 2023, as follows:

> Some sister courts have likewise concluded that a motion for sanctions does not constitute a "legal action" for purposes of the TCPA, while others have reached the opposite conclusion. *Compare Patel v. Patel*, No. 14-18-00771-CV, 2020 WL 2120313, at *4–8 (Tex. App.—Houston [14th Dist.] May 5, 2020, no pet.) (mem. op.) (concluding the "TCPA does not apply to appellee's claim that appellants filed frivolous pleadings"), and *Barnes v. Kinser*, 600 S.W.3d 506, 511 (Tex. App.—Dallas 2020, pet. denied), and *Misko v. Johns*, 575 S.W.3d 872, 877 (Tex. App.—Dallas 2019, pet. denied), with *KB Home Lone*

> *Star, Inc. v. Gordon*, 629 S.W.3d 649, 656–57 (Tex. App.—San Antonio 2021, no pet.) (holding that motion for sanctions seeking $5,000 constituted a "legal action" under the TCPA and distinguishing cases that held otherwise), and *Whataburger Restaurants LLC v. Ferchichi*, No. 04-22-00020-CV, 2022 WL 17971316, at *3 (Tex. App.—San Antonio Dec. 28, 2022, no pet.) (mem. op.) (concluding motion for sanctions constituted "legal action" under the TCPA), and *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 228–29 (Tex. App.—Austin 2018, no pet.) (concluding that "counterclaim" or "motion for sanctions" was a "legal action"). The Patel court relied on the doctrine of ejusdem generis and applied it to the definition's list of "lawsuit, cause of action, petition, complaint, cross-claim, and counterclaim" to determine that when more specific things are listed, the catchall provision must be limited to things like the former. *See Patel*, 2020 WL 2120313, at *4; *see also Ross v. St. Luke's Episcopal Hosp*., 462 S.W.3d 496, 504 n.1 (Tex. 2015) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.")). The Dallas Court of Appeals reasoned in *Barnes v. Kinser* that a sanctions request did "not seek vindication of a substantive legal right arising outside the litigation context[ ]" and thus, seeking sanctions for filing a frivolous or groundless lawsuit was not a "legal action" under the TCPA. 600 S.W.3d at 511. We believe the courts in *Barnes* and *Patel* reached the right result, albeit for different reasons than we set forth here, as they analyzed the definition of "legal action" before the exclusions were added to that definition. . . . We hold that Scott's Motion for Sanctions pursuant to Texas Rule of Civil Procedure 13 and Civil Practice and Remedies Code chapter 10 is not a "legal action" pursuant to the TCPA. Having overruled issue three, we affirm the trial court's order denying Thuesen's Motion to Dismiss."

Thuesen v. Scott, 667 S.W.3d 467, 476-77 (Tex. App.– Beaumont 2023, no pet.).

On the other end of the spectrum is the San Antonio Court of Appeals' opinion in *Whataburger Restaurants LLC v. Ferchichi*, No. 04-22-00020-CV, 2022 WL 17971316, at *2–3 (Tex. App.– San Antonio Dec. 28, 2022, pet. filed) (mem. op.). The San Antonio Court of Appeals reached a diametrically opposite conclusion than did the Beaumont Court of Appeals in *Thuesen*:

> Under the TCPA three-part analysis, we must first consider whether Whataburger and Krueger demonstrated that Ferchichi and Coronado's motion for sanctions was based on or was in response to Whataburger and Krueger's exercise of one of the rights set forth in section 27.005(b), including as relevant here, the right to petition. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b); *KB Home Lone Star Inc. v. Gordon*, 629 S.W.3d 649, 654 (Tex. App.—San Antonio 2021, no pet.).
>
> The TCPA defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). "The term does not include: (A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief; (B) alternative dispute resolution proceedings; or (C) post-judgment enforcement actions." *Id.* Last year, this court explained that "a judicial filing that requests monetary relief, other than a filing in an alternative dispute resolution proceeding or a post-judgment enforcement action, is a 'legal action' within the meaning of section 27.001(6)." *KB Home*, 629 S.W.3d at 656. Here, Ferchichi and Coronado's motion for sanctions sought monetary relief (and was not filed in an alternative dispute resolution proceeding or a post-judgment enforcement action). Accordingly, we conclude the motion for sanctions is a "legal action" within the meaning of section 27.001(6).

The Supreme Court of Texas requested and has received full briefing on the merits in *Ferchichi*. Thus, it is possible (but by no means certain) that this conflict amongst intermediate appellate courts may be resolved by early-to-mid 2025.

The Supreme Court of Texas requested and has received full briefing on the merits in a different matter on the same day as it did in *Ferchichi*. *See Pate and Burke v. Haven at Thorpe Lane, LLC*, 681 S.W.3d 476 (Tex. App.– Austin 2023, pet. filed). The Austin Court of Appeals reached a slightly different conclusion about sanctions motions under the TCPA than did the Beaumont and San Antonio Courts of Appeals:

> There are relatively few post-amendment appellate opinions addressing the 2019 definition of "legal action." One recent case that deserves mention, however, is *Thuesen v. Scott*, 667 S.W.3d 467 (Tex. App.—Beaumont 2023, no pet.). There, the defendant responded to the plaintiff's original petition by filing a motion for sanctions pursuant to Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code Chapter 10, arguing that the plaintiff's allegations were groundless and frivolous. *Id.* at 470. The plaintiff then filed a TCPA motion to dismiss the defendant's motion for sanctions, which the trial court denied. On appeal, the Beaumont Court of Appeals affirmed, concluding that the defendant's motion for sanctions did not constitute a "legal action." *Id.* at 476. We believe the Thuesen court may have reached the correct result, because a Rule 13 or Chapter 10 challenge to an existing pleading as being frivolous adds neither new parties nor new essential factual allegations. Thus, the idea that such a challenge, by itself, adds a new "claim" may be illusory, even if it includes a request for sanctions. But the Thuesen court put all motions for sanctions in the same bucket, holding without limitation that "a motion for sanctions does not constitute a 'legal action' for purposes of the TCPA." *Id.* at 477. In so doing, we feel the court painted with too broad a brush. A motion for sanctions that adds new parties and new essential factual allegations, as Haven's motion did here, does not fall within the 2019 statutory exclusion to "legal action."

Pate and Burke v. Haven at Thorpe Lane, LLC, 681 S.W.3d 476, 486 (Tex. App.– Austin 2023, pet. filed).

IV. OBTAINING SANCTIONS - THE CONTENT OF YOUR MOTION MATTERS

Let's say that opposing counsel or its client has committed clearly sanctionable conduct. You have tried to resolve the problem informally through telephone calls and e-mails all to no avail. You have decided that the only realistic option left is to file a motion for sanctions. You have the option of drafting your sanctions motion in the nature of a highly specific rifle-shot (mentioning only one subsection of one sanctions rule or statute and complaining about only one aspect of opposing counsel's acts or omissions), or as a shotgun-blast (listing multiple clearly applicable sanctions rules or statutes attacking multiple acts or omissions by opposing counsel and/or its client). Is there a tactical advantage to either of these approaches?

The first step is to outline the specific acts or omissions you are complaining about. By way of example, only, the standard of review applied to sanctions motions under Rule 13 of the Texas Rules of Civil Procedure has been stated as follows:

> To impose sanctions under Rule 13 of the Texas Rules of Civil Procedure, the movant must establish that the suit was (1) groundless and brought in bad faith or (2) groundless and brought for purposes of harassment. TEX. R. CIV. P. 13. "Groundlessness turns on the legal merits of a claim." *River Oaks Place Council of Co–Owners v. Daly*, 172 S.W.3d 314, 322 (Tex. App.—Corpus Christi 2005, no pet.); *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725 (Tex. 1993) (orig. proceeding). "A party seeking sanctions has the burden of establishing his right to relief." *Tanner*, 856 S.W.2d at 729. Even assuming that non-movant's claim against movant was groundless, in order to recover attorney fees as sanctions, movant must also show that non-movant brought her claim in bad faith or for the purpose of harassment. Bad faith does not exist when a party exercises bad judgment or negligence. Rather, bad faith means "the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 71 (Tex. App.—El Paso 1994, writ denied); *see Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
>
> "In deciding whether a pleading was filed in bad faith or for the purpose of harassment, the trial court must measure a litigant's conduct at the time the relevant pleading was signed." *Texas–Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 139 (Tex. App.—Texarkana 2000, no pet.). Rule 13 generally requires that the trial court hold an evidentiary hearing to make a determination about the motives and credibility of the person signing the petition. *R.M. Dudley Const. Co. v. Dawson*, 258 S.W.3d 694 (Tex. App.—Waco 2008, pet. denied); *Low*, 221 S.W.3d at 613, 617 (referring to trial court's evidentiary hearing on motion for Chapter 10 sanctions); *Alejandro v. Robstown Indep. Sch. Dist.*, 131 S.W.3d 663, 669–70 (Tex. App.—Corpus Christi 2004, no pet.) ("Rule 13 requires that the trial court provide notice and hold an evidentiary hearing to make the necessary factual determinations about the motives and

> credibility of the person filing the groundless pleading. Without such a hearing, the trial court has no evidence before it to determine that a pleading was filed in bad faith or to harass."

It is only when you have outlined the standard of review applicable to the opposing party's conduct and satisfied yourself that the record establishes one or more violation of one or more applicable standards that you should proceed with drafting a motion for sanctions.

The next step in the process is to review the list of various sanctions rules and statutes (see section II, above), that potentially apply to the allegedly sanctionable acts or omissions in question. If you choose the rifle-shot motion and win, the appeal of a sanctions order will rise or fall on that one act or omission that is alleged to have violated one specific sanctions rule or statute. But if you choose the shotgun-blast approach to briefing your sanctions motion, two potential strategic advantages may appear.

First, while one alleged act or omission constituting sanctionable conduct may or may not move a trial court to grant sanctions, a pattern of sanctionable conduct might be more likely to persuade a trial court to grant sanctions, and potentially in a larger amount.

Second, many sanctions appeals have been lost due to the granting of sanctions based on multiple acts or omissions allegedly violating more than one sanctions rule or statute, where one or more of those bases was not challenged on appeal. Typical language one might see in such an appellate opinion affirming on the basis of briefing waiver includes the following:

> An appellant must challenge every ground on which the trial court's judgment may be upheld. *See Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977) (observing that a judgment must be affirmed if appellant does not challenge each separate and independent ground); *see also Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 653 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

There is even case authority on this issue specifically in the context of sanctions orders:

> In this case, even if we agreed with appellant that there was insufficient evidence to support the grounds it challenges on appeal, there are other grounds that could support the trial court's decision to impose sanctions that appellant has not attacked on appeal. In particular, appellant has not challenged the trial court's findings or conclusions that it served inconsistent and false discovery responses that conflicted with each other and the pleadings, made serially untimely and incomplete discovery responses, and violated the Texas Rules of Civil Procedure and the Local Rules of the Collin County District Courts. Having failed to challenge these grounds, appellant cannot show reversible error. *See Lugo v. St. Julian*, No. 05–10–01062–CV, 2012 WL 2160244, at *2 (Tex.App.–Dallas June 14, 2012, no pet.) (mem. op.) (concluding appellants could not show reversible error when they failed to challenge all bases for sanctions); *In re H.R.H.*, No. 05–07–01148–CV, 2008 WL 3984055, at *5 (Tex.App.–Dallas Aug. 29, 2008, no pet.) (mem. op.) (affirming sanctions when appellant failed to attack all grounds in order); *Miaoulis v. AmegyBank*, No. 01–11–00959–CV, 2012 WL 2159375, at *5 (Tex.App.–Houston [1st Dist.] June 14, 2012, no pet.) (mem. op.) (same).

The Shops at Legacy (Inland) Ltd. P'ship v. Fine Autographs & Memorabilia Retail Stores, Inc., No. 05-14-00889-CV, 2015 WL 2201567, at *2 (Tex. App.–Dallas May 8, 2015, pet. den.) (mem. op.). *See also Rice v. Lewis Energy Group, L.P.*, No. 04-19-00234-CV, 2020 WL 6293454 at *5 (Tex. App.– San Antonio 2020, no pet.) (mem. op.) (same).

The take-away here is that by including multiple appropriate grounds for the imposition of sanctions that are each supported by the trial court record, you may end up helping your client avoid appellate review of the sanctions order on the merits if the non-moving party fails or neglects to brief each of the grounds for sanctions asserted in the trial court.

V. OBTAINING SANCTIONS - AVOID THE TIMING TRAPS

There exist both non-jurisdictional and jurisdictional timing traps that have the potential to interfere with your ability to obtain (and keep on appeal) an order granting sanctions.

A. Non-Jurisdictional Sanctions Timing Traps

Case authority exists holding that the failure to raise certain sanctions issues prior to trial waives those sanctions issues, even if the trial court still has plenary power over the lawsuit. The following excerpt from *Phillips v. Rob Roy Homeowners Association, Inc.*, No. 03-21-00543-CV, 2023 WL 2817342 (Tex. App.–Austin April 7, 2023, pet. den.) (mem. op.), is representative of this line of authority:

> Phillips moved to sanction the HOA and its former counsel pursuant to Rule 215.2(b) for failing to serve a copy of the HOA's then-current motion for summary judgment. *See* Tex. R. Civ. P. 21 ("Every pleading, plea, motion, or application to the court for an order ... must be served on all other parties[.]"), 21b (providing that if any party fails to comply with Rule 21, "the court may in its discretion, after notice and hearing, impose an appropriate sanction" under Rule 215.2(b)). Generally, a failure to obtain a pretrial ruling on a request for sanctions under Rule 215.2(b) waives any claim for sanctions based on that conduct.

Phillips v. Rob Roy Homeowners Ass'n, Inc., No. 03-21-00543-CV, 2023 WL 2817342, at *8 (Tex. App.– Austin Apr. 7, 2023, pet. den.) (mem. op.) (*citing Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993); *In re Smith*, No. 01-19-00014-CV, 2020 WL 5269417, at *6 (Tex. App.—Houston [1st Dist.] Sept. 3, 2020, no pet.) (mem. op.)).

> Phillips filed a motion for sanctions seeking to, among other things, strike the motion for summary judgment but did not set it for a hearing or obtain a ruling before the district court granted summary judgment. We conclude that Phillips waived his request for sanctions by failing to obtain a pretrial ruling.

Phillips v. Rob Roy Homeowners Ass'n, Inc., No. 03-21-00543-CV, 2023 WL 2817342, at *8 (Tex. App. Apr. 7, 2023, pet. den.) (mem. op.) (*citing Trussell Ins. Services, Inc. v. Image Sols., Inc.*, No. 12-09-00390-CV, 2010 WL 5031100, at *4 (Tex. App.—Tyler Dec. 8, 2010, no pet.) (mem. op.) ("Sanctions for alleged violations of chapter 10 known to the movants before trial are waived if a hearing and ruling are not secured pretrial."); and *Howell v. Texas Workers' Comp. Comm'n*, 143 S.W.3d 416, 446 (Tex. App.—Austin 2004, pet. denied) (holding Texas Mutual waived motion to compel by failing to obtain pretrial ruling)).

The takeaway here is that just because a trial court retains plenary power over a lawsuit, including sanctions issues involved therein, does not mean that a litigant can unnecessarily delay in raising pretrial sanctions issues until time of trial or thereafter.

B. Jurisdictional Sanctions Timing Traps

If delaying until time of trial can waive certain sanctions issues, then quite obviously, waiting until after the trial court loses plenary power over the lawsuit is also a way to waive sanctions issues. The following scenario has its basis in the proceedings that formed the basis of *Sheller v. Goldstein Faucett and Prebeg, LLP*, 653 S.W.3d 301 (Tex. App.– Houston [14th Dist.] 2022, no pet.). In *Sheller*, a $1.37 million sanctions order was declared void by the appellate court because the trial court inadvertently failed to sign the sanctions order during the trial court's plenary power.

Trial court signed a final judgment on X-date in favor of Defendants. The judgment states that it "is a final and appealable order which disposes of all issues between the parties" and that all "other pending motions or requests for relief against any party is denied." The trial court taxed all costs of Court against Plaintiff, and ordered that Defendants shall have "all writs of execution and other processes as may be necessary to the enforcement and collection of this FINAL JUDGMENT."

Thereafter, on X-date plus 25 days (25 days after the final judgment was signed), Defendants filed their "Motion for Sanctions Against Plaintiff's Attorney" along with voluminous attachments. This motion moved the trial court "for an order imposing sanctions against Plaintiff's attorney in an amount the Court deems appropriate under the circumstances" which, according to the attorneys, should "equal or approximate the attorneys' fees and expenses incurred by Defendants in defending" against the allegations in the lawsuit.

The attorneys requested "that after notice and a hearing, the Court enter an order assessing sanctions against Plaintiff's attorney for his abuse of the judicial process and flagrant bad faith throughout the course of the proceedings before this Court, and by repeatedly ignoring this Court's many orders, holding him liable for the attorneys' fees and costs awarded Defendants against Plaintiff in the amount of $2,057,169.41, which were a direct result of Plaintiff's attorney's filing of this lawsuit in this Court. Note: the motion does not request that the trial court modify, correct, reform, or vacate, the Court's X-date Final Judgment in any manner whatsoever. The form of proposed order filed with the motion for sanctions: (1) did not request that the Final Judgment be vacated, modified, corrected, or changed in any manner; (2) was not titled as an amended judgment, supplemental judgment, additional judgment, or judgment of any kind; (3) did not change the relief awarded in the X-date Final Judgment in any respect; and (4) affirmatively constituted a stand-alone order of sanctions irrespective of, and in addition to, the Final Judgment that the trial court signed on X-date.

On or around Day 70 after the final judgment was signed on X-date, the trial court signed the lawyers' "Order on Defendants' Motion for Sanctions Against Plaintiff's Attorney and *Modified* Final Judgment."

The X-day plus 70 Order and *Modified* Final Judgment states: "The Final Judgment Against Plaintiff entered on or about X-day, in favor of Defendants (the "Final Judgment") is hereby MODIFIED as stated

herein. The Order and Modified Judgment then proceeds to assess a total of $1.37 million in sanctions against Plaintiff's Attorney."

Question: Did the trial court have plenary power sufficient to sign the Order and Modified Final Judgment on X-day plus 70 from date that the final judgment was signed? The answer is "no." Here is why.

The trial court signed the original final judgment on X-date. If no party filed a timely and appropriate post-judgment motion, the trial court's plenary power would have expired thirty days later, on X-date plus 30. Tex. R. Civ. P. 329b(d).

The Defendants argued that their "Motion for Sanctions Against Plaintiff's Attorney" that they filed on X-date plus 25 days (within the trial court's plenary power) constituted a motion to modify, correct or reform the X-date final judgment even though it did not specifically ask the trial court to modify, correct or reform the judgment.

Effectively, then, that motion was a standalone motion for sanctions that did not ask for the X-date Final Judgment to be modified in any manner. It simply asked for an order imposing sanctions to be issued against Plaintiff's lawyer. The lawyers requested:

> "that after notice and a hearing, the Court enter an order assessing sanctions against Plaintiff's lawyer for his abuse of the judicial process and flagrant bad faith throughout the course of the proceedings before this Court, and by repeatedly ignoring this Court's many orders, holding him liable for the attorneys' fees and costs awarded Defendants against Plaintiff in the amount of $2,057,169.41, which were a direct result of Plaintiff's lawyer's filing of this lawsuit in this Court (along with numerous amendments) which were frivolous, filed for the purpose of harassment, and primarily intended to cause unnecessary delay or increased costs."

Why did this motion not extend the plenary power of the trial court?

The Texas Supreme Court has held that a "timely filed postjudgment motion to incorporate sanctions into a new final judgment qualifies" as a motion to modify under Rule 329b(g), which extends the trial court's plenary power. *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000).

However, the lawyers' motion for sanctions does not request that the X-date Final Judgment be amended or modified to include an order of sanctions. It merely asks for the signing of a stand-alone order of sanctions. Under the plain language of *Lane Bank*, the lawyers' motion for sanctions does not constitute a either a motion for new trial or a motion to modify, correct, or reform the judgment sufficient to extend further the trial court's plenary power:

> This case raises three questions, which are: does a motion filed within the trial court's plenary jurisdiction extend that jurisdiction and the time for perfecting appeal in the same manner as a motion for new trial if it requests:
>
> (1) that the judgment be changed to include sanctions?
> (2) that additional relief such as sanctions be granted, without specifically requesting a change in the judgment?
> (3) a nonsubstantive change in the judgment?
>
> I agree with the Court that the answer to the first question is yes, but I disagree with the Court's "no" answers to the other questions.

Lane Bank Equip. Co. v. Smith S. Equip., Inc. 10 S.W.3d 308, 314-15 (Tex. 2000) (Hecht, C.J., concurring). *See also Gillis v. Wal-Mart Stores*, No. 05-97-02070-CV (Tex. App.– Dallas 2000, no pet.) (mem. op.) (not designated for publication):

> A trial judge's power to rule on a motion for sanctions pertaining to conduct before the judgment is no different than his power to rule on any other motion during the trial court's plenary jurisdiction. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). When a trial judge issues an order outside the court's plenary jurisdiction, the order is void. *See Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987); *Jobe v. Lapidus*, 874 S.W.2d 764, 768 (Tex. App.-Dallas 1994, writ denied). A void order is a nullity and has no legal effect. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995). HN3 A motion for sanctions made after the judgment may extend the trial court's plenary jurisdiction if it seeks to add the award of sanctions to an existing judgment. *See Lane Bank Equip. v. Smith Southern Equip.*, 10 S.W.3d 308, 2000 Tex. LEXIS 3, 43 Tex. Sup. J. 267, 269, 2000 WL 4866, at *3 (2000). Such a motion is construed as a motion to modify, correct, or reform the judgment and therefore extends the trial court's plenary jurisdiction beyond the initial thirty-day [*3] period. *See Lane Bank*, 10 S.W.3d at 311, 2000 Tex. LEXIS 3, 43 Tex. Sup. J. at 269, 2000 WL 4866, at *3; TEX. R. CIV. P. 329b(g).

> In this case, the trial judge dismissed the suit on August 29, 1997 based on Gillikin's motion for nonsuit. Wal-Mart filed its motion for sanctions on September 22, 1997, before the expiration of the court's plenary jurisdiction, and the trial judge issued the sanctions order October 29, 1997. Although the motion for sanctions specifically requested the trial judge issue an order of sanctions, it did not request any change in the judgment. Because the motion for sanctions in this case was not a motion to modify, correct, or reform the judgment, it did not extend the trial court's plenary jurisdiction. *Cf. Lane Bank*, 2000 Tex. LEXIS 3, 43 Tex. Sup. J. at 270-71, 2000 WL 4866, at *5. Therefore, the trial judge did not have authority to enter the sanctions order. *See Schexnider*, 940 S.W.2d at 596. Because the trial judge issued the sanctions order after the court's plenary jurisdiction expired, the order is void. *See Schexnider*, 940 S.W.2d at 596.

Gillis v. Wal-Mart Stores, No. 05-97-02070-CV, 2000 Tex. App. LEXIS 508, at *2-3 (Tex. App.—Dallas Jan. 24, 2000, no pet.) (mem. op.) (not designated for publication) *(citing Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (" the time during which the trial court has authority to impose sanctions on such a motion is limited to when it retains plenary jurisdiction. . . ."); *cf. Cocke v. Elliott*, No. 03-12-00667-CV at *20-21, 2013 WL 4821123 (Tex. App.– Austin 2013, pet den.) (mem. op.); *Mann v. Kendall Home Builders Constr., Partners I, Ltd.*, 464 S.W.2d 84, 89-90 (Tex. App.– Houston [14th Dist.] 2015, no pet.).

Simply put, it is without question that if the lawyers filed a timely motion to modify, correct or reform the judgment during the trial court's plenary power, the filing of such a motion would have acted to extend the trial court's plenary power. But they did not, so it did not. The lawyers' motion was a stand-alone motion that merely asked for the imposition of sanctions, and did not ask for any modification, correction or reformation of the trial court's X-date final judgment. As such, the trial court was without jurisdiction to grant relief in the X-date plus 70 days *modified* final judgment, which was void as a matter of law. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) ("the time during which the trial court has authority to impose sanctions on such a motion is limited to when it retains plenary jurisdiction. . . .").

The bottom line is that neither the Defendants' motion for sanctions against Plaintiff's lawyer nor the proposed form of order they filed in support of it while the trial court retained plenary power, served to extend the trial court's plenary power sufficient to authorize the trial court's signing of the modified final judgment on X-date plus 70 days. As such, the trial court's modified final judgment signed on X-date plus 70 days, was void as a matter of law.

Do post-judgment deadlines and plenary power matter in the context of sanctions? It did to litigants who had a $1.37 million trial court sanctions order in their favor declared void and of no legal effect due to expiration of the trial court's plenary power.

VI. ATTACKING AND DEFENDING SANCTIONS - THE SANCTIONS AWARD

There is both good news and bad news about attacking and defending the amount of sanctions awarded by a trial court. The good news is that the Supreme Court of Texas has set forth strict constitutional and procedural rules and limits pertaining to permissible amount of sanctions awards. The bad news is that it did so in the context of ultimately affirming a sanctions award under Chapter 10 of the Texas Civil Practice & Remedies Code amounting to over $1.35 million.

> Before 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. *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex. 2008) (*quoting TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)); *see also Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007) ("[A] sanction cannot be excessive nor should it be assessed without appropriate guidelines."). "Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016).

> Chapter 10 of the Civil Practice and Remedies Code authorizes a court to award sanctions for groundless allegations and other pleadings presented for an improper purpose. Tex. Civ. Prac. & Rem. Code §§ 10.001-.006. The sanction may include a "directive" from the court, the payment of a "penalty into court," and a payment to the opposing party of "the amount of the reasonable expenses incurred by the other party ... including reasonable

> attorney's fees." *Id.* § 10.004(c)(1)-(3). We have recently clarified the legal and evidentiary requirements to establish a reasonable attorney's fee in a fee-shifting situation. *See Rohrmoos*, 578 S.W.3d at 492. Although this case deals with attorney's fees awarded through a sanctions order, the distinction is immaterial because all fee-shifting situations require reasonableness.
>
> On remand, the Hospital and Baylor attempted to prove the reasonableness of the awarded fees by submitting two additional conclusory affidavits. Although we expressed confidence in *Nath I* that the reasonableness of the sanction might be resolved on the existing record or through additional affidavits, 446 S.W.3d at 372 n.30, the subsequent affidavits here merely reference the fees without substantiating either the reasonable hours worked or the reasonable hourly rate. *See Rohrmoos*, 578 S.W.3d at 498 (explaining the applicability of the lodestar analysis for fee-shifting awards). *Rohrmoos* explains the necessity of presenting either billing records or other supporting evidence when seeking to shift attorney's fees to the losing party. *Id.* Conclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here. *See Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam) (overturning an attorney's fee award when the affidavit supporting the fees "only offer[ed] generalities" and "no evidence accompanied the affidavit"); *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763–64 (Tex. 2012) (discussing the insufficiency of attorney's fee evidence that "based [its] time estimates on generalities").
>
> The trial court's judgment awards the Hospital attorney's fees of $726,000 and Baylor attorney's fees of $644,500.16 for their respective defenses to Nath's groundless claims and recites that this amount "fairly compensates [them] with regard to defending against the claims that serve as the basis for this award." The court has thus used its authority under Chapter 10 to shift responsibility for the defendant's reasonable attorney's fees to the plaintiff, Nath, as a penalty for his pursuit of groundless claims. Because the standard for fee-shifting awards in Rohrmoos likewise applies to fee-shifting sanctions, we reverse the court of appeals' judgment affirming the sanctions award and, without hearing oral argument, remand the case to the trial court for further proceedings in light of Rohrmoos. *See* Tex. R. App. P. 59.1.

Nath v. Texas Children's Hosp., 576 S.W.3d 707, 709–10 (Tex. 2019).

The supreme court has clarified that the lodestar analysis does not apply to appellate fees because they are contingent and have not yet been incurred. *See Yowell v. Granite Op. Co.*, 620 S.W.3d 335, 355 (Tex. 2020). However, "a party seeking contingent appellate fees ... need[s] to provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Id.*

While the strict *Rohrmoos/Nath* burden of proof does not apply to an award of appellate attorney's fees (as a sanction or otherwise), an award of appellate attorney's fees as a sanction should be contingent upon the success of the appeal. *See ASEP USA, Inc. v. Cole*, 199 S.W.3d 369, 380 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Ventling v. Johnson*, 466 S.W.3d 143, 156 (Tex. 2015) ("An award of conditional appellate attorney's fees to a party is essentially an award of fees that have not yet been incurred and that the party is not entitled to recover unless and until the appeal is resolved in that party's favor.").

VII. ATTACKING AND DEFENDING - TRIAL COURT PRESERVATION

Some lawyers and litigants who are facing a sanctions motion in the trial court believe: (1) the court would never sanctions me for that; or (2) if I get sanctioned, it will only be a few hundred dollars; or (3) if I or my client do somehow get hit for sanctions, I'll get it fixed on appeal.

The prudent litigator assumes that all sanctions motions are potentially ruinous to their purse or professional reputation. As such, the prudent litigator timely makes objections to the motion for sanctions that are on the same basis as that litigator would raise in the appellate courts, and obtains a clear ruling on each objection. The prudent litigator does not handle sanctions motions against that litigator because they recognize the old adage that one who represents himself or herself has a fool for a client. What follow are excerpts from several appellate opinions holding that complaints about a trial court sanctions order were waived.

An appellant waives her right to complain of a trial court's failure to specify the grounds for its sanctions order if the appellant did not first bring the omission to the trial court's attention. See TEX. R. APP. P. 33.1; *Birnbaum v. Law Offs. of G. David Westfall, P.C.*, 120 S.W.3d 470, 475–76 (Tex. App.—Dallas 2003, pet. denied) (finding that although the trial court erroneously omitted detailed explanation of its basis for Rule 13 sanctions, appellant waived error by not calling it to the trial court's attention).

Bravenec also complains that the trial court did not set out the reasons for the imposition of sanctions in its order. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 10.005 (West 2002) (court shall describe in sanction order offending conduct and explain basis for sanction imposed); TEX.R. CIV. P. 13 (court must specify in order particulars for imposition of sanctions). A complaint regarding a trial court's compliance with these requirements may be waived if the error is not preserved by objection or a request that the particular grounds for awarding sanctions be set out by the court. *E.g., Nolte v. Flournoy*, 348 S.W.3d 262, 273 (Tex.App.-Texarkana 2011, pet. denied); *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex.App.-Austin 2008, pet. denied); *Spiller v. Spiller*, 21 S.W.3d 451, 456 (Tex.App.-San Antonio 2000, no pet.). Bravenec does not direct us to nor do we find any indication in the record that he presented this complaint to the trial court. Bravenec therefore waived the complaint by failing to object or otherwise preserve error. *See, e.g., Nolte*, 348 S.W.3d at 273; *Spiller*, 21 S.W.3d at 456.]

Susan first contends that the trial court erred in failing to state with particularity what acts or omissions justified the Rule 13 sanctions order. Susan failed to preserve this issue for our review. She did not object to the form of the trial court's judgment, she failed to file a request for traditional findings of fact and conclusions of law, and she failed to draw the court's attention to the need for particularized findings under Rule 13. *See Parker v. Walton*, 233 S.W.3d 535, 541 n. 7 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (holding that appellant failed to preserve for appellate review its claim that trial court's judgment nunc pro tunc imposing sanctions for groundless or bad faith claims did not comply with rule governing such sanctions, where appellant failed to raise such objection to the trial court); *see also Olibas v. Gomez*, 242 S.W.3d 527, 532 (Tex.App.-El Paso 2007, pet. denied) (noting that complaint regarding a trial court's compliance with Rule 13, regarding sanctions for frivolous pleadings, may be waived if the error is not preserved by objection or a request that the particular grounds for awarding sanctions be set out by the court); *Spiller v. Spiller*, 21 S.W.3d 451, 456 (Tex.App.-San Antonio 2000, no pet.) (concluding that trial court's failure to include required findings in order imposing sanctions against plaintiff was not basis for reversal of order, where plaintiff did not call failure to trial court's attention); *Schexnider v. Scott & White Mem'l Hosp.*, 953 S.W.2d 439, 441 (Tex.App.-Austin 1997, no pet.) (holding that sanctioned attorney did not preserve for review contention that sanction order under Rule 13 was erroneous due to trial court's failure to state particulars upon which trial court's conclusions of law, where attorney failed to bring error to attention of trial court).

In his first issue, Dr. Tabe argues that the trial court abused its discretion by imposing "death penalty sanctions" against him "for an apparent failure to comply with a pretrial order." He argues that the trial court's dismissal of his case on March 22, 2022, amounted to a death penalty sanction because it adjudicated his claims without presentation of the merits. *See TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991) (holding that discovery sanctions under Texas Rule of Civil Procedure 215 must be related to offensive conduct, may not be excessive, and "cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hinderance of the discovery process justifies a presumption that its claims or defenses lack merit"). Dr. Tabe argues that although a trial court may impose sanctions for violations of pretrial orders, the sanctions must be just and, before imposing death penalty sanctions, the trial court must consider and test lesser sanctions. Because the trial court did not award any lesser sanctions before dismissing Dr. Tabe's claims, he argues the trial court abused its discretion.

> We first observe that Dr. Tabe did not complain to the trial court that the dismissal of his claims with prejudice was an excessive and inappropriate "death penalty sanction," suggest that lesser sanctions should be imposed, or request the trial court modify its order of dismissal from one "with prejudice" to one "without prejudice." A party cannot raise for the first time on appeal an issue that was not presented to the trial court by way of a timely request, motion, or objection. TEX. R. APP. P. 33.1(a)(1); *Gott v. Rice Consol. Indep. Sch. Dist.*, No. 01-07-00051-CV, 2008 WL 4670257, at *8 (Tex. App.—Houston [1st Dist.] Oct. 23, 2008, no pet.) (mem. op.) (holding that appellant's argument that trial court's dismissal with prejudice after appellant failed to amend pleadings following granting of special exceptions was improper death penalty sanction was not preserved because appellant failed to raise this argument with trial court); *see also McCain v. NME Hosps., Inc.*, 856 S.W.2d 751, 755 (Tex. App.—Dallas 1993, no writ) (complaint that dismissal of case with prejudice was not appropriate sanction was not preserved for appellate review because it was not raised in trial court); *Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568–69 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (op. on reh'g) (holding that appellant failed to preserve complaint that trial court improperly dismissed claim "with prejudice" by not presenting alleged error first to trial court). We therefore hold that Dr. Tabe failed to preserve this complaint for appellate review.

VIII. ATTACKING AND DEFENDING - COMPLETE APPELLATE RECORD

In an appeal from an order granting summary judgment, in most cases, one who appeals can limit the clerk's record to each party's live pleadings, the motion for summary judgment, any replies and responses thereto, and the trial court's written ruling on the motion and any evidentiary objections. Not so with respect to sanctions orders.

> We review a trial court's decision to impose discovery sanctions for a clear abuse of discretion and will reverse only if the trial court acted without reference to any guiding rules or principles, making its ruling arbitrary or unreasonable. To make that determination, we ***"independently review the entire record,"*** *American Flood Rsch. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam), "including ***the evidence, counsels' arguments, the circumstances surrounding the offending party's discovery abuse, and all of the offending party's conduct during the litigation***," *Duncan v. Park Place Motorcars, Ltd.*, 605 S.W.3d 479, 488 (Tex. App.—Dallas 2020, pet. withdrawn). We view the evidence in the light most favorable to the trial court's ruling, and we draw all reasonable inferences in support of that ruling. *Id.*

Duncan v. Park Place Motorcars, Ltd., 605 S.W.3d 479, 488 (Tex. App.—Dallas 2020, pet. withdrawn) (emphasis added).

The failure to provide the appellate court with the ***entire*** trial court record, as set forth above, can doom an appeal from a sanctions order to failure.

IX. ATTACKING AND DEFENDING - SANCTIONS AGAINST THE STATE?

Whether sanctions are available against the State of Texas, despite the existence of sovereign immunity and separation of powers arguments was presented to, and decided by the 14th Court of Appeals in *Int. of E.M.*, 665 S.W.3d 832, 835–37 (Tex. App.– Houston [14th Dist.] 2023, no pet.):

> Here, appellee did not seek or request sanctions under section 105.002 and instead requested sanctions under the trial court's inherent authority. "It is well established that when the State enters the courts as a litigant, it must observe and will be bound by the same evidentiary and procedural rules that apply to all litigants." *Att'y Gen. of Tex. ex rel. State v. Cartwright*, 874 S.W.2d 210, 219 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see also Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 301 (Tex. 1976) ("[T]he State is not exempt from these rules of procedure but is subject to them as any other litigant."); *In re A.C.B.*, 103 S.W.3d 570, 574 (Tex. App.—San Antonio 2003, no pet.) (request for declaratory judgment against the OAG for alleged wrongful issuance of writ of withholding and sanctions did not implicate sovereign immunity); *Office of Att'y Gen. v. Phillips*, No. 14-03-01040-CV, 2004 WL 2559934, *1 (Tex. App.—Houston [14th Dist.] Nov. 12, 2004, no pet.) (mem. op.) ("We are unpersuaded ... and decline to hold in this case that sovereign immunity applies to deprive the trial court of jurisdiction to assess attorney's fees against it.").

We are unpersuaded by the OAG's general arguments that the trial court's inherent authority is "limited" and therefore the trial court lacks jurisdiction. *See In re Tex. Dep't. of Fam. & Protective Servs.*, 415 S.W.3d 522, 529–30 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (concluding inherent authority limited by plenary power doctrine but not discussing court's inherent authority to sanction under principles of sovereign immunity). The OAG does not dispute that it may be sanctioned under Rule 13 of the Rules of Civil Procedure but argues that an "express rule of civil procedure" should be treated differently. However, the OAG has given no argument as to why such a distinction should be made between an "express rule" and the trial court's inherent authority. Instead, the OAG asserts that an award of attorney's fees in this case could not be rendered under section 105.002 of the Civil Practice and Remedies Code, nor under Rule 215.2 of the Rules of Civil Procedure. However, the OAG acknowledges the trial court's authority and jurisdiction to render such an award in those cases. The OAG does not indicate why or how the trial court's inherent authority should be afforded different treatment and we decline to apply such different treatment under the facts as presented herein. *See Lowe*, 540 S.W.2d at 301 *Cartwright*, 874 S.W.2d at 219.

"Courts possess inherent powers that aid the exercise of their jurisdiction, facilitate the administration of justice, and preserve the independence and integrity of the judicial system." *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 718 (Tex. 2020). Thus, we disagree with the OAG that the trial court lacks jurisdiction to render sanctions under its inherent authority or that sovereign immunity is implicated herein. *See Lowe*, 540 S.W.2d at 301; *In re A.C.B.*, 103 S.W.3d at 574. We do not comment on whether such sanctions, would be appropriate in this case. The trial court has not rendered any opinion on whether it will or will not award sanctions and the record has not been developed with the presentation of evidence. We merely conclude that in this case, the trial court's jurisdiction is not implicated by a request for sanctions under its inherent authority.

The OAG next contends that any award of sanctions in this case would necessarily conflict with the separation of powers doctrine because it "seeks to manage the solely administrative actions of the OAG, an executive branch agency." *See Tex. Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, pet. denied). The OAG concludes that "the trial court violated the separate [sic] of powers doctrine when it held that it could sanction the OAG under these facts."

"In the context of judicial review of administrative decisions, the separation-of-powers doctrine ensures that discretionary functions delegated to administrative agencies by the legislature are not usurped by the judicial branch." *Id.* "Although courts have the authority to hold that an agency erred and must correct its error, courts cannot dictate how to correct the error if, by doing so, the court effectively usurps the authority and discretion delegated to the agency by the legislature." *Id.* However, "[i]t is well settled that trial courts may review an administrative action only if a statute provides a right to judicial review or the action adversely affects a vested property right or otherwise violates a constitutional right." *In re Office of Att'y Gen.*, 456 S.W.3d 153, 157 (Tex. 2015); *see also* Tex. Fam. Code § 158.506(c) ("[T]he obligor may file a motion with the court to withdraw the administrative writ of withholding and request a hearing ....").

The OAG argues that through sanctions the trial court "seeks to manage the solely administrative actions of the OAG." However, the OAG admits that the trial court has not yet ordered sanctions. The question presented by the OAG is, therefore, whether if the trial court rendered sanctions under those facts pleaded, it would violate the separation of powers doctrine. However, since no such sanctions have been awarded and the record has not been fully developed, the mere consideration of the evidence and facts does not implicate a separation of powers concern. Any award of sanctions is still contingent and uncertain. As a result, this question is not ripe for our review. *See Perry v. Del Rio*, 66 S.W.3d 239, 249–50 (Tex. 2001) ("Ripeness is one of several categories of justiciability.... 'Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision. The central concern is whether the case involves uncertain or

> contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (*quoting* 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3529, at 278–79 (2d ed. 1984))).

X. CONTEMPT OF COURT - THE ULTIMATE SANCTION

While not expressly denominated a type of sanction, few attorneys would argue with the fact that a criminal contempt finding, followed by incarceration in jail or prison, is, indeed, the a serious sanction. Last month, the Supreme Court of Texas had reason to provide Texas attorneys with a bit of guidance regarding these proceedings. It occurred in the form of a four-justice dissenting opinion on denial of a petition for writ of mandamus.

The trial court permitted a judgment creditor to prosecute its debtor for acts of criminal contempt. *In re: Paul*, No. 23-0253, 2024 WL 1122520, ___ S.W.3d. ___ (March 15, 2024) (Bland, J., dissenting). The creditor sought to criminally penalize the debtor for perjury and for violations of an injunction the creditor obtained to aid in securing its judgment. The four justice dissenting opinion on denial of petition for writ of mandamus was written by Justice Bland, and joined by Chief Justice Hecht, Justice Devine, and Justice Busby. The dissent expressly stated that "[e]mploying a financially interested private party to prosecute a defendant for criminal contempt raises due process and separation-of-powers constitutional concerns." *Id.*, at 1.

The thoughtful dissenting opinion provided a framework for future criminal contempt prosecutions, and those who oppose them:

> While a court may initiate criminal contempt charges based on a failure to comply with its orders or abuse of process, a court should refer such charges to the local prosecuting authority. In the rare circumstance that such a referral is unworkable, the court should appoint an independent prosecutor—one financially disinterested in the outcome of the contempt proceeding. . . . Because the trial court did not refer charges of criminal contempt to an authorized local prosecutor and instead permitted a financially interested party to prosecute the defendant, our Court should consider this petition for writ of habeas corpus on its merits. Upon review, we are likely to conclude that the trial court did not accord the defendant due process before finding him guilty of criminal contempt.

Id.

> Courts differentiate civil and criminal contempt by their purposes: "civil contempt is 'remedial and coercive in nature'—the contemnor carries the keys to the jail cell in his or her pocket since the confinement is conditioned on obedience with the court's order."2 Criminal contempt, in contrast, is punitive, and its punishment applies even though a punished party might cure its contempt.3
>
> Criminal contempt is a criminal offense that stands separately from the underlying civil case.4 Our Court has recognized criminal contempt as "quasi-criminal in nature," acknowledging "that proceedings in contempt cases should conform as nearly as practicable to those in criminal cases."5 And the Court of Criminal Appeals has directed that courts must require prosecution that has no conflict of interest that "rise[s] to the level of a due process violation."6 Prosecution by a judgment creditor in a related civil action likely presents such a conflict: "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters."7
>
> Private prosecution of criminal contempt by a judgment creditor in a related civil action is likely a constitutional violation worthy of this Court's attention. Most states and the federal courts would invalidate this interested prosecution, and members of the Supreme Court have expressed an interest in deciding whether private prosecution of criminal contempt by an interested party comports with constitutional due process guarantees and separation-of-powers principles.

Id., at 2.

> The United States Supreme Court first discussed private prosecution in *Young v. United States ex rel. Vuitton et Fils S.A.,*8 decided under the Supreme Court's supervisory power over the federal courts.9 In *Young*, the Supreme Court held "that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order."10 Although the Court did not require that all criminal contempt prosecutions employ public authorities, it disallowed a

> financially interested private prosecution in that case, observing that "the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety."11
>
> Under *Young*, a federal district court must "first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied."12 The Court stressed that criminal proceedings are between the public and the defendant, not two parties to civil litigation.13 "A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution."14 In a concurring opinion, Justice Scalia observed that a federal district court cannot prosecute a claim of criminal contempt on its own; prosecution is an executive act, not a judicial one.15
>
> Recognizing the persuasiveness of *Young*'s reasoning that private prosecution by interested parties presents fundamental concerns, the majority of state high courts to consider the issue have applied the Young standard either in their supervisory roles16 or have concluded that due process requires it.17 A number of federal circuits, including the Fifth Circuit, apply *Young* as a matter of due process, noting that its constitutional underpinnings go beyond a high court's supervisory posture.18 A bare minority of state appellate courts have rejected the due process considerations expressed in *Young*, finding no per se due process violation arising from the private prosecution of criminal contempt by a party's civil opponent.19

Id., at 3.

> In recent years, multiple Justices of the Supreme Court have observed that due process20 and separation-of-powers21 considerations require protection from court-employed private prosecutions by interested parties. In *Robertson v. United States ex rel. Watson*, four Justices in dissent from the dismissal of the writ of certiorari as improvidently granted objected to a private prosecution of criminal contempt by an interested party, and in noting the due process concerns that such a prosecution raises, stated: "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another."22 Last year, two different Justices dissented from the Court's denial of certiorari over a case concerning private criminal contempt prosecution, rejecting the notion that an independent judicial branch has a role in employing a prosecutor.23
>
> When prosecutors whose interest is maximizing recovery of their client's judgment serve at the pleasure of a court that has initiated criminal contempt proceedings, trust and confidence in an independent judiciary wane.24 The Court should accept review and consider the view that the Constitution demands more. Because we do not, I respectfully dissent.

Id., at 4.

Some lawyers assume the constitutionality discussion contained in the four justice dissenting opinion is not important because, after all, it is a dissenting opinion. Other lawyers will recognize that even though that is the case, *In re Paul* might form a stepping stone for a future litigant or attorney who is found guilty of criminal contempt and seeks relief from the United States Supreme Court on the federal constitutionality issues addressed by the four dissenting justices. Additionally, the possibility always exists that something about the particular facts of *In re Paul* made it less attractive for a fifth justice (or more) to join in and grant relief, but a future set of facts might provide the additional impetus for intervention by the Supreme Court of Texas on the state and federal constitutional issues Nate Paul presented unsuccessfully.

The bottom line is that in order to preserve these potential state and federal constitutional arguments for appellate review, they must be timely, clearly, and effectively raised in the trial court, or else they are waived. *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (*citing Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959)); *Walker v. Emps. Ret[.] Sys.*, 753 S.W.2d 796, 798 (Tex. App.—Austin 1988, writ denied) ("A constitutional challenge not raised properly in the trial court is waived on appeal."). Whether a state or federal constitutional argument is ultimately successful, if preserved, it becomes an important bargaining chip for settlement in the event the trial court signs a criminal contempt judgment.

XI. DOTTING THE I'S AND CROSSING THE T'S

Some lawyers believe that if a trial court grants sanctions, the appellate court is going to be predisposed to affirming those sanctions on appeal. That is not necessarily the case, particularly in federal court. A Fifth Circuit opinion from last month demonstrates the importance of "dotting the I's and crossing the T's" when it comes to requesting and obtaining sanctions in the trial court, and supporting them during the appellate process.

In *Kennard Law P.C. v. United Airlines, Inc*., No. 23-20430, 2024 WL 3717272 (5th Cir. Aug. 8, 2024), Thomas sued United in federal court under Title VII and the Americans with Disabilities Act for discrimination and retaliation based on her race and disability. Opinion at *1. In the district court's order granting summary judgment, the court of appeals found that the district court highlighted "convincing evidence" that Thomas had lied about her emergency room visit on July 20 and submitted falsified medical documentation to United. The district court also found that Kennard Law "amplif[ied]" Thomas's wrongdoing by bringing "to bear the courts and system of justice that wrongfully targeted United in this action." The district court identified five statements in plaintiff's briefing in which her law firm "vouched for a perjurious version of the facts" and concluded that basing arguments on "perjured testimony and forged documents ... is contrary to the commands of [Federal Rule of Civil Procedure] 11(b)(3) & (4)." The district court then instructed United that it could, "if desired, bring a motion under Rule 11(c) for sanctions against the law firm for the entirety of its legal fees and expenses expended in this litigation[.]" Opinion at *1.

United filed a separate motion for sanctions that tracked the district court's earlier observations regarding sanctionability of the conduct in question. The district court granted United's motion for sanctions and jointly sanctioned the law firm and the lawyer in the amount of $52,287.72. After neither the law firm nor the lawyer responded to the motion for two months, the district court treated their failure to respond as a "representation of no opposition" per the court's local rules. The district court concluded that United's "substantial and persuasive" evidence that Thomas submitted false evidence warranted imposing sanctions against the law firm under Rule 11. The district court found that the law firm violated Rule 11 by "conced[ing] that it initiated and maintained this lawsuit without any good-faith basis" because the law firm amended the complaint without reasonable investigation and with minimal evidentiary support. Additionally, it noted that the law firm "submitted factual contentions in briefing that lacked minimal evidentiary support" and "made denials of factual contentions that could in no way be warranted on the available evidence." Opinion at *2.

The court of appeals first set out the applicable standard of review. "We review the imposition of sanctions under Rule 11 for abuse of discretion." *Elliott v. Tilton*, 64 F.3d 213, 215 (5th Cir. 1995); *see also Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 802–03 (5th Cir. 2003). A district court abuses its discretion when it bases its Rule 11 ruling on "an erroneous view of the law or a clearly erroneous assessment of the evidence." *Elliott*, 64 F.3d at 215 (*citing FDIC v. Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994)). "This court can affirm the district court on any ground supported by the record." *Ozmun v. Portfolio Recovery Assocs., L.L.C.*, 2022 WL 881755, at *6 (5th Cir. Mar. 24, 2022) (per curiam) (alterations adopted) (*quoting United States v. Mazkouri*, 945 F.3d 293, 307 (5th Cir. 2019)) (applying the principle in the context of imposition of sanctions).

The law firm contended that United's failure to comply with the safe harbor provision in Rule 11 required reversal of the sanctions order. "When a party moves for sanctions, Rule 11's safe harbor provisions dictate that the motion must be served in compliance with Rule 5 and "must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." *Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 388 (5th Cir. 2022) (*quoting* Fed. R. Civ. P. 11(c)(2)). These provisions cannot be waived by the party against whom sanctions are sought. *See Elliott*, 64 F.3d at 216.

United conceded that neither it nor the district court complied with Rule 11's safe harbor provision in seeking and awarding Rule 11 sanctions. Opinion at *3. The panel of the Fifth Circuit concluded, "To the extent the sanction order relied on United's motion for sanctions, it was improperly entered despite United's failure to comply with the safe harbor provisions." Opinion at *3.

The law firm also argued on appeal that the district court abused its discretion in awarding Rule 11 sanctions *sua sponte*.

"A court may impose sanctions sua sponte under Rule 11. *See* Fed. R. Civ. P. 11(c)(3). The safe harbor provisions do not apply to a district court's sua sponte imposition of sanctions. *See id.* 11(c)(2). For that reason, we have previously assumed that a district court intended to "impose[ ] ... sanctions on its own initiative" solely because one party had "filed a motion seeking sanctions, [but] their motion failed to follow the safe harbor procedures of Rule 11." *Brunig v. Clark*, 560 F.3d 292, 297 (5th Cir. 2009)." Opinion at *3.

The Fifth Circuit noted the procedural mandates that must precede a district court's *sua sponte* order of sanctions. "But a district court still must follow certain procedural mandates before issuing an order imposing

sanctions sua sponte. Rule 11(c)(3) provides that "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated" Rule 11. *See Jenkins v. Methodist Hosps. of Dall., Inc.*, 478 F.3d 255, 264 (5th Cir. 2007) ("If, after notice and a reasonable opportunity to respond, the court determines Rule 11 sanctions may be warranted, it may sua sponte issue a show-cause order specifying the offending conduct and, following a response, may impose sanctions."). "We have held that a district court imposing sua sponte sanctions abuses its discretion by disregarding Rule 11's procedural requirements that it issue a show cause order and describe the specific offensive conduct." *Brunig*, 560 F.3d at 297 (*citing Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999)).

"A show-cause order under Rule 11(c)(3) need not be its own separate order. *See id.* at 297 n.18. We have previously deemed an order adequate to satisfy Rule 11(c)(3) where it was included in a magistrate judge's report and recommendation and simply directed the party against whom sanctions were sought, "[i]f [he] chooses[,] to show cause why sanctions may not be warranted in this case." *Id.* at 297. On the other hand, a final order "grant[ing] the appellees their costs as either indemnification or sanctions" did not provide sufficient notice to comply with the rule. *Goldin*, 166 F.3d at 714, 722." Opinion at *3.

The Fifth Circuit noted that the district court's conduct in suggesting a sanctions motion would be appropriate was not sufficient to comply with Rule 11(c)(3)'s mandate. "Here again, the district court did not comply with these procedural requirements. It did not issue an order for Kennard Law to show cause why sanctions should not be imposed, and nothing in any of its related orders satisfies Rule 11(c)(3)'s mandates. The district court expressly invited United to file a motion for sanctions "if desired," but it did not suggest that it would raise the issue *sua sponte* if United declined to do so. The district court's failure to issue a show-cause order as required by Rule 11(c)(3) constitutes an abuse of discretion. *Brunig*, 560 F.3d at 297. Opinion at *4.

United tried one last unsuccessful effort to obtain affirmance of the district court's sanctions order. United argued that the order imposing sanctions should be affirmed because the record supports a finding of bad faith such that the district court could have relied on its inherent power to impose sanctions.

"Federal courts enjoy an inherent power to manage their own affairs to achieve the orderly disposition of cases. *In re Goode*, 821 F.3d 553, 558–59 (5th Cir. 2016) (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). This power includes the ability to discipline attorneys. *Id.* at 559. "[A] court should invoke its inherent power to award attorney's fees only when it finds that fraud has been practiced upon it, or that the very temple of justice has been defiled." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 590 (5th Cir. 2008) (internal quotation marks and citation omitted). Accordingly, "a specific finding that the [sanctioned party] acted in bad faith" is a prerequisite for imposing sanctions pursuant to a court's inherent power. *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998). We have reversed the imposition of sanctions where "the district court merely made general complaints about the sanctioned party." *Goldin*, 166 F.3d at 722 (*citing Elliott*, 64 F.3d at 217)." Opinion at *4.

"Bad faith exists when a party knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent. *Portillo v. Cunningham*, 872 F.3d 728, 740 n.29 (5th Cir. 2017); *see also Gate Guard Servs., L.P. v. Perez*, 792 F.3d 554, 561 n.4 (5th Cir. 2015) ("Bad faith implies that a litigant intentionally took a position he subjectively knew was unfounded."). When invoking its inherent power to sanction parties or their attorneys, the court must comply with the mandates of due process in determining whether bad faith exists. *Chambers*, 501 U.S. at 50. And "the threshold for the use of inherent power sanctions is high." *Elliott*, 64 F.3d at 217 (internal quotation marks and citation omitted)." Opinion at *4.

"Because "this court can affirm the district court on any ground supported by the record," we may consider United's inherent-power argument despite the fact that it was not raised before the district court. *Ozmun*, 2022 WL 881755, at *6. Ultimately, however, it does not save the district court's order imposing sanctions. United's motion for sanctions did not rely on the district court's inherent power at all. The district court's sanctions order likewise did not refer to its own inherent authority to discipline parties and attorneys. Kennard Law had no notice that the district court might rely on its inherent power to impose sanctions and no opportunity to respond to the district court's purported bad faith finding. The procedure here therefore did not comport with principles of due process. *See Chambers*, 501 U.S. at 50. Moreover, the district court did not make a "specific finding" of bad faith. *See Gipson v. Weatherford Coll.*, 2023 WL 7314355, at *2 (5th Cir. Nov. 6, 2023) (per curiam) ("The district court's order imposing monetary sanctions on defense counsel contains no mention of 'bad faith,' let alone a 'specific finding.'"). Instead, it simply listed several arguably false statements Kennard Law made, which is insufficient to show bad faith. *Goldin*, 166 F.3d at 722 (reversing imposition of sanctions where district court merely listed frustrating conduct by party)." Opinion at 4.

"And even if the district court had complied with these procedural safeguards, nothing in the final order imposing sanctions amounts to a finding of bad faith on

the part of Kennard Law. The district court stated simply that Kennard Law "could not merely accept as true and trustworthy allegations such as those made by Thomas and on that basis present them to a federal court." The district court concluded that Kennard Law "failed to undertake any such reasonable inquiry into the allegations made by its client." These failures to act reasonably do not suggest that "fraud has been practiced upon" the court "or that the very temple of justice has been defiled." *Maxxam, Inc.*, 523 F.3d at 590. The district court's findings do not reflect any intentionally or recklessly fraudulent conduct. Accordingly, the order imposing sanctions does not satisfy the "high" threshold for invoking a district court's inherent power to sanction attorneys and parties. *Elliott*, 64 F.3d at 217. VACATED and REMANDED." Opinion at *5.

There are a number of lessons that can be learned from this very recent unpublished Fifth Circuit panel opinion. But before addressing them, the reader is cautioned that the opinion in *Kennard Law* is subject to change until all potential appellate challenges are completed. At the time this article was written, the mandate was scheduled to be issued in eleven days.

> Lesson #1 - If a motion for sanctions is filed against you, your firm, and/or your client, DO file a timely response to the motion. The district court's grant of very substantial money sanctions relied, in part, on the fact that no response to the sanctions motion was filed on behalf of the plaintiff, the lawyer, or the law firm.
>
> Lesson #2 - When moving for sanctions, familiarize yourself thoroughly with the applicable rules and case authorities so that a sanctions order, if granted, is not vacated for failure to dot the I's and cross the T's.
>
> Lesson #3 - When moving for sanctions, list ALL possible bases for the award of sanctions in the motion, and present evidence to support all claimed bases for the imposition of sanctions. In this case, a different result may have occurred on appeal if the movant had relied upon its own motion for sanctions, the district court's show cause order, AND the inherent power of the court.
>
> Lesson #4 - When defending a sanctions order on appeal, be sure to know the applicable standard of review, and demonstrate how the district court record supports the imposition of sanctions based upon each of the claimed bases for sanctions.
>
> Lesson #5 - Overconfidence and underpreparedness in the district court when seeking sanctions may result in vacating of a sanctions order on appeal. Dot every I and cross every T.
>
> Lesson #6 - The vacating of sanctions in this appeal may well end up a pyrrhic victory. The Fifth Circuit did not state that the conduct of the lawyer or law firm was not sanctionable on the whole. It held that defects in the manner of seeking and obtaining the sanctions required the sanctions order to be vacated and the matter remanded to the district court for further proceedings. One could imagine a set of circumstances where the district court hears the same evidence pertaining to sanctionable conduct and issues a new sanctions order perhaps larger in dollar amount to cover the additional proceedings that does comply with the applicable procedural safeguards.

XII. CONCLUSION

The best way to avoid an order of sanctions is for attorneys and their clients to understand the numerous bases upon which sanctions may be granted in statutes, rules, local rules, and under common law, and to avoid acts or omissions that come close to violating those standards. When faced with a motion for sanctions, the best course of action is NOT to assume that everything will turn out fine, that sanctions won't be issued, or if they are, it will not be an amount that is ruinous. Substantial sanctions orders granting hundreds of thousands and even millions of dollars in sanctions are occurring with what feels like increasing frequency since the turn of the century. The best course of action is to assume the worst, prepare for the sanctions hearing as though your fortune and your reputation depend on it, make all appropriate objections on a timely basis, obtain clear rulings to all objections, and present evidence that refutes the notion that sanctionable conduct has occurred. Raise all issues in the trial court that you MIGHT want to raise in the court of appeals on appeal. That is the best way to minimize the chance for an appellate ruling of trial court waiver.

Most important of all, recognize that upon the other side's threat of a sanctions motion, or filing of a sanctions motion, that alone can create a potential conflict of interest between the attorney and its client, depending on who sanctions are sought against. If only the attorney, or only the client, there is no conflict. But if opposing counsel seeks sanctions from both the attorney and the client, it is time to quickly recommend to the client that it obtain separate counsel to avoid the potential for a reputation-ruining allegation of conflict of interest in the event the sanctions hearing goes

poorly.

Finally, make certain that on appeal, you present the appellate court with the COMPLETE record from the trial court, that you argue and brief ALL bases for sanctions set forth by opposing counsel in the trial court (whether in a sanctions motion or during the hearing). In this way, you stand the best chance possible to obtain reversal of the trial court's sanctions order, if such is legally appropriate under all of the circumstances presented.

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Supreme Court of Texas Update
November 2023 – December 2024

Kelly Canavan
Martha Newton
Amy Starnes
Supreme Court of Texas, Austin

Table of Contents

I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from November 1, 2023, through December 31, 2024. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to amy.starnes@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Medicaid Eligibility

a) *Tex. Health & Hum. Servs. Comm'n v. Est. of Burt*, 689 S.W.3d 274 (Tex. May 3, 2024) [22-0437]

The issue in this case is whether an interest in real property purchased after a Medicaid applicant enters a skilled-nursing facility qualifies as the applicant's "home," excluding it from the calculation that determines Medicaid eligibility.

The Burts lived in a house in Cleburne for many years and then sold it to their adult daughter and moved into a rental property. About seven years later, the Burts moved into a skilled-nursing facility. At that time, their cash and other resources exceeded the eligibility threshold for Medicaid assistance. Later that month, the Burts purchased a one-half interest in the Cleburne house from their daughter, reducing their cash assets below the eligibility threshold. They then applied for Medicaid. The Burts passed away, and the Health and Human Services Commission denied their application after determining that the Burts' partial ownership interest in the Cleburne house was not their home and therefore was not excluded from the calculation of the Burts' resources. After exhausting its administrative remedies, the Burts' estate sought judicial review. The trial court reversed, and the court of appeals affirmed the trial court's judgment. The court of appeals held that whether a property interest qualifies as an excludable "home" turns on the property owner's subjective intent and that the Burts considered the Cleburne house to be their home.

The Supreme Court reversed and rendered judgment for the Commission. In an opinion authored by Justice Bland, the Court held that under federal law, an applicant's "home" is the residence that the applicant principally occupies before the claim for Medicaid assistance arises, coupled with the intent to return there in the future. An ownership interest in property acquired after the claim for Medicaid assistance arises, using resources that are otherwise available to pay for skilled nursing care, is insufficient. The Court observed that federal and state regulations provide that the home is the applicant's "principal place of residence," which coheres with the federal statute and likewise requires residence and physical occupation before the claim for assistance arises.

Chief Justice Hecht dissented. He would have held that an applicant's home turns on the applicant's subjective intent to return to the house, even if the applicant had not owned or occupied it before admission to skilled-

nursing care, and that the Burts satisfied that standard.

2. Jurisdiction

a) *Morath v. Lampasas Indep. Sch. Dist.*, 686 S.W.3d 725 (Tex. Feb. 16, 2024) [22-0169]

The central issue in this case is whether the Commissioner of Education had jurisdiction over a detachment-and-annexation appeal.

A land development company petitioned two school boards to detach undeveloped property from one school district and annex it to the other. Under the relevant statutory provisions, if both boards agree on the disposition of a petition, the decision is final. But if only one board "disapproves" a petition, the Commissioner can settle the matter in an administrative appeal. Here, one board approved the petition, but the other board took no action following a hearing. The company appealed to the Commissioner, asserting that the board constructively disapproved the petition by its inaction. The Commissioner approved the annexation but surpassed a statutory deadline to issue a decision. In a suit for judicial review, the trial court affirmed. The court of appeals vacated the judgment and dismissed the case, holding that a board's inaction cannot provide the requisite disagreement for an appeal to the Commissioner.

The Supreme Court reversed. The Court held that the Commissioner had jurisdiction because, under a plain reading of the statute, a board "disapproves" a petition by not approving it within a reasonable time after a hearing. The Court further held that the Commissioner did not lose jurisdiction when the statutory deadline passed. The deadline is not jurisdictional, and the Legislature did not intend dismissal as a consequence for noncompliance with that deadline. The Court remanded the case to the court of appeals to address other challenges to the Commissioner's decision.

3. Public Information Act

a) *Univ. of Tex. at Austin v. GateHouse Media Tex. Holdings, II, Inc.*, ___ S.W.3d ___, 2024 WL 5249449 (Tex. Dec. 31, 2024) [23-0023]

The issue in this case is whether the Texas Public Information Act gives the University of Texas discretion to withhold records of the results of disciplinary proceedings.

The Austin–American Statesman sent a PIA request to the University, seeking the results of disciplinary proceedings in which the University determined that a student was an alleged perpetrator of a violent crime or sexual offense and violated the University's rules or policies. The University declined to provide the information, asserting that the federal Family Educational Rights and Privacy Act does not require this information's disclosure.

The Statesman filed a statutory mandamus proceeding in the trial court, seeking to compel the disclosure. It then moved for summary judgment, arguing that the PIA revokes the discretion granted by FERPA. The trial court granted the Statesman's motion, ruling that the records are presumed subject to disclosure because the University failed to comply with the PIA's requirement that a decision of the Office of Attorney General be sought. The

court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the University. The Court first held that the plain language of Section 552.026 of the PIA—which states that the act "does not require the release" of education records "except in conformity with" FERPA—grants an educational institution discretion whether to disclose an education record if the disclosure is authorized by FERPA. The Court then held that the University was not required to seek an OAG decision before withholding the records. The Court reasoned that the PIA provision imposing the requirement of an OAG decision does not apply to records withheld under Section 552.026, and it noted OAG's policy refusing to review education records to determine their compliance with FERPA.

4. Public Utility Commission

a) *Pub. Util. Comm'n of Tex. v. Luminant Energy Co.*, 691 S.W.3d 448 (Tex. June 14, 2024) [23-0231]

The main issue is whether orders issued by the Public Utility Commission during Winter Storm Uri exceed the Commission's authority under Chapter 39 of the Public Utility Regulatory Act.

The 2021 storm caused almost 50% of Texas' power-generation equipment to freeze and go offline, stressing the state's electrical grid. When mandatory blackouts failed to return the grid to equilibrium, the Commission determined that its pricing formula was sending inaccurate signals to market participants about the state's urgent need for additional power. In two orders, the Commission directed ERCOT to adjust the pricing formula so that electricity would trade at the regulatory cap.

Luminant Energy Co. challenged the orders in a statutory suit for judicial review against the Commission in the court of appeals. The court of appeals agreed with Luminant that the orders violate Chapter 39 by directing ERCOT to set a single price for electricity.

The Supreme Court reversed and rendered judgment affirming the orders. Luminant's challenge rested on Chapter 39's express preference for competition over regulation. But the Court pointed to other language in Chapter 39 commanding the Commission and ERCOT to ensure the reliability and adequacy of the electrical grid and acknowledging that the energy market will not be completely unregulated. After applying the whole-text canon of statutory construction, the Court held that Luminant had not overcome the presumption that agency rules are valid. The Court went on to hold that the orders substantially comply with the Administrative Procedure Act's emergency rulemaking procedures.

b) *Pub. Util. Comm'n of Tex. v. RWE Renewables Ams., LLC*, 691 S.W.3d 484 (Tex. June 14, 2024) [23-0555]

The central issues in this case are: (1) whether the Public Utility Commission's order approving a protocol adopted by the Electric Reliability Council of Texas regarding electricity scarcity-pricing constitutes a "competition rule[] adopted by the commission"

under Section 39.001(e) of the Public Utility Regulatory Act, which may be directly reviewed by the court of appeals; and (2) if so, whether the Commission exceeded its authority under PURA or violated the Administrative Procedure Act's mandatory rulemaking procedures in issuing the approval order.

In 2021, Winter Storm Uri strained Texas's electrical power grid to an unprecedented degree. Regulators resorted to mandating blackouts to prevent catastrophic damage to the state's power grid. Simultaneously, the Commission issued emergency orders administratively setting the wholesale price of electricity to the regulatory maximum in an effort to incentivize generators to rapidly resume production.

In the storm's aftermath, ERCOT adopted, and the Commission approved, a formal protocol setting electricity prices at the regulatory ceiling under certain extreme emergency conditions. RWE, a market participant, appealed the Commission's approval order directly to the Third Court of Appeals. The court held the order was invalid, determining that (1) the order constituted a competition rule under PURA and a rule under the APA; (2) by setting prices, the rule was anti-competitive and so exceeded the Commission's statutory authority under PURA; and (3) the Commission implemented the rule without complying with the APA's rulemaking procedures.

The Supreme Court reversed, holding that the Commission's approval order is not a "competition rule[] adopted by the commission" subject to the judicial-review process for such rules. The Court reasoned that PURA envisions a separate path for ERCOT-adopted protocols, which are subject to a lengthy and detailed process before being implemented. The statutory requirement that the Commission approve those adopted protocols before they may take effect does not transform Commission *approval orders* into Commission *rules* eligible for direct review by a court of appeals. Hence, the court of appeals lacked jurisdiction over the proceeding. Accordingly, the Supreme Court vacated the court of appeals' judgment and dismissed the case for lack of jurisdiction.

B. ARBITRATION

1. Admission Pro Hac Vice

a) *In re AutoZoners, LLC*, 694 S.W.3d 219 (Tex. Apr. 26, 2024) (per curiam) [22-0719]

In this case, the Court addressed motions by out-of-state attorneys seeking to appear pro hac vice. Velasquez sued his employer, AutoZoners, for age discrimination. A Texas attorney, Koehler, filed an answer for AutoZoners. The signature block included the electronic signature of Koehler. Below this signature, the signature block included two out-of-state attorneys, Riley and Kern, with statements that an "application for pro hac vice admission will be forthcoming." Shortly thereafter, Riley and Kern filed motions to appear pro hac vice. Velasquez objected to their admission.

At a hearing, Riley and Kern testified that they had reviewed the answer and provided input but denied preparing and filing the answer. The trial court denied their motions to appear pro hac vice on the sole ground

that Riley and Kern were "signing documents before being admitted." Auto-Zoners sought mandamus relief from the order denying the motions.

The court of appeals denied mandamus relief. The Supreme Court granted mandamus relief. The Court held that Riley and Kern had not signed any pleadings, and the trial court abused its discretion in denying the motions to appear pro hac vice on that ground. The Court concluded that Riley and Kern had not engaged in the unauthorized practice of law and had not appeared on a frequent basis in Texas courts and that Kern's conduct in a federal case was not grounds for denying her motion. The Court concluded that mandamus relief was available to remedy the trial court's abuse of discretion.

b) *Lennar Homes of Tex. Inc. v. Rafiei*, 687 S.W.3d 726 (Tex. Apr. 5, 2024) (per curiam) [22-0830]

The issue is whether the plaintiff established that the arbitration agreement in his home-purchase contract is unconscionable because the cost to arbitrate the issue of "arbitrability" would be excessive.

Rafiei bought a house from Lennar Homes. Several years later, Rafiei sued Lennar for personal injuries that he attributed to improper installation of a garbage disposal. Lennar moved to compel arbitration pursuant to an arbitration agreement in the home-purchase contract. Rafiei opposed the motion on the ground that the costs of arbitration are so excessive that the agreement is unconscionable and unenforceable. The trial court denied Lennar's motion and the court of appeals affirmed.

The Supreme Court reversed. First, it observed that because the arbitration agreement had a clause delegating the issue of arbitrability to the arbitrator, Rafiei had to show that the costs to arbitrate the delegation clause are unconscionable, not the costs to arbitrate the entire case. If an arbitrator decides that the costs to arbitrate the entire case are unconscionable, the case is returned to the courts. The Court then concluded that Rafiei presented legally insufficient evidence to demonstrate unconscionability for that proceeding, which requires an evaluation of: (1) the cost for an arbitrator to decide arbitrability, (2) the cost for a court to decide arbitrability, and (3) Rafiei's ability to afford one but not the other.

C. ATTORNEYS

1. Legal Malpractice

a) *Henry S. Miller Com. Co. v. Newsom, Terry & Newsom, LLP*, ___ S.W.3d ___, 2024 WL 5249801 (Tex. Dec. 31, 2024) [22-1143]

The lead issue in this case is whether a client can pursue a legal-malpractice claim against its former attorney where the client's judgment creditor from the underlying case has a financial interest in the malpractice recovery.

Henry S. Miller Commercial Company sued its former attorney, Steven Terry, for malpractice after losing a fraud case. HSM claims that Terry was negligent in failing to designate a responsible third party and by stipulating to HSM's responsibility for its

agent's actions. HSM and its opponent in the fraud case, now a judgment creditor, made an agreement, memorialized in HSM's bankruptcy plan of reorganization, that the creditor would receive the first $5 million of any malpractice recovery and a percentage of additional amounts. The the jury found Terry 100% responsible for the fraud judgment against HSM and awarded actual and punitive damages. After Terry appealed, the court of appeals remanded for a new trial based on jury-charge error.

Both Terry and HSM petitioned for review. In an opinion by Chief Justice Hecht, the Supreme Court addressed Terry's argument that the bankruptcy-plan arrangement giving HSM's judgment creditor an interest in its malpractice recovery constitutes an illegal assignment of the malpractice claim. The Court disagreed, reasoning that HSM retained substantial control over litigation of the claim.

The Court concluded there is some evidence that Terry's negligence caused HSM's damages because the jury likely would have assigned at least partial responsibility to the undesignated third party. However, the only evidence supporting the amount of damages awarded—testimony that the jury would have assigned 85 to 100% fault to the third party based on the expert's "experience"—is conclusory. Since there is evidence of some damages, but no evidence supporting the full amount awarded, the Court agreed with the court of appeals' disposition remanding the case for another trial. Finally, the Court held that there is no evidence that Terry was grossly negligent and that the punitive damages award must therefore be reversed.

Justice Young filed a concurring opinion to further address how the judicial system should respond where a legal-malpractice case is not impermissibly assigned yet still implicates the concerns that led the Supreme Court to preclude such assignments.

Justice Bland dissented in part. She would have held that the expert testimony is legally insufficient to establish legal malpractice as a cause of damage to HSM and rendered judgment for Terry.

D. CLASS ACTIONS

1. Class Certification

a) *Frisco Med. Ctr., L.L.P. v. Chestnut*, 694 S.W.3d 226 (Tex. May 17, 2024) (per curiam) [23-0039]

The issue is whether emergency-room patients who were allegedly charged an undisclosed evaluation-and-management fee after receiving treatment were appropriately certified as a class under Texas Rule of Civil Procedure 42.

Baylor Medical Center at Frisco and Texas Regional Medical Center at Sunnyvale charge ER patients a fee for evaluation and management services. Paula Chestnut and Wendy Bolen allege that they were charged the fee without receiving notice prior to treatment. They sued the hospitals on behalf of themselves and all others similarly situated, seeking class certification under Rule 42 to bring claims under the Texas Deceptive Trade Practices Consumer Protection Act and the Texas Uniform Declaratory Judgments Act. The trial court ordered class certification, concluding that the Rule 42(a)

and (b) requirements were met. It further ordered certification of a Rule 42(d)(1) issue class with respect to four discrete issues.

The hospitals appealed, arguing that the class does not satisfy any of Rule 42(b)'s requirements. The court of appeals agreed that the Rule 42(b) requirements are not met by the class's claims as a whole, but it nonetheless preserved the "Rule 42(d)(1) certification of a Rule 42(b)(2) class action as to . . . three discrete issues" and decertified the class as to every other claim and issue. The hospitals filed a petition for review.

The Supreme Court reversed the part of the court of appeals' judgment that preserved a class certified on discrete issues under Rule 42(d)(1) and remanded the case to the trial court for further proceedings. The Court's precedent mandates that Rule 42(d) cannot be used to manufacture compliance with the certification prerequisites. Instead, Rule 42(d) is a housekeeping rule that functions as a case-management tool that allows a trial court to break down class actions that already meet the requirements of Rule 42(a) and (b) into discrete issue classes for ease of litigation. Once the court of appeals determined that Rule 42(b)'s criteria were not met by the claims as a whole, it should have decertified the class.

b) *USAA Cas. Ins. Co. v. Letot*, 690 S.W.3d 274 (Tex. May 24, 2024) [22-0238]

At issue in this case is whether the trial court erred by certifying a class of insurance claimants whose automobiles USAA had deemed a "total loss."

Sunny Letot's vehicle was rear-ended by a USAA-insured driver. USAA determined that the cost to repair Letot's vehicle exceeded its value. USAA therefore sent Letot checks for the car's value and eight days of lost use and, within days, filed a report with the Texas Department of Transportation identifying Letot's car as "a total loss" or "salvage." Letot later rejected USAA's valuation and checks. She sued USAA for conversion for sending TxDOT the report before she accepted payment. Letot then sought class certification.

The trial court certified a class for both injunctive relief and damages. The class consisted of all claimants for whom USAA filed a report within three days of attempting to pay a claim for a vehicle deemed a total loss. The court of appeals affirmed the certification order.

The Supreme Court reversed. It first concluded that Letot lacked standing to pursue injunctive relief because she could not show that her past experience made it sufficiently likely that she would again be subject to the challenged claims-processing procedures. Without standing to pursue injunctive relief on her own, Letot could not represent a class, so the Supreme Court reversed the certification on that ground and dismissed the claim for injunctive relief.

The Court then held that Letot had standing to pursue damages pursuant to her conversion claim, but that class certification was improper under the predominance and typicality requirements of Texas Rule of Civil Procedure 42. As to predominance, the

Court concluded that Letot could not show that individual issues (including whether the other class members have standing) would not overwhelm the common issue of whether USAA exercised dominion over class members' property when it filed reports concerning their vehicles. As to typicality, the Court held that the unique factual and legal characteristics of Letot's claim rendered that claim atypical of those of the other putative class members.

E. CONSTITUTIONAL LAW

1. Abortion

a) *In re State*, 682 S.W.3d 890 (Tex. Dec. 11, 2023) (per curiam) [23-0994]

The issue in this case is whether the trial court erred in granting a temporary restraining order enjoining the Attorney General from enforcing Texas abortion laws.

Kate Cox was about twenty weeks pregnant when her unborn child was diagnosed with a genetic condition that is life-limiting. Cox, her husband, and Dr. Damla Karsan sued the State, the Attorney General, and the Texas Medical Board, seeking a declaration that Cox's pregnancy fell within a statutory exception for abortions performed "in the exercise of reasonable medical judgment" on a woman with "a life-threatening condition" that places her "at risk of death or poses a serious risk of substantial impairment of a major bodily function." In a verified pleading, Dr. Karsan asserted a "good faith belief" that Cox met the exception, but Dr. Karsan did not base this belief on her reasonable medical judgment or identify Cox's life-threatening condition. The trial court entered a temporary restraining order, enjoining the State defendants from enforcing any abortion law against the Coxes or Dr. Karsan.

The State petitioned for a writ of mandamus, and the Supreme Court conditionally granted relief. The Court stressed that a court order is unnecessary for the provision of an abortion under the emergency exception. Nonetheless, the Court directed the trial court to vacate its order because Dr. Karsan failed to invoke the exception. The court explained that "reasonable medical judgment" requires more than a subjective belief that an abortion is necessary, and it held that the trial court erred in applying a standard that is different from the statutory standard.

b) *State v. Zurawski*, 690 S.W.3d 644 (Tex. May 31, 2024) [23-0629]

The issue in this direct appeal is whether Texas's civil abortion law permitting an abortion when the woman has a life-threatening physical condition is unconstitutional when properly interpreted.

The Center for Reproductive Rights, representing obstetricians and women who experienced serious pregnancy complications but were delayed or unable to obtain an abortion in Texas, sought to enjoin enforcement of Texas's civil, criminal, and private-enforcement laws restricting abortion. The Center argued that the laws must be interpreted to allow physicians to decide in good faith to perform abortions for all unsafe pregnancies and pregnancies where the unborn child is unlikely to sustain life after birth. If

not so interpreted, the Center charged that the laws violate the due-course and equal-protection provisions of the Texas Constitution. The State moved to dismiss the case on jurisdictional grounds, including standing and sovereign immunity. The trial court entered a temporary injunction, barring enforcement of the laws when a physician performs an abortion after determining in good faith that the pregnancy is unsafe or that the unborn child is unlikely to sustain life.

In a unanimous opinion, the Texas Supreme Court vacated the injunction, holding that it departed from Texas law. The Court held that jurisdiction existed for one physician's claims against the Attorney General to enjoin enforcement of the Human Life Protection Act because she had been threatened with enforcement and her claims were redressable by a favorable injunction. Next, the Court held it error to substitute a good-faith standard for the statutory standard of reasonable medical judgment. Reasonable medical judgment under the law does not require that all physicians agree with a given diagnosis or course of treatment but merely that the diagnosis and course of treatment be made "by a reasonably prudent physician, knowledgeable about [the] case and the treatment possibilities for the medical conditions involved." Under the statute, a physician must diagnose that a woman has a life-threatening physical condition, but the risk of death or substantial bodily impairment from that condition need not be imminent. Under this interpretation, the Court concluded that the Center did not present a case falling outside the law permitting abortion to address a life-threatening physical condition, where the due-course clause would compel an abortion. Nor is the law, which regulates the provision of abortion on medical grounds, based on membership in a protected class subject to strict scrutiny under the equal-protection clauses.

Justice Lehrmann filed a concurring opinion, emphasizing that a more restrictive law—one requiring imminent death or physical impairment or unanimity among the medical profession as to diagnosis or treatment—would be unconstitutional and a departure from traditional constitutional protections.

Justice Busby filed a concurring opinion, explaining that the Court's opinion leaves open whether the statute is void for vagueness or violates the rule of strict construction of penal statutes and does not decide the extent to which an abortion must mitigate a risk of death or bodily impairment.

2. Due Course of Law

a) *State v. Loe*, 692 S.W.3d 215 (Tex. June 28, 2024) [23-0697]

The issue in this direct appeal is whether a law prohibiting certain medical treatments for children with gender dysphoria likely violates the Texas Constitution.

Parents of children who have been diagnosed with gender dysphoria, along with doctors who treat such children, sought to enjoin enforcement of a Texas statute that prohibits physicians from providing certain treatments for the purpose of transitioning a child's biological sex or affirming a perception of the child's sex that is inconsistent with

their biological sex. The trial court entered a temporary injunction enjoining enforcement of the law, concluding that it likely violates the Texas Constitution in three ways: (1) it infringes on the parents' right to make medical decisions for their children; (2) it infringes on the physicians' right of occupational freedom; and (3) it discriminates against transgender children.

The Supreme Court reversed and vacated the injunction. In an opinion by Justice Huddle, the Court concluded that the plaintiffs failed to establish a probable right to relief on their claims that the law violates the Constitution. The Court first concluded that, although fit parents have a fundamental interest in making decisions regarding the care, custody, and control of their children, that interest is not absolute and it does not include a right to demand medical treatments that are not legally available. The Court observed that the Texas Legislature has express constitutional authority to regulate the practice of medicine, and the novel treatments at issue in this case are not deeply rooted in the state's history or traditions such that parents have a constitutionally protected right to obtain those treatments for their children. The Court therefore concluded that the law is constitutional if it is rationally related to a legitimate state purpose, and the plaintiffs failed to establish that it is not.

The Court next concluded that physicians do not have a constitutionally protected interest to perform medical procedures that the Legislature has rationally determined to be illegal, and the law does not impose an unreasonable burden on their ability to practice medicine. Finally, the Court held that the statute does not deny or abridge equality under the law because of plaintiffs' membership in any protected class, so the plaintiffs failed to establish that the law unconstitutionally discriminates against them.

Justice Blacklock, Justice Busby, and Justice Young filed concurring opinions, although they also joined the Court's opinion. Justice Blacklock observed that the issues in this case are primarily moral and political, not scientific, and he would conclude that the Legislature has authority to prohibit the treatments in this case as outside the realm of what is traditionally considered to be medical care. Justice Busby wrote to clarify that the scope of traditional parental rights remains broad and is limited only by the nation's history and tradition, not by the nature of the state power being exercised. Justice Young noted that there is a considerable zone of parental authority or autonomy that is inviolate, but the parents' claim in this case falls outside it.

Justice Lehrmann filed a dissenting opinion. The dissent would have held that parents have a fundamental right to make medical decisions for their children by seeking and following medical advice, so a law preventing parents from obtaining potentially life-saving treatments for their children should be subjected to strict scrutiny, which this law does not survive.

3. Free Speech

a) *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd.*, 696 S.W.3d 646 (Tex. June 7, 2024) [22-0427]

The issues in this challenge to Texas's regulatory scheme for public insurance adjusters are whether professional licensing and conflict-of-interest constraints (1) restrict speech protected by the First Amendment and (2) are void for vagueness under the Fourteenth Amendment.

Stonewater offers professional roofing services but is not a licensed public insurance adjuster. A dissatisfied commercial customer claimed that Stonewater was illegally advertising and engaging in insurance-adjusting services. To avoid statutory penalties, Stonewater sued the Texas Department of Insurance, seeking a declaration that two Insurance Code provisions violate the U.S. Constitution. The first requires a license to act or hold oneself out as a public insurance adjuster. The second prohibits a contractor, whether licensed as an adjuster or not, from (1) serving as both a contractor and adjuster on the same insurance claim and (2) advertising dual-capacity services. TDI filed a Rule 91a motion to dismiss, which the trial court granted but the court of appeals reversed.

The Supreme Court reversed and dismissed the suit, holding that Stonewater's pleadings fail to state cognizable First and Fourteenth Amendment claims. Properly construed, the challenged statutes are conventional licensing regulations triggered by the role a person plays in a nonexpressive commercial transaction, not what any person may or may not say. Neither the regulated relationship (acting "on behalf of" the insured customer) nor the defined profession's commercial objective ("settlement of an insurance claim") is speech. False advertising about prohibited activities is not protected speech, and any incidental speech constraints are insufficient to invite First Amendment scrutiny. Additionally, Stonewater's as-applied and facial vagueness claims are foreclosed because the company's alleged conduct clearly violates the statutes.

Justice Blacklock concurred, concluding that no speech is implicated because only representative, or agency, capacity is regulated.

Justice Young's concurrence emphasized two points. First, in his view, regulating agency capacity is nearly irrelevant to the First Amendment's applicability; what is determinative here is that the challenged statutes, at their core, regulate nonexpressive conduct. Second, extant First Amendment jurisprudence is poorly equipped to address legitimate public-licensing regulation that affects speech or expressive conduct more than incidentally.

4. Gift Clauses

a) *Borgelt v. Austin Firefighters Ass'n*, 692 S.W.3d 288 (Tex. June 28, 2024) [22-1149]

The issues in this case are (1) whether article 10 of a collective-bargaining agreement between the City of Austin and the Austin Firefighters Association violates the Texas Constitution's Gift Clauses; and (2) whether the trial court erred by imposing TCPA sanctions and attorneys' fees on the plaintiffs.

In 2017, the City and the

Association entered into a collective-bargaining agreement. Article 10 of the agreement, titled "Association Business Leave," authorizes 5,600 hours of paid time off for firefighters to engage in "Association business activities," which was defined to include activities like addressing cadet classes and adjusting grievances. Article 10 permits the Association's president to use 2,080 of those hours, which is enough for him to work full time while on ABL.

The Gift Clauses in the Texas Constitution prohibit "gifts" of public resources to private parties. Taxpayers and the State sued the City, alleging that article 10 violates the Gift Clauses and seeking declaratory and injunctive relief. Specifically, plaintiffs allege that ABL time has been used for improper private purposes and that the City does not exercise meaningful control over the ABL scheme, but instead approves nearly all ABL requests without maintaining adequate records of how ABL time is used.

The trial court ruled on summary judgment that the text of article 10 is not unconstitutional and awarded the Association attorneys' fees and sanctions under the TCPA. The case proceeded to a bench trial on the issue whether article 10 is being implemented in an unconstitutional manner. The trial court concluded it is not and rendered judgment for the City. The court of appeals affirmed.

In an opinion by Justice Young, the Supreme Court affirmed in part and reversed in part. The Court affirmed the court of appeals' holding that article 10 as written does not constitute an unlawful "gift" of funds. The agreement's text and context impose limits on the use of ABL time, including that all such uses must support the fire department. Allegations of misuse of ABL would constitute violations of the agreement rather than show that the agreement itself is unconstitutional. The Court reversed the TCPA award of sanctions and attorneys' fees, holding that the taxpayers' contentions are sufficiently weighty and supported by the evidence to avoid dismissal under the TCPA.

Justice Busby filed an opinion dissenting in part and concurring in the judgment in part. He would have held that article 10 violates the Gift Clauses because the City does not exercise control over the Association to ensure that firefighters used ABL time only for public purposes. For that reason, he agreed that the TCPA awards must be reversed.

5. Retroactivity

a) *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852 (Tex. Apr. 26, 2024) [23-0565]

The issue in this certified question is whether the Pandemic Liability Protection Act—a statute shielding universities from damages for cancellation of in-person education due to the pandemic—is unconstitutionally retroactive as applied to a breach-of-contract claim.

Southern Methodist University ended in-person classes and services during the spring 2020 semester due to the pandemic. Graduate student Luke Hogan completed his degree online and graduated. He then brought a breach-of-contract claim against SMU for allegedly violating the Student Agreement, seeking to recover part of

the tuition and fees he paid expecting in-person education. While the suit was pending, the Texas Legislature passed the PLPA, which shields educational institutions from monetary damages for changes to their operations due to the pandemic.

A federal district court dismissed Hogan's breach-of-contract claim. On appeal, the U.S. Court of Appeals for the Fifth Circuit certified to the Supreme Court the question whether the PLPA violates the retroactivity clause in Article I, Section 16 of the Texas Constitution as applied to Hogan's breach-of-contract claim.

The Supreme Court answered No. It reasoned that "retroactive" in the constitution has never been construed literally and is not subject to a bright-line test. Rather, the core of Article I, Section 16's bar on retroactive laws is to protect "settled expectations." Hogan did not have a reasonable and settled expectation to recover from SMU, mainly because the common-law impossibility doctrine would have barred the heart of his claim, regardless of the PLPA. Whatever remains of his claim after the impossibility doctrine did its work was novel, untested, and unsettled. The Student Agreement permitted SMU to modify its terms, and, at any rate, Hogan accepted SMU's modified performance by finishing his degree online. Thus, the Court reasoned, whatever portion of Hogan's claim the PLPA removed was too slight and tenuous to render the PLPA unconstitutionally retroactive.

6. Separation of Powers

a) *In re Dallas County*, 697 S.W.3d 142 (Tex. Aug. 23, 2024) [24-0426]

At issue in this case is the constitutionality of S.B. 1045, the statute that creates the Fifteenth Court of Appeals.

The fourteen existing courts of appeals districts are all geographically limited, but the Fifteenth district includes all counties, and its justices will be chosen in statewide elections beginning in the November 2026 general election. Until then, the justices will be appointed by the Governor, subject to confirmation by the Senate. By statute, the Fifteenth Court will have exclusive intermediate appellate jurisdiction over various classifications of cases. S.B. 1045 requires any such cases pending in other courts of appeals to be transferred to the Fifteenth Court.

This petition involves one of the pending appeals subject to transfer. Dallas County and its sheriff sued officials of the Texas Health and Human Services Commission regarding HHSC's alleged failure to transfer certain inmates from county jails to state hospitals. The trial court denied HHSC's plea to the jurisdiction, so HHSC appealed to the Third Court of Appeals, noting in its docketing statement that the case is one that must be transferred to the Fifteenth Court if still pending by September 1. Invoking this Court's original jurisdiction, the County then filed a Petition for Writ of Injunction. The County argues that, for several reasons, S.B. 1045's creation of the Fifteenth Court is unconstitutional. As relief, the County asks the Court to prevent the appeal from being

transferred.

The Supreme Court denied relief. It first concluded that it had jurisdiction to consider the County's petition and construed it as seeking mandamus relief.

On the merits, the Court rejected each of the County's three core arguments. First, it held that neither the text nor history of Article V, § 6(a) of the Texas Constitution prohibits the legislature from adding an additional court of appeals with statewide reach. It next held that the same constitutional provision expressly granted the Legislature sufficient authority to give the Fifteenth Court exclusive intermediate appellate jurisdiction over certain matters, as well as to decline to vest that court with criminal jurisdiction. Finally, the Court held that the Governor's initial appointments to the Fifteenth Court do not violate Article V, § 28(a)'s requirement that vacancies on a court of appeals must be filled in the next general election. A vacancy must arise sufficiently before an election to be placed on the ballot; the Election Code determines that 74 days is needed, and the Court held that this rule, which allows ballots to be timely printed and distributed, adheres to the constitutional requirement. These vacancies arise on September 1, which is fewer than 74 days before the election. Filling the vacancies by appointment until the November 2026 general election, therefore, is lawful, not unconstitutionally void.

b) *In re Tex. House of Representatives*, ___ S.W.3d ___, 2024 WL 4795397 (Tex. Nov. 15, 2024) [24-0884]

The issue in this case is whether a subpoena issued by the Committee on Criminal Jurisprudence of the Texas House of Representatives required the Texas Department of Criminal Justice to cancel a scheduled execution because the date of the scheduled execution preceded the date on which the inmate was commanded to appear.

Robert Roberson was scheduled to be put to death on October 17, 2024. On October 16, the Committee issued a subpoena requiring Roberson to appear before it to testify about his case and its implications for article 11.073 of the Code of Criminal Procedure. The Committee then obtained a temporary restraining order from a district court preventing the Department from executing Roberson. The Department filed a mandamus petition in the Court of Criminal Appeals, which was granted. The Committee then invoked the Supreme Court's original jurisdiction, seeking a writ of injunction and emergency relief. The Court temporarily enjoined the Department from impairing Roberson's compliance with the subpoena and requested merits briefing.

The Court first confirmed its jurisdiction to resolve the dispute. It concluded that this case raised a justiciable and purely civil-law question concerning the separation of powers and the distribution of governmental authority. The Court explained that it may construe the Committee's petition as one for mandamus, which the Court has authority to issue against the department.

As for the merits, the Court held that the Committee's authority to compel testimony does not include the power to override the scheduled legal process

leading to an execution. While the legislative-inquiry power is robust and essential to the functioning of our system of government, the Committee had the opportunity to obtain any testimony relevant to its legislative task long before Roberson's scheduled execution. The Committee's subpoena, moreover, intruded on authority vested in the other branches: the judiciary's authority to schedule a lawful execution, the executive's authority to determine whether clemency is proper, and the legislature's own authority, which created the legal framework for capital punishment. The Committee thus lacked a judicially enforceable right to prevent the other branches from proceeding with the scheduled execution. That result, the Court said, accommodated the interests of all three branches of government. Accordingly, the Court denied the committee's petition, thereby superseding its temporary order.

c) *Webster v. Comm'n for Law. Discipline*, ___ S.W.3d ___, 2024 WL 5249494 (Tex. Dec. 31, 2024) [23-0694]

The issue in this case is whether the Texas Constitution's separation-of-powers doctrine renders the Commission for Lawyer Discipline's lawsuit against First Assistant Attorney General Brent Webster nonjusticiable.

After the 2020 presidential election, the State of Texas moved for leave to invoke the U.S. Supreme Court's original jurisdiction to sue four other states regarding those states' election-law changes. The first assistant appeared as counsel on the initial pleadings. After the State's lawsuit was dismissed for lack of standing, an individual filed a grievance with the commission alleging that the first assistant committed professional misconduct. The commission eventually agreed and initiated disciplinary proceedings. Invoking the separation of powers, the district court dismissed for lack of subject-matter jurisdiction. The court of appeals reversed, holding that neither the separation-of-powers doctrine nor sovereign immunity bars the case.

The Supreme Court reversed. In an opinion by Justice Young, the Court observed that generally, scrutiny of statements made directly to a court within litigation is by the court to whom those statements are made. In contrast with such direct scrutiny, the commission's collateral scrutiny seeks to second-guess the contents of the initial pleadings filed at the attorney general's direction on behalf of the State, which intrudes into the attorney general's constitutional authority both to file petitions in court and to assess the propriety of the representations that form the basis of those petitions. The separation-of-powers balance is delicate. While courts retain inherent authority to compel all attorneys to adhere to standards of professional conduct within litigation (hence why direct review remains available), the other branches lack the authority to control the attorney general's litigation conduct (which is why collateral review outside the litigation process would push too far). This Court's ultimate authority to regulate the practice of law does not depend on allowing the commission to bring its unprecedented lawsuit. Because this lawsuit does not allege criminal or ultra vires conduct, the first assistant is not subject to

collateral review of either the choice to file a lawsuit or the representations in the suit's initial pleadings. The Court therefore reinstated the district court's judgment of dismissal.

Justice Boyd filed a dissenting opinion that rejected the Court's newly minted distinction between the judicial branch's "direct" and "collateral" enforcement of the disciplinary rules. In his view, the constitutional separation of powers prohibits a branch of government from exercising a power that belongs to another branch but does not separate the powers that exist within a single branch or restrict the means by which a branch may exercise a power it properly possesses. He thus would have held that the separation-of-powers doctrine does not deprive the courts of subject-matter jurisdiction.

7. Takings

a) *Tex. Dep't of Transp. v. Self*, 690 S.W.3d 12 (Tex. May 17, 2024) [22-0585]

The issues in this case are whether a subcontractor's employees were TxDOT's "employees" under the Texas Tort Claims Act and whether TxDOT acted with the required intent to support an inverse condemnation claim when it destroyed the Selfs' property.

As part of a highway maintenance project, TxDOT contracted with a private company to remove brush and trees from its right-of-way easement on a tract of land owned by the Selfs. That company further subcontracted Lyellco, which ultimately removed 28 trees that were wholly or partially outside the State's right of way. The Selfs sued TxDOT for negligence and inverse condemnation. TxDOT filed a plea to the jurisdiction, and the parties disputed whether (1) Lyellco's employees were TxDOT's "employees" under the Act; (2) TxDOT employees exercised such control that they "operated" or "used" the equipment to remove the trees under the Act; and (3) TxDOT intentionally removed the trees, given its mistaken belief that the trees were inside the right-of-way. The trial court denied TxDOT's plea to the jurisdiction. The court of appeals affirmed in part and reversed in part. Both parties filed petitions for review.

The Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing the negligence cause of action, and remanded the cause of action for inverse condemnation to the trial court for further proceedings. Regarding negligence, the Court held immunity was not waived because the Selfs had not shown either that the subcontractor's employees were in TxDOT's "paid service" or that TxDOT employees "operated" or "used" the motor-driven equipment that cut down the trees. Regarding inverse condemnation, the Court held the Selfs had alleged and offered evidence that TxDOT intentionally directed the destruction of the trees, which was sufficient to support the inverse condemnation claim. The Court rejected TxDOT's argument that its mistaken belief that the trees were in the right-of-way negated its intentional acts in directing the subcontractors to destroy the trees.

F. CONTRACTS

1. Interpretation

a) *Bd. of Regents of the Univ. of Tex. Sys. v. IDEXX Labs., Inc.*, 690 S.W.3d 12 (Tex. June 14, 2024) [22-0844]

The issue is whether royalty provisions in a licensing agreement are ambiguous.

IDEXX Labs develops and sells veterinary diagnostic tests to detect disease in dogs. To improve its products that detect heartworm, Labs obtained a license for a Lyme disease peptide patented by the University of Texas. Under the license agreement, the amount of the royalty owed to the University depends on how a test for Lyme disease is packaged with other tests. One provision grants the University a 1% royalty for products sold to detect Lyme and "one other veterinary diagnostic test." Another provision grants a 2.5% royalty on the sales of products that detect Lyme and "one or more" tests "to detect tickborne diseases."

Each of the Labs products at issue test for heartworm, Lyme disease, and at least one other tickborne disease. For years, Labs paid the University royalties of 1%. The University sued, claiming it is owed royalties of 2.5%. The trial court granted the University's motion for partial summary judgment on the applicable royalty rate. The court of appeals reversed, concluding that the royalty provisions are ambiguous. The court characterized the parties' competing interpretations as "equally reasonable" and reasoned that when the provisions are considered separately and in the abstract, each could logically be read to apply.

The Supreme Court reversed, holding that the provisions are not ambiguous. The Court emphasized that contractual text is not ambiguous merely because it is unclear or the parties disagree about how to interpret it. A reviewing court must read the text in context and in light of the circumstances that produced it to ascertain whether it is genuinely uncertain or whether one reasonable meaning clearly emerges. After applying that analysis, the Court concluded that the provisions are most reasonably interpreted to require 2.5% royalties. The Court remanded the case to the court of appeals to address remaining issues, including defenses raised by Labs.

b) *U.S. Polyco, Inc., v. Tex. Cent. Bus. Lines Corp.*, 681 S.W.3d 383 (Tex. Nov. 3, 2023) (per curiam) [22-0901]

The issue before the Court concerns whether a land-improvement contract's requirement of a further writing applies to certain improvements Polyco made so that Polyco had to obtain Texas Central's further written agreement.

Polyco sued Texas Central for breach of contract and moved for partial summary judgment on this issue. The trial court granted the motion, concluding that a further written agreement was not required. Texas Central appealed. The court of appeals held that there were multiple reasonable interpretations of the contract provision and that the in-writing provision was therefore insolubly ambiguous. The court of appeals reversed and ordered a new trial on the meaning of the contract provision.

The Supreme Court reversed

and remanded to the court of appeals. The Court concluded that the multiple interpretations the court of appeals deemed reasonable are merely the parties' competing theories about the text's meaning. Looking to the structure and syntax of the provision, the Court concluded that the in-writing requirement only applies to the last antecedent. The Court remanded to the court of appeals to address Texas Central's other arguments in the first instance.

G. DAMAGES

1. Settlement Credits

a) *Bay, Ltd. v. Mulvey*, 686 S.W.3d 401 (Tex. Mar. 1, 2024) [22-0168]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Bay sued Mulvey and a former Bay employee, alleging that the employee stole Bay's resources to improve Mulvey's property. Bay also sued the employee in a separate lawsuit, alleging that he engaged in a pattern of similar acts for the benefit of himself, Mulvey, and others. Bay and the employee agreed to the entry of a $1.9 million judgment, which included Bay's injury for the improvements to Mulvey's property. The employee agreed to make monthly payments to Bay. Bay then went to trial against Mulvey alone, and the jury awarded Bay damages. Mulvey sought a settlement credit based on the agreement and agreed final judgment. The trial court refused and rendered judgment on the jury's verdict. The court of appeals reversed and rendered a take-nothing judgment, holding that Mulvey was entitled to a credit that exceeded the amount of Bay's verdict.

The Supreme Court affirmed. The Court first held that the agreement and agreed final judgment together constituted a settlement agreement that obligated the employee to pay Bay $1.9 million. The Court rejected Bay's argument that promised but not-yet-received settlement payments should not be included in determining the settlement amount. Following its settlement-credit precedents, the Court concluded that Mulvey was entitled to a credit for the full amount of the settlement unless Bay established that all or part of the settlement was allocated to an injury or damages other than that for which it sued Mulvey. Bay only presented evidence that $175,000 of the settlement was allocated to a separate injury. The Court therefore credited the remaining $1.725 million against the jury's verdict, resulting in a take-nothing judgment.

b) *Shumate v. Berry Contracting, L.P.*, 688 S.W.3d 872 (Tex. Apr. 26, 2024) (per curiam) [21-0955]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Berry Contracting d/b/a Bay, Ltd. obtained a jury verdict against Frank Thomas Shumate for conspiring with a Bay employee to use Bay's materials and labor for their personal benefit. Shumate sought a settlement credit based on an agreement between Bay and its employee that incorporated an agreed judgment in a separate

lawsuit. The trial court refused to apply a credit, and the court of appeals affirmed, concluding that the agreement was not a settlement.

In a per curiam opinion, the Supreme Court granted Shumate's petition and reversed in light of its opinion in *Bay, Ltd v. Mulvey*, ___ S.W.3d ___ (Tex. Mar. 1, 2024), which construed the same agreement and concluded that it was a settlement. The Court held that Shumate was entitled to a settlement credit based on that agreement. The Court remanded to the trial court to apply the credit and consider the parties' arguments regarding what effect, if any, the credit would have on the relief sought by Bay.

H. ELECTIONS

1. Ballots

a) *In re Dallas HERO*, 698 S.W.3d 242 (Tex. Sept. 11, 2024) [24-0678]

This case concerns the interplay between citizen- and council-initiated ballot propositions to amend the charter of the City of Dallas.

Nonprofit Dallas HERO spearheaded the collection of signatures for three petitions to amend the city charter. After confirming that the petitions met statutory requirements and negotiating with HERO on the specific ballot language for the three propositions, the City passed an ordinance setting a November 2024 special election. The citizen-initiated propositions, if passed, would amend the city charter to authorize, and waive the City's governmental immunity for, citizen suits to force compliance with the law; compel the City to conduct an annual community survey, the results of which would affect the city manager's compensation and job status; and require the City to appropriate a certain percentage of revenue for police hiring, compensation, and pension funding.

The City then approved three council-initiated propositions on the same topics for the same election. HERO filed a petition for writ of mandamus in the Supreme Court under the Elections Code.

The Court granted mandamus relief in part. Ballot language submit a question with such definiteness and certainty that the voters are not misled by omitting information that reflects the proposition's character and purpose. The Court concluded that the council-initiated propositions would confuse and mislead voters because they contradict and would supersede the citizen-initiated propositions without acknowledging those characteristics. The Court directed the City to remove the council-initiated propositions from the ballot but rejected HERO's request for additional revisions to the wording of the citizen-initiated propositions.

b) *In re Rogers*, 690 S.W.3d 296 (Tex. May 24, 2024) (per curiam) [23-0595]

This case concerns the statutory duty of an emergency services district's board of commissioners to call an election to modify the district's tax rate when presented with a petition containing the required number of signatures.

In the fall of 2022, voters in Travis County Emergency Services District No. 2 circulated a petition to change the sales and use tax rates in

their district. The petition gathered enough signatures to surpass the threshold required by law. However, the district's Board rejected the petition, claiming it was "legally insufficient." The Board has never contended any of the petition signatures are invalid for any reason. Relators, three of the petition signatories, sought a writ of mandamus directing the Board to hold an election on their petition.

The Supreme Court conditionally granted mandamus relief. The Court first concluded that it had jurisdiction to grant relief against the Board because the Legislature authorized the Court to issue writs of mandamus to compel performance of a duty in connection with an election, and the duty here was expressly imposed on the Board. Second, the Court held that the Board has a ministerial, nondiscretionary duty to call an election to modify or abolish the district's tax rate based on a petition with the statutorily required number of signatures. The Court thus directed the Board to determine whether the petition contains the required number of valid signatures and, if so, to call an election.

I. EMPLOYMENT LAW

1. Age Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Flores*, ___ S.W.3d ___, 2024 WL 5249446 (Tex. Dec. 31, 2024) [22-0940]

This case concerns Tech's jurisdictional plea in the plaintiff's age-discrimination case.

Tech employee Loretta Flores, age fifty-nine, applied to be chief of staff for Tech's president, Dr. Richard Lange. Flores had previously complained of age discrimination by Tech and Lange in connection with an earlier reassignment. While interviewing Flores, Lange asked her age. He later testified that the question was intended to address the "elephant in the room"—Flores's prior discrimination complaint. Amy Sanchez, the thirty-seven-year-old director of Tech's office of auditing services, also applied for the chief-of-staff position. Lange hired Sanchez.

Flores sued Tech for age discrimination and retaliation. Tech filed a jurisdictional plea based on sovereign immunity, which the trial court denied. The court of appeals reversed on retaliation but affirmed on age discrimination. Tech filed a petition for review.

The Supreme Court reversed. In an opinion by Justice Lehrmann, the Court held that Flores did not present sufficient evidence that the reason for not hiring her was untrue and a mere pretext for discrimination. The Court pointed to the undisputed evidence that both candidates have relevant experience and qualifications and declined to second-guess the manner in which Lange weighed those qualifications. The Court further reasoned that Lange's asking Flores's age is not evidence of pretext when viewed in the context of his knowledge of her prior discrimination claim. The Court thus held that Flores failed to raise a genuine issue of material fact that age was a motivating factor in Lange's hiring decision.

Justice Blacklock concurred, opining that the *McDonnell Douglas* formula has no foundation in the statutory text governing discrimination

claims. He emphasized that the chief of staff is a person in whom the president places significant trust and that there is no basis in the record for a reasonable factfinder to conclude that Lange subjectively believed Flores would be better suited to the position than Sanchez if not for her age.

Justice Young also concurred, echoing Justice Blacklock's call for reexamination of the Court's burden-shifting framework for analyzing discrimination claims.

2. Disability Discrimination

a) *Dall. Cnty. Hosp. v. Kowalski*, ___ S.W.3d ___, 2024 WL 5249566 (Tex. Dec. 31, 2024) (per curiam) [23-0341]

This case concerns disability-based discrimination and retaliation.

Sheri Kowalski served as Director of Finance at Parkland Hospital. In late 2017, Kowalski asked Parkland management to make changes to her workstation to alleviate neck and upper back pain. Parkland had Kowalski and her medical provider complete several forms. Kowalski repeatedly disclaimed having any ADA-covered disability and complained that the tedious process was unnecessary. Around the same time, Kowalski's position at Parkland was eliminated. Kowalski sued, alleging disability discrimination and retaliation under Chapter 21 of the Labor Code.

The trial court denied Parkland's plea to the jurisdiction, concluding that Kowalski had created a fact issue on her discrimination and retaliation claims. The court of appeals affirmed.

The Supreme Court held that Kowalski failed to create a fact issue on any of her claims. Evidence of neck pain without a showing that the pain significantly limits any activity, the Court explained, is no evidence of a disability under Chapter 21. Further, Parkland's having directed Kowalski to its formal accommodation process is not evidence that Parkland regarded Kowalski as disabled. Finally, the Court noted that Kowalski's complaints that Parkland did not require another employee to complete the same process—absent a showing that either employee is disabled—is no evidence that Parkland was on notice of disability-based discrimination. Kowalski's repeated insistence—confirmed by her medical provider—that she does not have a disability further illustrated these points. Without a fact issue on any claim, Parkland's plea to the jurisdiction should have been granted.

Accordingly, the Court reversed the court of appeals' judgment, rendered judgment for Parkland, and dismissed the case for lack of jurisdiction.

3. Employment Discrimination

a) *Scott & White Mem'l Hosp. v. Thompson*, 681 S.W.3d 758 (Tex. Dec. 22, 2023) [22-0558]

This case concerns the causation standard at the summary-judgment stage in an employment-discrimination lawsuit.

Dawn Thompson worked as a registered nurse at Scott & White Memorial Hospital. She had received two prior reprimands for violating the hospital's personal-conduct policy. The second reprimand warned that any future violation "will result in separation from

employment."

Thompson then received a third reprimand. She had become concerned that the parents of a child patient were not properly managing the child's medications. Thompson called the child's school nurse and disclosed the child's health information, which Scott & White claimed was a HIPAA violation. Thompson then reported her concerns to Child Protective Services. After the child's mother complained to the hospital, it fired Thompson. The form documenting her termination stated, "As a result of this [HIPAA] violation your employment is being terminated immediately." It also included the statement: "Furthermore a CPS referral was made without all details known to Ms. Thompson."

Thompson sued Scott & White under Section 261.110(b) of the Family Code for firing her for making a statutorily protected CPS report. Scott & White moved for summary judgment, arguing that it terminated Thompson for violating its personal-conduct policy by disclosing protected health information to the school nurse—not for making the CPS report. The trial court granted summary judgment in Scott & White's favor, but the court of appeals reversed.

The Supreme Court reversed the court of appeals' judgment and reinstated the summary judgment in Scott & White's favor. It held that Scott & White's evidence conclusively negated the "but for" causation element of Thompson's claim because it demonstrated that the hospital would have fired Thompson when it did for her third violation of its policy, regardless of the CPS report. Thompson therefore could not establish a violation of Section 261.110, and summary judgment in favor of Scott & White was proper.

4. Sexual Harassment

a) *Fossil Grp., Inc. v. Harris*, 691 S.W.3d 874 (Tex. June 14, 2024) [23-0376]

The issue in this workplace sexual-harassment case is whether the summary-judgment record bears any evidence that a company knew or should have known its employee was being harassed and failed to take prompt remedial action.

Shortly after Fossil Group hired Nicole Harris as a sales associate, the assistant store manager sent her sexually explicit content through social media. Harris told some colleagues about the conduct but did not tell anyone in management. After a brief term of employment, Harris voluntarily resigned. A week later, her store manager learned of the harassment from another source, met with her, and immediately reported it to human resources. Fossil then fired the assistant store manager.

Harris sued Fossil for a hostile work environment, alleging that she had reported the harassment by an email through Fossil's anonymous reporting system days before she resigned. Fossil moved for summary judgment, challenging the email's existence with a report from the system showing that it never received the complaint and asserting that its subsequent actions were prompt and remedial. The trial court granted summary judgment. But the court of appeals reversed, holding that Harris's testimony regarding her email is some evidence

Fossil knew of the harassment without taking remedial action.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's take-nothing judgment. The Court held that (1) Fossil's actions following the date of the email, even if taken in response to learning of the harassment from another source, were sufficiently prompt and remedial as a matter of law to avoid liability, and (2) Harris did not adduce evidence that Fossil knew or should have known of the harassment before that date.

Justice Blacklock filed a concurring opinion, emphasizing that federal Title VII sexual-harassment authorities do not play any formal role beyond what the Court has already recognized in the interpretation and application of Texas statutory law on sexual harassment.

Justice Young filed a concurring opinion, concluding that Harris's testimony regarding her email at most raised a presumption that Fossil was notified of her harassment, which Fossil rebutted through its generated report that it did not receive her complaint through the anonymous reporting system.

5. Whistleblower Actions

a) *City of Denton v. Grim*, 694 S.W.3d 210 (Tex. May 3, 2024) [22-1023]

In this case, the Court addressed the scope of the Texas Whistleblower Act. Plaintiffs Grim and Maynard were employees of the City of Denton. They sued the city under the Whistleblower Act after they were terminated. They alleged they were fired for reporting that city council member Briggs had violated the Public Information Act and the Open Meetings Act by meeting at her home with a reporter and disclosing confidential vendor information. The trial court rendered judgment on the jury's verdict for plaintiffs. A divided court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the city. The Act only applies to reports of a violation of law "by the employing governmental entity or another public employee." Briggs was not "another public employee" because Denton's city council members are not paid for their service. The case thus turned on whether Briggs' actions could be imputed to the city as the plaintiffs' "employing governmental entity." The Court answered that question no. The evidence showed that Briggs had acted alone and was not acting on behalf of the city or the city council. Under Texas law, a city council acts as a body through a duly called meeting. Under principles of agency law, a city might authorize a single city council member to act on the city's behalf, but there was no evidence here to support such a theory. It was undisputed that Briggs acted entirely on her own, without the knowledge of other council members or employees, and that she did not purport to be acting for the city. On the contrary, Briggs opposed the city council's support for a new power plant and this opposition motivated her communications with the reporter.

J. EVIDENCE

1. Privilege

a) *In re Richardson Motorsports, Ltd.*, 690 S.W.3d 42 (Tex. May 10, 2024) [22-1167]

The issue in this case is whether a minor's psychological treatment records are discoverable under the patient-litigant (*i.e.*, patient-condition) exceptions to the physician-patient and mental-health-information privileges.

Father purchased an ATV from Richardson. During a ride with his two children, E.B. and C.A.B, a recalled steering mechanism malfunctioned, causing the vehicle to roll over. E.B. suffered physical injuries and contemporaneously witnessed her brother's death. E.B. later sued Richardson for negligence, seeking damages for her physical injuries and for mental anguish. During discovery, Richardson requested E.B.'s psychological treatment records from E.B.'s treating psychologist and pediatrician, and E.B. moved to quash the requests, claiming privilege under Texas Rules of Evidence 509(c) and 510(b). The parties primarily disputed the extent to which E.B.'s mental condition was at issue and the applicability of the patient-condition exceptions.

Following the trial court's denial of the motions to quash, E.B. filed a petition for writ of mandamus. The court of appeals conditionally granted mandamus relief vacating the trial court's orders, holding that E.B.'s routine claim of mental anguish was insufficient to trigger the patient-condition exceptions.

Richardson filed a petition for writ of mandamus in the Supreme Court and the Court conditionally granted relief. After rejecting the argument that bystander recovery alone was sufficient to trigger the exceptions, the Court held that E.B.'s mental condition is part of both her claim and Richardson's causation defense. As such, the patient-condition exceptions to privilege apply and E.B.'s records are discoverable.

K. FAMILY LAW

1. Division of Community Property

a) *Landry v. Landry*, 687 S.W.3d 512 (Tex. Mar. 22, 2024) (per curiam) [22-0565]

The issue is whether legally sufficient evidence supports the trial court's finding that certain investment accounts are Husband's separate property.

In a divorce case, the trial court found that two investment accounts in Husband's name that preexisted the marriage are his separate property. At trial, Husband's expert had testified that he traced the accounts through fifteen-years' worth of statements and that the accounts were not commingled with community assets. The expert also testified that there was a four-month gap in the statements he reviewed but that the missing statements did not affect his analysis.

The court of appeals reversed the part of the judgment dividing the community estate and remanded for a new division. The court held that the "missing" account statements created a gap in the record, with the result that no evidence supports the accounts' characterization as separate property.

The Supreme Court reversed. The Court explained that while the

account statements at issue were not reviewed by the expert, they were admitted into evidence at trial, are included in the appellate record, and, thus, not "missing." Because the statements are in the record, the court of appeals erred in relying on their absence to hold that Husband failed to overcome the presumption that the accounts are community property. The Court remanded to the court of appeals to conduct a new sufficiency analysis that includes consideration of the account statements.

2. Division of Marital Estate

a) *In re J.Y.O.*, ___ S.W.3d ___, 2024 WL 5250363 (Tex. Dec. 31, 2024) [22-0787]

This divorce case concerns the characterization and division of a discretionary performance bonus, the marital residence, and a retirement account.

Lauren and Hakan Oksuzler were married in 2010. The trial court granted them a divorce in December 2019, but litigation continued relating to the division of the marital estate. One issue is a performance bonus of $140,000 that Hakan received from his employer, Bank of America, in early 2020. The evidence shows that Hakan has received a bonus annually as part of his compensation; that the bonus is discretionary and contingent on Hakan's and the Bank's performance during the previous calendar year; and that Hakan must still be employed by the Bank on the date of payment to receive it. The Supreme Court held that the characterization of a bonus—like any compensation—depends on when it was earned and that a discretionary bonus paid after divorce for work performed during marriage is community property. Because the bonus Hakan received in 2020 was for work performed during marriage, it is community property.

The second issue is the marital residence, which Hakan owned before marriage but refinanced during marriage. The deed executed in connection with the refinancing lists both Hakan and Lauren as grantees. The Supreme Court affirmed the court of appeals' judgment that Hakan and Lauren each own an undivided one-half interest in the home as tenants in common. Texas caselaw establishes a "gift presumption" in the context of real-property conveyances between spouses. When the marital home was purchased by one spouse before marriage, and a new deed executed during marriage purports to convey an interest in the home to the other spouse, it raises a presumption that the owner spouse intended to give the other spouse an undivided one-half interest in the property as a gift. This presumption can be rebutted by clear-and-convincing evidence that a gift was not intended, but the Court held Hakan presented no evidence to rebut the presumption here.

As to Hakan's 401(k) account, the Court noted Hakan contributed to the both during the marriage. It was therefore presumptively community property, and any separate property within the account must be traced to contributions made before marriage. The Court held that Hakan failed to overcome the community-property presumption.

The Court thus affirmed in part, reversed in part, and remanded to the

trial court for further proceedings.

3. Termination of Parental Rights

a) *In re A.V.*, 697 S.W.3d 657 (Tex. Aug. 30, 2024) (per curiam) [23-0420]

The issue in this case is whether evidence of a parent's drug use alone is sufficient to terminate parental rights for endangerment.

The trial court terminated both parents' rights to A.V. after hearing evidence that both parents used drugs during pregnancy, did not complete court-ordered services including drug testing and refraining from drug use, and only sporadically attended visitation. The court of appeals affirmed, citing its own precedent for the proposition that mere illegal drug use is sufficient to terminate. The Supreme Court subsequently clarified that illegal drug use accompanied by circumstances indicating related dangers to the child can establish a substantial risk of harm, in *In re R.R.A.*, 687 S.W.3d 269 (Tex. 2024).

The Supreme Court denied the parents' petition for review, reaffirming the endangerment review standards set forth in *R.R.A.* in a per curiam opinion. The evidence detailed by the court of appeals shows a pattern of behavior sufficient to support the court of appeals' decision under the *R.R.A.* standards.

b) *In re C.E.*, 687 S.W.3d 304 (Tex. Mar. 1, 2024) (per curiam) [23-0180]

The issue in this case is whether there was legally sufficient evidence to support termination of Mother's parental rights to her son.

DFPS began an investigation after Carlo, a seven-week-old infant, was hospitalized with a fractured skull, a brain bleed, and retinal hemorrhaging, and his parents could not provide an explanation for the injuries to hospital staff. Investigators ultimately concluded Mother likely injured Carlo. A jury made the findings necessary to terminate Mother's parental rights under Sections 161.001(b)(1)(D), (E), and (O) and Section 161.003 of the Texas Family Code, and the trial court rendered judgment on the verdict. The court of appeals reversed the judgment of termination because it concluded that the evidence was legally insufficient on each ground.

The Supreme Court held that there was sufficient evidence Mother engaged in conduct that endangered Carlo's well-being to support termination under (E). At trial, Mother and Father gave conflicting versions of the events taking place in the likely timeframe of Carlo's injuries. But there was other evidence—such as testimony that the injury likely occurred when Carlo was in Mother's care and concerns from caseworker regarding Mother's behavior and her inconsistent story throughout the investigation—that was legally sufficient to support the jury's finding that Mother engaged in endangering conduct. The Court thus reversed the court of appeals' judgment and remanded to that court to address Mother's remaining issues that the court of appeals had not addressed in its first opinion.

c) *In re R.J.G.*, 681 S.W.3d 370 (Tex. Dec. 15, 2023) [22-0451]

The issue in this case is whether strict compliance is required to avoid parental-rights termination based on the alleged failure to comply with the provisions of a court-ordered service plan.

The Department of Family and Protective Services removed Mother's three children and prepared a service plan identifying required actions for her to obtain reunification. The Department alleged that Mother failed to complete requirements that she participate in individual counseling and complete classes on parenting and substance abuse. It sought termination solely on that basis under Section 161.001(b)(1)(O) of the Family Code.

Mother argued that she substantially complied with these requirements. The Department's only witness testified that Mother had complied with the plan's requirements but not when she needed to or in the way she was ordered to comply. The trial court ordered termination of Mother's parental rights, concluding that strict compliance with the plan was required. The court of appeals affirmed.

The Supreme Court reversed, holding that strict or complete compliance with every plan requirement is not always necessary to avoid termination under (O). The Court noted that (O) authorizes termination only when the plan requires the parent to perform direct, specifically required actions. In addition, the parent must have failed to comply with a material plan requirement; termination is not appropriate for noncompliance that is trivial or immaterial in light of the plan's requirements overall. In this case, the plan did not specifically require Mother to achieve any particular benchmark in her individual counseling sessions, so the Department did not establish by clear and convincing evidence that Mother failed to comply with that requirement. And there was evidence that Mother completed the parenting and substance abuse classes with another provider, so her asserted failure to provide a certificate of completion was too trivial and immaterial, in light of the degree of her compliance with the plan's material requirements, to support termination. Because Mother complied with the material provisions of the plan, the Court held there was insufficient evidence to support termination by clear and convincing evidence under (O). The Court therefore reversed and vacated the order terminating Mother's parental rights.

d) *In re R.R.A.*, 687 S.W.3d 269 (Tex. Mar. 22, 2024) [22-0978]

The issue in this case is whether the State must prove that a parent's drug use directly harmed the child to prove endangerment as a ground for termination of parental rights.

Father had a history of methamphetamine use, unemployment, and homelessness for two months while parenting his three children, who were between one- and three-years old. The Department removed the children from Father's care. During the Department's attempts to reunify the children with Father over the course of a year and a half, Father tested positive for drugs twice more, stopped taking court-mandated drug tests for nearly a year, and

had no contact with the children for about six months before trial. Father did not secure housing or employment. The trial court ordered Father's parental rights terminated under grounds that require that a parent's conduct "endanger" the child, including one ground specific to drug use. A divided court of appeals reversed and held that individual pieces of evidence were insufficient to show that Father's drug use directly endangered the children.

The Supreme Court reversed. It reaffirmed that endangerment does not require that the parent's conduct directly harm the child. Instead, a pattern of parental behavior that presents a substantial risk of harm to the child permits a factfinder to reasonably find endangerment. This pattern can be shown when drug use affects the parent's ability to parent. The Court went on to hold that based on the totality of the evidence—Father's felony-level drug use, refusal to provide court-ordered drug tests, inability to secure housing and employment, and prolonged absence from the children—legally sufficient evidence supported the trial court's finding of endangerment. The Court remanded the case to the court of appeals to consider Father's challenge to the trial court's best-interest findings in the first instance.

Justice Blacklock filed a dissenting opinion. He would have held that the Department did not prove by clear and convincing evidence that the children were sufficiently endangered to warrant termination.

L. GOVERNMENTAL IMMUNITY

1. Contract Claims

a) *Campbellton Rd., Ltd. v. City of San Antonio ex rel. San Antonio Water Sys.*, 688 S.W.3d 105 (Tex. Apr. 12, 2024) [22-0481]

The issue in this case is whether a signed document providing for sewer services is a written contract for which the Local Government Contract Claims Act waives governmental immunity.

A private developer planned to develop land it owned into residential subdivisions. To ensure sewer service and guarantee sewer capacity, the developer signed a written instrument with a municipal water system, which included terms of an option for the developer to participate in and fund the construction of off-site oversized infrastructure, which the system would then own. The developer did not develop its land into residential subdivisions within the stated ten-year term. By the time it started developing the land, the system had no remaining unused sewer capacity. The developer sued the system for breach of contract, alleging that it had acquired vested rights to sewer capacity.

The Act waives immunity when a local governmental entity enters into a written contract that states the essential terms of an agreement for providing services to that entity. Here, the municipal system asserted that it is entitled to governmental immunity, but the trial court denied the plea to the jurisdiction. The court of appeals reversed, holding that the Act does not apply because the system had no contractual right to receive any services

and would not have legal recourse if the developer unilaterally decided not to proceed with its developments.

The Supreme Court reversed, holding that the Act waives the system's immunity from suit because the developer adduced evidence that (1) a contract formed when the developer decided to and did participate in the offsite oversizing project, (2) the written contract states the essential terms of an agreement for the developer to participate in the project, and (3) the agreement is for providing a service to the system that was neither indirect nor attenuated. The Court remanded the case to the trial court for further proceedings.

b) *Legacy Hutto v. City of Hutto*, 687 S.W.3d 67 (Tex. Mar. 15, 2024) (per curiam) [22-0973]

This case concerns statutory requirements for a contract between a governmental entity and a business entity.

Legacy Hutto sued the City for its failure to pay for work Legacy had performed under a contract. Section 2252.908(d) of the Government Code prohibits a governmental entity from entering into certain contracts with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity when the contract is signed. Legacy had never submitted the disclosure. The City argued that the lack of disclosure meant that the contract was not "properly executed," as required by Chapter 271 of the Local Government Code, which waives a governmental entity's immunity to suit for breach of contract. The City thus argued that its immunity to suit was not waived for Legacy's claim. The City filed a plea to the jurisdiction and a Rule 91a motion on that basis.

The trial court granted the City's plea and motion but also granted Legacy leave to replead. Both parties appealed. The court of appeals affirmed, holding among other things that Chapter 271's waiver of immunity requires compliance with Section 2252.908(d).

Both parties petitioned for review. After they had done so, the Legislature passed HB 1817, which amended Section 2252.908 to require that a governmental entity notify a business entity of its failure to submit a disclosure of interested parties. HB 1817 also provides that a contract is deemed to be "properly executed" until the governmental entity provides notice to the business entity. Lastly, it permits a court to apply the new statutory requirements to already-pending cases if the court finds that failure to enforce the new requirements would lead to an inequitable or unjust result. Due to this change in the law, the Supreme Court granted the petitions for review, vacated the court of appeals' judgment, and remanded for the trial court to conduct further proceedings in accordance with the new statutory requirements.

c) *San Jacinto River Auth. v. City of Conroe*, 688 S.W.3d 124 (Tex. Apr. 12, 2024) [22-0649]

The issue in this case is whether an alternative-dispute-resolution procedure in a government contract limits an otherwise applicable waiver of immunity under the Local Government

Contract Claims Act.

The cities of Conroe and Magnolia entered into municipal-water contracts with the San Jacinto River Authority. The contracts contained provisions that required pre-suit mediation in the event of certain types of default. The cities, along with other municipalities and utilities, began to dispute the rates set by SJRA under the water contracts. Substantial litigation ensued, including suits by several private utilities against SJRA. SJRA then brought third-party claims against the cities for failure to pay amounts due under the contracts. The cities filed pleas to the jurisdiction, arguing that their immunity had not been waived because SJRA failed to submit its claims to pre-suit mediation and because the contracts failed to state their essential terms. The trial court granted both pleas and dismissed SJRA's claims against the cities. SJRA filed an interlocutory appeal, and the court of appeals affirmed, holding that the cities' immunity was not waived.

The Supreme Court reversed, holding that contractual alternative dispute resolution procedures do not limit the waiver of immunity in the Local Government Contract Claims Act. Instead, the Act provides that such procedures are enforceable so that courts may exercise jurisdiction to order compliance with those provisions. The Supreme Court also held that the parties' dispute did not trigger the mandatory mediation procedure in SJRA's contracts with the cities. Finally, the Supreme Court rejected the cities' argument that their immunity was not waived because the contracts failed to state their essential terms. The contracts complied with the common law and the Act's requirements, and so stated their essential terms.

2. Official Immunity

a) *City of Houston v. Sauls*, 690 S.W.3d 60 (Tex. May 10, 2024) [22-1074]

The issue in this interlocutory appeal is whether a city established that official immunity would protect its police officer from liability in a wrongful-death suit for the purpose of retaining its governmental immunity under the Tort Claims Act.

Officer Hewitt was responding to a priority two suicide call when his vehicle struck a bicyclist crossing the road, tragically ending the bicyclist's life. At the time of the accident, Hewitt was traveling 22 miles per hour over the speed limit and without lights or sirens to avoid agitating the patient on arrival. The bicyclist's family sued the City of Houston for wrongful death based on Hewitt's alleged negligence.

Relying on Hewitt's official immunity, the City moved for summary judgment, asserting that its governmental immunity was not waived. The trial court denied the motion, and the court of appeals affirmed, holding that the City did not establish Hewitt's good faith through the required need–risk balancing factors.

The Supreme Court reversed the court of appeals' judgment. Emphasizing that the good-faith test is an objective inquiry, the Court held that the City established Hewitt was (1) performing a discretionary duty while acting within the scope of his authority in responding to the priority-two suicide call and (2) acting in good faith, given

that a reasonably prudent officer in the same or similar position could have believed his actions were justified in light of the need–risk factors. Because the plaintiffs failed to controvert the City's proof of Hewitt's good faith, the Court dismissed the case.

3. Texas Labor Code

a) *Tex. Tech Univ. Sys. v. Martinez*, 691 S.W.3d 415 (Tex. June 14, 2024) [22-0843]

The issue in this case is whether the plaintiff's petition alleged sufficient facts to demonstrate a valid employment-discrimination claim against university entities and thus establish a waiver of immunity.

Pureza "Didit" Martinez was terminated at age 72 from her position at the Texas Tech University Health Sciences Center. She sued the Center for age discrimination. Her petition also named as defendants Texas Tech University, the TTU System, and the TTU System's Board of Regents.

The University, the System, and the Board jointly filed a plea to the jurisdiction. They argued that only the Center, Martinez's direct employer, could be liable for her employment-discrimination claim. Martinez responded that she alleged sufficient facts to impose liability under the Labor Code against the other defendants. The trial court denied the plea. The court of appeals reversed the trial court's order as to the University, though it allowed Martinez to replead. The court affirmed as to the System and the Board, concluding that Martinez's allegations were sufficient. The System and the Board petitioned the Supreme Court for review.

The Court reversed. In an opinion by Justice Huddle, the Court first noted that to affirmatively demonstrate a valid employment-discrimination claim against defendants other than her direct employer, Martinez needed to allege sufficient facts showing that those defendants controlled access to her employment opportunities and that they denied or interfered with that access based on unlawful criteria. The Court held that Martinez's factual allegations and the exhibits attached to and incorporated in her petition fail to demonstrate she has a valid claim against the System or the Board. Because Martinez's petition does not affirmatively demonstrate that she cannot cure the jurisdictional defect, the Court remanded to the trial court to allow her to replead.

Justice Young filed a dissenting opinion. He would have held that Martinez's allegations are sufficient at this stage of the litigation, particularly under the Court's duty to liberally construe her pleading in a way that reflects her intent.

4. Texas Tort Claims Act

a) *City of Austin v. Powell*, ___ S.W.3d ___, 2024 WL 5249451 (Tex. Dec. 31, 2024) [22-0662]

The issue in this case is whether the Texas Tort Claims Act waives the City of Austin's governmental immunity.

Officers Brandon Bender and Michael Bullock were involved in a police chase. Officer Bullock was closely following Officer Bender's vehicle. Officer Bender decided to make a sudden right turn. Unable to slow in time,

Officer Bullock struck the side of Officer Bender's car. The two cars lost control, and Officer Bullock's car hit Noel Powell's minivan, which was stopped at the intersection.

Powell sued the City. The City filed a plea to the jurisdiction under the Act's emergency-response exception. To establish the emergency exception, it was Powell's burden to create a fact issue on either Officer Bullock's compliance with an applicable statute or his recklessness during the chase. The trial court denied the City's motion, and the City filed an interlocutory appeal. The court of appeals affirmed, holding that there is a fact issue about whether Officer Bullock's actions were reckless.

The Supreme Court reversed. The Court held that the City's immunity to suit is not waived. First, no statute specifically applies to Officer Bullock's actions during the chase, and thus no fact issue could arise as to compliance with one. Second, no evidence supports characterizing Officer Bullock's actions as reckless. Reckless requires more than a momentary lapse in judgment. There must be evidence that the officer consciously disregarded a high degree of risk. Here, the accident report listed Officer Bullock's inattentiveness and failure to keep a safe following distance as reasons for the accident. At most, this evidence shows that Officer Bullock was negligent. Powell offered no other evidence to create a fact issue as to recklessness. Because the plaintiff must establish a waiver of sovereign immunity, Powell's inability to provide evidence essential to the emergency exception means that the City should have prevailed on its plea to the jurisdiction. Accordingly, the Court reversed the court of appeals' judgment and rendered judgment dismissing the case for lack of jurisdiction.

b) *City of Houston v. Rodriguez*, ___ S.W.3d ___, 2024 WL 5249666 (Tex. Dec. 31, 2024) [23-0094]

The issue in this interlocutory appeal is whether the City of Houston established that official immunity protects its police officer from liability in a high-speed pursuit case.

Assisting in a prostitution sting, Officer Corral pursued a suspect fleeing in a stolen car at a high rate of speed. The suspect suddenly turned on a side street, and Corral followed. While making the turn, Corral hit the curb and struck a vehicle waiting at a stop sign. Corral later testified that he hit the curb due to his brakes not working. The driver and passenger of the vehicle sued the City.

The Texas Tort Claims Act waives a city's immunity from suit for injuries caused by its employee's negligence in operating a vehicle if the employee would be personally liable. But when government officials perform discretionary duties in good faith and within their authority, the law shields them from personal liability. The City moved for summary judgment based on Corral's official immunity. The trial court denied the motion, and the court of appeals affirmed. Relying on Corral's testimony that the brakes were not working, the intermediate court inferred that the brakes were deficient. Because Corral did not explain when he became aware that he was driving with deficient brakes, the court held

that a fact issue on good faith precludes summary judgment.

The Supreme Court reversed and rendered judgment dismissing the case. The Court held that (1) a governmental employer bears the burden to assert and prove its employee's official immunity in a manner analogous to an affirmative defense; (2) when viewed in context, Corral's statement communicated that the brakes were functional, but their use did not accomplish his intended result of stopping the car before it hit the curb; and (3) the City established as a matter of law Corral's good faith in making the turn.

Justice Busby concurred to make two observations: evidence of an officer's recklessness may inferentially rebut the good-faith prong of official immunity, and the Court's opinion should not be construed as sanctioning the decision to initiate a high-speed chase to apprehend a suspected nonviolent misdemeanant.

5. Ultra Vires Claims

a) *City of Buffalo v. Moliere*, ___ S.W.3d ___, 2024 WL 5099112 (Tex. Dec. 13, 2024) (per curiam) [23-0933]

The issue in this case is whether a city's governing body had authority to terminate a police officer and therefore is immune from suit.

The City of Buffalo's City Council fired police officer Gregory Moliere after he violated department policy by engaging in a high-speed chase while a civilian was riding along, resulting in an accident. Moliere sued the City, its mayor, and the City Council members, alleging that the City Council has no authority to fire him. The trial court dismissed Moliere's claims based on governmental immunity.

The court of appeals reversed. It held that there is a fact issue whether the City Council had authority to fire Moliere, so he properly alleged an ultra vires claim that should not have been summarily dismissed. The appellate court concluded that the Local Government Code requires the City Council to pass an ordinance specifically authorizing termination of police officers and that the City's policy manuals are ambiguous and therefore created a fact issue regarding the City Council's authority to terminate Moliere.

In a per curiam opinion, the Supreme Court reversed and held that, to the extent Moliere alleged an ultra vires claim based on the City Council's lack of authority to fire him, the trial court properly dismissed that claim. The Court noted that the Local Government Code authorizes the City Council to "establish and regulate" the City's police force and that the City Council passed an ordinance requiring its approval of all police officers' hiring or appointment. The Court concluded that the statute and ordinance, considered together, authorize the City Council as a matter of law to terminate Moliere. The Court remanded to the court of appeals to consider a previously unaddressed argument regarding Moliere's separate claim that the City Council members violated Moliere's due process when he was terminated.

b) *Image API, LLC v. Young*, 691 S.W.3d 831 (Tex. June 21, 2024) [22-0308]

At issue is the interpretation of a statute requiring the Health and Human Services Commission to conduct annual external audits of its Medicaid contractors and providing that an audit "must be completed" by the end of the next fiscal year.

HHSC hired Image API to manage a processing center for incoming mail related to Medicaid and other benefits programs. In 2016, HHSC notified Image that an independent firm would audit Image's performance and billing for years 2010 and 2011. Image cooperated fully. The audit, completed in 2017, found that HHSC had overpaid Image approximately $440,000.

Image sued HHSC's executive commissioner for ultra vires conduct, alleging that she has no legal authority to audit Medicaid contractors outside the statutory timeframe. Image sought a declaration that the 2016 audit for years 2010 and 2011 violated the Human Resources Code and an injunction preventing HHSC from conducting or relying on any noncompliant audit. The parties filed cross-motions for summary judgment, and HHSC also filed a plea to the jurisdiction. The lower courts ruled for HHSC. The court reasoned that the lack of any textual penalty for noncompliance, coupled with HHSC's heavy workload, supported "forgo[ing] the common man's interpretation of 'must'" and construing the deadline as directory rather than mandatory.

The Supreme Court affirmed the part of the court of appeals' judgment dismissing Image's claims arising from the 2016 audit, while clarifying the mandatory–directory distinction in Supreme Court caselaw. After agreeing with the court of appeals that Image is a Medicaid contractor, the Court emphasized that a statute requiring an act be performed within a certain time, using words like shall or must, is mandatory. The deadline is therefore mandatory because it states that a statutorily required audit "must be completed" within the time prescribed. What consequences follow a failure to comply is a separate question, which turns on whether a particular consequence is explicit in the text or logically necessary to give effect to the statute. Because there is no textual clue that the relief Image seeks is what the Legislature intended, the Court held that an injunction prohibiting HHSC from collecting overpayments found by the 2016 audit would be error. The Court remanded the case to the trial court for further proceedings on remaining claims.

M. HEALTH AND SAFETY

1. Involuntary Commitment

a) *In re A.R.C.*, 685 S.W.3d 80 (Tex. Feb. 16, 2024) [22-0987]

At issue in this case is whether a second-year psychiatry resident qualifies as "psychiatrist" under the Texas Health and Safety Code.

A.R.C. was detained on an emergency basis after exhibiting psychotic behavior during a visit to an emergency room. After a medical examination yielded troubling results, the State filed an application for involuntary commitment. By statute, a court cannot hold a hearing to determine whether involuntary civil commitment is appropriate unless it has received "at

least two certificates of medical examination for mental illness completed by different physicians." One of those certificates must be completed by "a psychiatrist" if one is available in the county. In this case, both certificates of medical examination filed with respect to A.R.C. were completed by second-year psychiatry residents.

In the probate court, A.R.C. argued that neither resident qualifies as a psychiatrist under the statute because each was licensed under a physician-in-training program and was training under more senior doctors. The court disagreed and ordered A.R.C. to undergo in-patient mental health services for forty-five days.

A split panel of the court of appeals held that the residents are not psychiatrists and vacated the probate court's order.

The Supreme Court granted the State's petition for review, reversed the court of appeals' judgment, and remanded the case to that court to consider A.R.C.'s remaining challenges. The Court held that physicians who specialize in psychiatry are psychiatrists under the applicable statute. The statutory definition of "physician" includes medical residents who practice under physician-in-training permits, and dictionaries show that psychiatrists are physicians who specialize their practices in psychiatry. Because the second-year residents who completed A.R.C.'s certificates of medical examination met that standard, they qualify as psychiatrists.

N. INSURANCE

1. Appraisal Clauses

a) *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. Feb. 2, 2024) [23-0534]

The U.S. Court of Appeals for the Fifth Circuit certified this question to the Supreme Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?"

A tornado struck Mario Rodriguez's home. His insurer, Safeco, issued a payment, which Rodriguez accepted. But Rodriguez claimed he was owed an additional sum and then sued, asserting breach of contract and statutory claims under the Insurance Code. The parties agreed that Chapter 542A would govern an attorney's fees award for any of Rodriguez's claims.

After removing the case to federal court, Safeco invoked the policy's appraisal provision. The appraisal panel valued the damage, and Safeco paid that amount plus interest to Rodriguez. The parties' remaining disagreement was whether Safeco's payment of the appraisal award foreclosed an award of attorney's fees under Chapter 542A.

The Court answered the certified question yes. Under Chapter 542A, attorney's fees are limited to reasonable fees multiplied by a specified ratio. The ratio is "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy" divided by the amount claimed in a statutory notice under Chapter 542A. The Court reasoned that, here,

the numerator of the ratio is zero. The Court reasoned that no amount could be awarded in a judgment under the policy because Safeco had complied with its contractual obligation when it timely paid the full amount owed under the policy's appraisal provision. The Court rejected Rodriguez's argument that this interpretation led to an absurd result because under the default American Rule, each side pays its own attorney's fees.

2. Policies/Coverage

a) *In re Ill. Nat'l Ins. Co.*, 685 S.W.3d 826 (Tex. Feb. 23, 2024) [22-0872]

This mandamus action concerns the no-direct-action rule and when a settlement agreement may be admissible as evidence to establish the amount of the insured's loss.

Relator GAMCO sued Cobalt for securities fraud. Cobalt's insurers denied coverage. Cobalt filed for bankruptcy, and GAMCO and Cobalt settled. The parties agreed that GAMCO would pursue the settlement amount solely through insurance proceeds. The federal bankruptcy and district courts approved the settlement.

GAMCO then intervened in a suit by Cobalt against its insurers. The trial court entered summary-judgment orders ruling that: (1) GAMCO was permitted to sue Cobalt's insurers, (2) Cobalt suffered insured losses, and (3) the settlement was enforceable against the insurers. The insurers sought mandamus relief, which the court of appeals denied.

The Supreme Court granted relief in part. It held that the settlement agreement legally obligated Cobalt to pay to GAMCO its insurance benefits. If Cobalt fails to fulfill its obligations, GAMCO's release will not become effective. And because the settlement agreement establishes that Cobalt is in fact liable to GAMCO for any recoverable insurance benefits, Cobalt has suffered a covered loss and the no-direct-action rule does not prevent GAMCO from suing the insurers directly.

However, the settlement did not result from a fully adversarial proceeding and was therefore not binding against the insurers as to coverage and the amount of Cobalt's loss. Cobalt did not have a meaningful incentive to ensure that the settlement accurately reflected GAMCO's damages. Mandamus relief was warranted on this issue because the trial court's rulings prevent the insurers from challenging their liability for the full settlement amount.

b) *Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc.*, ___ S.W.3d ___, 2024 WL 5172096 (Tex. Dec. 20, 2024) [23-0006]

The issue in this case is whether an excess-insurance policy covers the insured's legal-defense expenses.

Patterson provides oil-and-gas equipment and services. To cover its risk, Patterson purchased a primary policy and multiple levels of excess policies from its broker, Marsh USA, Inc. A drilling-rig incident led to lawsuits against Patterson. The settlements and defense expenses triggered an excess policy from Ohio Casualty after exhausting the coverage limits of the lower-level policies. Ohio Casualty funded portions of the settlements but refused to indemnify Patterson for

defense expenses.

The trial court granted Patterson's motion for summary judgment, concluding that the policy covers defense expenses. The court of appeals affirmed.

The Supreme Court reversed, holding that the policy does not cover Patterson's defense expenses. According to the Court, a "follow-form" excess policy like the one at issue in this case can incorporate an underlying policy to varying degrees. At all times, however, courts interpreting the agreement must start with the text of the excess policy, not that of the underlying policy. Here, the underlying policy undisputedly covers defense expenses. The court of appeals began with the underlying policy and thus erroneously concluded that the excess policy also covers defense expenses because it does not expressly exclude them. The court should instead have looked first to the excess policy, which provides its own statement of coverage that does not include defense expenses.

Accordingly, the Court reversed the court of appeals' judgment, rendered judgment for Ohio Casualty, and remanded the case to the trial court for further proceedings between Patterson and Marsh.

3. Pre-Suit Notice

a) *In re Lubbock Indep. Sch. Dist.*, 700 S.W.3d 426 (Tex. Oct. 25, 2024) (per curiam) [23-0782]

This case concerns the interpretation of an Insurance Code provision requiring pre-suit notice.

The Lubbock Independent School District sent a pre-suit notice to numerous insurance companies that provided the District with layers of coverage during two separate storms. Each notice stated that the "specific amount alleged to be owed" was $20 million. After filing suit, the District estimated in its initial disclosures that the covered damages would range from $100 to $250 million.

The insurers sought an abatement, asserting that the notice failed to comply with the Insurance Code's requirement that pre-suit notice include "the specific amount alleged to be owed by the insurer on the claim." The trial court denied the abatement, but the court of appeals granted the insurers' petition for writ of mandamus and directed the trial court to grant the abatement. The court of appeals held that the statute does not permit a claimant "to equivocate, or suggest an estimate, or offer a placeholder sum that might be changed after further investigation takes place"; instead, the statute requires the notice to "clearly articulate" the "precise sum alleged to be owed."

The Supreme Court disagreed with that holding. The Court observed that federal courts have consistently held that the "specific amount" language requires only that the notice assert a specific dollar amount; it does not require that the notice provide a "fixed and final total dollar sum" that is free from estimate and can never change. The Court commented that the federal courts' construction appears to be the one most consistent with the statute as a whole, especially in light of statutory provisions suggesting that the amount awarded may vary from the amount stated in the notice. But because the

District's notice was inadequate for other reasons, the Court denied the District's mandamus petition in a per curiam opinion.

O. INTENTIONAL TORTS

1. Defamation

b) *Polk Cnty. Publ'g Co. v. Coleman*, 685 S.W.3d 71 (Tex. Feb. 16, 2024) [22-0103]

This case involves the application of the Texas Citizens Participation Act to a defamation claim against a newspaper.

The *Polk County Enterprise* published an article criticizing local prosecutor Tommy Coleman and his former employer, the Williamson County District Attorney's office, for their involvement in the wrongful conviction of Michael Morton. Coleman sued the Polk County Publishing Company—the *Enterprise*'s owner—alleging that the article was defamatory. Coleman challenged as false the statement that he had "assisted with the prosecution of Michael Morton" while a prosecutor in Williamson County. Coleman averred that he was not a licensed lawyer when Morton was convicted in 1987; that he was only a prosecutor in the Williamson County DA's office from 2008 to 2012; and that, while there, he never appeared as counsel, signed court filings, discussed case strategy, argued in court, or gave any public statements or interviews in the Morton case. The trial court denied Polk County Publishing's motion to dismiss under the TCPA, and the court of appeals affirmed.

The Supreme Court reversed. In an opinion by Justice Blacklock, the Court explained that an article is substantially true and not defamatory if the "gist" of the article is true, even if it "errs in the details." The *Enterprise* article reported that Coleman, while present in the courtroom during one of Morton's post-conviction hearings, mocked Morton's efforts to obtain the DNA evidence that ultimately exonerated him. The Court reasoned that, reading the article as a whole, an average reader would understand the article's gist to be that Coleman "assisted with the prosecution" by mocking Morton's post-conviction efforts to exonerate himself and by providing courtroom support for his office's opposition to Morton's efforts. The Court also held that the challenged statement is not actionable for the additional reason that the undisputedly true account of Coleman's courtroom mocking of Morton, in the mind of an average reader, would be more damaging to Coleman's reputation than the specific statement that Coleman alleged to be false and defamatory.

2. Fraud

a) *Keyes v. Weller*, 692 S.W.3d 274 (Tex. June 28, 2024) [22-1085]

At issue is whether Section 21.223 of the Business Organizations Code limits a corporate owner's personal liability for torts committed as a corporate officer or agent.

David Weller spent several months in employment negotiations with MonoCoque Diversified Interests LLC, which is wholly owned by Mary Keyes and Sean Nadeau. The parties exchanged emails detailing compensation terms, Weller's salary, a training supplement, and payments based on quarterly revenues. Weller declined

other employment opportunities and accepted MonoCoque's employment offer. MonoCoque and Weller subsequently disagreed on the terms of the required compensation, and Weller resigned. MonoCoque denied owing Weller any additional compensation.

Weller sued MonoCoque for breach of contract and asserted fraud claims against Keyes and Nadeau individually, alleging that they are personally liable for their own tortious conduct. Keyes and Nadeau moved for summary judgment on the ground that Section 21.223 bars the claims against them individually because they were acting as authorized agents of MonoCoque. The trial court granted the motion, but the court of appeals reversed and remanded for further proceedings.

The Supreme Court affirmed. In a unanimous opinion by Justice Lehrmann, the Court explained that Section 21.223 does not shield a corporate agent who commits tortious conduct from direct liability merely because the agent also possesses an ownership interest in the company. Because Weller's claims against Keyes and Nadeau stemmed from their allegedly fraudulent conduct as MonoCoque's agents, not as its owners, they were not entitled to summary judgment on the ground that Section 21.223 shields them from liability.

Justice Busby concurred, opining that the statutory text and the Court's opinion provide guidance on future analysis of Section 21.223's effect on a shareholder's liability for tortious acts not committed as a corporate agent.

Justice Bland concurred, emphasizing the distinction between a shareholder's conduct in his role as an owner and conduct in his role as a corporate agent acting on the company's behalf.

P. INTEREST

1. Simple or Compound

a) *Samson Expl., LLC v. Bordages*, 662 S.W.3d 501 (Tex. June 7, 2024) [22-0215]

The issues in this case are collateral estoppel and whether a late-charge provision in a mineral lease calls for simple or compound interest.

Samson Exploration holds oil-and-gas leases on properties owned by the Bordages. Each lease has an identical late-charge provision that provides for interest on unpaid royalties at a rate of 18%. A late charge is "due and payable on the last day of each month" in which a royalty payment was not made. After the Bordages sued to recover unpaid royalties and interest, Samson paid the unpaid royalties and the amount of interest it believed to be due, which Samson calculated by applying 18% simple interest to the unpaid royalties.

The parties continued to dispute whether the late-charge provision provides for simple or compound interest. On cross-motions for summary judgment, the trial court determined that the provision calls for compound interest and ordered Samson to pay another $13 million in compounded late charges. The court of appeals affirmed.

The Supreme Court reversed and remanded for further proceedings. The Court addressed first the Bordages' argument that Samson is collaterally estopped from relitigating the interpretation of the late-charge

provision. In another case involving a different landowner, the court of appeals concluded that an identical late-charge provision called for compound interest, and the Supreme Court denied Samson's petition for review. The Court held that nonmutual collateral estoppel will not prevent a party from relitigating an issue of law in the Supreme Court when the Court has not previously addressed the issue, and the Court deems the issue to be important to the jurisprudence of the State.

The Court turned next to interpreting the late-charge provision. The Court held that because Texas law disfavors compound interest, an agreement for interest on unpaid amounts is an agreement for simple interest absent an express, clear, and specific provision for compound interest. Temporal references such as "per annum," "annually," or "monthly," standing alone, are insufficient to sustain the assessment of compound interest. The court of appeals thus erred by construing the language making a late charge "due and payable on the last day of each month" as providing for compound interest.

Q. JURISDICTION

1. Appellate

a) *In re A.C.T.M.*, 682 S.W.3d 234 (Tex. Dec. 29, 2023) (per curiam) [23-0589]

In this appellate-jurisdiction case, the court of appeals dismissed as untimely two attempts by Mother to appeal the trial court's termination of her parental rights.

The trial court first made an oral pronouncement terminating Mother's parental rights in October. Mother filed her notice of appeal from that pronouncement before the trial court signed a written order. The trial court did sign a written order in November, but it was never made part of the appellate record. The court of appeals dismissed Mother's appeal for lack of jurisdiction after concluding that the trial court had not yet issued a final judgment.

In January, after the court of appeals issued its opinion and judgment, the trial court signed a second order terminating Mother's parental rights. Mother filed a new notice of appeal, but a split panel of the court of appeals dismissed this appeal as untimely too. In an about-face, the majority concluded that the November order was the trial court's final judgment after all, rendering Mother's second notice of appeal untimely. The majority further reasoned that the trial court's January order is void because it was issued after the court's plenary power expired. Mother filed a petition for review in the Supreme Court. The Department of Family and Protective Services conceded error in its response.

The Supreme Court reversed without requesting further briefing or hearing argument, holding that Mother timely sought to invoke the appellate court's jurisdiction with respect to both orders. The Court explained that if the November order was the trial court's final judgment, then Mother's premature appeal from the court's oral pronouncement was effective under Texas Rule of Appellate Procedure 27.1(a) to invoke the appellate court's jurisdiction. Furthermore, that the November order was not included in the record of Mother's first appeal presented a record defect, not a

jurisdictional defect. By obtaining the January order and filing a new notice of appeal, Mother was following the court of appeals' instructions, and she could not have done more to invoke her appellate rights. The Court remanded the case to the court of appeals with instructions to address the merits.

b) *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.,* 685 S.W.3d 816 (Tex. Feb. 23, 2024) [22-0459]

This case raises questions of appellate jurisdiction and finality of judgments, including whether a trial court can sever unresolved claims following a grant of partial summary judgment, thereby creating an appealable final judgment, and the extent to which summary judgment against a party's claim resolves a related request for attorney's fees.

FERMA sued Sealy ER for breach of contract. Sealy ER counterclaimed and requested attorney's fees on those claims. FERMA obtained a grant of partial summary judgment on its counterclaims that did not separately dispose of Sealy ER's request for attorney's fees. FERMA moved to sever the claims disposed of on partial summary judgment. Sealy ER agreed with FERMA's proposal to sever but moved for reconsideration of the partial summary judgment ruling. The trial court granted the motion to sever and denied the motion for reconsideration. Sealy ER sought to appeal the trial court's judgment, but the court of appeals determined it lacked jurisdiction in light of the claims still pending in the original action and because the trial court's partial summary judgment order did not dispose of Sealy ER's request for attorney's fees on its counterclaims.

The Supreme Court reversed. If an order in a severed action disposes of all the remaining claims in that action or includes express finality language, then that order results in a final judgment regardless of whether claims remain pending in the original action. The Court further noted that although an erroneous severance does not affect finality or appellate jurisdiction, it may have consequences for any preclusion defenses. The Court also held that when a party seeks attorney's fees as a remedy for a claim under a prevailing-party standard, a summary judgment against the party on that claim automatically disposes of the fee request, and therefore a trial court's failure to expressly deny a request for attorney's fees in this context will not affect a judgment's finality for purposes of appeal.

2. Service of Process

a) *Tex. State Univ. v. Tanner*, 689 S.W.3d 292 (Tex. May 3, 2024) [22-0291]

The main issue in this case is whether diligence in effecting service of process is a "statutory prerequisite to suit" under Section 311.034 of the Government Code and, thus, a jurisdictional requirement in a suit brought against a governmental entity.

In 2014, Hannah Tanner was injured after being thrown from a golf cart driven by her friend, Dakota Scott, a Texas State University employee. Shortly before the two-year statute of

limitations ran in 2016, Tanner filed a lawsuit under the Texas Tort Claims Act against the University, Scott, and another defendant. Tanner did not serve the University until 2020, three-and-a-half years after limitations had run. The University filed a plea to the jurisdiction, alleging that Tanner failed to use diligence in effecting service on the University and arguing that Tanner's untimely service meant that she had failed to satisfy a statutory prerequisite to suit under Section 311.034. The trial court granted the plea, but the court of appeals reversed.

The Supreme Court reversed and remanded. The Court held that the statute of limitations, including the requirement of timely service, is jurisdictional in suits against governmental entities and that the University's plea to the jurisdiction was the proper vehicle to address Tanner's alleged failure to exercise diligence. The Court reasoned that diligence is a component of timely service and pointed to its precedent holding that if service is diligently effected after limitations has expired, the date of service will relate back to the date of filing. The Court also noted that the statute of limitations for personal injuries requires a person to "bring suit" within two years of the date the cause of action accrues, and it cited precedent establishing that "bringing suit" includes both filing the petition and achieving service of process.

The Court went on to hold that Tanner could not establish diligence in service on the University. But rather than render a judgment of dismissal, the court remanded to the court of appeals to address in the first instance Tanner's alternative legal theory under the Tort Claims Act that her service on Scott satisfied her obligation to serve the University.

3. Standing

a) *Tex. Right to Life v. Van Stean*, ___ S.W.3d ___, 2024 WL 4863170 (Tex. Nov. 22, 2024) (per curiam) [23-0468]

This case concerns a motion to dismiss under the Texas Citizens Participation Act in a suit challenging the constitutionality of the Texas Heartbeat Act.

The plaintiffs allege that the defendants organized efforts to sue those who may be or may be perceived to be violating the Texas Heartbeat Act. The defendants filed a motion to dismiss under the TCPA, which the trial court denied. The defendants filed an interlocutory appeal, and the court of appeals held that the TCPA does not apply to the plaintiffs' claims. It therefore affirmed the trial court's order. The defendants petitioned for review.

The Supreme Court held that the court of appeals erred by determining the TCPA's applicability before addressing the disputed jurisdictional question of the plaintiffs' standing. The Court explained that the standing inquiry is not influenced by the TCPA's multi-step framework, the second step of which requires a plaintiff to show clear and specific evidence of each element of every claim. That heightened standard is relevant only if the TCPA applies. But *whether* it applies (or, if it does, whether a plaintiff can satisfy the clear-and-specific-evidence requirement), are merits questions that a court may not resolve without first

assuring itself that it has subject-matter jurisdiction.

The Court further held that under its precedents, a pending TCPA motion cannot create jurisdiction when a court lacks jurisdiction to entertain the underlying case. A claim for fees and sanctions under the TCPA can prevent an appeal from becoming moot, but only if a court with subject-matter jurisdiction had already determined that the TCPA movant prevails. If the plaintiffs here lack standing, then no court ever had jurisdiction to declare the defendants to be prevailing parties. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to that court for further proceedings.

4. Subject Matter Jurisdiction

a) *Hensley v. State Comm'n on Jud. Conduct*, 692 S.W.3d 184 (June 28, 2024) [22-1145]

This case raises jurisdictional issues arising from a suit under the Texas Religious Freedom Restoration Act.

Justice of the Peace Dianne Hensley declined to officiate marriages for same-sex couples due to her religious beliefs but referred those couples to another officiant. The Commission issued a public warning against Hensley for violating the Canon proscribing extra-judicial conduct that casts doubt on a judge's capacity to act impartially as a judge. Rather than appeal the warning to a Special Court of Review, Hensley sued the Commission and its members under TRFRA, alleging that the warning substantially burdens her free exercise of religion. The trial court granted the defendants' plea to the jurisdiction, which was based on exhaustion of remedies and sovereign immunity. The court of appeals affirmed.

In an opinion by Chief Justice Hecht, the Supreme Court reversed most of the court of appeals' judgment. The Court first held that Hensley was not required to appeal the warning before bringing her TRFRA claim. Even if the Special Court were to reverse the warning, that disposition would not moot Hensley's claims because it would not extinguish the burden on her rights while the warning was in effect. Hensley also seeks injunctive relief against future sanctions, and the Special Court is not authorized to grant that relief.

The Court then concluded that most of Hensley's suit survives the defendants' sovereign-immunity challenges. The Court held that the written letter Hensley's attorney sent the Commission was sufficient presuit notice under TRFRA. The Court clarified that the immunity from liability accorded the defendants under Government Code Chapter 33 does not affect a court's jurisdiction, and it held that Hensley's allegations are sufficient to state an ultra vires claim against the commissioners. The Court affirmed the court of appeals' judgment dismissing one request for a declaratory judgment against the Commission, reversed the remainder of the judgment, and remanded to the court of appeals.

Justice Blacklock and Justice Young filed concurrences. Justice Blacklock opined that the Court should reach the merits of Hensley's TRFRA claim and rule in her favor. Justice Young expressed his view that the Court should only address legal

questions in the first instance when doing so is truly urgent, and that test is not met here.

Justice Lehrmann dissented. She would have held that Hensley's suit is barred by her failure to appeal the public warning to the Special Court of Review.

b) *Tex. Windstorm Ins. Ass'n v. Pruski*, 689 S.W.3d 887 (Tex. May 10, 2024) [23-0447]

The issue in this case is whether Section 2210.575(e) of the Insurance Code, which provides that a suit against the Texas Windstorm Insurance Association "shall be presided over by a judge appointed by the judicial panel on multidistrict litigation," deprives a district court of subject-matter jurisdiction over such a suit when the judge is not appointed by the panel.

Stephen Pruski filed two claims with his insurer, TWIA, which partially accepted and partially denied coverage for both claims. Pruski sued TWIA in Nueces County district court under Chapter 2210 of the Insurance Code, seeking damages for improper denial of coverage. The case was assigned to a court without an appointment by the MDL panel. Pruski argued that the judge was not qualified to render judgment because she was not appointed by the panel, as required by statute. The court denied Pruski's motion for summary judgment, granted TWIA's motion for summary judgment, and rendered a final, take-nothing judgment for TWIA.

The court of appeals reversed, holding that a trial judge who is not appointed by the MDL panel is without authority to render judgment in a suit under Chapter 2210. The court thus held that the trial court's judgment was void and remanded with instructions to vacate the judgment.

The Supreme Court reversed, holding that although the panel-appointment requirement is mandatory, it is not jurisdictional. The Court first explained that a statute can be, and often is, mandatory without being jurisdictional and that classifying a statutory provision as jurisdictional requires clear legislative intent to that effect. The Court then reasoned that nothing in Section 2210.575(e) or Chapter 2210, generally, demonstrates a clear legislative intent to deprive a district court of jurisdiction over a suit against TWIA unless the judge is appointed by the MDL panel. Thus, the trial court did not lack subject matter jurisdiction over the suit simply because the judge was not appointed by the MDL panel. The Court remanded the case to the court of appeals to address additional issues raised by the parties.

5. Territorial Jurisdiction

a) *Goldstein v. Sabatino*, 690 S.W.3d 287 (Tex. May 24, 2024) [22-0678]

The question presented is whether territorial jurisdiction, a criminal concept, is a necessary jurisdictional requirement for a Texas court to enter a civil protective order under Texas Code of Criminal Procedure Chapter 7B.

Goldstein and Sabatino were involved in a romantic relationship in Massachusetts. After a period of no contact, Sabatino found sexually explicit photos on a phone Goldstein had previous lent him. Sabatino began

contacting Goldstein about them and refused to return the phone, leading her to fear that he would use the photos to control her and ruin her career. Goldstein was granted a protective order in Massachusetts. Goldstein then moved to Harris County. After receiving notice of several small-claims lawsuits filed by Sabatino against her in Massachusetts, Goldstein filed for a protective order in Harris County under Chapter 7B's predecessor.

The trial court held a hearing on the protective order. Sabatino did not file a special appearance and appeared at the hearing pro se. The trial court found reasonable grounds to believe Goldstein had been the victim of stalking, as defined by the Texas Penal Code, and issued a protective order preventing Sabatino from contacting Goldstein.

On appeal, Sabatino challenged the trial court's subject matter jurisdiction and personal jurisdiction because he was a Massachusetts resident, and the order was predicated on conduct that took place entirely in Massachusetts. The court of appeals vacated the protective order, holding that the trial court lacked territorial jurisdiction, which the court concluded is a requirement in "quasi-criminal" proceedings.

The Supreme Court disagreed with the court of appeals' territorial jurisdiction analysis but affirmed its judgment because the trial court lacked personal jurisdiction over Sabatino. The Court first held that Chapter 7B protective orders are civil proceedings and, as such, there is no additional requirement of territorial jurisdiction. The Court explained that the historical understanding of territorial jurisdiction in civil cases was subsumed into the minimum contacts personal jurisdiction analysis. Thus, the court of appeals erred by imposing a separate requirement of territorial jurisdiction in a civil case. Nevertheless, Court held that Sabatino did not waive his personal jurisdiction challenge. Because all relevant conduct occurred in Massachusetts, and Sabatino had no contacts with Texas, the trial court lacked personal jurisdiction to enter the order. Accordingly, the Court affirmed the court of appeals' judgment vacating the protective order and dismissing the case.

R. MEDICAL LIABILITY

1. Damages

a) *Noe v. Velasco*, 690 S.W.3d 1 (Tex. May 10, 2024) [22-0410]

The issue in this case is what damages, if any, are recoverable in an action for medical negligence that results in the birth of a healthy child.

Grissel Velasco allegedly requested and paid for a sterilization procedure to occur during the C-section delivery of her third child. Her doctor, Dr. Michiel Noe, did not perform the procedure and allegedly did not inform her of that fact. Velasco became pregnant again and gave birth to a healthy fourth child. Velasco brought multiple claims against Dr. Noe, including for medical negligence. The trial court granted Dr. Noe summary judgment on all claims. A divided court of appeals reversed as to the medical-negligence claim, concluding that Velasco raised a genuine issue of material fact regarding her mental-anguish damages, as well as the elements of duty and breach.

The Supreme Court reversed and reinstated the trial court's judgment. The Court first held that Velasco's allegations stated a valid claim for medical negligence. But the Court explained that Texas law does not regard a healthy child as an injury requiring compensation. Thus, when medical negligence causes the birth of a healthy child, the types of recoverable damages are limited. The Court rejected recovery of noneconomic damages arising from pregnancy and childbirth, such as mental anguish and pain and suffering, reasoning that those types of damages are inherent in every birth and therefore are inseparable from the child's very existence. The Court also held that the economic costs of raising the child are not recoverable as a matter of law. But the Court held that a parent may recover economic damages, such as medical expenses, proximately caused by the negligence and incurred during the pregnancy, delivery, and postpartum period. The Court emphasized that these types of damages do not treat the pregnancy itself or the child's life as a compensable injury. In this case, because Velasco failed to present evidence of recoverable damages, the trial court correctly granted summary judgment.

2. Expert Reports

a) *Walker v. Baptist St. Anthony's Hosp.*, ___ S.W.3d ___, 2024 WL 5099109 (Tex. Dec. 13, 2024) (per curiam) [23-0010]

This case concerns the sufficiency of expert reports under the Texas Medical Liability Act.

Kristen and Daniel Walker's son was born at Baptist St. Anthony's Hospital under Dr. Castillo's care. Immediately after birth, the baby suffered a medical emergency, thought to be a stroke, that required resuscitation. The Walkers sued the Hospital and Dr. Castillo for medical negligence and submitted expert reports by an obstetrician, a neonatologist, and a nurse in support of their claim.

The reports seek to show that certain actions and omissions by the Hospital and Dr. Castillo during the delivery fell below the standard of care and that had the Hospital and Dr. Castillo met the standard of care, the baby's injuries could have been avoided. The Hospital and Dr. Castillo objected to the reports and filed a motion to dismiss the Walkers' claims under the Act. The trial court denied the motion, finding that the reports provide a fair summary of the experts' views regarding the standard of care, breach, and causation. The court of appeals reversed reasoning that the reports include conclusory language and that they fail to sufficiently explain the cause of the baby's brain injury.

The Supreme Court reversed and remanded to the trial court for further proceedings. The Court held that the trial court did not abuse its discretion by finding that the reports reflect a good-faith effort to provide a fair summary of the experts' conclusions. Considered together, the first two reports explain how the Hospital's and Dr. Castillo's actions fell below the standard of care and how those breaches caused the baby's neurologic injury. Because the first two expert reports adequately address causation, the Court did not address the third report.

Justice Bland filed a concurring opinion that addresses the defendants' challenges to the experts' qualifications and to the proper standard of care.

S. MUNICIPAL LAW

1. Authority

a) *City of Dallas v. Emps.' Ret. Fund of the City of Dallas*, 687 S.W.3d 55 (Tex. Mar. 15, 2024) [22-0102]

At issue is whether the City of Dallas could properly give veto power over amending its city code to a third party.

By ordinance, the City of Dallas established the Employees' Retirement Fund of the City of Dallas, which provides benefits for Dallas employees, and codified that ordinance in Chapter 40A of its city code. A board of trustees administers the Fund. The City later adopted another ordinance that purports to prevent any further amendments to Chapter 40A unless the board approves them. In 2017, the City amended Chapter 8 of its code—by ordinance, without the board's approval—to impose term limits on the Fund's board members.

The Fund resisted the term-limits amendment because it was passed without the board's approval. The Fund and the City each sought declaratory relief about the amendment's validity. The trial court rendered judgment for the City. The court of appeals reversed. According to that court, Chapter 40A was a codified trust document, and trust law barred amendment to it except as the document provided. The amendment, it held, was invalid because imposing term limits on the board changed the trust document's terms without board approval.

The Supreme Court reversed. Although it agreed with the court of appeals that the ordinance imposing term limits amended Chapter 40A, the Court held that the board's veto power was unenforceable and could not prevent the otherwise valid term-limits amendment from taking effect. That amendment impliedly repealed the board's veto power. Chapter 40A's status as a codified ordinance meant that the term-limits amendment was just one ordinance amending another, not an ordinance purporting to amend something protected by a separate or higher source of law. Even if trust law applies to the Fund, trust law does not authorize much less require the City to bestow the core power of legislating on any third party, such as the board. To hold otherwise would improperly prevent the City from amending its own code, authority that is constitutionally given only to the City.

The Court declined to analyze a separate issue about whether the amendment remained valid despite being passed without the City voters' approval. The Court remanded the case to the court of appeals to consider this separate issue in the first instance.

T. NEGLIGENCE

1. Duty

a) *HNMC, Inc. v. Chan*, 683 S.W.3d 373 (Tex. Jan. 19, 2024) [22-0053]

The issue in this case is whether a property owner owes a duty to make an adjacent public roadway safe from, or otherwise warn of, third-party drivers.

Leny Chan, an HNMC nurse,

was struck and killed by a careless driver while she was crossing the street adjacent to the HNMC hospital where she worked. Chan's estate and surviving relatives sued HNMC, the driver, and the driver's employer for negligence. A jury found HNMC 20% liable, and the trial court entered a final judgment against HNMC based on that finding. The court of appeals affirmed the judgment, holding that HNMC owed a duty to Chan under the factors described in *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990).

The Supreme Court reversed and rendered judgment for HNMC. The Court explained that courts should not craft case-specific duties using the *Phillips* factors when recognized duty rules apply to the factual situation at hand. Because the facts of this case implicated several previously recognized duty rules—including the rule that a property owner need not make safe public roadways adjacent to its property and the rule that a property owner who exercises control over adjacent property is liable for that adjacent property as a premises occupier—HNMC had, at most, a limited duty as a premises occupier based on its exercise of control over certain parts of the right-of-way adjoining its hospital. But there was no evidence that any condition HNMC controlled in the right-of-way caused Chan's harm and therefore no basis for liability against HNMC.

2. Premises Liability

a) *Albertsons, LLC v. Mohammadi*, 689 S.W.3d 313 (Tex. Apr. 5, 2024) (per curiam) [23-0041]

At issue in this slip-and-fall case is whether the premises owner's knowledge of a leaking bag placed in a wire shopping cart is evidence of the owner's actual knowledge of the dangerous condition that caused the fall.

Maryam Mohammadi slipped and fell at a Randalls grocery store next to a shopping cart used by Randalls to store returned or damaged goods. She alleged that a leaking bag placed in the cart caused her to slip. Randalls disputed that the floor was wet. The jury charge contained separate questions about Randalls' constructive knowledge of the danger and its actual knowledge of the danger, and the jury was instructed to answer the actual-knowledge question only if it answered "yes" to the constructive-knowledge question. The jury answered "no" to the constructive-knowledge question and therefore did not answer the actual-knowledge question. The trial court rendered a take-nothing judgment for Randalls.

The court of appeals reversed, holding that the jury should have been given the opportunity to answer the question on Randalls' actual knowledge. Though there is no evidence that Randalls knew of the wet floor before the fall, the court reasoned that Randalls had knowledge of the dangerous condition because there is some evidence that an employee knowingly placed a leaking grocery bag in the shopping cart.

The Supreme Court reversed

and reinstated the trial court's judgment, holding that any charge error is harmless because there is legally insufficient evidence of Randalls' actual knowledge. The Court reiterated that the relevant dangerous condition is the condition at the time and place injury occurs, not the antecedent situation that created the condition. Here, the dangerous condition for which Randalls could be liable was the wet floor, not the leaking bag placed into the shopping cart.

b) *Pay & Save, Inc. v. Canales*, 691 S.W.3d 499 (Tex. June 14, 2024) (per curiam) [22-0953]

The issue is whether a wooden pallet used to transport and display watermelons is an unreasonably dangerous condition.

Grocery stores use wooden pallets to transport and display whole watermelons. While shopping at a Pay and Save store, Roel Canales' steel-toed boot became stuck in a pallet's open side. When Canales tried to walk away, he tripped, fell, and broke his elbow. Canales sued the store for premises liability and gross negligence. After a jury trial, the trial court awarded Canales over $6 million.

The court of appeals reversed. The court concluded that the evidence is legally, but not factually, sufficient to support a finding of premises liability, and it remanded for a new trial on that claim. The court rendered judgment for Pay and Save on gross negligence because Canales had not presented clear and convincing evidence that the pallet created an extreme degree of risk. Both parties filed petitions for review.

Without hearing oral argument, the Court reversed and rendered judgment for Pay and Save on premises liability. The Court held that the wooden pallet was not unreasonably dangerous as a matter of law. To raise a fact issue on whether a common condition is unreasonably dangerous, a plaintiff must show more than a mere possibility of harm; there must be sufficient evidence of prior accidents, injuries, complaints, reports, regulatory noncompliance, or other circumstances that transformed the condition into one measurably more likely to cause injury. There was a complete absence of such evidence here.

The Court also affirmed the court of appeals' judgment on gross negligence because the absence of legally sufficient evidence for premises liability also disposed of the gross-negligence claim.

c) *Weekley Homes, LLC v. Paniagua*, 691 S.W.3d 911 (Tex. June 21, 2024) (per curiam) [23-0032]

The issue in this case is whether Chapter 95 of the Civil Practice and Remedies Code applies to claims by contractors who were injured on a driveway of the townhome on which they were hired to work.

Weekley Homes, LLC hired independent contractors to work on a townhome construction project. While the workers were moving scaffolding across the townhome's wet driveway, electricity from a temporary electrical pole or lightning killed one worker and injured another. Weekley filed a combined traditional and no-evidence summary-judgment motion arguing that Chapter 95 applies and precludes

liability. The trial court granted Weekley's motion, but the court of appeals reversed, holding that Chapter 95 does not apply because the summary-judgment evidence does not conclusively establish that the driveway is a dangerous condition of the townhome on which the contractors were hired to work.

The Supreme Court reversed in a per curiam opinion and held that Chapter 95 applies to the workers' claims. The Court held that Weekley conclusively established that the electrified driveway is a condition of the townhome because the workers alleged that the electrified driveway was a dangerous condition that they were required to traverse to perform their work, and the summary-judgment evidence established that the driveway, by reason of its proximity to the townhome, created a probability of harm to those working on the townhome.

3. Unreasonably Dangerous Conditions

a) *Union Pac. RR. Co. v. Prado*, 685 S.W.3d 848 (Tex. Feb. 23, 2024) [22-0431]

This case asks what makes a railroad crossing extra-hazardous or unreasonably dangerous.

Rolando Prado was killed by a Union Pacific train after he failed to stop at a railroad intersection located on a private road owned by Ezra Alderman Ranches. Prado's heirs sued the Ranch and Union Pacific for negligence, negligence per se, and gross negligence. They argued that various elements obstructed the view of the train and that the defendants breached their duties to warn of extra-hazardous and unreasonably dangerous conditions. The trial court granted summary judgment for the defendants. The court of appeals reversed, holding that fact issues existed as to whether the crossing was extra-hazardous and unreasonably dangerous.

The Supreme Court reversed and reinstated the trial court's summary judgments. The Court held that a reasonably prudent driver would stop at the posted stop sign at the intersection where he could see and hear an oncoming train. Evidence that most drivers do not stop at a particular stop sign does not establish that reasonably prudent drivers could not stop. Evidence of one similar accident over a nearly forty-year period was also no evidence that the crossing was extra-hazardous.

The Court next held that there was no evidence that the Ranch had actual knowledge that the crossing was unreasonably dangerous. There was no evidence that any Ranch employee knew that the previous fatality resulted from a train–vehicle collision or if the circumstances of that accident were similar. And assuming the Ranch had a duty to evaluate the dangerousness of the crossing, that would establish only that the Ranch should have known it was unreasonably dangerous, not that it actually knew.

4. Willful and Wanton Negligence

a) *Marsillo v. Dunnick*, 683 S.W.3d 387 (Tex. Jan. 12, 2024) [22-0835]

In this healthcare-liability case arising from an emergency-room physician's treatment of a snakebite, the issue is whether the plaintiff has

produced evidence of "willful and wanton negligence" by the physician.

Because antivenom poses risks to a patient, the hospital at which Dr. Kristy Marsillo worked developed detailed guidelines for the determination of whether and when administration of antivenom is appropriate. Marsillo followed those guidelines when treating rattlesnake-victim Raynee Dunnick. As a result, Marsillo began infusing Raynee with antivenom three hours after she arrived at the hospital and four hours after she was bitten. Raynee was transferred to a children's hospital where she continued to receive antivenom over the course of a few days before being released.

Raynee's parents sued Marsillo, alleging that her failure to administer antivenom immediately upon Raynee's arrival at the hospital caused Raynee lasting pain and impairment. By statute, a physician is not liable for injury to a patient "arising out of the provision of emergency medical care in a hospital emergency department" without proof that the physician acted "with willful and wanton negligence." The trial court granted Marsillo's no-evidence motion for summary judgment on breach of duty and causation, but the court of appeals reversed.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's summary judgment for Marsillo. The Court began by examining the meaning of willful and wanton negligence. The parties and the lower courts have assumed that the term is synonymous with gross negligence. The Court agreed that willful and wanton negligence is "at least gross negligence."

Next, the Court explained that Raynee had not produced evidence sufficient to raise a genuine issue of material fact on gross negligence because her expert's affidavit is conclusory and, thus, no evidence. Because Raynee had not raised a fact issue on gross negligence, the Court left to a future case the task of defining the precise contours of willful and wanton negligence.

U. OIL AND GAS

1. Assignments

a) *Occidental Permian, Ltd. v. Citation 2002 Inv. LLC*, 689 S.W.3d 899 (Tex. May 17, 2024) [23-0037]

The issue in this case is whether an assignment of mineral interests that conveys leasehold estates is limited by depth notations in an exhibit describing property found within the leases.

In 1987, Shell Western E&P, Inc. assigned to Citation "all" of its oil-and-gas property interests described in an incorporated exhibit. The exhibit contains columns listing (1) an overarching leasehold mineral estate, (2) tracts within that lease (some with depth specifications), and (3) third-party interests that encumber those leases. In 1997, Shell purported to transfer to Occidental's predecessor some of the same oil-and-gas interests contained in the 1987 Assignment. Litigation ensued.

Occidental contends that Shell in 1987 had reserved to itself portions of the described leases beyond the depth notations and that the reserved interests were conveyed to Occidental in 1997. As a result, Occidental and Citation dispute ownership of the "deep

rights" to the property. The trial court granted summary judgment for Occidental, concluding that the 1987 assignment was a limited-depth grant that did not convey Shell's deep rights to Citation. The court of appeals reversed, holding that the assignment of "all right and title" to the leases is not limited by the exhibit's information about those leases, leaving Citation and its transferee as the owners of the interests in their entirety.

The Supreme Court affirmed the court of appeals' judgment. The Court first observed that the exhibit presents ambiguities because the property interests listed in it overlap, and the exhibit contains no language directing the proper method for reading its tables. The Court then turned to the assignment's three granting clauses. The first and third clauses grant all of Shell's rights and interests in the "leasehold estates" or "leases" described in the exhibit. The second clause, which grants Shell's rights in "contracts or agreements," contains language acknowledging that those contracts may be depth limited. This differentiation between the grant of leases and the grant of contract rights and burdens solidifies a reading that the exhibit column listing Shell's leases is not narrowed by the columns referring to contracts or agreements that contain depth limitations. The Court thus held that the 1987 assignment unambiguously transferred Shell's entire leasehold interests without reservation.

2. Lease Termination

a) *Scout Energy Mgmt., LLC v. Taylor Props.*, ___ S.W.3d ___, 2024 WL 5249490 (Tex. Dec. 31, 2024) (per curiam) [23-1014]

This case concerns whether the due date for payment under an oil-and-gas lease's savings clause is affected by a notation on an earlier check receipt.

Scout was the lessee for two oil-and-gas leases on land owned by Taylor Properties. To maintain the leases during nonproduction, a "shut-in royalty" savings clause provided that the lessee could pay "$50.00 per well per year, and upon such payment it will be considered that gas is being produced." Scout's predecessor made a payment in September 2017, then made another payment one month later. When Scout made a payment in December 2018, Taylor claimed it was too late and sought a declaration that the leases had terminated. Specifically, Taylor argued that the leases terminated in October 2018, one year after the second payment, while Scout argued that the second payment secured a full additional year.

The trial court concluded that the savings clause is ambiguous, but it agreed that Scout's interpretation reflects the parties' intent that each payment secure a full year of constructive production, and it therefore rendered judgment for Scout. The court of appeals concluded that the savings clause unambiguously supports Scout's interpretation, but it nonetheless reversed, holding that a notation on the check receipt in October 2017 established a new starting date for the one-year period of constructive production.

The Supreme Court reversed and reinstated the trial court's judgment. The Court agreed with the court of appeals that the savings clause is unambiguous, and that the only reasonable interpretation is that each payment provides a full year of constructive production. The Court then held that the check-receipt notation is too vague to be considered a contract expressing the parties' intent to deviate from the savings clause.

3. Pooling

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.*, 698 S.W.3d 198 (June 28, 2024) [21-1035]

This case arises from the Railroad Commission's rejection of forced-pooling applications under the Mineral Interest Pooling Act.

Ammonite leases the State-owned minerals under a tract of the Frio River. EOG leases the minerals on the land next to the river on both sides. The leases lie in a field in which minerals can only be extracted through horizontal drilling. Because the river is narrow and winding, a horizontal well cannot be drilled entirely within the boundaries of Ammonite's riverbed lease.

While EOG was drilling its wells, Ammonite proposed that the parties pool their minerals together. EOG rejected the offers because its wells would not reach the riverbed; thus, Ammonite was proposing to share in EOG's production without contributing to it.

Ammonite filed MIPA applications in the Commission. By then, EOG's wells were completed, and it was undisputed they were not draining the riverbed. The Commission "dismissed" the applications because it concluded that Ammonite's voluntary-pooling offers were not "fair and reasonable." The Commission alternatively "denied" the applications because Ammonite failed to prove that forced pooling is necessary to "prevent waste." The lower courts affirmed the Commission's final order.

The Supreme Court also affirmed but for different reasons. In an opinion by Chief Justice Hecht, the Court repudiated the intermediate court's reasoning that the Commission's dismissal is justified by Ammonite's offering a "risk penalty" of only 10%. The Court pointed out that Ammonite had agreed to a higher penalty if prescribed by the Commission, and there is no statutory requirement that a voluntary-pooling offer include a risk-penalty term.

The Court held that both of the Commission's dispositions are reasonable on the record. The Court reasoned that Ammonite's offers were based solely on EOG's wells as permitted and did not suggest extending them, EOG's wells do not drain the riverbed, and Ammonite did not present any evidence to the Commission on the feasibility of reworking them. The Court explained that even if Ammonite's minerals are stranded, forced pooling could not, at the time of the hearing, have *prevented* waste because the wells were already completed.

Justice Young dissented. He opined that Ammonite's offers were fair and reasonable as a matter of law and, because Ammonite's minerals are stranded, that forced pooling might be

necessary to prevent waste. He would have reversed and remanded either to the court of appeals or to the Commission for further proceedings.

b) *ConocoPhillips Co. v. Hahn*, ___ S.W.3d ___, 2024 WL 5249570 (Tex. Dec. 31, 2024) [23-0024]

At issue in this case is the proper calculation of Kenneth Hahn's royalty interest in a tract of land in DeWitt County.

In 2002, Hahn conveyed the tract to William and Lucille Gips but reserved a 1/8 non-participating royalty interest. The Gipses later leased their executive interest to a subsidiary of ConocoPhillips in exchange for a 1/4 royalty. The lease also allowed ConocoPhillips to pool the acreage. At ConocoPhillips's request, Hahn signed a document ratifying the lease in all its terms. Hahn also signed a separate stipulation of interest with the Gipses, in which they agreed that Hahn had intended to reserve a 1/8 "of royalty" in his 2002 conveyance to the Gipses. ConocoPhillips then pooled the tract into one of its existing production units.

In 2015, Hahn sued ConocoPhillips and the Gipses, alleging he had reserved a fixed rather than floating royalty interest. The trial court disagreed and granted summary judgment for the Gipses. The court of appeals reversed, holding that Hahn had reserved a 1/8 fixed royalty in the 2002 conveyance.

On remand, Hahn added a claim for statutory payment of royalties, and the parties filed cross-motions for summary judgment regarding whether Hahn's ratification of the lease made his non-participating royalty interest subject to the landowner's royalty. The trial court granted summary judgment for the defendants, but the court of appeals reversed, holding that Hahn was only bound to the lease's pooling provisions and that this Court's intervening decision in *Concho Resources v. Ellison* was inapplicable.

The Supreme Court affirmed in part and reversed in part. The Court upheld the court of appeals' determination that Hahn's ratification of the lease did not transform his royalty interest from fixed to floating. But the Court rejected Hahn's argument that the stipulation of interest failed as a conveyance because it lacked a sufficient property description, and it held that the court of appeals' failure to give effect to the stipulation was contrary to *Concho Resources*. The Court therefore reversed in part and rendered judgment that ConocoPhillips correctly calculated Hahn's share of proceeds from the production on the pooled unit.

4. Royalty Payments

a) *Carl v. Hilcorp Energy Co.*, 689 S.W.3d 894 (Tex. May 17, 2024) [24-0036]

In this case, the Court addressed certified questions from the Fifth Circuit.

The plaintiffs Carl and White filed a class action on behalf of holders of royalty interests in leases operated by defendant Hilcorp. The leases state that Hilcorp must pay as royalties "on gas . . . produced from said land and sold or used off the premises . . . the market value at the well of one-eighth of the gas so sold or used." Hilcorp also "shall have free use of . . . gas . . . for all operations hereunder." The parties

dispute whether Hilcorp owes royalties on gas used off-lease for post-production activities. The district court ruled in favor of Hilcorp on a motion to dismiss.

On appeal, the Fifth Circuit sought guidance from the Texas Supreme Court as to the effect of *BlueStone Natural Resources, II, LLC v. Randle*, 620 S.W.3d 380, 386 (Tex. 2021), on the issues presented. *Randle* discussed a free-use clause, but the Fifth Circuit noted a lack of Texas authority analyzing *Randle* when construing value-at-the-well leases. It certified two questions to the Texas Supreme Court:

(1) After *Randle*, can a market-value-at-the well lease containing an off-lease-use-of-gas clause and free-on-lease-use clause be interpreted to allow for the deduction of gas used off lease in the post-production process?

(2) If such gas can be deducted, does the deduction influence the value per unit of gas, the units of gas on which royalties must be paid, or both?

The Court answered the first question yes. It reasoned that under longstanding caselaw, gas used for post-production activities should be treated like other post-production costs where the royalty is based on the market value at the well. *Randle* involved a gross-proceeds royalty and its discussion of a free-use clause had no bearing on the outcome of this dispute.

As to the second question, the Court noted that the parties did not fully engage on this issue, but the Court's rough mathematical calculations indicated that either of the accounting methods referenced in the second question would yield the same royalty payment. The Court did not state a preference for any particular method of royalty accounting.

V. PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

1. Transfer of Trust Property

a) *In re Tr. A & Tr. C*, 690 S.W.3d 80 (Tex. May 10, 2024) [22-0674]

This case raises issues of subject-matter jurisdiction and remedies arising from a co-trustee's transfer of stock from the family trust to herself and then to others.

Glenna Gaddy, a co-trustee of a family trust, transferred stock from the family trust to her personal trust without the participation or consent of the other co-trustee, her brother Mark Fenenbock. Glenna then sold the stock to her two sons. Mark sued Glenna.

The probate court declared the stock transfer void and ordered that the stock "be restored" to the family trust. Glenna appealed. The court of appeals vacated and remanded, holding sua sponte that the probate court lacked jurisdiction to declare the stock transfer void because Glenna's sons, the owners of the stock, were "jurisdictionally indispensable" parties.

The Supreme Court reversed both the court of appeals' judgment and the probate court's order. The court of appeals relied on Texas Rule of Civil Procedure 39 to support its jurisdictional holding, but the Supreme Court pointed to its caselaw teaching that parties' failure to join a person will rarely deprive the court of jurisdiction. The Court concluded that this is not such a rare case, and while the absence

of Glenna's sons may have limited the relief the probate court could grant, it did not deprive the court of jurisdiction to resolve the case before it.

The Court then rejected Glenna's contention that she did not commit a breach of trust as a matter of law. But it agreed the probate court had erred by imposing a constructive trust requiring Glenna to restore the stock shares to the family trust when she no longer owns or controls the shares. The Court remanded to the probate court for further proceedings with the instruction that if Glenna's sons are not made parties on remand, then any relief must come from Glenna or her trust or through the ultimate distribution of the family trust's remaining assets.

2. Will Contests

a) *In re Estate of Brown*, 697 S.W.3d 647 (Tex. Aug. 30, 2024) (per curiam) [23-0258]

The issue is whether unsworn testimony from an officer of the court is competent evidence to establish the cause of nonproduction of an original will under Section 256.156 of the Estates Code.

Beverly June Eriks and the Humane Society of the United States each filed an uncontested application to probate a copy of decedent Brown's will, which named the Society her sole beneficiary. Although the trial court found that a reasonably diligent search for the original will had occurred, it nonetheless concluded that the Society failed to establish the cause of nonproduction and that Brown died intestate. The court of appeals affirmed, holding that unsworn testimony from Catherine Wylie—an attorney and the guardian of Brown's personal and financial estate—could not be considered evidence of the cause of nonproduction.

The Supreme Court reversed. The Court held that, as an officer of the court, Wylie's testimony is properly considered evidence because her statements were made on the record, without objection from opposing counsel, and where there was no doubt her statements were based on her personal knowledge. The Court further held that, in addition to other testimony, Wylie's testimony regarding her thorough search of Brown's home and safe deposit box established the cause of nonproduction as a matter of law. The Court remanded to the court of appeals to address other issues.

W. PROCEDURE—APPELLATE

1. Finality of Judgments

a) *In re Lakeside Resort JV, LLC*, 689 S.W.3d 916 (Tex. May 10, 2024) (per curiam) [22-1100]

The issue in this mandamus proceeding is whether a purportedly "Final Default Judgment" is final for purposes of appeal despite expressly describing itself as "not appealable."

Mendez was a guest at Margaritaville Resort Lake Conroe, which Lakeside Resort JV owns but does not manage. Mendez alleged that she sustained severe bodily injuries after stepping in a hole. She sued Lakeside, seeking monetary relief of up to $1 million. Lakeside failed to timely answer; it alleged that its registered agent for service failed to send it a physical copy of service and misdirected an electronic copy. Mendez subsequently moved for a

default judgment. The draft judgment prepared by Mendez's counsel was labeled "Final Default Judgment" and contained the following language: "This Judgment finally disposes of all claims and all parties, and *is not appealable*. The Court orders execution to issue for this Judgment." (Emphasis added.) The trial court signed the order. After the trial court's plenary jurisdiction had expired and the time for a restricted appeal had run, Mendez sent Lakeside a letter demanding payment.

Lakeside quickly filed a motion to rescind the abstract of judgment and a combined motion to set aside the default judgment and for a new trial, arguing that the "Final Default Judgment" was not truly final. The trial court denied Lakeside's motions, thinking that the judgment was final and that its plenary power had expired. The court of appeals denied mandamus relief, describing the judgment as erroneously stating that it was "not appealable" but holding that the judgment was clearly and unequivocally final on its face.

In a per curiam opinion, the Supreme Court conditionally granted Lakeside's petition for writ of mandamus. The Court held that the judgment's assertion of non-appealability does not unequivocally express an intent to finally dispose of the case, but in fact affirmatively undermines or contradicts any such intent. The Court then held that default judgments that affirmatively undermine finality are not final regardless of whether the trial court's order or judgment resolves all claims by all parties, so finality may not be established by turning to the record to make that showing. Accordingly, the Court ordered the trial court to vacate its orders denying Lakeside's motions and allowing execution.

b) *In re Urban 8 LLC*, 689 S.W.3d 926 (Tex. May 10, 2024) (per curiam) [22-1175]

This case concerns the effect of a trial court order declaring a default judgment issued months prior to be a final judgment.

Susan Barclay sued Urban 8 for negligence. After Urban 8 failed to answer, the trial court issued an order titled "Final Order of Default" in November 2021. The order awarded Barclay all the damages she requested except for exemplary damages. Months later, Urban 8 filed a "Motion to Set Aside Interlocutory Judgment and Motion for New Trial," which the trial court denied in August 2022. That order expressly stated that the November 2021 order was the court's final judgment and that it fully and finally disposed of all parties and claims and was appealable.

Urban 8 filed both a petition for writ of mandamus challenging the November 2021 order and a notice of appeal as to the August 2022 order. The court of appeals abated Urban 8's appeal pending resolution of its petition for writ of mandamus, which it then denied.

The Supreme Court also denied mandamus relief, holding that Urban 8 had an adequate remedy by appeal. The Court cautioned that a judgment cannot be backdated or retroactively made final, as doing so could deprive a party of an adequate remedy by appeal. But the Court did not read the August 2022 order to have that effect. The

August 2022 order modified the November 2021 order by providing that it fully and finally disposed of all parties and claims and was appealable. The modification caused the timeline for appeal to run from the date of the August 2022 order. As a result, the court of appeals has jurisdiction over Urban 8's pending appeal.

2. Interlocutory Appeal Jurisdiction

a) *Bienati v. Cloister Holdings, LLC*, 691 S.W.3d 493 (Tex. June 7, 2024) (per curiam) [23-0223]

The issue in this case is whether delay of a trial pending the appellate review of a temporary injunction deprives the court of appeals of jurisdiction to hear the appeal.

Cloister Holdings is part-owner of Holy Kombucha, Inc., a beverage company. Following a dispute about the company's management and finances, Cloister sued several members of Holy Kombucha's board of directors. The trial court granted Cloister's request for a temporary injunction, enjoining the board members from making certain amendments to the company's shareholders' agreement, and the board members appealed. While the appeal was pending, the trial court abated the underlying case, postponing trial to await the court of appeals' ruling on the temporary injunction.

The court of appeals then dismissed the appeal. It held that the trial court's delay of trial was an effort to obtain an advisory opinion from the court of appeals. It also held that such a delay violated Texas Rule of Civil Procedure 683, which provides that the appeal of a temporary injunction "shall constitute no cause for delay of the trial." The enjoined board members petitioned for review.

The Supreme Court reversed. In a per curiam opinion, it held that although parties ordinarily should proceed to trial pending an appeal from a temporary injunction, failure to do so does not deprive the court of appeals of jurisdiction. The Court explained that an interim appellate decision resolves a current controversy and governs the parties until final judgment; therefore, any decision is not advisory, even if it decides a question of law that is also presented on the merits of the dispute. The Court also held that Rule 683 is not a basis for dismissing the appeal. Parties have a statutory right to an interlocutory appeal from a temporary injunction, and the rule does not provide that the remedy for the failure to proceed to trial is dismissal.

b) *Harley Channelview Props., LLC v. Harley Marine Gulf, LLC*, 690 S.W.3d 32 (Tex. May 10, 2024) [23-0078]

The issue in this case is whether an interlocutory order requiring a party to convey real property within thirty days as part of a partial summary judgment ruling is an appealable temporary injunction.

Harley Marine Gulf leases a maritime facility from Harley Channelview Properties. When Harley Marine attempted to exercise a contractual option to purchase the facility, Channelview refused on grounds that any option right had terminated. Harley Marine sued for breach of the option contract and sought specific

performance.

The trial court granted Harley Marine's partial summary judgment motion, and it ordered Channelview to convey the property to Harley Marine within thirty days. Channelview appealed, but the court of appeals dismissed the appeal for want of jurisdiction, holding that the trial court's order granted permanent relief on the merits and thus was not an appealable temporary injunction.

The Supreme Court reversed. It held that an order to immediately convey real property based on an interim ruling is a temporary injunction from which an interlocutory appeal may be taken. An order functions as a temporary injunction when it operates during the pendency of the suit and requires a party to perform according to the relief demanded. The absence of the protective hallmarks of a temporary injunction, like a trial date or a bond, may invalidate the injunction, but it does not change the character and function of the order.

3. Jurisdiction

a) *In re S.V.*, 697 S.W.3d 659 (Tex. Aug. 30, 2024) (per curiam) [23-0686]

The issue in this case is whether the petitioner timely filed his notice of appeal.

Venkatraman, a pro se litigant, missed the deadline to file a notice of appeal but timely sought an extension under Texas Rule of Appellate Procedure 26.3. His explanation for missing the deadline was that he mistakenly believed a notice of appeal was not required until after the trial court ruled on his post-judgment motions. The court of appeals denied the Rule 26.3 motion and dismissed the case.

The Supreme Court reversed and remanded the case to the court of appeals for further proceedings. The Court pointed out that a movant must offer a reasonable explanation for needing an extension. Then the appellate court's focus should be on a lack of deliberate or intentional failure to comply with the deadline. Here, Venkatraman operated under a genuine misunderstanding of the deadlines. There was no argument or evidence that he intentionally disregarded the rules or sought an advantage by waiting for the trial court to decide his post-judgment motions. In these circumstances, the court of appeals erred in denying his Rule 26.3 motion and dismissing the case for want of jurisdiction.

4. Preservation of Error

a) *In re Est. of Phillips*, 700 S.W.3d 428 (Tex. Nov. 1, 2024) (per curiam) [24-0366]

The issue in this case is whether a plaintiff waives a claim by omitting it from an amended petition when the omission is required to comply with the trial court's prior order.

Billy Phillips devised his estate, including a fourteen-acre tract of land, to his daughters Sheila Smith and Billie Hudson. After Smith, as independent executor, sought to sell the tract, Hudson intervened in the probate proceeding, asserting claims to partition the property in kind and other claims for relief. The trial court granted Smith's special exceptions, struck Hudson's partition claims, and ordered her to file an amended petition omitting those claims. Hudson complied, though

her amended pleading expressly reserved the right to replead the stricken claims if the trial court's order was reversed on appeal. The trial court later signed an order authorizing Smith to sell the property. A divided court of appeals affirmed, holding that Hudson abandoned the partition claims by omitting them from her amended petition, which superseded her prior petitions.

The Supreme Court reversed. The Court acknowledged the general rule that any claim not carried forward in an amended petition is deemed dismissed but pointed to caselaw recognizing possible exceptions to this rule. One is that when a plaintiff files an amended petition omitting a claim that the trial court previously ruled against, but the plaintiff indicates an intent not to abandon the claim, the plaintiff does not waive her ability to complain of that ruling on appeal. This exception applies to Hudson's amended petition and the court of appeals erred by viewing Hudson's adherence to the trial court's order as manifestation of an intent to abandon the stricken claims. Because Hudson opposed Smith's special exceptions and obtained an adverse ruling from the trial court, no further step was required to preserve her complaint for appellate review. The Court remanded to the court of appeals for it to address the merits of Hudson's complaint.

5. Temporary Orders

a) *In re State*, ___ S.W.3d ___, 2024 WL 2983176 (Tex. June 14, 2024) [24-0325]

In this mandamus proceeding arising from a guaranteed-income program, the Court addressed the standard for deciding a motion for temporary relief.

Under Harris County's Uplift Harris program, residents who meet eligibility requirements can apply to receive monthly payments of $500 for 18 months. The State sued to block the program, claiming that it violates Article III, Section 52(a) of the Texas Constitution—one of the Gift Clauses. The trial court denied the State's request for a temporary injunction. On interlocutory appeal, the court of appeals denied the State's request for an order staying Uplift Harris payments under Texas Rule of Appellate Procedure 29.3. The State filed a mandamus petition in the Supreme Court challenging the court of appeals' Rule 29.3 ruling and separately filed a motion for temporary relief under Texas Rule of Appellate Procedure 52.10.

The Court addressed the request for temporary relief under 52.10. It first observed that while "preserving the status quo" remains a valid consideration in a request for temporary relief, identifying the status quo is not always a straightforward undertaking. Rule 29.3's analogous standard of an order "necessary to preserve the parties' rights" pending appeal is more helpful. The Court identified two factors important to deciding the Rule 52.10 motion pending before it. The first is the merits; an appellate court asked to issue temporary relief should make a preliminary inquiry into the likely merits of the parties' legal positions. The second is the injury that either party or the public would suffer if relief is granted or denied.

Applying those factors here, the

Court concluded that the State's motion for temporary relief should be granted. The State has raised serious doubt about the constitutionality of Uplift Harris. The Court's Gift Clause precedents require that the governmental entity issuing the funds retain public control over them. The record here indicates that Uplift Harris advertised a "no strings attached" stipend, and so it appears there will be no public control of the funds after they are disbursed. Turning to the balance of harms, the Court pointed to precedent recognizing that ultra vires conduct by local officials automatically results in harm to the State, and it observed that once the funds are disbursed to individuals, they cannot feasibly be recouped.

The Court ordered Harris County to refrain from distributing funds under the program until further order of the Court and directed the court of appeals to proceed to decide the temporary-injunction appeal pending before it. The State's mandamus petition remains pending before the Court.

6. Vexatious Litigants

a) *Serafine v. Crump*, 691 S.W.3d 917 (Tex. June 21, 2024) (per curiam) [23-0272]

In this case, pro se petitioner Serafine challenges the determination that she is a vexatious litigant.

The court of appeals affirmed the trial court's order deeming Serafine a vexatious litigant by counting each of the following as separate "litigations": (1) Serafine's partially unsuccessful appeal to a Texas court of appeals of a final trial court judgment in a civil action; (2) her unsuccessful petition for review of that court of appeals judgment and motion for rehearing in the Supreme Court of Texas; (3) her unsuccessful petition for writ of mandamus in the court of appeals; (4) a civil action she filed in federal district court that was dismissed for lack of jurisdiction; (5) her unsuccessful appeal of that dismissal to the Fifth Circuit; and (6) her unsuccessful petition for writ of mandamus in the Fifth Circuit. Serafine now challenges the court of appeals' method of counting "litigations" under Section 11.054(1)(A) of the Civil Practice and Remedies Code, which requires a showing that the plaintiff has in the past seven years "maintained at least five litigations as a pro se litigant other than in a small claims court that have been . . . finally determined adversely to the plaintiff."

The Supreme Court reversed and remanded the case to the trial court for further proceedings. It held Serafine is not a vexatious litigant because an appeal and a petition for review from a judgment or order in a civil action are part of the same civil action and therefore count as a single "litigation." Accordingly, Serafine maintained at most only four litigations as a pro se litigant that were determined adversely to her.

X. PROCEDURE—PRETRIAL

1. Discovery

a) *In re Elhindi*, ___ S.W.3d ___, 2024 WL 132218 (Tex. Dec. 31, 2024) (per curiam) [23-1040]

At issue in this case is whether the trial court should have delayed production of a video allegedly containing child sexual abuse material to permit law enforcement review.

Magdoline Elhindi sued Hamilton Rucker for invasion of privacy, alleging the filming and distribution of an illicit video made without her consent. The trial court entered a temporary injunction prohibiting the parties from disclosing intimate material of one another. During discovery, Rucker requested videos in Elhindi's possession that depicted him. Elhindi objected to the production of one video, which she alleged contained child sexual abuse material. She sought leave from the trial court's injunction to provide the video to the FBI for its review before producing the video to Rucker. The trial court issued an order allowing Elhindi to send the video to the FBI only after producing it to Rucker. The court of appeals denied Elhindi's request for mandamus relief.

The Supreme Court conditionally granted relief. The Court reasoned that the risk of harm to the alleged minor by further transmission before law enforcement review outweighed any delay in the discovery timeline. The Court directed the trial court to modify its order to permit Elhindi to provide the video to the FBI and receive a determination that it does not contain child sexual abuse material before compelling its production in discovery.

b) *In re Euless Pizza*, ___ S.W.3d ___, 2024 WL 4996714 (Tex. Dec. 6, 2024) (per curiam) [23-0830]

At issue is the trial court's denial of relators' request to withdraw and amend responses to requests for admission.

Two delivery drivers for i Fratelli Pizza began racing each other in a low-speed zone. One crashed into plaintiffs' vehicle, injuring them. The driver was arrested and indicted for felony racing causing serious bodily injury. Plaintiffs sued the driver and three corporate defendants, including Euless Pizza, LP.

In discovery, plaintiffs asked each corporate defendant to admit that at the time of the crash, the driver was acting within the scope of his employment "with i Fratelli Pizza" and "with You." Each defendant admitted to the first request, while only Euless Pizza admitted to the second. Defendants later sought leave to withdraw and amend their admissions to reflect that each denied both requests. The trial court denied the motion, and the court of appeals denied defendants' request for mandamus relief.

The Supreme Court granted defendants' request for mandamus relief in a per curium opinion. The Court reiterated the established test for withdrawing admissions—good cause and lack of undue prejudice to the opposing party—and held that the test is met here. Defendants represented that their initial responses were based on a misunderstanding about the pizzeria's corporate structure and confusion arising from the wording of the RFAs. Defendants further contended that new information revealed in the police investigation supported a defense that the driver's criminal conduct was outside the scope of his employment. Defendants' explanation established good cause, the Court said, because their initial responses were based on inaccurate or incomplete information, and there is no evidence defendants acted in bad faith. The Court reasoned that

the no-undue-prejudice prong was also met because granting defendants' motion would not have delayed trial or hampered plaintiffs' preparation, while denial of the motion compromised the merits by eliminating defendants' scope-of-employment defense. The Court emphasized that RFAs must not be used to trick a party into admitting that it has no claim or defense. Additionally, the Court clarified that the test for changing an admission is not a high bar and that a trial court's "broad discretion" when faced with such a request is not unlimited.

c) *In re Liberty Cnty. Mut. Ins. Co.*, 679 S.W.3d 170 (Tex. Nov. 17, 2023) (per curiam) [22-0321]

The issue in this case is whether the trial court abused its discretion by quashing a subpoena seeking medical records from a plaintiff's primary care physician in a case where the plaintiff's injuries are in dispute.

Following a car accident, Thalia Harris sued the other driver and settled for that driver's policy limits. Harris then sued her insurer, Liberty County Mutual Insurance Company, for underinsured motorist benefits, alleging that her damages exceeded the settlement amount. Liberty sent two subpoenas to Harris's primary care physician seeking all documents, records, and films pertaining to the care, treatment, and examination of Harris for a fifteen-year period. Harris moved to quash both subpoenas as facially overbroad and for sanctions. In its written response, and again at the hearing, Liberty agreed to reduce the timeframe of the requests to ten years (five years before the accident and five years after). The trial court granted Harris's motion to quash and sanctioned Liberty's counsel. Liberty sought mandamus relief, which the court of appeals denied. Liberty then petitioned the Supreme Court for a writ of mandamus.

The Court conditionally granted Liberty's petition. The Court held that the trial court clearly abused its discretion because Liberty's requests sought relevant information and, as modified, were not so overbroad or disproportionate as to justify an order precluding all discovery from Harris's primary care physician. By suing Liberty for UIM benefits, Harris placed the existence, causation, and extent of her injuries from the car accident at issue. The record also showed that Harris was involved in multiple other car accidents both before and after the accident at issue, some of which involved similar injuries. The Court further held that mandamus relief was appropriate because the trial court's order denied Liberty a reasonable opportunity to develop a defense that goes to the heart of its case, and it would be difficult to determine on appeal whether the discovery's absence would affect the outcome at trial. Finally, the Court set aside the sanctions order because it was supported only by the erroneous order quashing Liberty's discovery requests.

d) *In re Off. of Att'y Gen.*, ___ S.W.3d ___, 2024 WL 4863177 (Tex. Nov. 22, 2024) (per curiam) [24-0073]

The issue in this mandamus proceeding is whether the trial court abused its discretion by compelling depositions of fact witnesses in a case

where the defendant amended its answer and no longer contests liability.

Four former employees sued the Office of the Attorney General under the Whistleblower Act. They sought to depose the Attorney General and three senior OAG employees. OAG amended its answer, stating that it no longer disputes the lawsuit as to any issue and consents to the entry of judgment against it. The trial court issued an order compelling the depositions. OAG sought mandamus relief.

In a per curiam opinion, the Supreme Court conditionally granted relief. It concluded that OAG's unambiguous statements in its amended answer unquestionably alter the analysis to determine whether the deposition requests show a reasonable expectation of obtaining information that would aid in the dispute's resolution and whether the burden or expense of the depositions outweigh their likely benefit. The Court held that the trial court abused its discretion by failing to consider how the narrowing of the disputed fact issues to include only damages affect the need, likely benefit, and burden or expense of the requested depositions. The Court rejected the plaintiffs' additional arguments that the depositions are needed to advance the purposes of the Whistleblower Act and to obtain effective relief through legislative approval of the judgment. The Court concluded that neither argument justifies altering the rules' limits on discovery obligations in a lawsuit.

e) *In re Peters*, 699 S.W.3d 307 (Tex. Oct. 4, 2024) (per curiam) [23-0611]

This case involves the application of the Fifth Amendment privilege against self-incrimination to discovery requests.

After drinking, Taylor Peters caused a multi-car crash that injured the plaintiffs. Peters was admitted to a hospital, where he told the responding police officer that he had visited two bars whose names he had forgotten, drank three beers, and remembered feeling "buzzed." The officer noted that Peters appeared confused and disoriented. A breathalyzer test revealed that Peters had a blood-alcohol concentration above the legal limit. He was arrested and charged with intoxication assault with a motor vehicle.

After suing Peters for negligence, the plaintiffs served interrogatories inquiring where Peters had been before the crash. They sought the names of the bars that served Peters alcohol in order to initiate a timely dram shop action. Peters invoked the Fifth Amendment and refused to provide the information. The trial court granted the plaintiffs' motion to compel. The court of appeals denied Peters' mandamus petition.

The Supreme Court conditionally granted mandamus relief. The constitutional privilege against self-incrimination applies in civil litigation and can bar discovery, no matter how critical the need for that discovery is. Here, Peters' discovery responses could be used against him in the criminal case by leading to evidence that Peters drank more than the three beers that he claimed. The Court rejected the

plaintiffs' argument that Peters waived the privilege by disclosing to the police that he had visited two bars, drank three beers, and felt buzzed. The plaintiffs did not show a voluntary, knowing, and intelligent waiver of the privilege in the record; indeed, the officer's notes about Peters' condition cut against a voluntary waiver.

2. Forum Non Conveniens

a) *In re Weatherford Int'l, LLC*, 688 S.W.3d 874 (Tex. Apr. 26, 2024) (per curiam) [22-1014]

The issue is whether the trial court abused its discretion by denying a motion to dismiss for forum non conveniens.

Kevin Milne was working for a Houston-based affiliate of the Weatherford company when he accepted an international assignment to work for a Weatherford affiliate in Egypt. Pursuant to Weatherford Houston's policy, Milne was required to undergo medical exams before commencing the assignment and then every two years for its duration. Milne's first exam was facilitated by Weatherford Egypt, and it cleared him to visit offshore rigs in Egypt and Tunisia. A second exam conducted by a different organization in South Africa provided the clearance required by Weatherford Houston. Unbeknownst to Milne, the first exam revealed a renal mass around his left kidney, and the report recommended further assessment. Milne first learned of the mass and follow-up recommendation a year later when he requested his medical records from Weatherford Egypt. By that point, the mass had already metastasized, and Milne passed away shortly after.

Milne's widow and children, all non-U.S. citizens, filed wrongful-death claims against Weatherford Houston in Texas. Weatherford Houston moved to dismiss them for forum non conveniens and identified Egypt as an appropriate forum. The trial court denied Weatherford Houston's motion, and the court of appeals denied mandamus relief.

Weatherford Houston filed a petition for writ of mandamus in the Supreme Court. The Court granted mandamus relief, concluding that all six statutory forum non conveniens factors favor dismissal and that Egypt is a more appropriate forum for the family's claims because, among other reasons, Weatherford Egypt's policies and practices governed the handling of Milne's medical information.

3. Multidistrict Litigation

a) *In re Jane Doe Cases*, ___ S.W.3d ___, 2024 WL 5249567 (Tex. Dec. 31, 2024) [23-0202]

The issue in this case is whether the MDL panel erred by refusing to remand a "tag along" case.

In the underlying case, Jane Doe alleges that she was a victim of sex trafficking as a minor, and the perpetrator befriended her on Facebook to convince her to meet in person. Thereafter, she was sexually assaulted at a hotel owned by Texas Pearl. In 2018, Doe sued Facebook and Texas Pearl, alleging they both facilitated her trafficking. In 2019, the MDL panel formed an MDL with seven other cases involving sex-trafficking allegations, and it assigned an MDL pretrial court. None of the other cases involve the same parties or events alleged in the Facebook

case. In 2022, Texas Pearl filed a Notice of Transfer of Tag-Along Case to move the underlying case into the MDL, asserting that Doe's claims relate to the MDL cases because all involve sex-trafficking allegations against hotels.

The MDL pretrial court denied Facebook's motion to remand, and the MDL panel denied Facebook's motion for rehearing. Facebook sought mandamus relief in the Supreme Court, arguing that its case shares no common fact question with the MDL, and further that the inclusion of the case in the MDL will not improve convenience or efficiency.

The Supreme Court granted relief, holding that that the Facebook case lacks a fact question in common with the MDL cases, as required to form an MDL. Without a common connection through the same plaintiffs, defendants, or events, general allegations of criminal activity by different perpetrators do not create the required common fact question to include a case within an MDL for pretrial docket management. The Court directed the MDL panel to remand the tag along case to its original trial court.

4. Statute of Limitations

b) *Sanders v. Boeing Co.*, 680 S.W.3d 340 (Tex. Dec. 1, 2023) [23-0388]

This certified question concerns the interpretation of Section 16.064 of the Texas Civil Practice and Remedies Code, which tolls limitations when a prior action is dismissed "because of lack of jurisdiction" and then is refiled in a court of "proper jurisdiction" within sixty days after the date the dismissal "becomes final."

Two flight attendants sustained injuries on the job. They sued the Boeing Company and other defendants in federal district court, which later dismissed their suit for failure to adequately plead diversity jurisdiction. The flight attendants filed this suit shortly after the Fifth Circuit affirmed the dismissal, but the district court dismissed it as barred by the statute of limitations.

On appeal to the Fifth Circuit, the flight attendants argued that Section 16.064 tolled the statute of limitations while they pursued their prior suit because that case was dismissed for lack of jurisdiction and they filed this suit less than sixty days after the Fifth Circuit affirmed. The Fifth Circuit certified two questions to the Supreme Court: (1) Does Section 16.064 apply to this lawsuit where the flight attendants could have invoked the prior district court's subject-matter jurisdiction with proper pleadings?; and (2) Did the flight attendants file this lawsuit within sixty days of when the prior judgment became "final" for purposes of Section 16.064?

The Supreme Court answered both questions "Yes." First, the Court concluded that Section 16.064 applies whenever the prior action was dismissed "because of lack of jurisdiction," even if the court could have had jurisdiction. The statute does not require that the prior court be a "court of improper jurisdiction." Second, the Court held that a dismissal "becomes final" under the statute only after the parties have exhausted their appellate remedies and the appellate court's power to alter the judgment ends.

5. Sufficient Pleadings

a) *Herrera v. Mata*, ___ S.W.3d ___, 2024 WL 4996713 (Tex. Dec. 6, 2024) (per curiam) [23-0457]

At issue in this case is whether the plaintiffs pleaded sufficient facts to allege an ultra vires claim against irrigation district officials under the Tax Code.

In 2019, Hidalgo County Irrigation District No. 1 sought to collect charges accrued in the 1980s and 1990s from a group of homeowners. The homeowners sued the district, claiming that the charges are taxes and that the district's refusal to remove them from the tax rolls violates the Tax Code's limitations period. In the alternative, the homeowners claim that the charges are Water Code assessments that the district has no authority to levy. The district filed a plea to the jurisdiction, arguing that the charges are assessments with no applicable limitations period; thus, governmental immunity bars suits seeking to stop their collection. The trial court granted the plea.

The court of appeals affirmed in part. It held that the Tax Code does not apply as a matter of law, so district officials did not act ultra vires by refusing to remove the charges from the tax rolls.

The Supreme Court reversed. It held that the homeowners pleaded sufficient facts to demonstrate the trial court's jurisdiction for their Tax Code claim by alleging that the charges are taxes assessed well after the limitations period. It also held that the homeowners' alternative pleading treating the charges as assessments does not affirmatively negate their pleadings that the charges are taxes. The Court remanded the case to the trial court for further proceedings.

6. Summary Judgment

a) *Gill v. Hill*, 688 S.W.3d 863 (Tex. Apr. 26, 2024) [22-0913]

This case concerns the burden of proof at the summary-judgment stage when a plaintiff asserts that a void judgment prohibits limitations from barring its suit.

In 1999, several taxing entities obtained a judgment foreclosing on the properties of more than 250 defendants, including James Gill. The following month, David Hill purchased Gill's former mineral interests, and Hill recorded the sheriff's deed with the county. Twenty years later, Gill's successors sued Hill to declare the foreclosure judgment and resulting deed void for lack of due process and to quiet title to the mineral interests in their names. They argued that the 1999 judgment was void because Gill was never properly served. Hill moved for summary judgment under a statute that requires suits against purchasers of property at a tax sale to be brought within one year after the deed is filed of record, and he attached a copy of the sheriff's deed to his motion. The trial court granted summary judgment for Hill, and a divided court of appeals affirmed.

The Supreme Court held that the trial court correctly granted summary judgment. The Court concluded that Hill satisfied his summary-judgment burden by conclusively showing that the statute of limitations expired before the suit was filed. Gill's successors conceded that limitations had expired but asserted that their suit was

not barred because the foreclosure judgment and deed were void for lack of due process. Gill's successors therefore had the burden to raise a genuine issue of material fact that the foreclosure judgment was void, and they failed to present any such evidence.

The Court concluded, however, that the case should be remanded to the trial court because the summary-judgment proceedings took place without the benefit of two recent decisions from the Court: *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. 2021), which addressed the burdens of proof for summary judgments based on limitations, and *Mitchell v. MAP Resources, Inc.*, 649 S.W.3d 180 (Tex. 2022), which clarified the types of evidence that can be used to support a collateral attack on a judgment such as that asserted by Gill's successors. The Court thus vacated the lower courts' judgments and remanded to the trial court for further proceedings.

b) *Keenan v. Robin*, ___ S.W.3d ___, 2024 WL 5249568 (Tex. Dec. 31, 2024) (per curiam) [23-0833]

This dispute between adjacent landowners involves claims of trespass and malicious prosecution.

A plat for a subdivision was approved by Randall County and filed in 2006. The plat shows forty-five lots separated by several named streets that, according to the Owner's Acknowledgment, are "dedicated to the public forever." Although the rest of the subdivision was never fully developed, the Keenans bought one of the lots in 2009. The Ranch Respondents eventually purchased all remaining lots at a bankruptcy auction, began using the land to run cattle, and erected a gate across one of the streets that the Keenans had been using to access their lot. Michael Keenan broke or removed the Ranch's gate and portions of its fence on two occasions, which resulted in his arrest and indictment on two counts of criminal mischief of a livestock fence.

The Keenans filed the underlying lawsuit against the Ranch Respondents, alleging claims for trespass and malicious prosecution and requesting declaratory and injunctive relief in addition to damages. At summary judgment, the parties disputed whether (1) the plat had dedicated the streets to the public or created a private easement, (2) the Ranch had "procured" Michael Keenan's prosecution, and (3) the Ranch Respondents were the owners of the cattle that had been crossing the Keenans' lot without their permission. The trial court granted summary judgment for the Ranch Respondents and entered a take-nothing judgment on all the Keenans' claims. The court of appeals reversed the entry of a take-nothing judgment on the claims for declaratory and injunctive relief but otherwise affirmed the trial court's judgment.

The Supreme Court reversed in part and affirmed in part. The Court disagreed with the court of appeals' conclusion that the Keenans offered no evidence of trespass, pointing to Michael Keenan's declaration stating that he saw cattle and manure on his lot and that one of the respondents admitted ownership of the cattle. The Court further held that the Ranch does not own the dedicated public streets within the subdivision as a matter of law and that, therefore, the court of appeals erred by remanding the claim for declaratory relief to resolve factual disputes. Finally,

the Court affirmed the court of appeals' judgment upholding the trial court's take-nothing judgment on the malicious prosecution claim. The Court remanded to the trial court for further proceedings.

c) *Verhalen v. Akhtar*, 699 S.W.3d 303 (Tex. Oct. 4, 2024) (per curiam) [23-0885]

The issue is whether the trial court abused its discretion by denying a motion to file a summary judgment response tendered one day late.

Georgia Verhalen and her mother sued Evan Johnston and Adriana Akhtar for negligence. The defendants filed motions for summary judgment, resulting in an October 5, 2022, deadline for the Verhalens' responses. The Verhalens did not file their responses until 11:48 p.m. on October 6. They also filed a verified motion for leave to file the responses late. The motion and affidavit explained that the deadline was improperly entered in the calendaring software used by the plaintiffs' counsel and that counsel filed the responses immediately upon discovering the oversight. The trial court denied the motion for leave, insisting on strict compliance with the response deadline prescribed by the rules of civil procedure. The trial court then granted the defendants' motions for summary judgment and awarded take-nothing judgments to both. The Verhalens appealed the denial of their motion for leave, but the court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court for further proceedings. The Court held that the trial court abused its discretion by denying the motion for leave because the Verhalens established good cause for the delay in filing. The Court emphasized counsel's uncontroverted factual assertions about her discovery of the calendaring error and her prompt action in response.

Y. PROCEDURE—TRIAL AND POST-TRIAL

1. Defective Trial Notice

a) *Wade v. Valdetaro*, 696 S.W.3d 673 (Tex. Aug. 30, 2024) (per curiam) [23-0443]

The Supreme Court reversed a $21.6 million judgment rendered after a one-hour bench trial at which the pro se defendant appeared but presented no evidence.

The defendant was unprepared to mount a defense because notice of the trial setting was sent to an incorrect address. The Court held that a party who has appeared in a civil case has a constitutional right to notice of a trial, which by rule must ordinarily be at least 45 days before a first setting. Having sufficiently informed the trial court about the service defect, the defendant was entitled to a new trial. The defendant's failure to request a continuance did not constitute a voluntary, knowing, and intelligent waiver of the due process right to reasonable notice.

2. Incurable Jury Argument

a) *Alonzo v. John*, 689 S.W.3d 911 (Tex. May 10, 2024) (per curiam) [22-0521]

The issue in this personal-injury suit is whether an accusation of race and gender prejudice directed at opposing counsel was incurably harmful.

Roberto Alonzo was driving a tractor-trailer when he rear-ended

Christine John and Christopher Lewis. John and Lewis sued Alonzo and his employer, New Prime, Inc. John requested $10–12 million in non-economic damages, but the defense asked the jury to award her $250,000. In closing, plaintiffs' counsel argued that "we certainly don't want this $250,000" and then remarked: "Because it's a woman, she should get less money? Because she's African American, she should get less money?" The defense moved for a mistrial, but the motion was overruled. The jury awarded John $12 million for physical pain and mental anguish, and the trial court rendered judgment on the verdict. The court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court, holding that defense counsel was entitled to suggest a smaller damages amount than John sought without an uninvited accusation of race and gender bias. The resulting harm was incurable by withdrawal or instruction because the argument struck at the heart of the jury trial system and was designed to turn the jury against opposing counsel and their clients.

3. Jury Instructions and Questions

a) *Horton v. Kan. City S. Ry. Co.*, 692 S.W.3d 112 (Tex. June 28, 2024) [21-0769]

This case raises questions of federal preemption, evidentiary sufficiency, and charge error.

Ladonna Sue Rigsby was killed by a Kansas City Southern Railroad Company train while she was driving across a railroad crossing. Her children (Horton) sued the Railroad, alleging two theories of liability: (1) the Railroad failed to correct a raised hump at the crossing; and (2) it failed to maintain a yield sign at the crossing. Both theories were submitted to the jury in one liability question. The jury found both the Railroad and Rigsby negligent, and the trial court awarded Horton damages for the Railroad's negligence.

The court of appeals reversed, holding that the federal Interstate Commerce Commission Termination Act preempted Horton's humped-crossing theory and that the submission of both theories in a single liability question was harmful error. The court remanded for a new trial on the yield-sign theory alone.

The Supreme Court granted both sides' petitions for review. In a June 2023 opinion, the Court affirmed the court of appeals' judgment, but on different grounds. It held that federal law does not preempt the humped-crossing claim, but no evidence supports the jury's finding that the absence of a yield sign proximately caused the accident. The Court then concluded that the trial court's use of a broad-form question to submit the negligence claim was harmful error.

Both parties filed motions for rehearing. The Court denied the Railroad's motion and granted Horton's, which challenged the holding that the submission of the broad-form question was harmful error. The Court withdrew its original opinion. In a new opinion by Justice Boyd, the Court maintained its holdings that the humped-crossing claim is not preempted and that no evidence supports the yield-sign theory. But in the

new opinion, the Court concluded that the submission of the broad-form question was not harmful error.

The Court held that *Casteel*'s presumed-harm rule does not apply when a theory or allegation is "invalid" because it lacks legally sufficient evidentiary support, as was the case here. The Court then reviewed the entire record and concluded that the broad-form question did not probably cause the rendition of an improper judgment. It therefore reversed the court of appeals' judgment and reinstated the trial court's judgment in Horton's favor.

Justice Busby filed a concurring opinion, urging the Supreme Court of the United States to reconsider its holding in *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), on the basis that implied-obstacle preemption is inconsistent with the federal Constitution.

Justice Young, joined by Justice Blacklock, dissented to the Court's judgment. He would apply *Casteel* whenever there is the risk that the jury relied on any theory that turns out be legally invalid.

b) *Oscar Renda Contracting v. Bruce*, 689 S.W.3d 305 (Tex. May 3, 2024) [22-0889]

This case raises procedural questions arising from an award of exemplary damages in a verdict signed by only ten jurors.

As part of a flood-mitigation project undertaken by the City of El Paso, Renda Contracting installed a pipeline from Interstate 10 to the Rio Grande river. Nearby homeowners sued Renda Contracting, alleging that vibration and soil shifting from the construction caused damage to their homes. The jury found gross negligence and awarded $825,000 in exemplary damages, but the verdict certificate and subsequent jury poll indicated that only ten of twelve jurors agreed with the verdict. The jury charge, which was not objected to, failed to instruct the jury that it must be unanimous in awarding exemplary damages, as required by Section 41.003(e) of the Civil Practice and Remedies Code.

When the homeowners moved for entry of a judgment that included exemplary damages, Renda Contracting objected on the basis that the verdict was not unanimous. The trial court sustained the objection and entered judgment on the jury's verdict without an exemplary damages award.

A split court of appeals reversed. The majority held that unanimity as to exemplary damages could be implied despite the verdict certificate's demonstrating a divided verdict because the disagreement could be on an answer to a different question. The majority further held that Renda Contracting had the burden to prove that the verdict was not unanimous and that it had waived any error in awarding exemplary damages by failing to object to the jury charge. The dissenting justice would have held that the homeowners had the burden to secure a unanimous verdict.

The Supreme Court reinstated the trial court's judgment. The Court explained that Section 41.003 places the burden of proof on a claimant seeking exemplary damages to secure a unanimous verdict and states that this burden may not be shifted. Thus, it was the homeowners' burden to secure a unanimous verdict and to seek

confirmation as to unanimity for the amount of exemplary damages after the jury returned a divided verdict. The Court also held that Renda Contracting's objection to the judgment, which the trial court had sustained, was sufficient to preserve the issue for appeal.

4. Rendition of Judgment

a) *Baker v. Bizzl*e, 687 S.W.3d 285 (Tex. Mar. 1, 2024) [22-0242]

The issue in this case is whether the trial court rendered judgment fully resolving the divorce action in an email sent only to the parties' counsel.

At the conclusion of a bench trial on cross-petitions for divorce, the judge orally declared "the parties are divorced" "as of today" but neither divided the marital estate nor ruled on the grounds pleaded for divorce. The judge later emailed the parties' counsel with brief rulings on the outstanding issues and instructed Wife's attorney to prepare the divorce decree. Two months later, Wife died, and her counsel subsequently tendered a final divorce decree to the court.

Husband moved for dismissal, arguing that (1) an unresolved divorce action does not survive the death of a party and (2) the court's prior email was not a rendition of judgment on the open issues. Over Husband's objection, the trial court signed the divorce decree, but on appeal, the court of appeals agreed with Husband that the decree was void. The court held that the oral pronouncement was clearly interlocutory, the email lacked language indicating a present intent to render judgment, and dismissal was required when Wife died before a full and final rendition of judgment.

The Supreme Court affirmed. Without deciding whether the email stated a present intent to render judgment, the Court held that the writing was ineffective as a rendition because the decision was not "announced publicly." Generally, judgment is rendered when the court's decision is "officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly." A ruling shared only with the parties or their counsel in a nonpublic forum is not a public announcement of the court's decision.

Justice Lehrmann concurred to note her view on an unpresented issue. If presented, she would hold that a trial court's interlocutory marital-status adjudication continues to have legal significance after a party dies even though the trial court would lack jurisdiction to subsequently divide the marital estate.

Justice Young's concurrence proposed modernizing the law to eliminate distinctions between "rendering," "signing," and "entering" judgment by adopting an all-purpose effectiveness date based on the date of electronic filing.

Z. PRODUCTS LIABILITY

1. Design Defects

a) *Am. Honda Motor Co. v. Milburn*, 696 S.W.3d 612 (Tex. June 28, 2024) [21-1097]

The main issue presented is whether Texas Civil Practice and Remedies Code Section 82.008's rebuttable presumption of nonliability shields Honda from liability on a design-defect claim.

Honda designed a ceiling-mounted, detachable-anchor seatbelt system for the third-row middle seat of the 2011 Honda Odyssey. The detachable system allowed the seat to fold flat for additional cargo space. The Federal Motor Vehicle Safety Standards promulgated by the National Highway Traffic Safety Administration authorize the detachable system used in the Odyssey.

In November 2015, an Uber driver picked up Milburn and her friends in a 2011 Odyssey. Milburn sat in the third-row middle seat and buckled her seatbelt, but because the anchor was detached at the time, her lap remained unbelted. An accident caused the van to overturn, and Milburn suffered severe cervical injuries. Milburn sued several defendants and settled with all except Honda. Milburn alleged that the seatbelt system was defectively designed and confusing, creating an unreasonable risk of misuse. The jury found that Honda negligently designed the system, Honda was entitled to the Section 82.008 presumption of nonliability, and Milburn rebutted the presumption. The trial court rendered judgment for Milburn, and the court of appeals affirmed.

The Supreme Court reversed and rendered judgment for Honda. In an opinion by Justice Lehrmann, the Court first held that the statutory presumption applies because the system's design complied with mandatory federal safety standards governing the product risk that allegedly caused the harm. Next, the Court addressed the basis for rebutting the presumption, which requires a showing that the applicable standards are inadequate to protect the public from unreasonable risks of injury. The Court concluded that absent a comprehensive review of the various factors and tradeoffs the federal agency considered in adopting the standard, which was not provided here, the standard generally may not be deemed "inadequate" to prevent an unreasonable risk of harm to the public as a whole.

Justice Blacklock concurred, emphasizing that a factfinder cannot validly judge a safety standard's adequacy absent testimony about how the regulatory process works and the many competing considerations it entails.

Justice Devine dissented, opining that legally sufficient evidence supports the jury's findings of defective design and safety-standard inadequacy.

2. Statute of Repose

a) *Ford Motor Co. v. Parks*, 691 S.W.3d 475 (June 7, 2024) [23-0048]

This case addresses a defendant's burden of proof to obtain summary judgment under the statute of repose for a products-liability action. The statute requires a claimant to sue the manufacturer or seller "before the end of 15 years after the date of the sale of the product by the defendant."

Samuel Gama was injured when his 2001 Ford Explorer Sport rolled over on a highway. On May 17, 2016, Gama's wife, Jennifer Parks, brought products-liability claims against Ford. The trial court granted Ford's motion for summary judgment based on the statute of repose, but the court of appeals reversed. Ford's uncontroverted evidence established that Ford released and shipped the Explorer to a dealer in May 2000, more than 15 years

before Parks' May 2016 suit. But the court of appeals accepted Parks' argument that Ford was required to conclusively prove the exact date that the dealer paid for the Explorer in full, and the court held Ford had not done so.

The Supreme Court reversed and rendered judgment for Ford. The Court explained that the premise underlying the court of appeals' analysis—that money must change hands before a sale is completed—is contrary to law. Chapter 2 of the Uniform Commercial Code sets a default rule that a sale is complete when the seller performs by physically delivering the goods, even if the buyer has not made full payment. This timing rule is consistent with blackletter contract law and the Court's caselaw, both of which recognize that a promise to pay is sufficient consideration for a sale. The court of appeals therefore erred by imposing on Ford the burden of proving the date that the dealership paid Ford for the Explorer. The Court emphasized that the way a buyer finances a purchase is irrelevant to whether a sale occurred.

The Court also clarified that a defendant need not prove an exact sales date to be entitled to judgment under the statute of repose. One purpose of a statute of repose is to relieve defendants of the burden of defending claims where evidence may be lost or destroyed due to the passage of time. It is enough for a defendant to prove that the sale, whatever the date, must have occurred outside the statutory period.

AA. REAL PROPERTY

1. Bona Fide Purchaser

a) *425 Soledad v. CRVI Riverwalk*, ___ S.W.3d ___, 2024 WL 5249787 (Tex. Dec. 31, 2024) [23-0344]

At issue in this case is whether an easement is enforceable against a property purchaser who claims bona fide purchaser protections.

425 Soledad executed a parking agreement that secured parking availability to its office building occupants in a garage connected by tunnel access. The parties agreed that the parking covenant would run with the land but did not record the interest. The garage later was sold, with the new owner's debt secured by mortgage liens. CRVI Crowne acquired part of this debt. When the new garage owner neared default, CRVI Crowne placed the property into a receivership, and its affiliate, CRVI Riverwalk, purchased the garage from the receiver. CRVI Riverwalk later rejected an office building occupant's request for parking under the agreement, arguing that it is a bona fide purchaser who took without notice.

The trial court held that the parking agreement is an enforceable easement appurtenant that transferred with the property. The court of appeals agreed that the agreement is an easement but held it unenforceable because CRVI Crowne purchased its note without notice of the easement, and it "sheltered" CRVI Riverwalk as a subsequent purchaser under its bona fide mortgagee status.

The Supreme Court reversed. The Court agreed with both courts that the parking agreement is an easement. However, the Court concluded that the

trial court correctly enforced the easement against CRVI Riverwalk because both it and CRVI Crowne had inquiry notice sufficient to remove any bona fide purchaser protection. Because the Court resolved the case on the notice element, it did not address whether a property purchaser can rely on an earlier lender's bona fide status to claim shelter.

2. Easements

a) *Albert v. Fort Worth & W. R.R. Co.*, 690 S.W.3d 92 (Tex. Feb. 16, 2024) (per curiam) [22-0424]

The issue presented is whether legally sufficient evidence supports a jury's finding of an easement allowing a landowner to cross adjacent railroad tracks to access a highway.

Albert purchased a tract of land in Johnson County, which is separated from a state highway by a strip of land owned by Fort Worth & Western Railroad. Western operates railroad tracks along that strip. After the purchase, Albert and his business partners formed Chisholm Trail Redi-Mix, LLC to operate a concrete plant on the property. After the plant became operational, Chisholm Trail's trucks used a single-lane gravel road to cross the tracks and access the highway. The gravel road is the sole point of access between the concrete plant and the highway.

Western sent Albert a cease-and-desist letter demanding that he and Chisholm Trail stop using the gravel crossing. Albert and Chisholm Trail sued, seeking a declaration that they possessed easements by estoppel, necessity, and prescription allowing them to use the gravel road. The jury found that the plaintiffs were entitled to all three easements, and the trial court rendered judgment on the verdict. The court of appeals reversed, holding that the evidence is legally insufficient to support the easements.

The Supreme Court affirmed the court of appeals' judgment in part and reversed it in part. The Court agreed that the evidence is legally insufficient to support the jury's findings as to the easements by estoppel and necessity, but it held the evidence sufficient to support the prescriptive easement. The testimony presented at trial could enable a reasonable and fair-minded juror to find that Albert and his predecessors-in-interest used the gravel crossing in a manner that was adverse, open and notorious, continuous, and exclusive for the requisite ten-year period. The Court remanded the case to the court of appeals to consider additional, unaddressed issues.

3. Implied Reciprocal Negative Easements

a) *River Plantation Cmty. Improvement Ass'n v. River Plantation Props. LLC*, 698 S.W.3d 226 (Tex. June 14, 2024) [22-0733]

The issue in this case is whether real property in a residential subdivision is burdened by an implied reciprocal negative easement requiring it to be maintained as a golf course.

River Plantation subdivision contains hundreds of homes and a golf course. The subdivision's restrictive covenants provide that certain "golf course lots" are burdened by restrictions that, among other things, require structures to be set back from the

golf course. The developer included graphic depictions of the golf course in some of the plat maps that it filed for the subdivision, which was often marketed as a golf course community. Forty years later, the subsequent owner of the golf course, RP Properties, sought to sell the property to a new owner who intended to stop maintaining it as a golf course.

The subdivision's HOA sued RP Properties to establish the existence of an implied reciprocal negative easement burdening the golf course, requiring that it be used as a golf course in perpetuity. RP Properties sold a portion of the property to Preisler, who was added as a defendant. The trial court granted the defendants' motions for summary judgment, declaring that the golf course property is not burdened by the claimed easement. The court of appeals affirmed.

The Supreme Court affirmed, holding that the implied reciprocal negative easement doctrine does not apply. This kind of easement is an exception to the general requirement that restraints on an owner's use of its land must be express. It applies when an owner subdivides its property into lots and sells a substantial number of those lots with restrictive covenants designed to further a common development scheme, such as a residential-use restriction. In that instance, the lots retained by the owner or sold without the express restriction to a grantee with notice of the restrictions in the other deeds will be subject to the same restrictions. Here, the HOA did not claim that the golf course property should be impliedly burdened by similar restrictions to the other lots in the subdivision; rather, it claimed that the property should be burdened by an entirely different restriction. The Court declined to consider whether a broader, unpleaded servitude-by-estoppel theory could be applied or would entitle the HOA to relief.

4. Landlord Tenant

a) *Westwood Motorcars, LLC v. Virtuolotry, LLC*, 689 S.W.3d 879 (Tex. May 17, 2024) [22-0846]

The issue in this case is what effect, if any, an agreed judgment awarding possession to a landlord in an eviction suit has on a related suit in district court by a tenant for damages.

Virtuolotry leased property to Westwood, an automobile dealer. When Westwood sought an extension under the lease, Virtuolotry rejected the attempt and asserted that Westwood had defaulted. Westwood sued in district court for a declaration of its right to extend the lease. When the current lease term expired, Virtuolotry initiated and prevailed in an eviction suit in justice court. Westwood appealed the eviction-suit judgment to county court, but the parties ultimately entered an agreed judgment awarding Virtuolotry possession of the premises. Westwood then added claims for breach of contract and constructive eviction to its district-court suit. After a jury trial, the district court awarded Westwood over $1 million in damages. But the court of appeals reversed and rendered a take-nothing judgment because Westwood had agreed to the eviction-suit judgment awarding possession to Virtuolotry.

The Supreme Court reversed.

The Court first explained that eviction suits provide summary proceedings for which the sole issue adjudicated is immediate possession. Accordingly, agreeing to an eviction-suit judgment does not concede an ultimate right to possession or abandon separate claims for damages, even if those claims also implicate the right to possession. The Court also rejected Virtuolotry's argument that Westwood's agreement to the judgment conclusively established that it voluntarily abandoned the premises, extinguishing any claims for damages. The Court explained that a key dispute at trial was whether Westwood left voluntarily, and it concluded that legally sufficient evidence supported a finding that neither Westwood's departure nor its agreement to entry of the eviction-suit judgment was voluntary. The Court remanded the case to the court of appeals to consider several unaddressed issues.

5. Nuisance

a) *Huynh v. Blanchard*, 694 S.W.3d 648 (Tex. June 7, 2024) [21-0676]

The issue in this case is the availability and appropriate scope of permanent injunctive relief to redress a temporary nuisance.

The Huynhs set up and operated two farms for raising chickens on the same property, upwind of residential properties. Because the Huynhs' submissions to state regulators misrepresented the scale and geographic isolation of their proposed operations, the Huynhs avoided triggering more stringent regulatory requirements. The farms routinely housed twice the number of chickens that the TCEQ has deemed likely to create a persistent nuisance. Shortly after the farms began receiving chickens, the TCEQ started to receive complaints about offensive odors from nearby residents. The TCEQ investigated, issued multiple notices of violation to the farms, and required the farms to implement odor-control plans. Nonetheless, the farms continued to operate in largely the same manner and generate a similar volume of complaints.

Some of the farms' neighbors sued for nuisance. A jury found that the farms caused nuisance-level odors of such a character that any anticipated future injury could not be estimated with reasonable certainty. The trial court rendered an agreed take-nothing judgment on damages and granted the neighbors a permanent injunction that required a complete shutdown of the two farms. The court of appeals affirmed the trial court's judgment.

The Supreme Court reversed in part and remanded for the trial court to modify the scope of injunctive relief. In an opinion by Justice Busby, the Court held that the jury's finding did not preclude the trial court from concluding the farms posed an imminent harm. The Court also held that monetary damages would not afford complete relief for the nuisance, the recurring nature of which would necessitate multiple suits, and was therefore an inadequate remedy. Finally, the Court held that the trial court abused its discretion in determining the scope of injunctive relief because the shutdown of the two farms imposed broader relief than was necessary to abate nuisance-level odors.

Justice Huddle filed an opinion

concurring in the judgment. While the concurrence also would have held that the record supported the trial court's finding of imminent harm and inadequate remedy at law, it asserted that the Court did not give proper deference to the jury's factual finding of a temporary nuisance and gave insufficient consideration to the Legislature's and TCEQ's regulatory authority in instructing the trial court to craft an injunction as narrowly as possible.

BB. RES JUDICATA

1. Claim Preclusion

a) *Steelhead Midstream Partners, LLC v. CL III Funding Holding Co.*, ___ S.W.3d ___, 2024 WL 5249688 (Tex. Dec. 31, 2024) (per curiam) [22-1026]

In this case, the Court held that a judgment in a lien-foreclosure suit does not bar a later suit on a related contract claim.

Predecessors to Steelhead and CL III had a joint-operating agreement to develop leases. The JOA obliged Steelhead and CL III to share the costs of constructing a pipeline. Orr placed a lien on the pipeline for unpaid construction costs. CL III settled with Orr and was assigned the lien in a bankruptcy proceeding. CL III then sued Steelhead in Montague County to foreclose on Steelhead's pipeline interest. Steelhead counterclaimed, alleging as a contract claim that under the JOA it had paid its share of construction costs. CL III filed a plea to the jurisdiction arguing the contract claim was barred because it was subject to the jurisdiction of the bankruptcy court. The trial court granted the plea and rendered judgment granting CL III the right to foreclose on the pipeline. Steelhead paid CL III over $400,000 to avoid foreclosure.

Steelhead brought a separate suit in Travis County, alleging CL III breached the JOA by failing to pay its share of the pipeline costs. The trial court rendered judgment for Steelhead. The court of appeals reversed, reasoning that the Travis County suit is an impermissible collateral attack on the Montague County judgment.

The Supreme Court reversed. It held that the Travis County suit is not barred because the contract claim was not decided in the Montague County foreclosure suit. The foreclosure suit decided the status of a lien originating from a construction debt owed to a third party. That suit did not decide whether one party to the JOA owed a contractual debt to the other. Steelhead in fact persuaded the Montague County court that it lacked jurisdiction to decide the contract claim. In these circumstances, neither res judicata nor judicial estoppel bars the Travis County suit.

2. Judicial Estoppel

a) *Fleming v. Wilson*, 694 S.W.3d 186 (Tex. May 17, 2024) [22-0166]

The issue in this case is whether judicial estoppel bars a defendant from invoking defensive collateral estoppel because of inconsistent representations made in prior litigation.

George Fleming and his law firm represented thousands of plaintiffs in securing a products-liability settlement. Many of Fleming's clients then sued him for improperly deducting

costs from their settlements. Some of those former clients sought to bring a class action in federal court, but Fleming persuaded the district court to deny class certification by arguing that issues of fact and law among class members meant that aggregate litigation was improper.

Later, in state court, Fleming prevailed in a bellwether trial involving ten plaintiffs. He then moved for summary judgment, contending that his trial win collaterally estopped the remaining plaintiffs from litigating the same issues. The trial court agreed and dismissed the remaining plaintiffs' claims with prejudice. The court of appeals reversed, holding that Fleming failed to establish that the remaining plaintiffs were in privity with the bellwether plaintiffs such that they were bound by the verdict.

The Supreme Court affirmed. It held that judicial estoppel bars Fleming from arguing that the plaintiffs' claims are identical. When a party successfully convinces a court of a position in one proceeding and wins relief on the basis of that representation, judicial estoppel bars that party from asserting a contradictory position in a later proceeding. Because Fleming secured denial of class certification on the ground that the plaintiffs' claims are not identical, he is estopped from arguing that their claims *are* identical, which is essential to his effort to bind all plaintiffs to the bellwether trial's result.

CC. STATUTE OF LIMITATIONS

1. Lien on Real Property

b) *Moore v. Wells Fargo Bank*, 685 S.W.3d 843 (Tex. Feb. 23, 2024) [23-0525]

These certified questions concern whether a lender may reset the limitations period to foreclose on a property by rescinding its acceleration of a loan in the same notice that it re-accelerates the loan.

After the Moores failed to make payments on a loan secured by real property, the lenders accelerated the loan, starting the running of the four-year limitations period to foreclose on the property. Several months later, the lenders notified the Moores that they had rescinded the acceleration and, in the same notice, reaccelerated the loan. The lenders issued the Moores four similar notices over the next four years and never foreclosed on the property. After four years, the Moores sought a declaratory judgment that the limitations period had run. The federal district court granted the lenders' motion for summary judgment, holding that the lenders had rescinded the acceleration under Section 16.038 of the Civil Practice and Remedies Code. The Fifth Circuit certified the following questions of law to the Supreme Court: (1) May a lender simultaneously rescind a prior acceleration and re-accelerate a loan under Section 16.038? and (2) If a lender cannot simultaneously rescind a prior acceleration and re-accelerate a loan, does such an attempt void only the re-acceleration, or both the re-acceleration and the rescission?

The Court answered the first question "yes." The lenders' notices to the Moores complied with the

requirements of Section 16.038 to be in writing and served via an appropriate method. The statute did not require that a notice of rescission be distinct or separate from other notices, nor did it establish a waiting period between rescission and reacceleration.

2. Tolling

a) *Hampton v. Thome*, 687 S.W.3d 496 (Tex. Mar. 8, 2024) [22-0435]

At issue is whether an incomplete or defective medical authorization form can toll the statute of limitations under Section 74.051(c) of the Civil Practice and Remedies Code.

A health care liability claimant is required to provide notice to the defendant at least sixty days prior to filing suit. This notice must be accompanied by a medical authorization form that permits the defendant to obtain information from relevant health care providers. After being released from the hospital after a surgery, Dorothy Hampton fell at her house and was found confused and disoriented. Hampton notified Dr. Leonard Thome of her intent to bring a health care liability claim, alleging he had prematurely released her from the hospital. This notice was accompanied by an incomplete medical authorization form, which was missing several health care providers that had treated Hampton. Hampton's form also left out a sentence, found in the statutory form provided in Section 74.052(c), that extends authorization to future providers.

Hampton eventually filed her suit past the two-year statute of limitations, but within the 75-day tolling period specified in Section 74.051(c). Dr. Thome moved for summary judgment on limitations grounds, claiming that Hampton's deficient form could not trigger the 75-day tolling period. The district court denied Dr. Thome's motion for summary judgment. On appeal, the court of appeals reversed, concluding that tolling was unavailable due to defects in Hampton's form.

The Supreme Court reversed. In an opinion by Justice Blacklock, the Court held that an incomplete or erroneous medical authorization form is still an authorization form for tolling purposes. The appropriate remedy for an incomplete or defective form is a 60-day abatement as provided by Section 74.052(a)-(b).

Justice Boyd filed a dissenting opinion. He would have held that only a fully compliant authorization form tolls the statute of limitations.

DD. SUBJECT MATTER JURISDICTION

1. Standing

a) *Busbee v. County of Medina*, 681 S.W.3d 391 (Tex. Dec. 15, 2023) (per curiam) [22-0751]

This case involves a dispute between the 38th and 454th Judicial Districts over an office building in Medina County.

In 1998, when Medina County was part of the 38th Judicial District, the 38th District used funds from its forfeiture account to buy an office building in the County. The property's deed named the County as the grantee but restricted the building's use to 38th District business for as long as the County owned the property. The deed also required the 38th District Attorney's consent before the County could

sell the property.

In 2019, the Legislature carved Medina County out of the 38th District into the new 454th District. Because of the deed's restrictions on use, the County decided to sell the property and divide the proceeds with the two counties that remained in the 38th District. Before the sale closed, newly elected 38th District Attorney Christina Busbee notified the County that she did not consent to the sale and took the position that all sale proceeds were 38th District forfeiture funds under Chapter 59 of the Texas Code of Criminal Procedure.

Medina County sued Busbee in her official capacity to quiet title. Busbee asserted several counterclaims stemming from her assertions that the property—and any proceeds from its sale—rightfully belonged to the 38th District Attorney and that the County could not sell the property without her consent. The County filed a plea to the jurisdiction as to the counterclaims, arguing among other grounds that Busbee lacked standing. The trial court granted the plea to the jurisdiction on the standing ground and did not reach the other jurisdictional issues presented in the plea. The court of appeals affirmed, holding that only the Attorney General may sue to enforce Chapter 59 and that, because Busbee's claims were all "based on Chapter 59," she lacked standing to bring them.

The Supreme Court reversed, holding that whether Busbee may sue under Chapter 59 affects her right to relief but does not implicate the trial court's subject-matter jurisdiction over the case. The Court explained that Busbee has standing in the constitutional, jurisdictional sense if she has a concrete injury that is traceable to the defendant's conduct and redressable by court order. Busbee's claims that the County is attempting to sell the property without her mandated consent and that the 38th District Attorney is entitled to all proceeds from the property's sale present such an injury. The Court expressed no opinion on the merits of Busbee's claims or the court of appeals' analysis of Chapter 59, holding only that the court's conclusion could not support an order granting a plea to the jurisdiction. The Court remanded the case to the trial court for further proceedings.

EE. TAXES

1. Property Tax

a) *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844 (Tex. June 7, 2024) [22-0485]

The primary issue in this case is whether a residence homestead tax exemption for disabled veterans can be claimed by two disabled veterans who are married but live separately.

Yvondia and Gregory Johnson are both 100% disabled U.S. military veterans. Mr. Johnson applied for and received a residence homestead exemption under the Tax Code for the couple's jointly owned home in San Antonio. After the couple bought another home in Converse, they separated. Yvondia moved into the Converse home, and she applied for the same exemption for that home. Bexar Appraisal District refused her application. After her protest was denied, Yvondia sued. The trial court granted summary judgment for the appraisal district. The court of appeals reversed, holding that the Tax Code did

not preclude Yvondia from receiving the exemption even though her husband received the same exemption on a different home.

The Supreme Court affirmed. In an opinion by Justice Huddle, the Court held that the statute's plain text entitles Yvondia to the claimed exemption. The Court rejected the appraisal district's argument that the word "homestead" has a historical meaning imposing a one-per-family limit on the residence homestead exemption. It concluded that the disabled-veteran exemption does not incorporate the one-per-family limit found elsewhere; the Legislature deliberately placed the disabled-veteran exemption outside the reach of statutory limitations on other residence homestead exemptions.

Justice Young filed a dissenting opinion. He would have held that a one-per-couple limit inheres in the historical meaning of "homestead" and that nothing in the Constitution or the Tax Code displaces that meaning. He also would have held that allowing Yvondia to receive the exemption is contrary to the rule that tax exemptions can only be sustained if authorized with unmistakable clarity and that any doubt about the scope of the text requires rejecting a claimed exemption.

2. Tax Protests

a) *J-W Power Co. v. Sterling Cnty. Appraisal Dist.* and *J-W Power Co. v. Irion Cnty. Appraisal Dist.*, 691 S.W.3d 466 (Tex. June 7, 2024) [22-0974, 22-0975]

The issue is whether an unsuccessful ad valorem tax protest under Section 41.41 of the Tax Code precludes a subsequent motion to correct the appraisal role under Section 25.25(c) with respect to the same property.

J-W Power Company leases natural gas compressors to neighboring counties. The compressors at issue here were maintained in Ector County and leased to customers in Sterling and Irion Counties. Between 2013 and 2016, the Sterling and Irion County Appraisal Districts appraised J-W Power's leased compressors as conventional business-personal property. This was despite the fact that the Legislature amended the Tax Code in 2011 so that leased heavy equipment like J-W Power's compressors would be taxed in the county where it is stored by the dealer when not in use.

J-W Power filed protests in Sterling and Irion Counties under Section 41.41 of the Tax Code, arguing that its compressors should be taxed elsewhere. The protests were denied. J-W Power did not seek judicial review. After the Supreme Court clarified in 2018 that leased heavy equipment should be taxed in the county of origin, J-W Power filed motions under Section 25.25 to correct the appraisal rolls for the relevant years. After the appraisal review boards again denied J-W Power's motions, J-W Power sought judicial review.

The trial court granted summary judgment for the districts. The court of appeals affirmed, holding that the denial of J-W Power's Section 41.41 protests precluded subsequent motions to correct because of the doctrine of res judicata.

The Supreme Court reversed, holding that Section 25.25(l), which

allows a Section 25.25(c) motion to be filed "regardless of whether" the property owner protested under Chapter 41, eliminates any preclusive effect a prior protest may have had. The Court remanded the case to the court of appeals for further proceedings.

b) *Oncor Elec. Delivery Co. NTU, LLC v. Wilbarger Cnty. Appraisal Dist.* and *Mills Cent. Appraisal Dist. v. Oncor Elec. Delivery Co.*, 691 S.W.3d 890 (Tex. June 21, 2024) [23-0138, 23-0145]

The issue in these cases is whether questions regarding the validity and scope of a statutory agreement under Section 1.111(e) of the Tax Code implicate the trial court's subject-matter jurisdiction over a suit for judicial review under Section 42.01 of the Code.

In 2019, Oncor's predecessor-in-interest, Sharyland, protested the value of its transmission lines in various appraisal districts, including in Wilbarger and Mills counties. Sharyland ultimately settled its protests by executing agreements with the chief appraiser of each district. The agreements with the appraisal districts for Wilbarger and Mills counties each stated a total value for Sharyland's transmission lines within that district. After acquiring the transmission lines, Oncor sought to correct the two districts' appraisal rolls, filing motions to correct under Section 25.25 of the Tax Code with the appraisal review board for each district. Oncor's motions asserted that the valuations listed on each district's appraisal rolls were based on a "clerical error" that occurred when Sharyland's agent sent incorrect mileage data to the districts' agent. The Wilbarger appraisal review board denied Oncor's motions and the Mills appraisal review board dismissed the motions for lack of jurisdiction.

Oncor sought review of those decisions in district court in each county, suing both the relevant appraisal district and review board, asserting the same claims, and seeking substantially identical relief in both cases. The relevant taxing authorities filed pleas to the jurisdiction, which were granted in the Mills case and denied in the Wilbarger case. The Wilbarger appraisal district and Oncor each filed an interlocutory appeal of the decision against them.

The courts of appeals reached conflicting decisions. In the Mills case, the court of appeals reversed in part and remanded for further proceedings, holding that the doctrine of mutual mistake, if applicable, would prevent the settlement agreement from becoming final. In the Wilbarger case, the court of appeals reversed the trial court's order and rendered judgment granting the Wilbarger taxing authorities' plea. Oncor and the Mills taxing authorities petitioned the Supreme Court for review. The Supreme Court granted both petitions and consolidated the cases for oral argument.

The Supreme Court held that a Section 1.111(e) agreement poses nonjurisdictional limits on the scope of appellate review under Chapter 42 of the Tax Code. Accordingly, the Court affirmed the court of appeals' judgment in the Mills case, reversed the court of appeals' judgment in the Wilbarger case, and remanded both causes to their respective trial courts for further

proceedings.

c) *Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752 (Tex. June 21, 2024) [22-0620]

The issue in this case is whether statutory limits on an appraisal district's ability to challenge an appraisal review board's decision confine the trial court's subject matter jurisdiction.

Texas Disposal Systems Landfill operates a landfill in Travis County. In 2019, Travis County Central Appraisal District appraised the market value of the landfill, and the Landfill protested the amount under a Tax Code provision requiring equal and uniform taxation. The Landfill won its challenge, and the appraisal review board significantly reduced the appraised value of the landfill. The District appealed to the trial court and claimed that the appraisal review board's appraised value was unequal and below market value. The Landfill filed a plea to the jurisdiction, arguing that it raised only an equal-and-uniform challenge, not one based on market value. The trial court granted the Landfill's plea. The court of appeals reversed, holding that review of an appraisal review board's decision is not confined to the grounds the taxpayer asserted before the board.

In an opinion by Justice Bland, the Supreme Court affirmed. The Tax Code limits the trial court's review to the challenge the appraisal review board heard. That limitation, however, is procedural, not jurisdictional. The Court observed that the Tax Code allows the parties to agree to proceed before the trial court despite a failure to exhaust administrative remedies. This signals that the parameters of an appeal are not jurisdictional because parties cannot confer jurisdiction by agreement. Additionally, the Tax Code employs limits like those in other statutes the Court has held to be procedural, not jurisdictional. The Court also noted that the fair market value of the property is relevant to an equal and uniform challenge, but if the fair market value deviates from the equal and uniform appraised value, a taxpayer is entitled to the lower of the two amounts.

Justice Boyd filed a dissenting opinion. The dissent would have held that any limitation the Tax Code imposes on the scope of the District's appeal is jurisdictional, and the statute does not limit the trial court's jurisdiction to the specific protest grounds relied on by the taxpayer.

FF. TEXAS MEDICAID FRAUD PREVENTION ACT

1. Unlawful Acts

a) *Malouf v. State*, 694 S.W.3d 712 (Tex. June 21, 2024) [22-1046]

The issue in this case is whether Section 36.002(8) of the Texas Medicaid Fraud Prevention Act imposes civil penalties when a provider indicates their license type but fails to indicate their identification number on a claim form.

Richard Malouf owned All Smiles Dental Center. Two of Malouf's former employees filed *qui tam* actions against him alleging that he and All Smiles committed violations of the Texas Medicaid Fraud Prevention Act. The State intervened in both actions, consolidating them and asserting a claim under Section 36.002(8) of the

Human Resources Code.

The State filed a motion for partial summary judgment, alleging that All Smiles submitted 1,842 claims under Malouf's identification number even though a different dentist actually provided the billed-for services. Malouf filed a no-evidence summary judgment motion, arguing that a provider violates Section 36.002(8) only when he fails to indicate both the license type *and* the identification number of the provider who provided the service. Because the forms all correctly indicated the correct license type, Malouf argued he did not violate the Act. The trial court denied Malouf's motion and granted the State's, entering a final judgment that fined Malouf over $16,500,000 in civil penalties. The court of appeals affirmed the trial court's judgment apart from the amount awarded in attorney's fees.

The Supreme Court reversed and rendered judgment in Malouf's favor. In an opinion by Justice Boyd, the Court held that based on the statute's grammatical structure, context, and purpose, Section 36.002(8) only makes unlawful the failure to indicate both the license type and the identification number of the provider who provided the service. The Court concluded that the State failed to demonstrate that Malouf committed unlawful acts under Section 36.002(8).

Justice Young filed a dissenting opinion. He would have held that Section 36.002(8) makes unlawful the failure to indicate either the type of license or the identification number.

III. GRANTED CASES

A. ADMINISTRATIVE LAW

1. Administrative Procedure Act

a) *Carlson v. Tex. Comptroller of Pub. Accounts*, No. D-1-GN-23-004690 (53rd Dist. Ct., Travis County, Tex. May 16, 2024), *argument granted on pet. for writ of mandamus* (Nov. 15, 2024) [24-0081]

At issue in this case is whether the state Comptroller is required to issue a final order after the State Office of Administrative Hearings dismisses a case for lack of jurisdiction.

Thomas and Becky Carlson filed an administrative contested case against the Comptroller, alleging a takings claim. The Comptroller referred the case to SOAH to conduct a contested case hearing. The Comptroller filed a motion to dismiss for lack of jurisdiction, which the administrative law judge granted. A SOAH official advised the Carlsons that the Comptroller needed to issue a final order before any further action could be taken in the case. The Carlsons requested that the Comptroller accept, reject, or modify the SOAH dismissal so that they could file a motion for rehearing, a prerequisite to seeking judicial review. The Comptroller refused, asserting that the SOAH dismissal was already a final, appealable order. By then, the deadline to file a motion for rehearing had passed.

The Carlsons sought mandamus relief in the trial court but nonsuited that action after the Comptroller filed a plea to the jurisdiction. The Carlsons then filed a petition for writ of mandamus in this Court, arguing that the Comptroller had a ministerial duty to issue a final order in their case under the

Administrative Procedure Act. The Court granted argument on the petition for writ of mandamus.

b) *Tex. Dep't of State Health Servs. v. Kensington Title-Nev., LLC*, ___ S.W.3d ___, 2023 WL 4373384 (Tex. App.—Austin 2023), pet. granted (Sept. 27, 2024) [23-0644]

The Administrative Procedure Act waives sovereign immunity in a suit seeking a declaration about an administrative rule's "applicability." The issue in this case is whether the request for declaratory relief challenges a rule's application (*how* the rule applies) as opposed to its applicability (*whether* the rule applies).

Kensington Title-Nevada, LLC acquired real property on which the occupant had abandoned stored radioactive waste. Kensington initiated decommissioning activities but stopped before completion. The Texas Department of State Health Services then fined Kensington for possessing the material without a license and for failing to decommission in a timely manner. Kensington challenged the fine through a formal administrative hearing. Concurrently, Kensington sued the Department requesting a declaration that the administrative rule could not be applied to force Kensington to accept liability for radioactive materials abandoned on its property. The Department filed a plea to the jurisdiction arguing that Kensington failed to invoke the APA's immunity waiver because it only seeks a determination about the rule's application, not its applicability. The trial court denied the Department's plea, but the court of appeals reversed and dismissed for want of subject-matter jurisdiction.

On petition for review, Kensington contends that the appeals court's failure to apply the immunity waiver rests on an improper rewriting of the request for declaratory relief. The Department's response argues that dismissal was proper because (1) the court's analysis was correct; and (2) Kensington lacks standing for want of a redressable injury. As to the latter, the Department asserts that the administrative action was based on Kensington's exercise of dominion and control over the regulated materials, not ownership of real property.

The Court granted the petition for review.

2. Commission on Environmental Quality

a) *Tex. Comm'n on Env't Quality v. Save Our Springs All., Inc.*, 668 S.W.3d 710 (Tex. App.—El Paso 2022), *pet. granted* (June 14, 2024) [23-0282]

The issue is whether a Texas Commission on Environmental Quality order approving a permit to discharge wastewater into a creek violates state and federal law governing water-quality standards.

The City of Dripping Springs applied to TCEQ for a permit to discharge wastewater into Onion Creek, which is home to two endangered species of salamander. The creek is considered a "high quality" waterbody, meaning that the quality of its waters exceeds the standards required to maintain their existing uses, which include recreation, aquatic life, aquifer protection,

and domestic water supply. Under state and federal law, an application to discharge wastewater into a high-quality waterbody must satisfy two tiers of review.

After contested-case proceedings in the agency and the State Office of Administrative Hearings, TCEQ issued a final order approving the permit. Nonprofit conservation group Save Our Springs Alliance filed suit for judicial review of the order under the Administrative Procedure Act, arguing that TCEQ misapplied the standards both tiers of review and failed to demonstrate reasoned decision-making in its order.

Agreeing with Save Our Springs, the trial court reversed the order as unsupported by law or substantial evidence. A split panel of the court of appeals reversed the trial court's judgment and affirmed TCEQ's final order issuing the permit. The Supreme Court granted Save Our Springs' petition for review.

3. Judicial Review

a) *Port Arthur Cmty. Action Network v. Tex. Comm'n on Env't Quality*, 92 F.4th 1150 (5th Cir. 2024), *certified question accepted* (Feb. 23, 2024) [24-0116]

At issue in this certified question is the meaning of the phrase "has proven to be operational" in the Texas Commission on Environmental Quality's definition of "best available control technology."

Port Arthur LNG, LLC applied to the Commission for an air-quality permit associated with a proposed natural gas liquefaction plant and export terminal in Port Arthur, Texas. Texas law requires that regulated emitters use the best available control technology, defining that requirement as an air-pollution control method that "has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility." Port Arthur LNG's application sought authorization to exceed applicable thresholds for nitrogen oxide, carbon monoxide, and particulate matter. After concluding that the application met all applicable permit requirements, including that the facility would use best available control technology for all applicable sources, the Commission issued a final order granting the permit.

The Port Arthur Community Action Network (PACAN), a not-for-profit community organization, sought judicial review of the permit in the U.S. Court of Appeals for the Fifth Circuit. PACAN argued that the lower-emission limits in a permit recently granted to another LNG facility represent the best available control technology and, thus, the Commission should have imposed those same limits on the Port Arthur facility or explained why it had not. The Commission argued that the limits for the other LNG facility are not best available control technology because they have never been achieved in operation—i.e., they are not "proven to be operational." The Fifth Circuit initially vacated the Commission's order on the ground that it did not employ the best available control technology for nitrogen oxide and carbon monoxide because the Commission had approved a different facility to use experimental emissions limitations, which could provide greater emissions reductions. On

petitions for rehearing and rehearing en banc, the Fifth Circuit withdrew its opinion and certified the following question to the Court:

> Does the phrase "has proven to be operational" in Texas's definition of "best available control technology" codified at Section 116.10(1) of [Title 30 of] the Texas Administrative Code require an air pollution control method to be currently operating under a permit issued by the Texas Commission on Environmental Quality, or does it refer to methods that TCEQ deems to be capable of operating in the future?

The Court accepted the certified question.

b) *Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, 665 S.W.3d 135 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0192]

This case concerns the validity of an administrative rule governing immigration detention centers and the mootness and reviewability of the rule challenge.

In 2014, U.S. Immigration and Customs Enforcement began to detain undocumented families with children at two immigration-detention centers in Texas. But a federal court ruled that ICE violated a consent decree requiring detained minors to be placed in facilities with appropriate state childcare licenses. After the ruling, the Texas Department of Family and Protective Services promulgated Rule 748.7, establishing licensing requirements for family residential centers.

The advocacy group Grassroots Leadership, several detained mothers, and a daycare operator sued the Department to challenge Rule 748.7. The private operators of the two detention centers intervened. After the trial court declared the rule invalid, the court of appeals dismissed the case for lack of standing. The Supreme Court reversed and remanded, holding that the detained mothers (and their children) sufficiently alleged concrete personal injuries traceable to the rule's adoption.

On remand, the Department and private operators argued that the dispute is now moot because the plaintiff–detainees are no longer detained and are not reasonably likely to be detained at the centers again. The court of appeals agreed but applied a public-interest exception to the mootness doctrine and affirmed the trial court's judgment that Rule 748.7 is invalid because the Department lacked statutory authority to promulgate it.

The Department and the private operators petitioned for review, arguing that the rule challenge is moot, there is no public-interest exception in Texas, and Rule 748.7 is valid. The Supreme Court granted the Department's and the private operators' petitions for review.

4. Public Information Act

a) *Paxton v. Am. Oversight*, 683 S.W.3d 873 (Tex. App.—Austin 2024), *pet. granted* (Dec. 21, 2024) [24-0162]

At issue is whether trial courts have jurisdiction to issue writs of mandamus against the Governor and

Attorney General to compel information under the Public Information Act.

In 2021 and 2022, American Oversight submitted various PIA requests to the Office of the Governor and the Office of the Attorney General. These requests largely pertained to official governmental communications surrounding the events of January 6, 2021, and the 2022 shooting in Uvalde. Both offices provided some documents but also reported that they did not find documents responsive to the requests for communications between government officials and external entities, including the National Rifle Association. Both offices also sought to withhold information they view as excepted from disclosure. Both offices received open records letter rulings from OAG's Open Records Decision opining that the documents are excepted from disclosure and can be withheld.

American Oversight sued the Governor and Attorney General in their official capacities in Travis County district court, seeking a writ of mandamus to compel disclosure of the requested information. The Governor and Attorney General filed pleas to the jurisdiction asserting sovereign immunity and mootness. They argued, among other things, that American Oversight failed to plead a viable claim that they had "refuse[d]" to supply public information. The trial court denied the pleas. The court of appeals affirmed.

The Governor and Attorney General petitioned the Supreme Court for review, arguing that the trial court lacked mandamus jurisdiction over American Oversight's suit because only the Supreme Court has jurisdiction to issue a writ of mandamus against executive officers. They also argue that American Oversight has not demonstrated a waiver of sovereign immunity by showing that the government refused to supply public information. The Court granted the petition.

B. ATTORNEYS

1. Barratry

a) *Cheatham v. Pohl*, 690 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (May 31, 2024) [23-0045]

This case raises questions about the extraterritorial reach of Texas's civil barratry statute and whether barratry claims are subject to a two- or four-year statute of limitations.

Mark Cheatham, a Louisiana plaintiff, hired Texas attorneys, Michael Pohl and Robert Ammons, to represent him in a wrongful-death suit. Cheatham later asserted civil barratry claims against Pohl and Ammons in Texas, alleging that the attorneys paid a sham financing company run by Pohl's wife, Donalda, to offer him money for funeral expenses as an incentive to hire Pohl and Ammons.

Pohl and Ammons filed motions for partial summary judgment, asserting that Cheatham's claims were barred by a two-year statute of limitations. The trial court denied the motions, concluding that a four-year statute of limitations applied. Pohl, Ammons, and Donalda filed subsequent motions for summary judgment, asserting that the barratry statute has no extraterritorial reach to conduct that occurred out of state. The trial court

granted the motions. The court of appeals reversed and remanded, reasoning that the attorneys' conduct occurred in Texas, but even if it had not, the statute can permissibly be extended to out-of-state conduct.

Pohl, Donalda, and Ammons petitioned for review, arguing that the court of appeals impermissibly extended the reach of the barratry statute and maintaining that such claims are subject to a two-year statute of limitations. The Supreme Court granted their petitions for review.

2. Disciplinary Proceedings

a) *In re Lane*, Cause No. 67623 (BODA Nov. 16, 2023), *argument granted on disciplinary appeal* (Aug. 30, 2024) [23-0956]

The main issue in this disciplinary appeal is whether the four-year limitations period in Texas Rule of Disciplinary Procedure 17.06 applies to a judgment imposing reciprocal discipline under Part IX of the rules.

In early 2023, the Illinois Supreme Court issued a final judgment suspending Lane for inappropriate emails she sent to a federal magistrate judge in 2017. After Lane sent a copy of that judgment to Texas's Chief Disciplinary Counsel, the Commission for Lawyer Discipline filed a petition for reciprocal discipline with the Board of Disciplinary Appeals. In November 2023, after a hearing, BODA issued its judgment of identical discipline with two members dissenting.

The BODA majority and dissent disagree whether Rule 17.06 applies to reciprocal-discipline proceedings and, if it does, whether Lane waived the defense by failing to raise it in her response to the Commission's petition or at the hearing. Rule 17.06 states a general rule prohibiting discipline "for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging Professional Misconduct is received by the Chief Disciplinary Counsel." The rule contains express exceptions for compulsory discipline under Part VIII and for prosecutorial misconduct.

The arguments presented by Lane and the Commission in this appeal address whether reciprocal discipline is initiated by a Grievance, whether the limitations rule is compatible with the procedure for reciprocal discipline in Part IX, whether the lack of an express exception for reciprocal discipline in Rule 17.06 is meaningful, and whether the limitations rule is an affirmative defense that is waived if not timely raised.

The Supreme Court set the appeal for oral argument.

C. CONSTITUTIONAL LAW

1. Administrative Subpoenas

a) *Paxton v. Annunciation House, Inc., argument granted on notation of probable jurisdiction over direct appeal* (Aug. 23, 2024) [24-0573]

This direct appeal case concerns a constitutional challenge to the Attorney General's administrative subpoena powers. Pursuant to its authority to examine books and records of businesses registered in Texas, the Attorney General served an administrative subpoena on Annunciation House, a Catholic volunteer organization, seeking a

variety of documents pertaining to individuals that received certain services from Annunciation House.

Annunciation House sought a declaratory judgment against the Attorney General, challenging the administrative subpoena on constitutional grounds, and later filed a no-evidence and traditional motion for summary judgment. The Attorney General cross-filed an application for temporary injunction, leave to file a quo warranto counterclaim, and a plea to the jurisdiction, which, among other things, sought to revoke Annunciation House's business registration.

The trial court granted Annunciation House's summary judgment motion, concluding that the administrative subpoena statute was facially unconstitutional and entering injunctive relief against the Attorney General as to future administrative subpoenas served on Annunciation House. In a separate order, the trial court also denied the State's application for temporary injunction and leave to file an amended petition asserting the quo warranto counterclaim, concluding that two provisions of the Texas penal code that served as the basis for the quo warranto counterclaim were preempted by federal law and that the penal code provisions and the quo warranto statute were unconstitutionally vague in violation of due course of law and therefore unenforceable. The Attorney General filed a direct appeal with the Court.

2. Due Process

a) *Stary v. Ethridge*, 695 S.W.3d 417 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Aug. 30, 2024) [23-0067]

This case concerns the proper burden of proof to support a permanent protective order that prohibits contact between a parent and minor child.

Christine Stary and Brady Ethridge divorced in May 2018. In March 2020, Ethridge filed an application for a protective order, alleging that Stary had committed acts of family violence and abuse against their children, including an arrest for third-degree felony offense of injury to a child. The trial court granted the protective order, prohibiting Stary from having any contact with the children, stating that the order would remain in effect "in permanent duration for [Stary's] lifetime" subject to the children filing a motion to modify the order.

Stary appealed, and the court of appeals affirmed. It held that the "permanent" protective order did not effectively terminate Stary's parental rights, and, thus, due process did not require application of the "clear and convincing evidence" standard of proof; that the evidence is legally and factually sufficient to support the order; and that the trial court's exclusion of Ethridge's history of domestic violence was not reversible error.

Stary petitioned for review, arguing that due process requires a heightened standard of proof and that the evidence adduced does not rise to that level. The Supreme Court granted the petition.

b) *Thompson v. Landry*, ___ S.W.3d ___, 2023 WL 4770126 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0875]

The issue in this case is whether a tax sale of real property can be challenged on due process grounds if the original owner had notice of the tax sale before the Tax Code's limitations period ended.

Mae Landry inherited her grandmother's interest in a twelve-acre property. Tax authorities obtained a 2015 default judgment, foreclosing liens on the property to collect delinquent property taxes. They served all defendants by posting notice on the courthouse door. Cindy Thompson later purchased the property at a tax sale. Landry lived on the property before and after the sale, and her husband paid rent to Thompson until Thompson asked the Landrys to vacate. Ten years after the sale of the property, Landry sued to void the default judgment and to quiet title, alleging that citation by posting violated her constitutional right to procedural due process.

The trial court granted Landry's summary judgment motion and declared the default judgment void, denying Thompson's summary judgment motions based on limitations and laches. The court of appeals reversed, holding that a fact issue existed as to whether Landry's due process rights were violated.

Thompson petitioned for review, arguing that the court of appeals incorrectly applied Texas Supreme Court precedent. Thompson argues that Landry had actual notice of the default judgment, and this notice prevents her due process claim. She also argues that Landry's claim is barred by the Tax Code, which imposes a two-year limitations period on claims disputing title against purchasers if the original owner lived in the property as her homestead when a delinquent tax suit was first filed. The Supreme Court granted the petition.

3. Religion Clauses

a) *Perez v. City of San Antonio*, 2024 WL 3963878 (5th Cir. Aug. 28, 2024), *certified question accepted* (Sep. 6, 2024) [24-0714]

This certified question concerns Article I, Section 6-a of the Texas Constitution, which prohibits the state of Texas and its political subdivisions from prohibiting or limiting religious services.

The City of San Antonio's plans to improve Brackenridge Park require the City to temporarily close the Lambert Beach area of the park. Plaintiffs Gary Perez and Matilde Torres—who are members of the Native American Church and consider the Lambert Beach area a sacred place—sued the City, alleging that the City's planned changes to and temporary closure of Lambert Beach violate Section 6-a. The district court denied plaintiffs' request for access to the Lambert Beach area for individual worship and their request to minimize tree removal.

The Fifth Circuit seeks guidance from the Supreme Court regarding the scope of Section 6-a. The City argues that the changes aim to promote safety and public health, while plaintiffs contend that Section 6-a does not even

allow the City to try to satisfy strict scrutiny. The Fifth Circuit certified the following question to the Texas Supreme Court:

> Does the "Religious Service Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—impose a categorical bar on any limitation of any religious service, regardless of the sort of limitation and the government's interest in that limitation?

The Court accepted the certified question.

D. CONTRACTS

1. Damages

a) *Simmons v. White Knight Dev., LLC*, ___ S.W.3d ___, 2023 WL 5624126 (Tex. App.—Waco 2023), *pet. granted* (Dec. 20, 2024) [23-0868]

This case concerns whether a seller awarded specific performance of a real estate contract is also entitled to monetary compensation for expenses incurred because of the purchaser's late performance.

In 2016, Dick and Julie Simmons sold real estate to White Knight Development with a "buy back" agreement requiring the Simmonses to repurchase the property if subdivision residents extended certain deed restrictions by 2018. Residents extended the restrictions in October 2016, and White Knight demanded the Simmonses perform the buy back agreement. They refused, and White Knight sued for specific performance, breach of contract, and fraud in the inducement of a real estate contract. After a bench trial, the trial court found the Simmonses liable for breach of contract and ordered specific performance. It also awarded White Knight "actual damages/consequential damages" for expenses incurred between the time the Simmonses should have performed and the trial.

The court of appeals affirmed the order of specific performance but modified the judgment to delete the monetary award to White Knight. It recognized that courts may award compensation incidental to specific performance to account for the delay in performance and adjust the equities between the parties. But here, the court reasoned, nothing indicates that the trial court made the monetary award to adjust the equities, as it spoke only of damages from the breach. The court of appeals thus deleted the award on the ground that White Knight cannot receive both specific performance and damages for the breach.

White Knight petitioned for review. It argues that the trial court's findings of fact and conclusions of law demonstrate that it made the monetary award to adjust the equities between the parties. Additionally, White Knight argues that the court of appeals improperly invoked a magic-words requirement that prevents warranted incidental compensation because it is labeled as damages. The Supreme Court granted the petition.

2. Interpretation

a) *Am. Midstream (Ala. Intrastate), LLC v. Rainbow Energy Mktg. Corp.*, 667 S.W.3d 837 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Oct. 18, 2024) [23-0384]

This case involves contract interpretation and repudiation, lost-profits damages, and the election-of-remedies doctrine.

American Midstream owns the Magnolia natural gas pipeline. Rainbow, a natural gas trading company, contracted with American Midstream to transport natural gas on the Magnolia. The parties' contract required American Midstream to provide "firm" transportation and balancing services absent certain contractual exemptions. American Midstream limited its balancing services on various occasions and claims that it was excused from performing under the contract. The parties' representatives spoke on a conference call in which Rainbow claims American Midstream repudiated the contract. A month later, after continuing to ship gas under the contract, Rainbow terminated the contract, citing American Midstream's breach and repudiation.

Rainbow sued American Midstream for breach of contract and related claims. After a bench trial, the trial court found for Rainbow on all its claims, and Rainbow elected to recover on its breach-of-contract claim. The trial court awarded Rainbow more than $6 million in lost-profit damages. In a divided opinion, the court of appeals affirmed. It held that the trial court properly interpreted the contract and sufficient evidence supports the trial court's findings of breach and its award of lost profits.

American Midstream petitioned the Supreme Court for review. It argues that (1) the contract excused American Midstream's performance; (2) the trial court erred by awarding Rainbow speculative lost profits; and (3) the court of appeals erred by creating an exception to the election-of-remedies doctrine for contracts "performed as discrete transactions conducted on an on-going basis." The Court granted the petition.

b) *American Pearl Group, L.L.C. et al. v. National Payment Systems, L.L.C.*, 2024 WL 4132409 (5th Cir. Sept. 10, 2024), *certified question accepted* (Sept. 20, 2024) [24-0759]

This certified question asks the Supreme Court to construe statutory language governing the computation of interest to determine whether a loan agreement is usurious. American Pearl Group, L.L.C., John Sarkissian, and Andrei Wirth entered into a debt financing agreement with National Payment Systems, L.L.C, which included a specified total amount to be repaid over forty-two months of payments and a payment schedule listing each individual payment's allocation towards principal and interest. However, the agreement did not list an exact percentage interest rate.

American Pearl sued NPS, seeking a declaration that the debt financing agreement and a related option agreement violated Texas's usurious interest statute because the total amount of interest under the

agreement was more than the maximum allowable amount under Texas law. The trial court granted NPS's motion to dismiss, utilizing the "spreading" method for calculating interest and determining that, based on that calculation, the total amount of interest was less than the statutorily maximum allowable amount.

The Fifth Circuit reversed the dismissal of American Pearl's usury claim relating to the option agreement but, as to the debt financing agreement, recognized that the "spreading" method was derived from Texas Supreme Court decisions involving distinguishable interest-only loans and that there was a lack of clear guidance for computing the maximum allowable interest for the loan entered into by the parties. The Fifth Circuit therefore certified the following question to the Texas Supreme Court:

> Section 306.004(a) of the Texas Finance Code provides: "To determine whether a commercial loan is usurious, the interest rate is computed by amortizing or spreading, using the actuarial method during the stated term of the loan, all interest at any time contracted for, charged, or received in connection with the loan." If the loan in question provides for periodic principal payments during the loan term, does computing the maximum allowable interest rate "by amortizing or spreading, using the actuarial method" require the court to base its interest calculations on the declining principal balance for each payment period, rather than the total principal amount of the loan proceeds?

The Court accepted the certified question.

E. CORPORATIONS

1. Nonprofit Corporations

a) *S. Cent. Jurisdictional Conf. of the United Methodist Church v. S. Methodist Univ.*, 674 S.W.3d 334 (Tex. App.—Dallas 2023), *pet. granted* (Oct. 18, 2024) [23-0703]

At issue in this case is whether a nonmember nonprofit corporation may amend its articles of incorporation when those articles provided that no amendments shall be made without the prior approval of a religious conference.

Southern Methodist University is a nonprofit corporation founded by a predecessor-in-interest to the South Central Jurisdictional Conference of the United Methodist Church. Since its founding, the University's articles of incorporation stated that it was to be owned, maintained, and controlled by the Conference and that the Conference possessed the right to approve all amendments. In 2019, without the Conference's approval, the University's board of trustees amended its articles to remove these provisions and filed a sworn certificate of amendment with the secretary of state. The Conference sued the University, seeking declaratory relief and asserting breach of contract, promissory estoppel, breach of fiduciary duty, and a statutory claim alleging that the University filed a materially false amendment certificate.

The trial court dismissed some of

the Conference's claims before granting summary judgment for the University on the remaining claims. The court of appeals affirmed in part and reversed in part, holding that the Conference was authorized to challenge the University's amendments under the Business Organizations Code, that both statements of opinion and fact could be actionable as materially false filings, and that plaintiffs can recover damages for nonpecuniary losses caused by those filings.

The University petitioned for review. It argues that the Conference is barred from bringing its breach-of-contract claim, that the University's articles cannot constitute a contract with the Conference, that the complained-of statements in the University's amendment certificate were good-faith legal opinions that cannot be materially false, and that the Conference could not have suffered the damages requisite for its statutory claim. The Supreme Court granted the petition.

F. EMPLOYMENT LAW

1. Employment Discrimination

a) *Butler v. Collins*, 2024 WL 3633698 (5th Cir. Aug. 2, 2024), *certified question accepted* (Aug. 9, 2024) [24-0616]

This certified question case concerns whether the Texas Commission on Human Rights Act preempts common law tort claims brought against the plaintiff's former coworkers.

After Southern Methodist University denied Professor Cheryl Butler's application for tenure and promotion, Butler filed suit against SMU and various SMU employees, asserting various statutory and common law claims, including common law claims of fraud, defamation, and conspiracy to defame against the defendant-employees. The district court granted a motion to dismiss against Butler on some of her claims, finding that the common law claims brought against the defendant-employees were preempted by the TCHRA.

The Fifth Circuit noted that the Texas Supreme Court has held that the TCHRA preempts common-law tort claims asserted against the plaintiff-employee's employer but has not addressed whether the TCHRA preempts such claims brought against other employees. The Fifth Circuit therefore certified the following question regarding Butler's claims against the defendant–employees:

> Does the Texas Commission on Human Rights Act ("TCHRA"), TEXAS LABOR CODE § 21.001, *et seq*., preempt a plaintiff-employee's common-law defamation and/or fraud claims against another employee to the extent that the claims are based on the same course of conduct as discrimination and/or retaliation claims asserted against the plaintiff's employer?

The Court accepted the certified question.

G. FAMILY LAW

1. Divorce Decrees

a) *In re Marriage of Benavides*, 692 S.W.3d 526 (Tex. App.—San Antonio 2023), *pet. granted* (June 14, 2024) [23-0463]

The issues in this case are (1) whether, and in what circumstances, a guardian may petition for divorce on behalf of a ward; and (2) the effect of one spouse's death on the appeal from a divorce decree.

Carlos and Leticia Benavides married in 2005. Carlos was later placed under the guardianshipof his adult daughter, Linda.In 2018, Linda filed a petition for divorce on Carlos's behalf. Linda moved for partial summary judgment that the divorce should be granted because Carlos and Leticia lived apart for more than three years—a no-fault ground for divorce under the Family Code. The trial court granted Linda's motion and rendered a final divorce decree. Leticia appealed, but while her appeal was pending, Carlos passed away. The court of appeals concluded that Carlos's death mooted Leticia's appeal of the partial summary judgment granting the divorce, but it otherwise affirmed the divorce decree and its disposition of the couple's property.

Leticia petitioned for review, arguing that her challenge to the divorce decree is not moot, that a guardian cannot petition for divorce on behalf of a ward, and that a living-apart divorce requires that at least one of the spouses voluntarily separated. The Supreme Court granted the petition for review.

2. Spousal Support

a) *Mehta v. Mehta*, ___ S.W.3d ___, 2023 WL 3521901 (Tex. App.—Fort Worth 2023), *pet. granted* (Oct. 25, 2024) [23-0507]

The principal issue in this case is whether child-support payments should be considered when determining a spouse's eligibility for spousal maintenance.

Manish Mehta filed for divorce from his spouse, Hannah Mehta. In the final divorce decree, the trial court ordered Manish to pay child support and spousal maintenance to Hannah. Manish appealed, arguing that the evidence is legally insufficient to support the spousal maintenance award under Chapter 8 of the Texas Family Code.

The Family Code allows the trial court to award spousal maintenance when the spouse seeking maintenance will lack sufficient property upon divorce to provide for their minimum reasonable needs. In its review, the court of appeals included Manish's child support payments as part of the property available to provide for Hannah's minimum reasonable needs. It then reviewed evidence of Hannah's minimum reasonable needs. After comparing the two, the court reversed the award of spousal maintenance, holding that Hannah is ineligible for spousal maintenance because she has sufficient property to provide for her needs.

Hannah filed a petition for review. She argues that the court of appeals erred because spousal maintenance is intended to provide only for the spouse's needs, while the purpose of child support is to financially support the children. Accordingly, Hannah

argues that receipt of child support should not be considered when determining a spouse's eligibility for spousal maintenance. The Supreme Court granted the petition.

H. INSURANCE

1. Insurance Code Liability

a) *In re State Farm Mut. Auto. Ins. Co.*, 698 S.W.3d 588 (Tex. App.—Dallas 2023), and ___ S.W.3d ___, 2023 WL 5604142 (Tex. App.—Dallas 2023), *argument granted on pet. for writ of mandamus* (June 14, 2024) [23-0755]

The issue in this case is whether the trial court must sever and abate Insurance Code claims when a motorist sues her insurance company for underinsured-motorist benefits and violations of the Insurance Code.

Mara Lindsey alleges that she was injured in an automobile accident. Lindsey settled with the driver of the other vehicle for his insurance policy limit and then sought underinsured-motorist benefits from State Farm. State Farm, through its claims adjuster, offered Lindsey far less than she claims she is entitled to under her policy. Lindsey sued State Farm and the claims adjuster, seeking a declaratory judgment that she is entitled to additional benefits and for violations of the Insurance Code. State Farm moved to sever and abate the Insurance Code claims until the underlying declaratory-judgment action determines the amount of liability and damages caused by the allegedly underinsured motorist. Lindsey opposed the motion, arguing that bifurcation is the proper procedure for underinsured-motorist cases, and discovery on the extracontractual claims is permitted against the insurer before the bifurcated trial. The trial court denied State Farm's motion and the court of appeals denied mandamus relief.

State Farm petitioned for a writ of mandamus from the Supreme Court. State Farm argues that the Insurance Code claims should have been severed and abated and that Lindsey is not entitled to discovery on those claims until she establishes that she is entitled to underinsured motorist benefits because the liability and damages caused by the underinsured driver exceeded the amount of the third party's policy limits. State Farm also argues that because the claims should have been abated, the trial court abused its discretion in refusing to quash the depositions of State Farm's corporate representative and claims adjuster, who lack personal knowledge about the facts of the underlying accident. Finally, State Farm argues that the trial court abused its discretion by limiting State Farm's access to Lindsey's medical records when her medical condition is at issue. The Court granted argument on the petition for writ of mandamus.

I. INTENTIONAL TORTS

1. Defamation

a) *Roe v. Patterson*, 2024 WL 1956148 (5th Cir. May 3, 2024), *certified question accepted* (May 10, 2024) [24-0368]

This certified-question case asks whether a person can be held liable for supplying defamatory material to a publisher. Jane Roe alleges that she was sexually assaulted by a fellow

student of Southwestern Baptist Theological Seminary in 2015. She sued the seminary and its president, Leighton Paige Patterson, for negligently failing to protect her from the assaults and for allegedly defaming her after. The district court granted summary judgment for Patterson and the seminary on all claims, and Roe appealed.

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment against Roe on her negligence claims but certified the following questions regarding her defamation claims to the Suprem Court:

> 1. Can a person who supplies defamatory material to another for publication be liable for defamation?
> 2. If so, can a defamation plaintiff survive summary judgment by presenting evidence that a defendant was involved in preparing a defamatory publication, without identifying any specific statements made by the defendant?

The Court accepted the certified questions.

J. JURISDICTION

1. Personal Jurisdiction

a) *BRP-Rotax GmbH & Co. KG v. Shaik*, 698 S.W.3d 305 (Tex. App.—Dallas 2023), *pet. granted* (June 14, 2024) [23-0756]

The issue in this case is whether the trial court had specific jurisdiction over a foreign manufacturer for claims based on an allegedly defective product.

Sheema Shaik suffered serious injuries when a plane she was flying crashed at an airport in Texas. She and her husband sued BRP-Rotax, the plane's engine manufacturer, asserting claims for strict products liability, negligence, and gross negligence. Rotax is based in Austria and sells its engines to international distributors who then sell the engines worldwide. The engine in this case was sold by Rotax under a distribution agreement to a distributor in the Bahamas whose designated territory included the United States.

The trial court denied Rotax's special appearance contesting personal jurisdiction. The court of appeals affirmed. Applying the stream-of-commerce-plus test, the court held that Rotax purposefully availed itself of the Texas market and that Shaik's claims arose from or related to those contacts with Texas.

Rotax petitioned this Court for review. It argues that all relevant contacts with Texas were initiated by Rotax's distributor, which Rotax had no control over or ownership interest in. In response, Shaik argues that Rotax's distribution agreement indicated an intent to serve the U.S. market, including Texas, and that Rotax maintained a website that allowed Texas customers to register their engines and identified a Texas-based repair center. The Court granted the petition for review.

2. Political Questions

a) *Elliott v. City of College Station*, 674 S.W.3d 653 (Tex. App.—Texarkana 2023), *pet. granted* (October 18, 2024) [23-0767]

At issue is whether claims under the Texas Constitution's "republican form of government" clause present a nonjusticiable political question.

Shana Elliott and Lawrence Kalke live in the City of College Station's extraterritorial jurisdiction. They cannot vote in City elections, but City codes regulate their property. Elliott and Kalke seek to place portable signs on their property and build a driveway for a mother-in-law suite. City ordinances prohibit portable signs and require a permit to build a driveway.

Elliott and Kalke sued the City and its officials, alleging that the ordinances facially violate the Texas Bill of Rights' "republican form of government" clause by regulating them despite their inability to vote in City elections. The City argued that the claims are not ripe because the ordinances have not been enforced against the plaintiffs. The City also argued that claims under the "republican form of government" clause present a nonjusticiable political question. The trial court agreed and granted the City's plea to the jurisdiction. The court of appeals affirmed.

The plaintiffs filed a petition for review. They argue that they have standing and that their claims are ripe and justiciable. The Supreme Court granted the petition.

3. Ripeness

a) *City of Houston v. The Commons of Lake Hous., Ltd.*, 698 S.W.3d 572 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Aug. 30, 2024) [23-0474]

This case concerns the application of the futility doctrine to inverse-condemnation and takings claims.

Commons is the developer of a master-planned community, parts of which are located within the City's 100-year or 500-year floodplains. In 2017, the City approved Commons' plans for the community utilities and paving. The following year, the City passed the 2018 floodplain ordinance. The 2018 ordinance requires new residential structures within the 100-year floodplain to be built a foot higher above the flood elevation than the previous ordinance required.

Commons sued the City for inverse condemnation and takings, alleging that the City's amended floodplain ordinance interferes with Commons' use and enjoyment of its property and deprives it of economically productive use of the land. The City filed a plea to the jurisdiction arguing that Commons' regulatory takings claim is not ripe because the City has not made a final decision on a permit or plan application. Commons responded that the City had ample opportunity to issue a final decision, but unreasonably withheld one, making Commons' claim under the futility doctrine ripe.

The trial court denied the City's plea, but the court of appeals reversed. The court of appeals held that Commons' regulatory takings claim is barred by governmental immunity

because the 2018 ordinance was a valid exercise of the City's police power and therefore could not constitute a taking.

Commons petitioned for review, arguing that its claim is ripe under the futility doctrine and that governmental immunity does not bar its inverse-condemnation claim because a valid exercise of police power can still constitute a taking. The Supreme Court granted the petition.

K. JUVENILE JUSTICE

1. Juvenile Court

a) *In re J.J.T.*, 698 S.W.3d 320 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Aug. 30, 2024) [23-1028]

The issue is whether the juvenile court erred in transferring a case to criminal district court where the defendant was a minor at the time of the murder but was charged after his 18th birthday.

In December 2022, J.J.T. was charged with a murder that occurred in October 2020, while J.J.T. was under the age of 18. The delay in charging J.J.T. concerned obtaining phone records from another witness.

The juvenile court waived jurisdiction and transferred the case to criminal district court under Section 54.02(j)(4) of the Family Code. Subpart (A) permits transfer if "for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday." Subpart (B) permits transfer if "after due diligence . . . it was not practicable to proceed in juvenile court" because "the state did not have probable cause to proceed" before the 18th birthday. The juvenile court's order did not specify whether it was based on (A) or (B).

A split panel of the court of appeals held that the juvenile court lacked jurisdiction to make the transfer and dismissed the case for lack of jurisdiction. The majority concluded that (B) is not implicated because the trial court did not make a due diligence finding and that the evidence is insufficient under (A) because the State had probable cause to proceed before J.J.T.'s 18th birthday.

In the Supreme Court, the State argues that the transfer was appropriate under (A); the court of appeals unduly focused on probable cause; and, even if probable cause existed, that does not mean it was "practicable" to proceed in juvenile court if, for example, the State could not reasonably expect to secure a conviction based on the evidence available before the juvenile's 18th birthday.

The Supreme Court granted the State's petition for review.

L. MEDICAL LIABILITY

1. Expert Reports

a) *Columbia Med. Ctr. of Arlington Subsidiary, L.P. v. Bush*, 692 S.W.3d 606 (Tex. App.—Fort Worth 2023), *pet. granted* (June 21, 2024) [23-0460]

The issue in this case is the sufficiency of an expert report supporting a health care liability claim against a hospital directly under Chapter 74 of the Civil Practice and Remedies Code.

Ireille Williams-Bush died from pulmonary embolism soon after she was discharged from Columbia Medical Center's emergency department. She had presented to the ER with chest

pain, shortness of breath, and severe fainting. The ER physicians diagnosed Ireille with cardiac-related conditions, never screened her for pulmonary embolism, and discharged her in stable condition with instructions to follow up with a cardiologist.

Ireille's husband, Jared Bush, sued the hospital for medical negligence. Bush served the hospital with an expert report prepared by a cardiologist, who opined that the hospital should have had a testing protocol to rule out pulmonary embolism and other emergency conditions prior to discharge. The expert also opined that having this protocol would have resulted in a proper diagnosis and precluded Ireille's discharge and eventual death.

The hospital objected to the expert report and moved to dismiss Bush's claim. The trial court denied the motion, but the court of appeals reversed and directed the trial court to dismiss the claim with prejudice. The court of appeals held that the report is conclusory, and therefore insufficient, on the element of causation. The court of appeals reasoned that the report fails to explain how a hospital policy—which can only be implemented by medical staff—could have changed the decisions, diagnoses, and orders of Ireille's treating physicians.

Bush petitioned the Supreme Court for review, arguing that the court of appeals misinterpreted the Court's caselaw to impose too high a burden for causation in a direct-liability claim and that the report is sufficient because it provides a fair summary of the causal link between the hospital's failure and Ireille's death. The Supreme Court granted the petition.

2. Health Care Liability Claims

a) *Leibman v. Waldroup*, 699 S.W.3d 20 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Sept. 27, 2024) [23-0317]

The main issue in this appeal is whether the plaintiffs' negligence suit against Leibman to recover damages for injuries sustained in a dog attack triggered the Texas Medical Liability Act's expert-report requirement.

Dr. Leibman, a gynecologist, wrote a series of letters to the landlord of his patient, stating that the patient has generalized anxiety disorder, she has four certified service animals, and she appears to need these service animals to control her anxiety. The purpose of the letters was to help the patient avoid eviction. At some point after the first note was written, the patient registered her dog Kingston as a service animal through a private company, which gave her a card identifying Kingston as a service dog under the Americans with Disabilities Act. One day the patient dressed Kingston in a "service dog" vest and brought him to a restaurant, where he attacked a toddler.

The toddler's parents sued the restaurant, the patient, and Leibman. The plaintiffs allege that Leibman was negligent in providing the letters without ascertaining whether Kingston is actually a service animal trained to perform specific tasks and that his conduct proximately caused the toddler's injuries by enabling the patient to misrepresent Kingston to the public.

Leibman filed a motion to dismiss, arguing that the plaintiffs' suit alleges a health care liability claim under the TMLA and that the claim must be dismissed because the plaintiffs failed to timely serve an expert report. The trial court denied the motion, and the court of appeals affirmed. The court held that the plaintiffs' suit against Leibman does not allege a health care liability claim, as defined in the Act, because it complains about Leibman's representation that Kingston is a certified service animal, rather than his diagnosing the patient with generalized anxiety disorder or his statement that service animals may help her control that disorder.

Leibman filed a petition for review, which the Supreme Court granted.

M. MUNICIPAL LAW

1. Zoning

a) *City of Dallas v. PDT Holdings, Inc.*, ___ S.W.3d ___, 2023 WL 4042598 (Tex. App.—Dallas 2023), *pet. granted* (Dec. 20, 2024) [23-0842]

The petitioner challenges the court of appeals' reversal of a judgment in its favor that the City of Dallas is estopped from enforcing a zoning ordinance.

PDT submitted plans for the construction of a thirty-six-foot-high townhome to the City of Dallas. The City approved the plans and issued a building permit. The City did not identify that its Residential Proximity Slope ordinance, which requires structures to have a maximum height of twenty-six feet, applies to the townhome. PDT began construction. A few months later, the City issued a stop-work order for PDT's failure to comply with a different regulation. The order did not mention the slope ordinance. A few months after that, when the townhome was 90% complete, the City issued another stop-work order, this time for violation of the slope ordinance. PDT sought a variance from the Board of Adjustment, which was denied.

In the trial court, PDT alleged that it is entitled to relief under several theories, including equitable estoppel, laches, and waiver. After a bench trial, the trial court rendered judgment for PDT. The judgment, drafted by PDT, states only that the City is estopped from enforcing the slope ordinance against the townhome. The City did not request findings of fact and conclusions of law. The court of appeals reversed and rendered judgment that PDT is not entitled to relief on its claim for equitable estoppel.

PDT filed a petition for review. It argues that the court of appeals applied the wrong standard of review in its analysis, that the court should have considered its alternative theories before reversing the judgment, and that policy considerations support the application of equitable estoppel here. The Supreme Court granted the petition.

N. NEGLIGENCE

1. Causation

a) *Tenaris Bay City Inc. v. Ellisor*, ___ S.W.3d ___, 2023 WL 5622855 (Tex. App.—Houston [14th Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0808]

This flooding case presents issues related to the legal sufficiency of causation evidence to support negligence claims.

For decades, homeowners in Matagorda County lived near a grass farm. In 2013, Tenaris bought the farm and built a manufacturing facility on the land. In 2017, Hurricane Harvey hit. The homeowners allege their properties flooded for the first time. They sued Tenaris for negligence, alleging that the facility's presence and storm-drainage deficiencies caused the flooding. During the trial, both sides presented weather and civil-engineering experts. The trial court granted a directed verdict on gross negligence in Tenaris's favor and rendered judgment for the homeowners on favorable jury findings for negligence, negligent nuisance, and negligence per se. The parties stipulated to damages. Tenaris appealed, and the court of appeals affirmed the trial court's judgment.

The Supreme Court granted Tenaris's petition for review, which argues that (1) the court of appeals applied the wrong causation standard; (2) expert causation evidence was required but legally insufficient to prove Tenaris caused the flooding; and (3) the trial court erred by striking the grass farm as a responsible third party.

b) *Werner Enters., Inc. v. Blake*, 672 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2023) (en banc), *pet. granted* (Aug. 30, 2024) [23-0493]

This car-crash case involves arguments about the sufficiency of the evidence, charge error, and damages.

Shiraz Ali, a novice driver employed by Werner Enterprises, was driving an 18-wheeler on I-20 westbound in Odessa in December 2014. He was accompanied by his supervisor, who was sleeping. In the eastbound lanes, Trey Salinas drove Jennifer Blake and her three children. Salinas hit black ice, lost control of his vehicle, and spun across the 42-foot-wide grassy median into Ali's westbound lane. Ali promptly braked, but the vehicles collided, resulting in the death of one child and serious injuries to the rest of the Blakes.

The Blakes sued Ali and Werner for wrongful death and personal injuries. The trial court rendered judgment on the jury's verdict, which found Ali and Werner liable and awarded the Blakes more than $100 million in damages. Sitting en banc, the court of appeals affirmed over two dissents.

Ali and Werner filed a petition for review. They argue that Ali did not owe a duty to reasonably foresee that the Blakes' vehicle would cross the median into his path, that no evidence supports a finding that Ali's conduct proximately caused the crash, that Werner cannot be held liable for derivative theories of negligent hiring, training, and supervision when it accepted vicarious liability for Ali's conduct, that the court of appeals erred by rejecting petitioners' claims of charge error on grounds of waiver, and that the jury's comparative-responsibility findings are not supported by legally sufficient evidence.

The Supreme Court granted the petition.

2. Duty

a) *Santander v. Seward*, 700 S.W.3d 126 (Tex. App.—Dallas 2023), *pet. granted* (Sept. 27, 2024) [23-0704]

The issues include (1) when an off-duty officer working for a private employer is considered to be on duty, (2) whether negligence claims by police officers responding to a request for assistance should have been pleaded as premises-liability claims, and (3) whether the common law "firefighter rule" applies.

Chad Seward was an off-duty police officer employed by Point 2 Point and assigned to work at a Home Depot store. He was asked by a Home Depot employee to issue a criminal trespass warning to a suspected shoplifter. Following police department procedures, Seward checked the suspect for outstanding warrants and then called for assistance. Two officers responded and guarded the suspect while Seward confirmed the warrant. The suspect pulled a gun and shot the officers, killing one and injuring the other.

The officers sued Seward, Home Depot, and Point 2 Point under various negligence theories. The trial court dismissed the claims against Seward based on the Tort Claims Act's election of remedies, concluding that he was on duty. The trial court later granted Home Depot's and Point 2 Point's motions for summary judgment.

The court of appeals largely reversed. Among other things, it concluded a genuine fact issue exists as to whether Seward was on duty before he confirmed the suspect's warrant. The court of appeals also rejected Home Depot's other arguments for summary judgment, including that the officers' claims sound only in premises liability and that the firefighter rule applies.

Seward, Home Depot, and Point 2 Point petitioned for review. Seward and Point 2 Point argue that Seward was on duty during his entire encounter with the suspect. Home Depot challenges the various grounds on which the court of appeals reversed the trial court's summary judgment.

The Supreme Court granted the petition.

3. Public Utilities

a) *In re Oncor Elec. Delivery Co.*, 694 S.W.3d 789 (Tex. App.—Houston [14th Dist.] 2024), *argument granted on pet. for writ of mandamus* (Dec. 20, 2024) [24-0424]

At issue is whether the multidistrict litigation court should have dismissed plaintiffs' gross negligence and intentional nuisance claims against transmission and distribution utility companies.

In February 2021, Winter Storm Uri created record-setting demand for electricity. ERCOT ordered transmission and distribution utilities to "load shed" (interrupt power) to protect the electric grid from collapse. The TDUs' load shedding reduced electric service on ERCOT's grid, causing blackouts for four days.

Thousands of customers filed hundreds of lawsuits against electricity companies, including TDUs, seeking damages related to the power outages. The cases were consolidated into an MDL court. Plaintiffs alleged various claims, including negligence, gross negligence, and nuisance. The TDUs

moved to dismiss under Texas Rule of Civil Procedure 91a, arguing that the claims are barred by the tariff governing their operations. The trial court dismissed some claims but refused to dismiss the negligence, gross negligence, and nuisance claims. The court of appeals granted mandamus relief in part, ordering dismissal of the negligence and strict-liability nuisance claims, while allowing the gross negligence and intentional nuisance claims to proceed.

The TDUs petitioned the Supreme Court for mandamus relief. They argue that the common law does not impose tort duties on TDUs in emergency load-shedding. Additionally, they contend that their tariff's force majeure provision bars gross negligence and intentional nuisance claims arising from good-faith compliance with ERCOT's emergency orders. The Court granted argument on the petition for writ of mandamus.

4. Vicarious Liability

a) *Renaissance Med. Found. v. Lugo*, 672 S.W.3d 901 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (June 21, 2024) [23-0607]

The issue is whether a nonprofit health organization certified under Section 162.001(b) of the Occupations Code can be held vicariously liable for the negligence of a physician employed by the organization.

Renaissance Medical Foundation is a nonprofit health organization certified by the Texas Medical Board. Dr. Michael Burke, who works for Renaissance, performed brain surgery on Rebecca Lugo's daughter. Lugo sued Renaissance, in addition to suing Dr. Burke, alleging that it is vicariously liable for Dr. Burke's negligence in performing the surgery that caused permanent physical and mental injuries to her daughter.

Renaissance moved for summary judgment, arguing that it cannot be held vicariously liable because it is statutorily and contractually barred from controlling Dr. Burke's practice of medicine. The trial court denied the motion after concluding that Dr. Burke's employment agreement gives Renaissance the right to exercise the requisite degree of control over Dr. Burke to trigger vicarious liability. Renaissance filed an interlocutory appeal. The court of appeals affirmed.

Renaissance petitioned for review, arguing that the Section 162.001(b) framework, which prohibits Renaissance from interfering with the employed physician's independent medical judgment, precludes vicarious liability. The Supreme Court granted the petition for review.

O. OIL AND GAS

1. Lease Termination

a) *Cromwell v. Anadarko E&P Onshore, LLC*, 676 S.W.3d 860 (Tex. App.—El Paso 2023), *pet. granted* (Nov. 15, 2024) [23-0927]

This case requires the interpretation of an oil-and-gas lease habendum clause.

David Cromwell and Anadarko are oil-and-gas co-tenants, both owning fractional shares of the working interest on the same acreage in Loving County. The habendum clauses of Cromwell's leases maintained his interest for "as

long thereafter as oil, gas or other minerals are produced from said land." Cromwell submitted his leases to Anadarko, the operating tenant, and requested to participate in its production, but Anadarko never responded. After one well reached payout, Anadarko sent Cromwell monthly "Joint Interest Invoices" that allocated production revenues and expenses to Cromwell. Years after the expiration of the leases' primary terms, Anadarko informed Cromwell that it believed his leases terminated at the end of their primary terms because he failed to enter a joint-operating agreement.

Cromwell sued Anadarko for declaratory relief, trespass to try title, and other claims. Both sides moved for summary judgment. After concluding that the leases had terminated, the trial court granted Anadarko's motion and denied Cromwell's. The court of appeals affirmed. Relying on its own precedent, the court held that Cromwell's leases terminated because he did not cause the production of oil or gas on the land.

Cromwell petitioned the Supreme Court for review. He argues that the plain language of the habendum clauses is satisfied because, at all relevant times, production in paying quantities has occurred on the acreage; thus, the leases have not terminated. The Court granted the petition.

2. Royalty Payments

a) *Myers-Woodward, LLC v. Underground Servs. Markham, LLC*, 699 S.W.3d 1 (Tex. App.—Corpus Christi–Edinburgh 2022), *pet. granted* (Aug. 30, 2024) [22-0878]

This case raises questions of who owns the right to use underground salt caverns created through the salt-extraction process and how a salt royalty interest is calculated.

USM owns the mineral estate of the property at issue, together with rights of ingress and egress for the purpose of mining salt. Myers owns the surface estate and a 1/8 nonparticipating royalty in the minerals. USM sued Myers, seeking declaratory relief regarding the royalty's calculation and the right to use the underground salt caverns, in which it stored hydrocarbons. Myers countersued, seeking, among other things, a declaration that USM cannot use the subsurface to store hydrocarbons. The parties filed competing summary-judgment motions.

The trial court granted USM's motion in part, declaring USM the owner of the subsurface caverns, and granted Myers's motion in part, holding USM may only use the caverns for the purposes specified in the deed, effectively denying USM the right to use the salt caverns for storing hydrocarbons. The trial court then held that Myers's royalty is based on the market value of the salt at the point of production, and it entered a take-nothing judgment on Myers's remaining claims. Both parties appealed.

The court of appeals reversed the judgment declaring that USM owns the subsurface caverns and rendered judgment that they belong to Myers. The court expressly declined to follow *Mapco*, *Inc. v. Carter*, 808 S.W.2d 262, 278 (Tex. App.—Beaumont 1991*), rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991) (per curiam) (holding that the salt owner owns and is entitled to compensation for the use of an underground storage cavern), holding instead that most authority in Texas

requires a conclusion that the surface estate owner owns the subsurface. It affirmed the remainder of the judgment, including the holding that the Myers's royalty interest is 1/8 of the market value of USM's salt production at the wellhead.

Both Myers and USM petitioned for review, raising issues regarding the calculation of Myers's royalty interest and the ownership of the caverns. The Supreme Court granted both petitions.

P. PROCEDURE—APPELLATE

1. Waiver

a) *Bertucci v. Watkins*, 690 S.W.3d 341 (Tex. App.—Austin 2022), *pets. granted* (May 31, 2024) [23-0329]

These cross-petitions raise issues of briefing waiver and whether fiduciary duties are owed among business partners.

Bertucci and Watkins founded several companies to develop low-income housing projects. After many years of working together, Bertucci came to suspect that Watkins was misappropriating the companies' funds and sought an accounting. Because of the dispute, certain company profits were placed in escrow, and eventually, Watkins sued for their distribution. Bertucci counterclaimed on behalf of himself and derivatively on behalf of the companies for theft and breach of fiduciary duty. Watkins maintains that Bertucci, now deceased, orally approved compensating Watkins with the allegedly misappropriated funds. The parties filed competing motions for summary judgment, and the trial court granted Watkins' motion.

The court of appeals, sitting en banc, reversed. First, it held that Bertucci waived his appeal of the summary judgment on the derivative claims by failing to brief them. The court concluded fact issues precluded summary judgment on Bertucci's individual claims. The court also held that Watkins' testimony that Bertucci orally approved of the transactions should have been excluded under the Dead Man's Rule, which precludes testimony by a testator against the executor in a civil proceeding. Both parties filed petitions for review.

Bertucci argues that his brief should have been liberally construed so that appeal of the derivative claims was not lost by waiver. He also argues that the trial court erred in admitting an auditor's report into evidence, alleging that it is unverified and unreliable. Watkins argues that he is entitled to summary judgment on the breach of fiduciary duty claim because, as limited partners in a partnership, Watkins did not owe Bertucci a fiduciary duty as a matter of law. Watkins further argues that the statute of limitations has run on Bertucci's claims because the discovery rule does not apply. Finally, Watkins argues that his testimony about Bertucci's oral approvals was corroborated and therefore admissible under the Dead Man's Rule. The Supreme Court granted both petitions for review.

Q. PROCEDURE—PRETRIAL

1. Forum Non Conveniens

a) *In re Pinnergy Ltd.*, 693 S.W.3d 485 (Tex. App.—Houston [1st Dist.] 2023), *argument granted on pet. for writ of mandamus* (May 31, 2024) [23-0777]

The issue in this case is whether the trial court erred by denying the defendants' motion to dismiss for forum non conveniens.

A Union Pacific train collided with Pinnergy's 18-wheeler truck (driven by Ladonta Sweatt) in northwest Louisiana. Thomas Richards and Hunter Sinyard were conductors on Union Pacific's train. Pinnergy filed suit in Red River Parish, Louisiana, seeking damages from the Louisiana Department of Transportation and Union Pacific. Three months later, Richards filed suit in Harris County, Texas against Pinnergy, Union Pacific, and Sweatt. Sinyard intervened in the Harris County suit as a plaintiff.

The Harris County defendants filed a motion to dismiss that suit for forum non conveniens. They pointed out that the accident occurred 240 miles from the Harris County courthouse, but only 18 miles from the Louisiana courthouse, that the plaintiffs live closer to Red River Parish than to Harris County, and the existence of litigation in Louisiana arising from the same collision. The trial court denied the motion without explanation. The court of appeals denied the defendants' mandamus petition without substantive opinion.

The defendants filed a petition for writ of mandamus in the Supreme Court, arguing that all six statutory forum non conveniens factors have been met. The Court set the petition for oral argument.

2. Responsible Third-Party Designation

a) *In re E. Tex. Med. Ctr. Athens*, ___ S.W.3d ___, 2023 WL 8103959 (Tex. App.—Austin 2023), *argument granted on pet. for writ of mandamus* (Dec. 20, 2024) [23-1039]

At issue is whether a negligence claim against a nonsubscribing employer is an action to collect workers' compensation benefits excluded from the scope of the proportionate-liability statute.

Sharon Dunn, an ER nurse employed by East Texas Medical Center Athens was injured when an EMT pushed a stretcher into her back. She initially sued the EMT and his employer, but those claims were dismissed because she failed to file expert reports by the statutory deadline as required under the Texas Medical Liability Act. While those claims were still pending, Dunn amended her petition to include a negligence claim against ETMC Athens, a nonsubscriber to workers' compensation. After the original defendants were dismissed, ETMC Athens filed a motion for leave to designate them as responsible third parties. Dunn did not object to the motion, and the trial court granted leave. Eleven months later, Dunn moved to strike the designation, arguing that ETMC Athens is foreclosed from designating RTPs because the proportionate-responsibility statute, found in Chapter 33 of the Texas Civil Practices and Remedies Code, is inapplicable.

Specifically, she argued that her negligence claim against ETMC Athens is "an action to collect workers' compensation benefits under the workers' compensation laws of this state," to which Chapter 33 does not apply.

The trial court granted Dunn's motion to strike. The court of appeals denied ETMC Athens's petition for writ of mandamus, holding that the trial court did not abuse its discretion in striking the RTPs because a negligence action against a nonsubscriber employer is an action to collect workers' compensation benefits under the Texas Workers' Compensation Act.

ETMC Athens filed a petition for writ of mandamus in the Supreme Court, arguing that the trial court clearly abused its discretion in striking the RTPs on nonevidentiary sufficiency grounds and that it lacks an adequate remedy on appeal. ETMC Athens argues that Dunn waived her nonevidentiary arguments by failing to timely raise them and that ETMC Athens is entitled to designate RTPs because Dunn's suit is a common-law negligence suit, not an action to collect workers' compensation benefits excluded from the scope of Chapter 33. The Supreme Court granted argument on the petition for writ of mandamus.

3. Summary Judgment

a) *Myers v. Raoger Corp.*, 698 S.W.3d 906 (Tex. App.—Dallas 2023), *pet. granted* (Sept. 27, 2024) [23-0662]

The issue is whether the evidence is sufficient to create a fact issue about whether it was apparent to a restaurant that its patron was obviously intoxicated.

Nasar Khan went to dinner with Kelly Jones at Cadot Restaurant, where he consumed at least four alcoholic beverages. After driving Jones home, Khan rear-ended Barrie Myers. Khan went to the hospital, where he failed a field-sobriety test and had a 0.139 BAC several hours after the collision.

Myers sued Cadot under the Dram Shop Act, alleging that Cadot is liable because it served a patron who was obviously intoxicated. Cadot filed no-evidence and traditional motions for summary judgment, arguing that Khan did not show any visible signs of intoxication at Cadot. In support of its traditional motion, Cadot submitted deposition and affidavit testimony of several witnesses who interacted with Khan that night, including Jones, Cadot's owner, and the officer who performed Khan's field-sobriety test. Each testified that Khan showed no signs of intoxication. In response, Myers submitted the testimony of several witnesses who claimed that based on Khan's BAC, he would have showed signs of intoxication at Cadot. Myers also submitted Khan's own testimony that he was overserved and that Cadot should have observed that he was intoxicated. The trial court granted Cadot's motion for summary judgment. The court of appeals reversed, holding that a fact issue exists about whether it was apparent to Cadot that Khan was obviously intoxicated.

Cadot filed a petition for review that challenges the court of appeals' holding. The Court granted the petition.

b) *State of Texas v. $3,774.28*, 692 S.W.3d 759 (Tex. App.—Amarillo 2024) *pet. granted* (Dec. 20, 2024) [24-0258]

At issue in this case is whether, in deciding a no-evidence motion for summary judgment, the trial court should have considered an affidavit that was on file with the court but not attached to the nonmovant's response.

The State initiated civil-forfeiture proceedings for bank accounts related to an opioid trafficking operation. The claimants filed a no-evidence motion for summary judgment on the State's claim that the accounts were used or intended to be used in the commission of a felony, making the accounts contraband. The State's response to the motion summarized an affidavit from the investigating law enforcement officer. The affidavit was attached to the State's original notice of forfeiture proceedings but was not attached to its response to the no-evidence motion.

The trial court granted summary judgment for the claimants. At a hearing on a related motion for leave in which the State sought to have the affidavit considered, the trial court said that it understood the Texas Rules of Civil Procedure to require all evidence considered in a no-evidence summary judgment to be attached to the summary judgment response. The court of appeals affirmed, concluding that the rules require attachment.

The State filed a petition for review. It argues that the court of appeals erred by concluding that there is an attachment requirement in the no-evidence rule. The State also argues that its references to and discussion of the affidavit in its response were sufficient to direct the trial court to the affidavit, which was indisputably on file with the court. Accordingly, the State argues that because the affidavit raises a genuine issue of material fact, the trial court erred in granting summary judgment for the claimants.

The Supreme Court granted the petition.

R. PROFESSIONAL SERVICES

1. Anti-Fracturing Rule

a) *Rivas v. Pitts*, 684 S.W.3d 849 (Tex. App.—Austin 2023), *pet. granted* (Mar. 15, 2024) [23-0427]

At issue is whether a plaintiff can maintain fraud and breach of fiduciary duty claims against his accountants.

From 2007 to 2018, Brandon Pitts and other accountants at the Pitts & Pitts firm provided accounting services to Rudolph Rivas, a custom home builder. These services included preparing tax returns and financial statements, defining ledger accounts, and training Rivas's staff in various accounting skills. In 2016, Rivas discovered several accounting errors that had artificially inflated the valuation of shareholder equity in his company. Rivas had to pay millions of dollars to various financial institutions to avoid defaulting on loans. Rivas also struggled to secure new lines of credit, and several of his businesses have since failed.

Rivas sued the accountants for professional negligence, breach of contract, breach of fiduciary duty, and fraud. The accountants filed a traditional and no-evidence motion for

summary judgment as to each claim. The trial court granted the accountants' motion without stating its reasoning.

The court of appeals affirmed in part and reversed in part. The court first held that Rivas had waived or confessed error with respect to his negligence and breach of contract claims, and it affirmed the summary judgment for those claims. The accountants argued that Rivas's claims for fraud and breach of fiduciary duty are barred by the anti-fracturing rule, which prohibits a plaintiff from converting a claim for professional negligence into some other common-law or statutory claim. The accountants also argued that there is no evidence to support either claim. The court of appeals rejected both arguments and reversed the summary judgment with respect to the fraud and breach of fiduciary duty claims.

The accountants petitioned the Supreme Court for review, urging their anti-fracturing rule and no-evidence points. The Supreme Court granted the petition.

S. REAL PROPERTY

1. Deed Restrictions

a) *EIS Dev. II, LLC v. Buena Vista Area Ass'n*, 690 S.W.3d 369 (Tex. App.—El Paso 2023), *pet. granted* (May 31, 2024) [23-0365]

The central issue in this case is the interpretation of a deed restriction.

EIS Development II acquired land in Ellis County to develop as a residential subdivision. The land came with a deed restriction stating: "No more than two residences may be built on any five acre tract. A guest house or servants' quarters may be built behind a main residence location . . . ." The subdivision was platted with 73 homes on 100 acres, with all but one lot being smaller than two acres. Nearby landowners formed the Buena Vista Area Association and sued to enforce the deed restriction.

The trial court denied EIS's plea in abatement, which sought to join adjoining landowners who were not already parties. The court concluded that the deed restriction unambiguously limits building on the property to two main residences per five-acre tract, and it granted partial summary judgment for the Association on that issue. The parties then proceeded to a jury trial on EIS's affirmative defense of "changed conditions." The jury failed to find that EIS had established that defense. The trial court entered a final judgment for the Association that permanently enjoined EIS from building more than two main residences per five-acre tract. The court of appeals affirmed.

In its petition for review, EIS challenges the trial court's denial of its plea in abatement, the court's interpretation of the deed and other legal rulings, and the jury instructions. The Supreme Court granted the petition.

T. TAXES

1. Sales Tax

a) *GEO Grp., Inc. v. Hegar*, 661 S.W.3d 470 (Tex. App.—Amarillo 2023), *pet. granted* (Aug. 30, 2024) [23-0149]

The issue is whether companies that own and operate correctional and detention facilities qualify for a sales-tax exemption under state law.

During the relevant tax period,

GEO operated correctional and detention facilities in Texas under contracts with both the State of Texas and the United States. The Comptroller later audited GEO's payment of sales and use tax for the relevant period and assessed a deficiency. GEO requested redetermination, refunds, and audit reductions, but the Comptroller rejected GEO's contention that certain purchases were exempt from taxation and denied the request. GEO then brought a taxpayer suit for refund.

In the trial court, the parties stipulated that GEO would be entitled to a refund of more than $3 million if it is an entity or organization eligible for exempt status under Rule 3.322(c) in Title 34 of the Administrative Code. So qualifying would then make GEO's purchases eligible for the exemptions set forth in Section 151.309 of the Tax Code. Following a bench trial, the trial court rendered judgment that GEO is not entitled to the claimed refunds. The court of appeals affirmed.

GEO petitioned for review, arguing that the lower courts applied the wrong evidentiary standard and misconstrued the term "instrumentality" in Rule 3.322(c). The Supreme Court granted the petition.

U. TEXAS CITIZENS PARTICIPATION ACT

1. Applicability

a) *Whataburger Rests. LLC v. Ferchichi*, 698 S.W.3d 297 (Tex. App.—San Antonio 2022), *pet. granted* (Aug. 30, 2024) [23-0568], *consolidated for oral argument with Pate v. Haven at Thorpe Lane, LLC*, 681 S.W.3d 476 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0993]

The issue in these cases is the applicability of the Texas Citizens Participation Act to a motion to compel discovery that includes a request for attorney's fees.

In *Whataburger*, Sadok Ferchichi sued Crystal Krueger after she rear ended Ferchichi while driving a Whataburger-owned vehicle. Ferchichi learned during mediation that Whataburger had evidence that it did not produce in discovery. Ferchichi moved to compel production of the evidence and to award reasonable attorney's fees as sanctions. Whataburger and Krueger filed a TCPA motion to dismiss the motion to compel.

Pate involves a suit for common-law fraud and DTPA violations by fifty plaintiffs who signed leases to live in Haven's student-housing apartment complex. Before the lawsuit, Jeretta Pate and April Burke, the mothers of two plaintiffs, created a Facebook group, conveyed information to media outlets who ran stories about the Haven complex, and asserted grievances with governmental authorities. Haven served subpoenas duces tecum on the nonparty mothers, seeking documents and communications about Haven and the lawsuit. The mothers objected to many requests for production and included a privilege log. Haven filed a motion to compel and for attorney's fees, and the mothers responded by filing a TCPA motion to dismiss that motion.

In both cases, the trial court denied the motion to dismiss. And in both cases, the court of appeals reversed.

Both courts of appeals held that the discovery motion before it is a "legal action" under the TCPA that was made in response to the exercise of the right to petition (*Whataburger*) or to "communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses" (*Pate*). Additionally, both courts held that the movant did not establish a prima facie case for sanctions so as to avoid dismissal.

Ferchici and Haven each petitioned for review. They argue that a motion to compel discovery that includes a request for attorney's fees is not a legal action under the TCPA, that their motions were not made in response to the exercise of a protected right, and that they established their prima facie cases for sanctions. The Supreme Court granted both petitions.

2. Initial Burden

a) *Walgreens v. McKenzie*, 676 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0955]

The main issue in this case is whether a party moving to dismiss a negligent-hiring claim under the Texas Citizens Participation Act meets its initial burden to demonstrate that the TCPA applies when the claim implicates an employee's exercise of a First Amendment right.

While shopping at Walgreens, Pamela McKenzie was detained and questioned by a police officer, who received an employee's report that McKenzie had shoplifted from the store earlier that day and on prior occasions. After reviewing surveillance video, the officer determined that McKenzie was not the thief, and she was released. McKenzie sued Walgreens, alleging that the employee knew that she was not the person in the video before reporting to the police and that she was targeted because of her race. She asserted several tort claims, including a claim that Walgreens was negligent in hiring, training, and supervising the employee who called the police. Walgreens moved to dismiss all her claims under the TCPA, arguing that its employee's report to law enforcement was a protected exercise of a First Amendment right. The trial court denied the motion, and Walgreens filed an interlocutory appeal.

A divided court of appeals panel affirmed with respect to the negligent-hiring claim but reversed otherwise and dismissed the remainder of McKenzie's claims. The majority reasoned that the negligent-hiring claim does not implicate the TCPA because it is based in part on conduct by Walgreens occurring before the incident and not based entirely on the employee's constitutionally protected police report. Thus, the majority held, Walgreens did not meet its initial burden to demonstrate that the TCPA applies to this claim. One justice dissented in part, opining that the majority had erroneously treated the negligent-hiring claim as an independent tort claim that may be viable even if there is no liability for an underlying tort.

The Supreme Court granted Walgreen's petition for review.

3. Timeliness of Trial Court's Ruling

a) *Farmland Partners Inc. v. First Sabrepoint Cap. Mgmt., L.P.*, ___ S.W.3d ___, 2023 WL 4286017 (Tex. App.—Dallas 2023), *pet. granted* (Dec. 20, 2024) [23-0634]

The central issue in this appeal is whether a trial court has the authority to grant a motion to dismiss under the Texas Citizens Participation Act after the motion has been denied by operation of law.

After an investment researcher published an article about Farmland Partners, Farmland alleged that the article was defamatory and caused its stock price to decline. Accusing Sabrepoint of participating with the researcher to manipulate the securities market and profit from the stock-price decline, Farmland sued in Colorado state court. The case was removed to federal court, and the court dismissed the suit for lack of personal jurisdiction. Farmland then filed suit in Texas state court. Sabrepoint moved to dismiss the suit under the TCPA because the article was protected speech. Sabrepoint also moved for summary judgment based on collateral estoppel, arguing that the federal court determined in its jurisdictional decision that Sabrepoint was not involved with the article. The trial court granted both motions, and Farmland appealed.

The court of appeals determined that the TCPA order is void and not appealable because the motion was initially denied by operation of law under the TCPA when the trial court did not rule within thirty days of the hearing on that motion. The court then reversed the summary judgment, concluding that Sabrepoint had not established that collateral estoppel applies, and it remanded the case to the trial court.

Sabrepoint petitioned for review, arguing that (1) the trial court had authority to grant the TCPA motion outside the thirty-day statutory window and (2) the court of appeals erred in reversing the summary judgment. The Supreme Court granted the petition.

V. WORKERS' COMPENSATION

1. Exclusive Jurisdiction

a) *Univ. of Tex. Rio Grande Valley v. Oteka*, ___ S.W.3d ___, 2023 WL 413587 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (Dec. 20, 2024) [23-0167]

In this personal-injury case, the issue on appeal is whether an employee must obtain a predicate finding from the Division of Workers' Compensation that her injuries did not occur in the course and scope of her employment for the trial court to have subject-matter jurisdiction over her negligence claim against the employer.

A university professor was walking through the parking lot after attending a commencement ceremony when a vehicle driven by a university police officer struck and injured her. The professor sued the university for negligence. As an affirmative defense, the university asserted that workers' compensation benefits are the exclusive remedy because the injuries occurred during the course and scope of her employment. Disputing that her injury was work related, the professor

moved for partial summary judgment on the affirmative defense. The university then filed a plea to the jurisdiction, arguing that the Division has exclusive jurisdiction to determine the course-and-scope issue and that the professor therefore failed to exhaust her administrative remedies.

The trial court denied the plea, and the university appealed. The court of appeals affirmed, holding that exhaustion is not required because the professor's suit is not based on the ultimate question whether she is eligible for workers' compensation benefits.

The Supreme Court granted the university's petition for review.

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