The Appellate Advocate

Appellate Section, State Bar of Texas

The Best of the Basics of Appellate Law

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State Bar of Texas

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Editor's Note

When reviewing the speaker evaluations and feedback from the various Appellate Law CLEs throughout the state, it is hard not to notice how often the attendees appreciate a review of the basics and a good old checklist. And your Appellate Law Section Council is committed to providing educational opportunities for the new or aspiring appellate lawyers in our midst. For these reasons we devote this issue of the Appellate Advocate to reviews of the basics of appellate practice by some of our most esteemed and popular authors. As always, we've included updates from Texas' high courts and the US Supreme Court. It is our hope that this issue will ultimately be a great reference for all our members.

For the next edition, due out late December/early January, we will provide you with more 'Best of' articles, this time from the Advanced Civil Appellate Course that we hosted in September of this year. It was a great course and we're confident you'll appreciate its treatments of the more complex issues we face as appellate practitioners.

Finally, we would be remiss if we did not thank the many people who contributed to this edition. We'd like to extend our gratitude to the staff at TexasBarCLE and the University of Texas School of Law for their hard work bringing us the CLE courses (and accompanying written materials) we all rely upon. We would also like to thank the Supreme Court of Texas for their efforts to continuously provide updates on recent cases decided by the court. Most importantly, we want to thank our authors for their expertise and willingness to volunteer – which greatly improves the practice of appellate law in Texas.

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 TXAppellateSection@gmail.com 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.

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Table of Contents

The Appellate Advocate

Volume 34 – No 1

Fall, 2024

Chair's Column

Bill Chriss, Corpus Christi
Of Counsel, The Snapka Law Firm

On behalf of your Appellate Section Council, let me welcome you to a new year of Appellate Section networking, 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.
- The *Appellate Advocate*, the section's premiere Journal that includes substantive articles and state and important case law updates!
- 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.

You Section's Council is not only committed to building upon these initiatives, but we are also constantly planning strategically to identify and address new areas of action. These include a new and improved website, more and updated free CLE, and an improved Appellate Advocate. We are looking forward to a great year and hope you will want to be a part of it.

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EFFECTIVE SCREENING AND ONBOARDING OF NEW APPELLATE CLIENTS

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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.

Effective Screening and Onboarding of New Appellate Clients

by Scott Rothenberg

Effective Screening and Onboarding of New Appellate Clients

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I. Introduction

Many attorneys and their firms are laser focused upon bringing in new clients and retaining new clients as continuing clients. That makes perfect sense. Clients, and the potential revenue streams that they bring to our appellate practices are the lifeblood of paying firm or office overhead, and earning profit with which we take care of our financial needs and wants, and those of our loved ones. However, bringing in just one "wrong" client can wreak havoc and devastation on a law practice or even cause the dissolution of a law firm. It has happened many times in the past to many different lawyers and firms.

What is a "wrong" client? It is one who is single-mindedly determined to benefit from engaging your services whether you obtain a favorable appellate result or not. If you obtain a favorable result for the client, that is a win for the client. If you do not obtain a favorable result for the client, the "wrong" client may attempt to turn the loss into a win through a combination of one or more grievances against you, allegations of legal malpractice, fraud, breaches of fiduciary duty, possibly criminal acts or omissions, and the like. Even if none of the foregoing is successful, in today's digital era of specialized online legal publications, social media, and the like, news of serious and damaging allegations can make their way around a local or even national legal community with lightning speed. Even one allegation of improper conduct can cause potential loss of future, or even existing client representations. Compounding the problem is that the internet is forever. Once negative allegations against a lawyer or law firm are published in digital format, they are available until the end of time. And what's worse, the "wrong" client knows this as part of his, her, or its strategy.

Effective onboarding of new appellate clients means a lot more than simply determining whether the retainer check will clear and whether the case and client pass a conflicts check. It requires the use of every bit as much forethought, skill, judgment, finesse, and experience as actually representing that appellate client in the first place.

This paper is designed to provide insights into "best practices" to help appellate attorneys and firms to carefully and thoughtfully vet their prospective appellate clients. It will not prevent your firm from being entangled with a "wrong" client. But it will limit the chances that will happen, and if it does, the damage that can result.

II. The New Client Interview. Your First and Best Opportunity to Avoid the "Wrong" Client.

People regularly bemoan e-mail communications because they lack tone of voice, body language, and eye contact. Each of these three things is integral to a fuller understanding of the words that appear on the digital page. The absence of them creates room for doubt and misunderstanding with respect to the message or messages being conveyed by the actual words used in the e-mail.

The same is all true of onboarding of new appellate clients. There is no doubt that as appellate lawyers, we are all very busy. However, using "busy" as an excuse or rationalization for turfing new client interviews to an administrative assistant, a legal assistant, a summer associate, a less experienced associate attorney, or worse, to a client solely filling out an online new client questionnaire, means that we lose the ability to observe that potential new client and form our own judgments. While verbal information (whether written or spoken) is useful, our physical observations of a new client could provide valuable non-verbal cues that provide a gut feeling that "something just isn't right." It could be a last best chance for us or our law firm (or both) to avoid a severely damaging entanglement with a prospective client who is willing to sacrifice honesty to accomplish "winning" (in whatever form that takes) to honesty.

The following onboarding checklist is by way of example only. There may be additional issues that you or your firm will want to include based upon the particular nature of your practice, your acceptable fee structure, the types of clients you represent, and the types of representations you and your firm are willing (and not willing) to undertake. It is a hybrid of a new client screening checklist published by the State Bar of Michigan, Swiss Re Corporate Solutions, and additions and modifications to the foregoing by me based upon specific issues that impact Texas attorneys. Not all of the suggested matters will be applicable to every potential new appellate client. However, this checklist is a good starting point for your firm to create its own checklist based upon your particular type of appellate practice.

SUBJECT MATTER OF REPRESENTATION

What is the legal matter for which the client needs representation?
Are there any imminent deadlines or time limitations?
Is the case too large, time consuming or expensive for my practice to handle?
Is the case one that is pending or that must be filed in another jurisdiction?
If so, am I familiar with the local statute of limitations, other filing deadlines, substantive issues and procedural rules? And am I even authorized to practice in that jurisdiction? If not, will I need to engage local counsel, and how will I find that local counsel?
Is the matter within my primary area(s) of practice?
If not, how much time would be required to become competent in that area?
If the case is outside my area of practice or in another jurisdiction, do I know an attorney to whom I could associate or refer the case?
If I refer the case, do I seek a referral fee and remain liable to the client as if I were the receiving attorney's partner?
If so, do I trust that the attorney is competent and will not expose me to a malpractice claim or ethical grievance?
Am I willing to learn and comply with the disclosure and consent requirements imposed by the applicable ethics rules?
Does the matter have merit?
Does the client have evidence to corroborate his/her story?
Are the potential defendants entitled to one or more shortened or additional notice periods that would not be reflected by the traditional statute of limitations? Such as governmental actors, medical malpractice, etc.
Does the case involve the filing of certifications or expert reports early in the lawsuit to prevent dismissal?
What is the risk of a TCPA counterclaim and how will that impact decision making as to whether to proceed and on what timetable?
Do I have enough facts to avoid potential sanctions under Chapter 10 of the Texas Civil Practice & Remedies Code Annotated?

CLIENT ISSUES

Is the client financially capable of paying an initial retainer and replenishing it as will be likely necessary based upon the nature and scope of the representation?
What are the client's expectations (with both the outcome and the time involved)?
Are they reasonable?
If not, is this client able to adjust his/her expectations to make them reasonable?
What is the client's motive (justice, revenge, vendetta, to be compensated)?
What are the client’s expectations with respect to what outcome would define a win?
Is the motive likely to cause the client to be unable to accept settlement or an unfavorable outcome?
Has the client shown himself/herself to be dishonest or to lack integrity?

Do available documents contradict the client's verbal representations?
Is the client evasive or reluctant in connection with a commitment to abide by a fee agreement?
Has the client indicated that he/she will be difficult to control as a witness?
Is the client more interested in speaking than listening?

PRIOR ATTORNEY-CLIENT RELATIONSHIPS

Has the client retained and discharged one or more prior attorneys in the same matter?
If so, why did the previous attorney-client relationships terminate?
Has the client made malpractice claims or filed grievances against any prior attorneys?
Has the client discussed filing malpractice claims or filing grievances against any prior attorneys?
Do any prior attorneys claim that legal fees/costs are still owed by the client?
Has the client refused to pay legitimate invoices for legal fees?

PROTECTING YOURSELF AND YOUR FIRM

If I have accepted the client, have I sent the client an engagement letter for the client to sign and return setting forth the scope of the retention and the fee agreement?
Does the scope of the retention expressly state not only what services will be provided under the agreement, but also those that will not be provided (bankruptcy, tax, probate, criminal, etc.)?
If the client is or involves an entity, does the engagement letter establish clearly who is, and who is not, the client?
If I have referred the client to another attorney without a referral fee, have I sent the client a non-engagement letter?
If I have referred the client to another attorney and have received or expect to receive a referral fee, have I sent the client a letter disclosing what is required by the applicable ethics rules and have I obtained the client's consent in the form required by the applicable ethics rules?
If I have declined to represent the client, have I sent a non-engagement letter clearly and unequivocally informing the client that I am not representing him/her, that I express no opinion about the matter, that the matter may be affected by a statute of limitations and that he/she should seek other representation?
Does your limited scope representation agreement adequately limit the temporal and task parameters of the representation? (Post-verdict only? Post-judgment? Perfection of appeal? Through brief of appellant? Through all briefing? Through opinion and judgment? Through rehearing?).

III. The Thoughtful and Comprehensive Limited Scope Representation Agreement.

How old is your form of appellate representation agreement? Was it originally drafted before your 32-year old son was born? Was it last revised when the Houston Rockets last won the NBA championship (1995)? If so, this is the year to set aside a few hours to review your firm's form of appellate representation agreement and make changes. Why now?

On May 25, 2021, all 9 justices of the Supreme Court of Texas signed an order revising the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. Those amendments went into effect on July 1, 2021. Additionally, less than two months ago, the membership of the State Bar of Texas voted in favor of 12 different sets of amendments to the Texas Disciplinary Rules of Professional Conduct that were approved by the State Bar Board of Directors. https://www.texasbar.com/AM/Template.cfm?Section=rulesvote&Template=/rulesvote/home.cfm The Supreme Court of Texas called for and received public comments regarding these proposed rules amendments. https://www.txcourts.gov/media/1458360/249015.pdf One month ago, on May 6, 2024, the Supreme Court of Texas conducted public hearings both live and over its YouTube channel regarding the proposed rules amendments. https://www.youtube.com/watch?v=eeRX5-XT_H8 While it is not known as a certainty that all 12 of the proposed rules amendments will be approved by the Supreme Court of Texas, there is a reasonably high probability that most, if not all, of the proposed rules amendments will be adopted (with clarifications provided by official comments that will accompany the affected rules). And when they are, it is essential that you compare the rules amendments to your firm's appellate representation agreement and make changes to it, as appropriate, based upon the rules as amended.

Your appellate representation agreement is (or should be) a document that clearly defines the rights, responsibilities and expectations of you– the appellate legal service provider– and your potential new appellate client. By the time the ink is dry on the parties' signatures, both attorney and client should know what is expected of them, and what they can expect to receive in return, for entering into the appellate representation agreement. If this paper were written in or before the mid-1980's, this paragraph would both begin and end this paper. It was not. This paper is written at the end of the first quarter of the 21st Century. As Bob Dylan warned us half a century ago, the times (and a small, but very dangerous percentage of our clients), they are a changin'.

It is a scene that repeats itself over and over again throughout the years. New Appellate Client shows up in your office for an appointment asking you to draft a petition for writ of mandamus, to perfect an interlocutory appeal, or to handle a pending appeal in one of our State's appellate costs. After a discussion of the facts surrounding the potential representation, the client's expectations, the anticipated costs of the representation, your background, experience, and ability, and your firm's resources and reputation, New Appellate Client agrees to hire you to represent him, her, or it.

You or your legal assistant pull up your firm's existing form of representation agreement from the firm's administrative database. The form agreement was originally created while Texaco v. Pennzoil was still pending in the First Court of Appeals. The firm's managing partner works under the theory that "if it was good enough to use then, it is good enough to use now." Or if you or your firm are like a small percentage of firms, the representation agreement has actually been tweaked a few times after the turn of the century (the 2000's, not the 1900's) to reflect new developments in attorney-client relationships, attorney ethics, and legal malpractice law. How do I know this? Because I have been asked to consult with lawyers and law firms about the representation agreements that they use. In the course of doing so, I have found many to be woefully inadequate.

Why do I say woefully inadequate? Back in the early 1980's, the typical species of bee found in the United States was fairly docile, would only attack when it was itself attacked, and usually only as a last resort at self-preservation. Its main interest in life was to fly from flower to flower, collect pollen and convert it to honey back at the hive. They were dependable, productive, hard-working, diligent and rarely aggressive.

In the mid-1980's, a new breed of bee– often referred to as killer bees– began to spread throughout North America. Killer bees react aggressively to disturbances as much as ten times faster than traditional honey bees. They have been known to chase humans for a quarter of a mile or more. To-date, killer bees have killed thousands, with their victims sometimes receiving vastly more stings than from their traditional counterparts. The aggressiveness of killer bees is not solely directed at humans. They frequently attack and kill horses and other livestock, as well as domestic pets.

Imagine that you are hiking through a state park. You come upon a tree laden with several bee hives. Knowing what you've read about killer bees, are you going to automatically assume that the bees flying nearby are gentle, docile traditional honey bees? Will you assume that they mean you no harm and walk as close to the hives and bees as possible? Or will you seek to manage the risk that this is a hive full of angry, aggressive, killer bees and take steps to protect yourself from the potential risk that results therefrom?

The prudent hiker will obviously seek to protect himself or herself from unnecessary risk. Doing so minimizes the risk of injury or death in case the hives turn out to be full of angry killer bees.

What do bees have to do with legal clients? Simply this. The overwhelming majority of potential clients who pass through your doors are comparable to traditional honey bees.

They are honest, decent, thoughtful, considerate, responsible, truthful individuals or companies who come to you seeking help in resolving a legal problem. However, like the American bee population, over the past three or so decades, the pool of potential legal clients has been invaded by a new, aggressive and highly dangerous form of client. Representing a small percentage of overall clients, this type of client is seemingly willing to say anything, or to do anything, whether truthful or not, in order to achieve a legal objective, win a case, or walk away with a pre-determined sum of money. And in doing so, they care not whether that sum of money comes from the opposing party in litigation, your firm's reserve account or your firm's malpractice insurance policy. This type of client considers the threat or actual filing of a grievance, or a lawsuit alleging legal malpractice, or an equitable fee forfeiture proceeding to be a first strike weapon of choice providing the client necessary leverage over the attorney, law firm, and their professional liability insurance carrier, regardless of the appropriateness of doing so under the facts and circumstances presented.

Just as you can no longer assume that your encounter with bee hives or bee swarms in the forest will end safely, you can no longer assume that potential clients are unwilling to cause serious and unwarranted risk to your firm's solvency, insurance coverage, continued ability to practice law, and reputation in the legal community, simply to achieve their predetermined litigation objectives.

How can you best protect yourself, your firm, your reputation, and your solvency from the small but dangerous percentage of new breed aggressive clients in the legal marketplace? Your first line of defense is a thoughtful, well-crafted appellate representation agreement.

How do I know this? Because I was a victim of an angry, aggressive killer bee client. And it cost me more than five years of litigation, both trial court and appellate, to extricate myself from that client. My well-drafted appellate representation agreement was a big part of the reason why that five-and-a-half year nightmare ended with all of the client's claims against me being dismissed by take-nothing judgment, all of the client's grievances (multiple, plus appeals thereof) being dismissed as unfounded, and a 12-0 jury verdict in my favor for every penny of fees, costs, and interest that I was entitled to under my representation agreement and asked for from the jury. This paper is written to help you, my colleagues, to survive such a situation should you ever find yourself in it, or one like it, in the future.

Why do many attorneys and firms fail when it comes to drafting effective representation agreements that adequately protect both the attorney and the client? I submit that there are two factors at play.

First, it is the shoemaker's children who go shoeless. We are so busy drafting effective legal documents for our clients, we sometimes fail to take the time and effort to draft effective legal documents for ourselves.

Second, attorneys sometimes fail to draft effective representation agreements because we use an incorrect paradigm. Typically, the attorney (or firm) will come from the perspective of "we need the agreement to state the rights and responsibilities of both the firm and New Appellate Client." In the mid-1980's, that would have been sufficient. But with the advent of the new, dangerous, aggressive form of potential client who sometimes appears in the legal marketplace, it is not enough.

I am about to talk about grievances. Before I do, a disclaimer is in order. For the next 23 days, I am an attorney member of a grievance committee, panel chair of a grievance panel, and committee chair for the District 4 grievance committee. While I have the benefit of my experience as having served on a grievance committee, this paper, and the PowerPoint presentation that accompany it, are written ***solely*** in my individual capacity as a lawyer who has avoided any findings of professional misconduct and legal malpractice for 38+ years of practice, and not in any representative capacity on behalf of any grievance committee, or on behalf of any other organization of which I am a part.

One of the most potentially dangerous allegations stated in grievances, legal malpractice lawsuits, and fee forfeiture proceedings is, "I would not have gone forward with the representation if the lawyer had disclosed X." Why is this allegation so potentially dangerous? Simply put, if a client wishes to falsely allege that an attorney failed to inform him or her about something at the beginning of the representation, ***and there is no documentation that the information at issue was provided to the client***, the matter becomes a ***disputed issue of fact***.

Disputed issues of fact sometimes mean the difference between receiving a take-nothing summary judgment in a legal malpractice lawsuit or not, or receiving a summary "no just cause" finding in a grievance proceeding or not. Just as important, legal malpractice carriers who seek to manage and avoid risk, sometimes settle otherwise meritless legal malpractice lawsuits simply because of the presence of a disputed issue of material fact.

What is the best way for an attorney or firm to prove that a factual matter was properly and timely disclosed? One might argue that placing the disclosure in a well-written, fair, comprehensive, written representation agreement, where the client initials or signs each page and signs the last page, is an excellent place to start. Therefore, the best way for an attorney to manage risk in the event a prospective client turn out to be in the small majority of aggressive and dangerous new breed clients is to include as many effective disclosures and as much helpful information in the appellate representation agreement as possible.

Why is it prudent to write appellate representation agreements with a focus on the very small percentage of potential clients who are willing to do or say anything in order to win their case? The very same disclosures that are made for the attorney to protect himself or herself against the (hopefully) less than 1% of "bad clients" will be of great assistance to educate and inform the vast majority of "good clients" who are willing to abide by the applicable rules of litigation, appeals, ethics, and civilized society. Thus, writing thoughtful, comprehensive, legal representation agreements is good policy and great ethics for lawyers, good clients, and not-so-good clients, alike.

The remainder of this paper discusses the matters that you should seriously consider including in your appellate representation agreement, and those that should never be included. This paper is written in hope that potential grievance claims, legal malpractice causes of action, and allegations of breach of fiduciary duty can be avoided by the drafting of thoughtful and effective appellate representation agreements.

IV. Construing Legal Representation Agreements and Why it Shouldn't Matter at the Outset

A reviewing court or arbitrator will construe an appellate representation agreement differently depending upon whether or not an attorney-client relationship pre-exists the formation of the representation agreement. Whether an attorney-client relationship pre-exists the formation of the representation agreement is not always clear. However, that fact should have no impact whatsoever on how you or your firm draft your appellate representation agreements. Why? If you draft all of your representation agreements to withstand review under the heightened fiduciary standard, you need not be concerned about whether or not that heightened standard will be applied.

Two distinct lines of authority exist as to when an attorney-client relationship exists that is sufficient to invoke fiduciary duties in the formation of the attorney-client representation agreement.

The first line of authority has its roots in *Nolan v. Foreman*, 665 F.2d 738, 739, n.3 (5th Cir. 1982). It may be characterized as follows:

> Foreman contends that because he and the Nolans reached agreement on the amount of the fee before he began representing Rick Nolan, an attorney/client relationship had not yet begun, and that, therefore, their agreement should be evaluated under contract principles governing common commercial transactions. This position is incorrect. The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention. *Braun v. Valley Ear, Nose, and Throat Specialists*, 611 S.W.2d 470 (Tex.Civ.App.- Corpus Christi 1980, no writ). All that is required under Texas law is that the parties, explicitly or by their conduct, manifest an intention to create the attorney/client relationship. *State v. Lemon*, 603 S.W.2d 313 (Tex.Civ.App.-Amarillo 1980, no writ). In this case, the Nolans approached Foreman with a request that he represent Rick Nolan in his forthcoming trial and appeal. At their scheduled meeting, a discussion of the cases against Rick Nolan ensued; only then did Foreman state his fee. Foreman's fiduciary responsibilities attached when he entered into the discussion of Rick Nolan's legal problems with a view toward undertaking representation.

Nolan v. Foreman, 665 F.2d 738, 739, n.3 (5th Cir. 1982). *See also Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.– Corpus Christi 1991, writ denied) ("An attorney's fiduciary responsibilities may arise even during preliminary consultations regarding the attorney's possible retention if the attorney enters into discussion of the client's legal problems with a view toward undertaking representation. *See Nolan v. Foreman*, 665 F.2d 738, 739 n. 3 (5th Cir.1982).").

The second line of cases regarding imposition of fiduciary duties in the drafting of a legal representation agreement is illustrated by the following analysis:

> The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client. *Bright v. Addison*, 171 S.W.3d 588, 596 (Tex.App.– Dallas 2005, pets. denied). The attorney-client relationship "arises from the clear and express agreement of the parties about the nature of the work to be done and the compensation to be paid." *Hill v. Bartlette*, 181 S.W.3d 541, 547 (Tex.App.– Texarkana 2005, no pet.). The relationship may be expressly created through a contract or it may be implied from the actions of the parties. *Addison*, 171 S.W.3d at 596. However, it is necessary that the parties either explicitly or implicitly manifest an intention to create an attorney-client relationship. *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex.App.– Texarkana 1989, writ denied). The determination of whether there was a meeting of the minds must be based on an objective standard examining what the parties did and said and not on their alleged subjective states of mind. *Addison*, 171 S.W.3d at 596; *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex.App.– Houston [14th Dist.] 1999, pet. denied).

Gillis v. Provost & Umphrey Law Firm, LLP, No. 05-13-00892-CV, 2015 WL 170240, at *10 (Tex. App.– Dallas 2015, no pet.). *See also Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*,

105 S.W.3d 244, 254 (Tex. App.– Houston [14th Dist.] 2003, pet. denied) ("The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client. *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex.App– Houston [1st Dist.] 2000, no pet.). The relationship may be expressly created by contract, or it may be implied from the actions of the parties. *Sutton v. Estate of McCormick*, 47 S.W.3d 179, 182 (Tex.App.– Corpus Christi 2001, no pet.); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex.App.– Houston [14th Dist.] 1997, writ dism'd by agr.). The determination of whether there is a meeting of the minds must be based on objective standards of what the parties did and said and not on their alleged subjective states of mind. *Terrell v. State*, 891 S.W.2d 307, 313 (Tex.App.– El Paso 1994, pet. ref'd).").

In order to limit the possibility that your appellate representation agreement will be incorrectly construed under a fiduciary duty standard, when factually appropriate, you may wish to include a statement such as the foregoing in your representation agreements:

> The attorney and client expressly agree that in preliminary negotiations leading up to the signing of this Representation Agreement, information has been shared by the client with the attorney, and by the attorney with the client. Regardless of that fact, the client and attorney expressly state their mutual intent that the attorney-client relationship that is the subject of this Representation Agreement did not come into existence until both the attorney and the client exchanged signed copies of this Representation Agreement (and the full agreed upon retainer was paid by the client to the attorney in good and sufficient funds [if appropriate]).

V. Matters that Should NOT be Included in Your Appellate Representation Agreements

There are a number of items that should normally be included in an appellate representation agreement. Those will be discussed later in this paper. However, certain matters should never appear in your appellate representation agreements. This is true because of various provisions of the Texas Disciplinary Rules of Professional Conduct and the cases construing and applying them.

Do NOT Charge for Preparing and Presenting a Motion to Withdraw

In *Lee v. Daniels & Daniels*, 264 S.W.3d 273, 280-82 (Tex. App.– San Antonio 2008, pet. denied), the San Antonio Court of Appeals held that a fee agreement requiring the client to "pay for all time spent, costs and expenses incident to withdrawal as attorney of record to include, but not limited to, airfare, mileage, motel, and lodging," was unconscionable at the time it was formed. In doing so, the court made the following observations:

> Unconscionability has no single legal definition and must be determined on a case by case basis in light of a variety of factors. *See Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498 (Tex. 1991) (Gonzalez, J., concurring). "When interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the

contractual relationship.' " *Hoover Slovacek*, 206 S.W.3d at 560 (*quoting López v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring and dissenting)). Paramount among those ethical considerations is the fiduciary obligation mandated by the professional nature of the attorney-client relationship. *See id.* at 561 (attorneys have a special responsibility to maintain the highest standards of conduct and fair dealing); *see also Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (attorney-client relationship is highly fiduciary in nature); *Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 567 (1962) (attorneys are members of an ancient profession with unique privileges and corresponding responsibilities).

. . . .

Implicitly, if not explicitly, the Disciplinary Rules demand that a reasonable legal fee be charged only for legal services. *See id.* 1.04(b)(1) ("... and the skill requisite to perform the legal service properly"); 1.04(b)(3) ("... the fee customarily charged in the locality for similar legal services "); 1.04(b)(7) ("... the experience, reputation, and ability of the lawyer or lawyers performing the services "); 1.04(b)(8) ("... or uncertainty of collection before the legal services have been rendered"). Legal services are services performed or rendered on behalf of a client. *See Crain v. The Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 333 (Tex.App.–Houston [1st Dist.] 1999, pet. denied) (noting practice of law embraces action taken for clients); *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41 (Tex.App.–Dallas 1987, writ denied) (same); TEX.R. EVID. 503(a)(1) (defining client as one who is rendered legal services); see generally BLACK'S LAW DICTIONARY 1399 (8th ed.2004) (defining service as act of doing something useful for another person).

Turning to the one sentence withdrawal provision at issue here, it broadly mandates that Cummings pay Daniels's hourly rate for "all time spent" incident to withdrawal, regardless of whether or not legal services were rendered on behalf of Cummings. Indeed, Daniels sought reimbursement for all time spent in his efforts to terminate his attorney-client relationship with Cummings including time spent adversarial to his own client. None of that time was spent engaged in "legal services" performed or rendered on behalf of Cummings, his client. *See Crain*, 11 S.W.3d at 333; *Brown*, 742 S.W.2d at 41. Instead, Daniels spent that time engaged in services performed for his own benefit. *See Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 756 (Tex.App.–Amarillo 1999, no pet.) (services rendered for one's own interest are not considered to be the practice of law by the State Bar of Texas). No lawyer could form a reasonable belief that time spent adversarial to the client and in pursuit of the lawyer's own interests is the rendering of "legal services" for the client. Thus, no lawyer could form a reasonable belief that fees incident to such time spent were reasonable. Therefore, we hold the particular withdrawal provision at issue here,

> which because of its broad nature allows the recovery of such fees, is unconscionable and contravenes Texas public policy as a matter of law. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a) ("[a] fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable").
>
> We recognize our holding may impose a burden on a withdrawing attorney with legitimate reasons to terminate the attorney-client relationship. Frankly, however, our ethical and fiduciary obligations require no less. It is simply one of the costs that must be borne by a professional who operates under the mantle of a fiduciary duty. As a professional, an attorney's relationship to his client is not to be guided by "the morals of the marketplace." *Hoover Slovacek*, 206 S.W.3d at 561. Otherwise, we relegate our profession to an ordinary business relationship. *See Bohatch v. Butler & Binion,* 977 S.W.2d 543, 560 (Tex. 1998) (Spector, J., dissenting) ("[a]s attorneys, we bear responsibilities to our clients and the bar itself that transcend ordinary business relationships").

Does the court of appeals' opinion in *Lee* mean that it is never appropriate for an attorney to charge a client for time expended in withdrawing from the client's representation? Not necessarily. There may be circumstances where an attorney withdraws at the request of his client for the purpose of facilitating representation by a different attorney who has expertise in an area that developed as the lawsuit was litigated. Under those circumstances, one could make an argument that the withdrawal efforts were "legal services" performed or rendered on behalf of the lawyer's client.

Why then, do I recommend that lawyers not charge for efforts to withdraw in general? The answer is simple. Until another appellate opinion comes along that expressly authorizes such conduct, which of us wants to be the attorney to risk his or her reputation, professional standing, and perhaps livelihood, for a few hours expended in withdrawing from a representation. Not me. It is just not worth it.

NEVER Retain the Right of Control over the General Methods of Representing the Client

Some attorneys tell a client what he or she will do for the client and the manner in which the attorney will proceed. And in the vast percentage of situations when the client approves or agrees, that does not become an issue. But what about when the attorney insists that he or she knows what is in the best interest of the client and insists upon that course of action over the client's (or prospective client's) wishes? Texas Disciplinary Rule of Professional Conduct 1.02(a)(1) states that with certain enumerated exceptions, a lawyer ***shall*** abide by a client's decisions "concerning the objectives and general methods of representation." Thus, an attorney should never include in a written representation agreement any right of control for the attorney over the wishes of the client with respect to the objectives and general methods of the representation. Remember, it is the client's legal matter, not yours.

NEVER Retain the Right of Control over Accepting Offers of Settlement

Texas Disciplinary Rule of Professional Conduct 1.02(a)(2) expressly states that an attorney ***shall*** abide by a client's decisions with respect to whether or not to accept an offer of settlement of a matter, except in very limited circumstances rarely seen. Therefore, your appellate representation agreements should not contain any provision that grants the attorney authority to accept or reject settlement offers without client input into the decision making process. If the attorney and the client disagree over whether to accept or reject a settlement offer, in most circumstances, the client's decision should prevail. And in some such circumstances, the conflict may be great enough that it triggers the attorney's obligation to withdraw from representation of the client.

NEVER Enter into a Contingent Fee Agreement in a Criminal Appeal

In 2011, the Texas Board of Legal Specialization recognized a new board certification in the area of Criminal Appellate Law. As in their trial court counterparts, criminal appellate attorneys should never enter into a contingent fee agreement with a criminal defendant in a criminal appeal. Tex. Disc. R. Prof. Cond. 1.04(e) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.").

NEVER Enter into an Oral Contingent Fee Contract

Section 82.065(a) of the Texas Government Code Annotated states: "A contingent fee contract for legal services must be in writing and signed by the attorney and client."

What is the effect of an "oral contingent fee contract"? From the legal ethics standpoint, an oral contingent fee contract could potentially constitute a violation of "any other laws of this state relating to the professional conduct of lawyers and to the practice of law," sufficient to trigger a violation of Tex. Disc. R. Prof. Cond. 8.04(a)(12).

With respect to whether an attorney may recover some or all requested attorney's fees in the absence of a written and signed contingent fee contract, the answer is, "sort of."

The customary answer to this question is that an attorney may not recover fees on an oral contingent fee contract.

> Section 82.065 of the Government Code expressly provides that contingent fee contracts must be in writing. Tex. Gov. Code Ann. § 82.065(a) (Vernon 1998). An oral contingent fee contract is voidable by the client. *See id.* § 82.065(b) (Vernon 1998); *see also Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex.App.—Austin 1994, no writ).

Sanes v. Clark, 25 S.W.3d 800, 804 (Tex. App.– Waco 2000, pet. denied).

However, in *Shamoun & Norman, LLP v. Hill*, 544 S.W.3d 724, 728, 739 (Tex. 2018), the Supreme Court of Texas held that section 82.065(a) of the Texas Government Code Annotated did not preclude a law firm from recovering attorney's fees under a theory of quantum meruit, but that the quantum meruit recovery could not be based on the voidable contingent fee contract:

> "We hold that despite the firm's lack of a signed writing, the statute of frauds does not preclude its quantum-meruit claim. In addition, we hold that there was sufficient evidence to demonstrate that the firm performed compensable services in negotiating the global settlement. However, we hold that the expert's opinion as to the reasonable value of the firm's services cannot be given legal weight. . . . [E]vidence of the oral contingent-fee agreement's value "cannot be given any weight or effect and legally cannot be considered as evidence supporting the jury's award." *Id.* Accordingly, we hold that an attorney's contingent-fee agreement that violates the statute of frauds cannot be considered as evidence of the reasonable value of that attorney's services."

NEVER Enter into a Business Transaction with a Client without Proper Disclosures, Client Consent and Client Opportunity for Independent Lawyer Review

For years, legal commentators have extolled the virtues of "alternative billing arrangements" that do not rely solely – or sometimes at all – upon the billable hour. In this context, attorneys sometimes wish to "take a piece of the client's action," in return for the rendition of professional legal services. However, when this is the case, the Texas Disciplinary Rules of Professional Conduct require certain safeguards for the client (or potential new client).

Rule 1.08(a)(1) expressly states that a lawyer "shall not" enter into a business transaction with a client unless the transaction and terms are "fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client." Even if this is done, the client must be "given a reasonable opportunity to seek the advice of independent counsel in the transaction." Tex. Disc. R. Prof. Cond. 1.08(a)(2). Finally, even after all of that, the client must consent in writing to the lawyer's involvement in the business transaction. Tex. Disc. R. Prof. Cond. 1.08(a)(3).

NEVER Accept Payment from a Third-Party from One Other than the Client Without Proper Mandatory Disclosures and Safeguards

Attorneys are rightly concerned about being compensated for the professional legal services that we render. Sometimes, payment for the representation of a client comes from a family member, a trusted friend, or an insurance company pursuant to a policy of liability insurance. When this occurs, attorneys must be careful to follow the requirements set forth in Tex. Disc. R. Prof. Cond. 1.08(e). That rule requires client consent for the third-party payment. Tex. Disc. R. Prof. Cond. 1.08(e)(1). It also requires that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Tex. Disc. R. Prof. Cond. 1.08(e)(2). Finally, client confidences must be protected, even from the third-party that is paying the client's legal bills. Tex. Disc. R. Prof. Cond. 1.08(e)(3).

NEVER Make Agreements Prospectively Limiting the Lawyer's Liability to a Client for Legal Malpractice

Texas Disciplinary Rule of Professional Conduct 1.08(g) prohibits attorneys from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith."

The only circumstance in which an exception to Rule 1.08(g) has been recognized to apply is the "customary qualification and limitations in legal opinions and memoranda." Official Comment 6 to Tex. Disc. R. Prof. Cond. 1.08.

NEVER Provide the Attorney with the Unilateral Right to Convert a Previously Non-Contingent Representation to a Contingent Representation

Wythe II Corp. v. Stone, 342 S.W.3d 96 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). Facts: Wythe owned apartments that were damaged by Hurricane Rita. Attorney Stone represented Wythe in an insurance claim against property insurer, XL Lloyds. Stone obtained payments of $2,775,000 for Wythe from XL Lloyds even though the insurance policy in question had limits of $1,625,000.

A fee dispute arose between Wythe and Stone. Stone intervened in the insurance lawsuit and withdrew from representing Wythe. Wythe counterclaimed against Stone for fraud and breach of fiduciary duty. The insurer paid the settlement insurance proceeds into the registry of the court.

Wythe contended that the representation agreement was unenforceable as a matter of law because it contained a provision allowing the attorney to unilaterally convert the hourly rate in the representation agreement to a percentage contingency fee "at any time during the representation."

Wythe also attacked a provision of the representation agreement that allowed the attorney to recover the full contingency fee upon withdrawal from representation of Wythe, regardless of whether the withdrawal was for good cause or not.

The court of appeals rejected Stone's unilateral right to convert the Representation Agreement from hourly to contingent at any stage of the proceedings:

> A contingent-fee contract is permissible in Texas in part because the potential for a greater fee compensates the attorney for assuming the risk that the attorney will receive no fee if the case is lost, while the client is largely protected from incurring a net financial loss in the event of an unfavorable outcome. *Hoover*, 206 S.W.3d at 561 (*citing Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). If the attorney could earn a reasonable fee on an hourly basis until recovery

> is assured and the work complete, but later exercise a unilateral option to collect a percentage of the client's recovery, the fee would no longer be "contingent" on anything—in effect, the client could be required to pay regardless of recovery. Shifting the risk of non-recovery to the client through the unilateral option provision would undermine one significant justification for the higher compensation sometimes received under a contingent-fee contract. *Id.* Simply stated, when an attorney bears no risk of going unpaid, risk of non-recovery is not a factor in assessing the reasonableness of the fee.

Wythe II Corp. v. Stone, 342 S.W.3d 96, 103 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). Under the particular facts unique to this case, the court of appeals deemed the fee agreement to be contingent at its inception because it had to be approved by a bankruptcy court as a contingent fee after Wythe filed for bankruptcy.

Incidentally, this paper argues that clients should be required to initial or sign each page of the Appellate Representation Agreement, and not merely the last page. In *Wythe*, the client argued that the attorney defrauded him by presenting the client only with the signature page of the agreement, and not the entire agreement. *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 105-06 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). This allegation is reason enough for attorneys to require their prospective clients to sign each page of the Appellate Representation Agreement, and not just the last page.

If You Accept An Assignment of a Contingent Fee Agreement NEVER Fail to Make Certain the Original Agreement Complies with TDRPC 1.04(f)

If a trial attorney has a representation based upon a contingent fee agreement, and you agree to accept an assignment of a portion of that fee for appellate representation, never fail to make certain that the original fee agreement complies with Texas Disciplinary Rule of Professional Conduct 1.04(f):

> (f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is:
>
> (i) in proportion to the professional services performed by each lawyer; or
>
> (ii) made between lawyers who assume joint responsibility for the representation; and
>
> (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

If, for some inexplicable reason, you fail to make certain that the above-quoted provisions are complied with, you still may have the right to seek quantum meruit recovery plus the recovery of reasonable and necessary expenses actually incurred on behalf of the client. Tex. Disc. R. Prof. Cond. 1.04(g). Regardless of the availability of this remedy, the far better practice is to make certain that the referral arrangement conforms in all respects with Tex. Disc. R. Prof. Cond. 1.04(f).

NEVER Fail to Obtain a Guardian or Take Other Appropriate Action to Protect the Client if the Circumstances Appear to Warrant It

Client walks in the door seeking appellate representation. Within minutes, he agrees to your full hourly rate of $1,200 per hour, signs your Appellate Representation Agreement without any questions or changes, and his $100,000.00 electronic transfer into your client trust fund account clears in a matter of minutes. He is also wearing a three-cornered tinfoil hat and mentions that Guardians of the Galaxy are trying to extradite him to the planet Jupiter as you are visiting with him.

This is an area that is changing substantially as a result of the July 1, 2021 amendments to the Texas Disciplinary Rules of Professional Conduct.

Before July 1, 2021, a lawyer's duty to protect a client that was reasonably believed to lack legal competence was stated in Texas Disciplinary Rule of Professional Conduct 1.02(g):

> "A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

Tex. Disc. R. Prof. Cond. 1.02(g).

Relatively new Texas Disciplinary Rule of Professional Conduct 1.16, titled, "Clients with Diminished Capacity" was effective July 1, 2021, and states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.
> (c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

So now, when the lawyer reasonably believes that a client has diminished capacity that puts him or her at risk of substantial physical, financial, or other harm unless action is taken, and the client cannot adequately act in his or her own interest, the lawyer has new tools available to address this situation. "[T]he lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client."

How should an attorney assess the existence of, or extent of, a client's diminished capacity? Comment 2 to new rule 1.16 states: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision; variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values."

May an attorney keep the client's family members in the information loop when the lawyer perceives that the client suffers from diminished capacity? This is answered by Comment 4 to new rule 1.16, as follows: "The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. As part of the client in-take process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise. Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person. Standardized forms

may be available from bar associations and practice groups. Information about trusted person designations should be appropriately safeguarded and periodically updated, as necessary. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor."

Comment 5 to new rule 1.16 elaborates on a the actions that a lawyer may take to protect a client perceived to have diminished legal capacity, as follows: "Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect an existing client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections. If it appears to be necessary to disclose confidential information to a third person to protect the client's best interests, a lawyer should consider whether it would be prudent to ask for the client's consent to the disclosure. Only in compelling cases should the lawyer disclose confidential client information if the client has expressly refused to consent. The authority of a lawyer to disclose confidential client information to protect the interests of the client is limited and extends no further than is reasonably necessary to facilitate protective action."

Should a legal representative for the diminished capacity client be appointed? Comment 8 to new rule 1.16 provides the following guidance: "When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction."

Under what circumstances may a lawyer disclose information to third-parties about the client's diminished capacity? Comment 9 to new rule 1.16 provides the following guidance: "Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a

client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational."

Finally, what may a lawyer do in an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with immediate and irreparable harm? Comments 10 and 11 to new rule 1.16 provide the following guidance: "[A] lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client. . . . A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken."

Lawyers are well-advised to take time to digest this relatively new rule, and its several comments. That way, when a situation involving a client or prospective client with diminished legal capacity arises, the attorney will be well-prepared to address it.

NEVER Treat Advance Payment of Fees as a "Non-Refundable Retainer"

Proper non-refundable retainers exist, but are exceedingly rare. Most of the time, attorneys who refer to non-refundable retainers are really saying, you will pay me in advance for work that I perform for you, and I earn that money immediately even if I end up not performing any legal services for you. This is NOT a proper non-refundable retainer, and may very well end up with your name on a file folder at a regional office of the Commission for Lawyer Discipline. *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, 739-40 (Tex. App.– Austin 2007, no pet.).

VI. Matters that Should be Included in Your Appellate Representation Agreements

The old proverb has it that "the shoemakers children often go shoeless." The modern day version of this proverb is the attorney who seeks to represent a client in a complicated matter, but leaves most aspects of the representation to chance by failing to address its parameters in a well-crafted representation agreement. You should assume that unless a matter is in writing and is signed by the client, if there is a dispute about whether a matter was addressed or how it was addressed, a finder of fact (in a grievance or legal malpractice lawsuit or fee collection arbitration), may be more inclined to (but will not always), side with the client and against the attorney. This is because of a general perception that if a matter was important to the representation, the attorney would have included it in the representation agreement.

In drafting a representation agreement, go through a checklist of issues that need to be addressed so that there is as little room for misunderstanding between you and the prospective client as possible. Among the matters that I address in the original **written** representation agreement or power of attorney that is signed by both the attorney and the client, and is initialed on each page by both the attorney and the client, are as follows:

* **A specific description of the professional services to be performed.** This is not as simple as it sounds. Will you become counsel of record in the trial court, or only enter an appearance in the court of appeals? If you appear in the trial court, will it be as attorney-in-charge or additional counsel? If on appeal, will your representation terminate upon the issuance of an appellate opinion, or will it include a motion for rehearing or response thereto? If the representation is in the court of appeals, will it automatically extend to the Supreme Court of Texas, or the United States Supreme Court, or terminate at the conclusion of the intermediate appellate court proceedings? If you assist in the trial court, will you be responsible for the entire representation (along with lead trial counsel) or only be responsible for preservation of error issues and drafting of dispositive motions, briefs and responses? Clear answers to these questions could save you from an unwarranted grievance or malpractice claim later on.

* **Express discussion of specific professional legal services that will not be performed.** If one or more of the parties files for bankruptcy, will your representation extend into the bankruptcy court? If tax issues, or probate and estate issues arise, do you intend to become involved in the prospective client's representation of those? Just as important as a description of the professional legal services that you intend to provide is a description of the professional legal services that you do not intend to provide.

* **The manner of calculation of the attorney's fee.** Many attorneys are satisfied when a Representation Agreement contains the attorney's hourly rate. Some attorneys even include different hourly rates for senior partners, junior partners, senior associates,

junior associates and paralegals. However, many attorneys fail to include other important information that could form the basis of an unwarranted grievance, malpractice or breach of fiduciary duty claim. Will time entries be rounded either up or down, or be actual time worked? Will the time spent in local travel or longer distance travel be billed or unbilled? If billed, will it be billed at full rate, half-rate or otherwise? Does the attorney bill portal-to-portal including both travel and waiting time (at courthouses, for instance)? Which attorneys will be primarily responsible for work on the file, and at what hourly billing rate? Addressing these matters up front could avoid substantial aggravation for the attorney and the client alike later on.

* **Frequency of billing.** This should be addressed in the representation agreement, and the attorney should bill as often as required by the representation agreement. Otherwise, the client may seek to argue that he or she "did not know what was going on with the case," and if he or she had known how expensive the representation was becoming, action may have been taken to reduce or eliminate future bills.

* **Frequency of attorney information updates.** I have had clients who did not want to hear from me after the Representation Agreement was signed until we received a decision from the appellate court. I have had other clients who wanted to receive copies of all documents, pleadings, motions, briefs and communications as they occurred. By addressing frequency of updates in the representation agreement, you can avoid misunderstandings later on, or claims that the attorney "failed to keep me informed regarding the status of the representation."

* **The specific expenses that will be charged, and the rates for each.** Once again, establishing this in writing will tend to cut down on complaints after the client receives the invoice.

* **Information required by the State Bar of Texas regarding availability of the grievance process.** I put this language right in the representation agreement so that there is no credible allegation that I failed to provide it. "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free phone call."

* **The specific identity of the client.** This is particularly important where entities are involved, and where a third-party may be paying for the representation of the actual client. Stating whether the entity or a particular individual or individuals are the client can avoid a potential disqualification later on. The same is true with nested entities such as parent and subsidiary corporations.

* **The specific identity of all those entitled to receive attorney-client communications and the manner of receipt of those communications.**

* **Bases for terminating the agreement, both by the attorney and the client, whether for good cause, or otherwise.**

* **The manner of calculating the attorney's fee in the event of early termination, both for good cause and not for good cause.** The following excerpts from the Supreme Court of Texas' opinion in *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561-65 (Tex. 2006), are so important that they should be committed to memory by Texas attorneys:

In Texas, if an attorney hired on a contingent-fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex.1969) (*citing Myers v. Crockett*, 14 Tex. 257 (1855)). Both remedies are subject to the prohibition against charging or collecting an unconscionable fee. Tex. Disciplinary R. Prof'l Conduct 1.04(a), reprinted in Tex. Gov't Code, tit. 2, subtit. G app. A (Tex. State Bar R. art., § 9).6 Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the factfinder. *See, e.g., Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 233 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (concluding that the evidence was sufficient to support a finding that a contingent fee equaling 70–100% of the client's recovery was unconscionable). On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law. *See, e.g.*, Tex. Bus. & Com.Code § 2.302 (courts may refuse to enforce contracts determined to be unconscionable as a matter of law); *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex.App.-Waco 2005, pet. denied) ("The ultimate question of unconscionability of a contract is one of law, to be decided by the court."); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex.App.-San Antonio 1996, no writ) (distinguishing procedural and substantive aspects of unconscionability). Hoover's termination fee provision purported to contract around the *Mandell* remedies in three ways. First, it made no distinction between discharges occurring with or without cause. Second, it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, discarding the quantum meruit and contingent fee measurements. Finally, it required Walton to pay Hoover the percentage fee immediately at the time of discharge. In allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment." Restatement (Third) of the Law Governing Lawyers § 35(2)

(2000). Hoover's termination fee, however, sought immediate payment of the firm's contingent interest without regard for when and whether Walton eventually prevailed. Public policy strongly favors a client's freedom to employ a lawyer of his choosing and, except in some instances where counsel is appointed, to discharge the lawyer during the representation for any reason or no reason at all. *See Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46, 48 (1916) (describing this policy as a "firmly established rule which springs from the personal and confidential nature" of the attorney-client relationship); *see also Whiteside v. Griffis & Griffis, P. C.*, 902 S.W.2d 739, 746 (Tex.App.-Austin 1995, writ denied) (noting that the policy supporting a client's freedom to select his attorney precludes the application of commercial standards to agreements that restrict the practice of law); Tex. Disciplinary R. Prof'l Conduct 1.15 cmt. 4 ("A client has the power to discharge a lawyer at any time, with or without cause...."). Nonetheless, we recognize the valid competing interests of an attorney who, like any other professional, expects timely compensation for work performed and results obtained. Thus, attorneys are entitled to protection from clients who would abuse the contingent fee arrangement and avoid duties owed under contract. Striving to respect both interests, *Mandell* provides remedies to the contingent-fee lawyer who is fired without cause. Hoover's termination fee provision, however, in requiring immediate payment of the firm's contingent interest, exceeded Mandell and forced the client to liquidate 28.66% of his claim as a penalty for discharging the lawyer. Because this feature imposes an undue burden on the client's ability to change counsel, Hoover's termination fee provision violates public policy and is unconscionable as a matter of law. Notwithstanding its immediate-payment requirement, several additional considerations lead us to conclude that Hoover's termination fee provision is unenforceable. In *Levine v. Bayne, Snell & Krause, Ltd.*, we refused to construe a contingent fee contract as entitling the attorney to compensation exceeding the client's actual recovery. 40 S.W.3d 92, 95 (Tex.2001). In that case, the clients purchased a home containing foundation defects, and stopped making mortgage payments when the defects were discovered. *Id.* at 93. They agreed to pay their lawyer one-third of "any amount received by settlement or recovery." *Id.* A jury awarded the clients $243,644 in damages, but offset the award against the balance due on their mortgage, resulting in a net recovery of $81,793. *Id.* The lawyer sued to collect $155,866, a fee equaling one-third of the gross recovery plus pre- and post-judgment interest and expenses. *Id.* In refusing to interpret "any amount received" as permitting collection of a contingent fee exceeding the client's net recovery, we emphasized that the lawyer is entitled to receive the contingent fee " 'only when and to the extent the client receives payment.' " *Id.* at 94 (quoting Restatement (Third) of the Law Governing Lawyers § 35). A reasonable client does not expect that a lawyer engaged on a contingent-fee basis will charge a fee equaling or, as in this case, exceeding 100% of the recovery. In *Levine*, we noted that " '[l]awyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee

arrangements with clients.' " *Id.* at 95 (*quoting In re Myers*, 663 N.E.2d 771, 774–75 (Ind.1996)). We believe Hoover's termination fee provision is unreasonably susceptible to overreaching, exploiting the attorney's superior information, and damaging the trust that is vital to the attorney-client relationship. The Disciplinary Rules provide that a contingent fee is permitted only where, quite sensibly, the fee is "contingent on the outcome of the matter for which the service is rendered." Tex. Disciplinary R. Prof'l Conduct 1.04(d). Hoover's termination fee, if not impliedly prohibited by Rule 1.04(d), is directly forbidden by Rule 1.08(h), which states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client, except that the lawyer may ... contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04." *Id.* 1.08(h)(2). Thus, even if Hoover's termination fee provision is viewed as transforming a traditional contingent fee into a fixed fee, it nonetheless impermissibly grants the lawyer a proprietary interest in the client's claim by entitling him to a percentage of the claim's value without regard to the ultimate results obtained. Examining the risk-sharing attributes of the parties' contract reveals that Hoover's termination fee provision weighs too heavily in favor of the attorney at the client's expense. Specifically, it shifted to Walton the risks that accompany both hourly fee and contingent fee agreements while withholding their corresponding benefits. In obligating Walton to pay a 28.66% contingent fee for any recovery obtained by Parrott, the fee caused Walton to bear the risk that Parrott would easily settle his claims without earning the fee. But Walton also bore the risk inherent in an hourly fee agreement because, if he discharged Hoover, he was obligated to pay a 28.66% fee regardless of whether he eventually prevailed. This "heads lawyer wins, tails client loses" provision altered *Mandell* almost entirely to the client's detriment. Indeed, the only scenario in which Hoover's termination fee provision would benefit Walton is if he expected the value of his claim to significantly increase after discharging Hoover. In that case, Walton could limit Hoover's fee to 28.66% of a relatively low value, and avoid paying 28.66% of a much larger recovery eventually obtained with new counsel. Thus, it is conceivable that a client viewing the events in hindsight could find that the arrangement worked out to his benefit. At the time of contracting, however, the client has no reason to desire such a provision because the winning scenario is not only unlikely, but also entirely arbitrary in relation to its timing and occurrence. Moreover, to the extent the client believes the value of his claim will increase as a result of employing new counsel, a rational client would forego the representation altogether rather than agree to the provision. In sum, the benefits of Hoover's termination fee provision are enjoyed almost exclusively by the attorney. Hoover's termination fee provision is also antagonistic to many policies supporting the use of contingent fees in civil cases. Most troubling is its creation of an incentive for the lawyer to be discharged soon after he or she can establish the present value of the client's claim with sufficient certainty. Whereas the contingent fee encourages efficiency and diligent efforts to obtain the best results possible, Hoover's termination fee provision encourages the lawyer to escape the contingency as soon as practicable, and take on

other cases, thereby avoiding the demands and consequences of trials and appeals. Moreover, the provision encourages litigation of a subset of claims that would not be pursued under traditional contingent fee agreements. Finally, Hoover's termination fee provision creates problems relating to valuation and administration, but not in the manner articulated by the court of appeals. The court of appeals viewed the parties' contract as empowering Parrott alone to determine the value of Walton's claims at the time of discharge, concluding that "[a]n agreement that leaves the damages to be paid upon termination by one party wholly within the unfettered discretion of the other party is so one-sided as to be substantively unconscionable." 149 S.W.3d at 846 (citations omitted). We disagree, because nothing in their fee agreement indicates that Parrott retained such discretion. On the contrary, the contract is silent with respect to valuation. Nevertheless, its silence in that respect exposes an additional defect—the contract fails to explain how the present value of the claims will be measured. It does not describe how the nature and severity of the client's injuries will be characterized, nor does it state whether any other factors, such as venue, availability and quality of witnesses, the defendant's wealth and the strength of its counsel, and the reprehensibility of the defendant's conduct will apply to the calculation. Lawyers have a duty, at the outset of the representation, to "inform a client of the basis or rate of the fee" and "the contract's implications for the client." *Levine*, 40 S.W.3d at 96 (citing Restatement (Third) of the Law Governing Lawyers §§ 38(1), 18). We have stated that "to impose the obligation of clarifying attorney-client contracts upon the attorney 'is entirely reasonable, both because of [the attorney's] greater knowledge and experience with respect to fee arrangements and because of the trust [the] client has placed in [the attorney].' " *Levine*, 40 S.W.3d at 95 (*quoting Cardenas v. Ramsey County*, 322 N.W.2d 191, 194 (Minn.1982)) (alterations in original). For these reasons, the "failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated" weighs in favor of a conclusion that the fee may be unconscionable. Tex. Disciplinary R. Prof'l Conduct 1.04 cmt. 8. And while experts can calculate the present value of a claim at the time of discharge, this extra time, expense, and uncertainty can be avoided under hourly billing and the traditional contingent fee, even in cases in which a discharged attorney seeks compensation from a disgruntled client. Our conclusion that Hoover's termination fee provision is unconscionable does not render the parties' entire fee agreement unenforceable. *See* Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978) (explaining that an illegal provision generally may be severed if it does not constitute the essential purpose of the agreement); *In re Kasschau*, 11 S.W.3d 305, 313 (Tex.App.-Houston [14th Dist.] 1999, no pet.) (concluding that an unenforceable provision may be severed if the parties would have entered into the contract without it). Walton paid Hoover its contingent fee for settlements that

Parrott negotiated with Texaco and El Paso Natural Gas, and Walton does not contend that this portion of the agreement is unconscionable. On the contrary, in his brief to the court of appeals, Walton argued in the alternative that Hoover was limited to recovering 28.66% of the $900,000 settlement reached in the Bass litigation and requested rendition of judgment in that amount. Severing the termination fee provision, the remainder of the fee agreement is enforceable. Thus, if Hoover were discharged without cause, it would be entitled to either its contingent fee or compensation in quantum meruit. *Mandell*, 441 S.W.2d at 847.

* **Disposition of the client's file at the conclusion of the representation.**

* **The manner of dispute resolution in the event of a dispute between the attorney and the client (choice of law, jurisdiction, venue, particular court, arbitration, mediation, jury waiver, specified arbitrator or mediator, etc.).** If arbitration is chosen, which disputes will or will not be included in the arbitration, which act (TAA or FAA) will apply, under what rules will the arbitration proceed, and what measure of trial court or appellate review will apply to the arbitration award.

* **Manner client is to receive communications (email address, fax, fax only with permission, mail, mail only to certain address, etc.), and informed disclosure by the attorney of the security risks and relative benefits of each.** *See* Texas Ethics Opinion 648 (April 2015).

* **Authorization to perform background check on client including banking, financial, judicial, litigation, and criminal records.**

* **Authorization to speak with client's prior legal counsel (if appropriate).**

* **Any matters required by the disciplinary rules with respect to contingent fee powers of attorney or representation agreements.**

* **Any referral fee matters required by the disciplinary rules.**

* **Disclosures of the risk of various rules based, statute based, and common law sanctions inherent in the type of legal representation sought.** Tex. R. Civ. P. 91a, Texas Rule of Appellate Procedure 45, Texas Rule of Civil Procedure 215, Texas Rule of Civil Procedure 13, Federal Rule of Civil Procedure 11, Texas Civil Practice & Remedies Code Chapters 9, and 10, inherent power of the courts, Texas Citizens Participation Act, medical malpractice dismissal for failure to provide proper expert report, among others.

* **Merger clause and no-reliance clause.** It is almost always the case that formation of a written legal representation agreement is preceded by a period of communications, negotiations and discussions between the attorney and the prospective client. Years after those negotiations, it is possible for one or both of the parties to those oral negotiations to mis-remember what was actually said. When those "mis-remembrances" form the basis of a claim of fraud in the inducement or breach of fiduciary duty, that becomes a serious problem. One way to help avoid that situation is to include a clause that neither the attorney nor the client relied upon any oral or written communication or representation by the other leading up to the formation of the written representation agreement. The clause could further state that the only promises, representations, or statements of fact or opinion by the attorney or the client that are binding on the parties to the legal representation agreement are those that are expressly stated in the legal representation agreement itself.

* **Anti-contract of adhesion language.** Whenever appropriate, include a prominent clause setting forth the fact that the legal representation agreement was the product of back and forth negotiation between the parties, and was not presented by one party to the other as a "take it or leave it" proposition.

* **Retainers by electronic wire transfer where possible.** The legal trade publications are filled with scams whereby attorneys are paid with checks that were stolen, modified, or counterfeit. In many of those cases, despite due diligence by the attorney in communicating with the bank, the attorney ends up having to repay the bank for the proceeds of the check. Many of these problems can be avoided by having client payment of the initial retainer (and all subsequent replenishments and payments) by bank-to-bank electronic wire transfer. Stating that requirement in the representation agreement itself eliminates any misunderstanding about this matter.

* **A copy of, or link to, the Texas Lawyer's Creed, the Disciplinary Rules, and the Texas Standards for Appellate Conduct.** Include either a link to, or copy of the Texas Lawyer's Creed, the Texas Disciplinary Rules of Professional Conduct, and the Texas Standards for Appellate Conduct in the appellate representation agreement. State in the representation agreement the client's express understanding that these three sets of rules and guidelines are expressly incorporated into the appellate representation agreement as if set forth at length, and your representation of the client will be guided by them wherever applicable.

* **Encourage independent attorney review of the agreement before it is signed by the client.**

* **Consider charging a fair and legal interest rate for past due balances in order to encourage prompt payment.**

* Disclosure of and explanation of attorney-client confidentiality **AND** the fact that a number of exceptions and exclusions from confidentiality exist under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Evidence, and Texas common law. In addressing these issues, consider including two brand new provisions of Texas Disciplinary Rule of Professional Conduct 1.05(c) effective July 1, 2021 that permit a lawyer to reveal confidential client information "[t]o secure legal advice about the lawyer's compliance with" the Texas Disciplinary Rules of Professional Conduct (TDRPC 1.05(c)(9)), and "[w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide (TDRPC 1.05(c)(10)).

VII. Protecting Yourself BEFORE Drafting an Appellate Representation Agreement

An insufficiently written legal representation agreement is the second most common reason that an unwarranted grievance or malpractice claim is asserted. The first most common reason is the attorney's failure to perform due diligence with respect to his or her prospective clients. The set-up for this mistake goes something like this. You had two large appellate matters set for lengthy briefing blocks back-to-back on your docket. All of a sudden, they both settle. One minute, your calendar for the next month was chock full of paying work. The next minute, your docket is virtually empty.

Just then, a prospective new client walks through the door. He (or she) spins you a tale of trial court woe and hands you a $25,000 retainer check. You call the bank, where it is reported that the check is good and there are sufficient funds to back it up. You look to the sky (or, more likely, to the LED light fixture in your conference room ceiling) and say a prayer of thanks for the new business that walked through the door just when you needed it.

Flash forward six months. That same client has filed a grievance against you. He has failed to replenish his retainer when requested. He objected when you sought to withdraw, claiming that his rights would be prejudiced. As a result, you filed a suit to recover your legal fees, and he obtains counsel to file a malpractice counterclaim, contending not only that you failed to represent him properly, but also breached your fiduciary duties towards him. The judge in the case has issued a show cause hearing ordering you to provide evidence why you should not be sanctioned for filing a groundless lawsuit brought for an improper purpose. Your professional liability carrier sends you a lengthy "reservation of rights" letter, instructing you that potential exposure for fee forfeiture, punitive damages, and actual damages above your policy limits may not be covered. You look up at that same conference room LED light fixture and ask, "why me?"

There is actually a very legitimate answer to the question, "why you?" It is perceived by many attorneys that it is better to have good work from questionable clients or questionable work from good clients than to have a period of no work at all. In my experience, that is simply not true.

The way to avoid this mistake is to screen your clients as carefully as you would your other financial investments. You wouldn't invest in $25,000 worth of stock simply because a door-to-door salesman offered it to you, right? Include in your **written** limited scope representation agreement or

written power of attorney a clause that authorizes you to perform a background check your prospective client's financial, judicial, and criminal background. As part of that document, include a release so that you may receive the prospective client's banking, financial, criminal and judicial records. Have the prospective client hand-write an information form asking him or her to disclose whether he or she has ever filed a grievance or legal malpractice lawsuit against one or more attorneys. Ask for a primary banking reference in writing. Then follow up on each of these matters. Call former attorneys and ask whether you should be concerned about representing their former client. Run the court records at the county, district, state and federal levels. Check for previous unwarranted legal malpractice lawsuits or other signs of inappropriate litigiousness. Review the prospective client's credit report. Most important of all, follow your gut instinct.

I have refused to represent a potential client who tendered a perfectly good $25,000 retainer check because the results of my pre-representation investigation indicated that he or she would likely be "a problem client." Would I have enjoyed receiving the additional revenue? Of course. Do I regret my decision to send him or her packing? Not for a second. The bottom line is that some clients are simply not worth the aggravation that they can cause. Fortunately, with due diligence, you can limit your exposure in this regard at the inception of the representation.

VIII. Conclusion - The Proper Mindset for Limiting Exposure to the "Wrong" Clients.

The best strategy for limiting your and your firm's potential exposure to the "wrong" clients is a combination of three things: (1) an in-person or Zoom interview of the client or client representative by the actual attorney who will be primarily responsible for rendering legal services to the prospective client; (2) a well-written and comprehensive limited scope representation agreement that documents matters that will be important to the lawyer and the law firm in the unfortunate event that a prospective client turns into a problem client; and (3) performing some investigation into the client as part of the new-client vetting process.

When drafting an appellate representation agreement, it is helpful for an attorney to keep in mind two factors. The first factor is the definition of a "fiduciary duty." This is important because it is possible – depending upon the relationship between the appellate attorney and the prospective appellate client – that this is the standard that may apply to the appellate representation agreement:

> An attorney owes fiduciary duties to his client as a matter of law. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 428–29 (Tex.App.—Austin 2009, no pet.) (*citing Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex.1988)). "The term 'fiduciary' refers to integrity and fidelity; thus, 'the attorney-client relationship is one of the most abundant good faith, requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception.' " *Id.* at 429 (*quoting Goffney v. Robson*, 56 S.W.3d 186, 193 (Tex.App.—Houston [14th Dist.] 2001, pet. denied)). Attorneys must render a full and fair disclosure of facts material to the client's representation. *Willis*, 760 S.W.2d at 645; *Beck*, 284 S.W.3d at 429.

> Texas courts apply a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000) ("Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts.") (internal citations omitted); *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex.App.—Houston [14th Dist.] 2007, pet. denied). Thus, in cases involving such transactions, the profiting fiduciary bears the burden of showing the fairness of the transactions. *Keck, Mahin & Cate*, 20 S.W.3d at 699; *Lee*, 286 S.W.3d at 21 (*citing Collins v. Smith*, 53 S.W.3d 832, 840 (Tex.App.—Houston [1st Dist.] 2001, no pet.)).

Simply put, if all of your appellate representation agreements are drafted to meet this elevated standard, you never have to be concerned about which of your clients, or representations, or fee contracts, will ultimately end up being held to this elevated standard.

Second, recognize that while the vast majority of potential appellate clients are honest and truthful, a very small but seemingly increasing percentage of prospective clients seem willing to say or do anything – truthful or not – in order to achieve their litigation or appellate objectives. Sometimes, it is not possible to recognize a prospective client as being in this small percentage of prospective clients before entering into the attorney-client relationship. In those cases, a comprehensive and thoughtful appellate representation agreement where the client initials or signs each page and signs the last page, may make all the difference between experiencing or avoiding unwarranted financial liability and irreparable damage to one's professional reputation.

Most of us would never blindly invest money in an investment without performing some appropriate research beforehand. The same thing applies to prospective new clients who have the potential to severely damage our professional reputations, relationships, firms, finances, law licenses, and ability to obtain professional liability insurance in the future, if we are not careful at the outset of the prospective representation.

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CHECKLIST FOR YOUR FIRST CIVIL APPEAL

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Thirteenth Court of Appeals

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As Clerk of the Court, Kathy serves as the Court's administrative lead, at the direction of the Chief and five Justices. The clerk's office is responsible for filing, maintaining, and preserving official court records. The financial aspect of her work includes drafting and submitting the Court's operating budget and legislative appropriation requests. Additionally, her tasks include performing highly advanced and senior-level managerial appellate work, with specific attention to procedure and jurisdiction.

Prior to her appointment, Kathy served the Nueces County District Attorney's Office in various capacities over many years. These roles included 2nd Assistant DA-Office Administrator, crimes against children special prosecutor, as a trial court prosecutor at all levels (felony, misdemeanor, and justice of the peace), and as an intake prosecutor. She has taught various sections of the penal code to the Corpus Christi Police Department cadets, as well as presented hundreds of cases to the Grand Jury. Beyond experience as a public administrator, appellate attorney, and criminal litigator, Kathy's civil trial and litigation experience includes civil rights, complex contract disputes, and insurance defense. Additionally, as a solo practitioner, she managed a robust criminal defense, family law, parental termination, and mental health law/ commitment caseload.

In addition to her professional activities, Kathy loves hiking, biking, kayaking, running, and relaxing in nature (especially the beach) with her husband, Billy, and their three sons Elliot, Ethan, and Evan.\

PROFESSIONAL ACTIVITIES

Former Federal Law Clerk for Hon. Alia Moses, U.S. District Court-Western District of Texas; Current Chair SBOT-Professionalism Committee (past vice-chair and board member); Fellow, Texas Bar Foundation; Past Board Member, Corpus Christi Bar Association (2020-2023); Past member of the Texas Bar College; Past Board Member, Corpus Christi Young Lawyers Association; Board Member, Coastal Bend Women Lawyers Association (2013-present); Past-President (2x), Vice President, and (2x)Treasurer Coastal Bend Women Lawyers Association.

PUBLICATIONS AND RECENT PRESENTATIONS

Checklist for First Appeals (SBOT CLE Civil Appellate Practice 101, scheduled for Sept. 6, 2023)
Presenting your Case in Reviewable Format Panel member (Texas Bar College "Summer School" July 2023)
The Texas Day of Civility in the Law: Encouraging an active engagement in civility. Tex. B.J. 144 (March, 2023)
The Texas Lawyers' Creed: An Inspiration in Aspiration (Coastal Bend Women Lawyers Association, Nov. 2021)
Mentoring for Civility: Tools for every lawyer (Corpus Christi Bar Association, Sept. 2021)
Thirteenth Court of Appeals Year in Review (Corpus Christi Bar Association, Aug. 2021)
*The Texas Day of Civility in the Law: A Day to remember our constant obligation…*Tex. B.J. 508 (June, 2021)
Post-Pandemic Changes-Remaining Professional in a Virtual Court (SBOT CLE-"Soaking up Some Sun" South Texas Litigation Couse, May 2021)
Remaining Professional in a Virtual World (SBOT CLE-Advanced Evidence and Discovery CLE, April 2021)
Situational Leadership and Rapid Decision Making ("GEM"-Great Educational Moments video series, Council of Chief Judges-State Courts of Appeals website, Feb. 2021)
Trends and Insights from the 13th Court of Appeals, (Coastal Bend Women Lawyers, Jan. 2021)

TABLE OF CONTENTS

CHECKLIST FOR YOUR FIRST CIVIL APPEAL

I. INTRODUCTION: ARTICLE PARAMETERS

This paper is written for attorneys hoping to learn the basics of the appellate process, or those with such vast experience they desire to trim back the hedges and see the bare branches of the basic appellate case once again. For clarity, since the rules do vary between the court systems and case types and because this paper accompanies a presentation at a state civil appellate seminar, this paper is primarily focused on civil appeals in the State of Texas. However, much of the process and structure is the same for criminal appeals.

Sticking with the hedge analogy in the first sentence of the paper, the Texas' appellate system in its entirety is a maze of hedges, like those found in the beautiful gardens in Europe. While the hedges together create a beautiful, twisting and turning landscape (with some dead ends), each hedge, like each case, is made simply of branches and leaves. The paper breaks down those branches and leaves into prerequisites for appeal and then the checklist for the actual appeal, as follows:

Pre-requisite to an appeal:

- Appealable order or judgment
- Preserve the issue

Checklist for an appeal:

- Perfect the appeal
- Gather the record
- Present your argument
- Take action (or not) on the disposition

To state this intro succinctly, this paper strives to provide an introduction into the structure and basics of a Texas civil appellate case. Beyond the main "checklist for an appeal," this paper contains several other checklists that are compiled in Appendix A.

One additional consideration for your first appeal, the information provided in this paper is primarily derived from the Texas Rules of Appellate Procedure, and you should always locate and review pertinent local orders.

II. PRE-REQUISITE #1: APPEALABLE ORDER

To proceed with an appeal, you must first have an appealable order. This section will help you identify appealable orders, since the jurisdiction of the courts of appeals is strictly limited to review of final judgments and certain interlocutory orders provided by statute. The only exception to this strictly set jurisdiction is via original proceeding. *See generally* TEX. R. APP. P. 52.

While listed here for organizational sake, original proceedings are actually a necessary exception to the prerequisite of an appealable order, allowing a court of appeals to review, and possibly provide relief from, exceptional circumstances. In other words, original proceedings are not actually a type of appealable order. Rather, original proceedings are appeals filed by special petition seeking extraordinary relief (i.e. habeas corpus, mandamus, injunction, quo warranto). TEX. R. APP. P. 52.1.

To return to our hedge-maze analogy, original proceedings would be a rare and extraordinary flower, perhaps a rose bush, growing amongst the hedges thereby making it part of the maze, but the rose bush is not a standard or necessary fixture expected among the usual hedges. That said, here is the list for this section:

Types of Appealable Orders:

- Final Judgment
- Interlocutory
- Permissive
- Original Proceeding (excepts prerequisite of appealable order)

A. Final Judgments

You can spot a final judgment when the trial court order resolves all matters before it, save enforcement. Do not be tricked, an order may be entitled "final judgment," but it is the content that will truly designate the order as final. A

final judgment is issued when the trial court has disposed all pending claims against all parties in a legal matter. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001). Therefore, a final judgment may be an order dismissing a single party, if all the other parties have resolved their claims, or a final judgment may address only attorney's fees or other singular issue, again, if a prior "judgment" or order disposed of the chief controversy and all other claims. A final judgment must dispose of all remaining parties *and* all remaining claims.

B. Interlocutory Orders

A party without a final judgment may still be able to appeal certain orders. To appeal an order that is not final, you must have statutory authority to appeal. This process is traditionally called an interlocutory appeal or the appeal of an interlocutory order. The Texas Civil Practices and Remedies Code contains a specific section which provides the most common interlocutory appeals and is the main place a practitioner should check for authority to bring an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE 51.014. You may also find statutory authority in a specific practice code.

Without getting too far into the maze, a few general issues to consider in appealing an interlocutory order is whether the order is suspended, which is not necessarily automatic, and whether temporary orders are necessary considering the ongoing nature of trial court action. *See* TEX. R. APP. P. 29.1 and 29.3. Back to the branches and leaves, if an order is not final, it may still be appealable via statutory authority permitting an interlocutory appeal.

C. Permissive Appeals

The final general category of appealable orders is any order that accompanies permission to appeal. If an order is not final and not otherwise statutorily appealable, you may still petition the court of appeals to invoke its jurisdiction. TEX. R. APP. P. 28.3 (a). This type of appeal begins with obtaining permission from the trial court. *Id*. Actually, to pursue a permissive appeal, you must follow a two-step process which requires first the permission from the trial court, sometimes contained within the subject order, and second the granting of the petition filed at the court of appeals.

The petition for permissive appeal has its own technical requirements, distinguishable from the notice of appeal. *See* TEX. R. APP. P. 28.3(e). Of note, a petition for permissive appeal must contain arguments establishing a substantial difference of opinions on a controlling question of law that the resolution of will materially advance resolution of the litigation. TEX. R. APP. P. 28.3 (e)(4). Basically, if you are seeking permission to appeal an otherwise unappealable order, you need to demonstrate to the court of appeals the essential reasons appealing the order now is more important and expeditious than waiting until the final judgment to appeal. The most common mistake in permissive appeals occurs when a party obtains the trial court's permission and files only a notice of appeal stating the appealing party has permission. In these cases, the party has failed to file the requisite petition for permissive appeal with the court of appeals.

III. PRE-REQUISITE #2: PRESERVE THE ISSUE (TEX. R. APP. P. 33)

Finally, before we start our actual checklist for your first appeal, shift your focus to the activity at the trial court. In order to appeal, you must have an issue to appeal, and that issue should have first been addressed at the trial level. Addressing a potential appellate issue at the trial level is generally called error preservation.

As a prerequisite to appellate review, you must first preserve your error at the trial court. *See* TEX. R. APP. P. 33.1. First, the trial court must be aware of the nature of your objection, request, or motion; and second, the trial court must have ruled on the objections, request, or motion. *See* TEX. R. APP. P. 33.1(1) and (2)(A). If the trial court refused to rule on the matter, the complaining party must object to the refusal. *See* TEX. R. APP. P. 33.1(1) and (2)(A). In short, the courts of appeals are reviewing the trial court's action or inaction, so the trial courts must have had a chance to rule or act correctly.

Of course, there are a few exceptions and alternatives to the usual on the record objections and rulings error preservation. The most obvious exception is that sufficiency of evidence generally may be complained of for the first time on appeal. *See* TEX. R. APP. P. 33.1(d). This rule may be applied to legal or factual insufficiency and may be applied to damages. *See id.*

Sometimes, the issue you may want to appeal will not be available on the record. To complain on appeal about a matter not appearing on the record, you can develop the record through a formal bill of exception. *See* TEX. R. APP. P. 33.2. Texas Rules of Appellate Procedure 33.2 sets out the process for parties to submit and trial courts to accept or reject bills of exception. *See id*. In order to move on to our checklist, and without getting into the maze, if you have a matter that is not reflected on the record, a bill of exception is the procedure to get your issue properly recorded.

The nature of preserving your appeal will widely vary depending on the issue you are bringing to the court of appeals and there are many CLEs and papers dedicated to various methods. This CLE program contains a section dedicated to preservation of error, so for now, it suffices to say preserve your right to appeal.

IV. CHECKLIST ITEM 1: PERFECTING THE APPEAL

An appeal is perfected when a notice of appeal is timely filed. The notice of appeal may actually be filed in two places. The trial court is the most common and procedurally correct place to file a notice of appeal. TEX. R. APP. P. 25.1(a). However, the rules allow you to jump ahead and file the notice with the appellate clerk, since the appellate clerk is required to immediately send a copy to the trial court clerk. *See id.* That said, ordinarily, an appeal is perfected when a notice of appeal is timely filed with the trial court clerk.

A. Format for the Notice of Appeal

A notice of appeal is the document that lets the trial court and court of appeals know several important items related to the appeal. Texas Rule of Appellate Procedure 25.1(d) contains the requirements for the contents of the notice, as follows:

Basic items:

- Trial Court
- Cause number
- Case style
- Date of judgment or order being appealed
- Identity of party appealing
- Court of Appeals
- Name of each party filing the notice

Extra items (where applicable):

- Statement if accelerated
- Statement for parental termination case
- Statement for child protection case
- Restricted appeal information and verification
- Indigency statement

The basic items must be included in every notice of appeal, but the extra items are only required where relevant. When the status of the appealed order changes at the trial court level, if other parties join the notice, or if the notice contains a defect or omission, a party may amend the notice of appeal at any time before the brief is filed. *See* TEX. R. APP. P. 25.1(g). A common defect in a notice of appeal is failing to include a statement that the appeal is accelerated. The rules do not prescribe a certain format for the notice of appeal, so some practitioners list the requisite items as a technical list, but it is more common to draft the notice of appeal in a narrative format as found in Appendix C.

B. Timeline to file the Notice of Appeal

Appeals can follow various timelines depending on the type of appeal and timing of certain post-judgment motions. Generally, if appealing from a final judgment the notice of appeal must be filed within 30 days after the order is signed. *See* TEX. R. APP. P. 26.1. However, motions for new trials, motions to modify judgment, requests for findings of fact and conclusions of law, and a few other post-judgment filings can extend that timeline to 90 days. *See* TEX. R. APP. P. 26.1(a). A final addition to the timeline is by motion, an appellant may request an additional 15 days of time from their original due date. *See* TEX. R. APP. P. 26.3.

Some appeals have an accelerated appellate timeline. Interlocutory appeals, appeals in quo warranto proceedings, and various other appeals required to be expedited by statute are called accelerated appeals. *See* TEX. R. APP. P. 28. If your appeal is accelerated, the notice of appeal must be filed within 20 days after the judgment or order is signed. TEX. R. APP. P. 26.1(b). The longest timeline to file a notice of appeal is the six months allowed for to file a restricted appeal. *See* TEX. R. APP. P. 26.1(c). This extra-long timeline exists perhaps because a restricted appeal is reserved for parties that did not participate in the hearing that resulted in the subject order or judgment of the appeal. *See* TEX. R. APP. P. 30.

Finally, a cross-appeal may be filed within the standard timeframes already outlined or within 14 days of the first filed notice of appeal. *See* TEX. R. APP. P. 26.1(d). This means, if an appellant extends the timeline to file appellant's notice of appeal, it automatically extends the timeline to file to a cross-appeal.

When calendaring your own timeline to file a notice of appeal, and in general, always consult the Texas Rules of Appellate Procedure, The Texas Civil Practices and Remedies Code, and your case specific code sections in search of any requirement regarding acceleration.

V. CHECKLIST ITEM 2: GATHER THE RECORD

A court of appeals has only a few tools to review matters before it. These tools mainly consist of the record, the law, and the arguments presented within briefs. The second major checklist item for your first appeal is to gather the record. The two main components of an appellate record are the clerk's record and the reporter's record. *See* TEX. R. APP. P. 34.1. The clerk's record and reporter's record generally contain everything the court of appeals will know about the activity of the trial court relevant to the appeal. Once gathered and submitted to the court of appeals, attorneys representing parties in a case can review the record on the attorney portal (currently found on the Texas Courts website at https://attorneyportal.txcourts.gov/Account/Login (last visited on 07/27/2023)).

A. The Clerk's Record

Texas Rule of Appellate Procedure 34.5(a) enumerates the required contents of the clerk's record. These items would not surprise most trial attorneys and include all the pleadings, the court's docket sheet, and the judgment or order being appealed, among other basic case filings. *See* TEX. R. APP. P. 34.5(a). Beyond the standard items, any party or the court of appeals may designate documents to be included in the clerk's record which are relevant, useful, or related to the appeal. *See* TEX. R. APP. P. 34.5(b).

The clerk's record may also be supplemented by letter request to the trial court clerk. *See* TEX. R. APP. P. 34.5(c). The appellate court, or any party, may request supplementation of the clerk's record. *See id*. Whether it is necessary to supplement a record depends on whether the initial clerk's record contains all documents needed to fully brief the matter or otherwise aid in the disposition of the appeal.

In summary, the clerk's record is comprised of the "paper" documents filed with the trial court which aids in the resolution of the dispute, assists the court of appeals review a specific issue, or simply informs the court of appeals what happened at the trial court.

Attorneys and parties generally do not need to trouble themselves with the specific formatting required for the clerk's record. Clerk's records are generally standardized across Texas, as the Supreme Court has ordered the specific formatting requirement for the clerk's record. *See* TEX. R. APP. P. app. C. These requirements are enforced by each court of appeals individually, and the specific format of the clerk's record may vary slightly from court to court.

B. The Reporter's Record (Part 1: the transcript)

Texas Rule of Appellate Procedure 34.6(a) describes the contents of the reporter's record, which provides a stenographic recording and electronic recording option. This section will focus on electronic and physical exhibits, since the hearing and trial transcripts are fairly straight forward. *See* TEX. R. APP. P. 34.6(a)(1), (2).

Reporter's records generally vary more widely in size than clerk's records, since not every hearing or part of a trial may be relevant to an appeal. Therefore, parties may request a partial reporter's record under certain circumstances. *See* TEX. R. APP. P. 34.6(c)(1). Entire transcripts can be costly, so requesting a well-tailored partial reporter's record could make financial sense to you and your client. If you choose to request a partial reporter's record, be sure to comply with Rule 34.6(c)(1), which provides: "If the appellant requests a partial reporter's record, the appellant *must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues*." *Id.*

As with the clerk's record, a court of appeals, trial court, or any party may, by letter, request supplementation of the reporter's record. *See* TEX. R. APP. P. 34.6(d). This ensures minimal gamesmanship regarding which portions of the reporter's record are requested by appellant at the onset of an appeal. Each party should request the portions which are necessary to make its arguments clear for the court of appeals and should request a record sufficient to allow the court to rule. Requesting less than everything necessary for the appellate court's review, without complying with Rule 34.6(c)(1)'s requirement to designate limited issues for the appeal, can prevent the court from ruling in your favor. *See Lehman v. Lehman*, No. 03-19-00730-CV, 2021 WL 268482, at *4 (Tex. App.—Austin Jan. 27, 2021, pet. denied) (mem. op.) (holding that court "must presume that the omitted portions of the reporter's record from the final hearing support the trial court's order" where appellant failed to request entire reporter's record and failed to comply with Rule 34.6(c)).

C. The Reporter's Record (Part 2: the exhibits)

The clerk's record and the reporter's transcript make up the basic "paper" portion of the appellate record. Beyond the "paper" portion, the reporter's records frequently contain an exhibit volume. Usually, a reporter collects all relevant original exhibits from the clerk's office and prepares copies for the court of appeals. *See* TEX. R. APP. P. 34.6(g). It is common for a reporter to submit digital copies of certain exhibits, such as contracts, pictures, and other papers. Increasingly more frequently, reporters also transmit digital copies of video and audio exhibits. Practitioners introducing voluminous digital evidence at trial, that may be relevant to appellate issues are encouraged to read *Presenting your Case in Reviewable Format,* Chapter 15, 25th Annual Texas Car College Summer School for the

General Practitioner, July 21-23, 2023, by Brandy Wingate Voss and Kathy S. Mills. *Presenting your Case in Reviewable Format* provides the technical aspects and recommendations for introducing trial exhibits and their submission to a court of appeal.

VI. CHECKLIST ITEM 3: MAKE YOUR ARGUMENT

A. Filing a Brief

Once the appellate record is compiled and before the Court, the briefing time begins. Appellant's brief is typically due 30 days after the final portion of the record is received by the court of appeals. TEX. R. APP. P. 38.6(a). Accelerated appeals follow an altered timeline for briefing requiring appellants to file a brief within 20 days. *Id*. Appellee is provided the same 30 or 20 days, depending on type of appeal, with the appellant's brief triggering the timeline, rather than the records. *See* TEX. R. APP. P. 38.6(b) and 38.7.

While briefing can be as simple as one brief per side, in complex cases there might be additional rounds of briefing. However, since the rules stretch out to cover up to one appellant's reply brief, which is due 20 days after the appellee's brief was filed, the timeline and permission to file additional reply and response briefs can only be allowed with permission from the court upon request of either party or *sua sponte*. *See* TEX. R. APP. P. 38.6(d). Furthermore, once a brief is filed, it may be amended or supplemented so long as justice requires. TEX. R. APP. P. 38.7.

Motions for extension of time to file briefs are common during the briefing stage. Parties seeking more time to prepare and file their brief must file a proper motion. *See* TEX. R. APP. P. 38.6(d). Courts of appeals have a broad range of discretion in setting the briefing timelines, as such, a motion to extend may be filed even after the deadline to file a brief has tolled. *See* TEX. R. APP. P. 38.6(d). However, be leery of requesting time after the due date since a court of appeals can dismiss a case if appellant fails to file a brief, or it can affirm the judgment upon the filing of appellee's brief. *See* TEX. R. APP. P. 38.8(a)(1) and (3). Furthermore, each court has mandated performance measures and other considerations of judicial economy, so call the clerk of the court or fellow practioners familiar with the court you are in to determine whether to expect a liberal or strict briefing timeline.

B. Contents of a Brief

The basic outline, essentially the shell, of all briefs should look the same, as the contents of the brief are clearly delineated by rule. *See* TEX. R. APP. P. 38. The required contents of Appellant's brief are as follows:

Requisites of appellant's brief:

- Identity of Parties and Counsel
- Table of Contents (with page numbers and subject matter of each issue)
- Index of Authorities (alphabetically with pages)
- Statement of the Case
- Statement regarding Oral Argument
- Issues presented
- Statement of Facts (supported by record references)
- Summary of the Argument
- Argument (citation to authorities and record)
- Prayer
- Appendix; required items (unless voluminous or impracticable):
    - Judgment or order appealed
    - Jury charge and verdict
    - Finding of facts and conclusions of law
    - Text of rule, regulation, statute, etc.
    - Optional contents, any other item pertinent to issues

See TEX. R. APP. P. 38.1. The required contents of appellee's brief are as follows:

Requisites of appellee's brief:

- Table of Contents (with page numbers and subject matter of each issue)
- Index of Authorities (alphabetically with pages)
- Statement regarding Oral Argument
- Statement of Facts (supported by record references)

- Summary of the Argument
- Argument (citation to authorities and record)
- Prayer

See TEX. R. APP. P. 38.2(a)(1). Appellee's brief may optionally include a clarification or correction to the identity of parties. TEX. R. APP. P. 38.2(a)(1)(A). Furthermore, if appellee is dissatisfied with appellant's statement of case, statement of issues, or statement of facts, the appellee's brief may also include any or all of those sections. TEX. R. APP. P. 38.2(a)(1)(B). Appellee's brief should also respond to appellant's issues in the same order, if practicable. TEX. R. APP. P. 38.2(a)(2).

Finally, if appellant or appellee file a defective brief, the court of appeals typically provides notice with a timeline within which to correct. Whether you receive this notice or spot a defective brief after filings, you can simply file a corrected, compliant brief as an amended brief. Whether such a filing triggers appellee's timeline may vary slightly from court to court, so always verify the timeline with the Clerk of the Court's office.

C. Oral Argument

Oral argument is a right conferred to any party who timely requested it, unless the Court denies the request after examining the briefs. *See* TEX. R. APP. P. 39.1. The request for oral argument may be done by motion, but, most commonly and traditionally, the request for oral arguments is done in the brief section entitled "Statement Regarding Oral Argument." *See* TEX. R. APP. P. 38.1(e) and TEX. R. APP. P. 38.2(a)(1). Reasons a court may deny oral argument include the appeal being frivolous, the issues already authoritatively decided, the briefs and record adequately present the facts and legal argument, or if oral argument will not aid in the decisional process. *See* TEX. R. APP. P. 38.1(a)-(d).

If oral argument is set, check the setting notice or the Clerk of the Court regarding the time allotted for your argument and rebuttal, if any. The court sets the amount of time and counsel must seek permission to continue beyond the time allowed. *See* TEX. R. APP. P. 39.3. Generally, by rule and tradition, only one counsel argues for each side; however, by leave of court no more than two may argue per side. *See* TEX. R. APP. P. 39.4. Finally, if the party consents and court grants leave, amicus may *share* in the time allotted to one party. *See* TEX. R. APP. P. 39.5. A final note, for anyone hoping to present oral argument for specialization qualification, it is common to state so within the statement on oral argument, and in many courts, it will increase your likelihood of getting an opportunity to argue before the court.

D. Submission

At some time after briefing is complete, parties will receive the notice of submission which tells the parties whether the case will be submitted on the briefs or with oral argument. *See* TEX. R. APP. P. 39.8. If oral argument is set, the notice will also include when and where the argument will be held and how much time is allotted for argument. *See* TEX. R. APP. P. 39.8.

Finally, the parties will learn the names of the justices serving the panel assigned to review the case in the submission notice. *See* TEX. R. APP. P. 39.8(d). This allows time for the parties to object and to talk to fellow practioners regarding your assigned panel members unique approaches to oral argument.

VII. CHECKLIST ITEM 4: TAKE ACTION (OR NOT) ON THE DISPOSITION

A. Disposition by the Court (opinion and judgment issued)

After submission on the briefs or oral arguments, the court will reach its disposition. The courts consider statutory requirements, demands of justice, judicial economy and the court's standard practices when determining what order they will decide the cases on its docket. *See generally* TEX. R. APP. P. 40. If you are curious how long your case might be waiting, the Office of Court Administration publishes an annual report containing statistics related to disposition timelines for appellate cases. https://www.txcourts.gov/statistics/annual-statistical-reports/ (last viewed on July 27, 2023).

Appellate cases are typically disposed of by panels of three justices. *See* TEX. R. APP. P. 41.1(a). The court must hand down a written opinion that concisely addresses each issue necessary to the final disposition of the appeal. *See* TEX. R. APP. P. 47.1. On the date the opinion is handed down, all parties, the trial judge, the trial court clerk, and the regional administrative judge will receive a copy of the opinion and the judgment. *See* TEX. R. APP. P. 48.1. If a clerical error is noted in any of the documents, call the Clerk of the Court to address your concern first, as they may be able to fix clerical errors quickly.

Courts of appeals have little variety in the permissible judgments. They may either affirm in whole or part, modify and affirm, reverse and render in whole or part, reverse and remand, vacate and dismiss or simply dismiss the appeal. TEX. R. APP. P. 43.2. The judgment will be issued at the same time as the opinion.

B. Proceeding at the intermediary court

If you think the court of appeals misunderstood the arguments or did not give adequate weight to a certain portion of the record, you might try representing those arguments to the same panel. Parties can request a motion for rehearing within 15 days of the issuance of a judgment or order which clearly states the points relied on for the request. TEX. R. APP. P. 49.1. Rehearing may be granted by majority of the same panel and can lead to additional briefing or disposition without additional briefing. TEX. R. APP. P. 49.3. If the rehearing results in a modified judgment, new judgment, or different opinion, and additional motion for rehearing may be filed. TEX. R. APP. P. 49.5.

If you think the panel reached a conclusion that is different from what the court en banc might have reached, or feel that en banc review is otherwise appropriate, a party may file a motion for en banc reconsideration. *See* TEX. R. APP. P. 49.7. If filed within 15 days of the judgment or order, or the denial of the last timely filed motion for reconsideration, a party may request en banc reconsideration. Id. The judgment or order does not become final if a majority of the court orders en banc reconsideration. *Id.*

C. Proceeding to the Supreme Court

If upon reviewing the opinion, you ideologically disagree with the court of appeals, there are disagreements among other courts of appeals relative to your issues, there are progressing areas of related law, or when otherwise appropriate, you might elect to proceed to the Supreme Court of Texas. Parties proceed by filing a petition of review at the Supreme Court of Texas requesting review of the court of appeals judgment. *See* TEX. R. APP. P. 49.5. A petition for review must be filed within 45 days of the judgment or the last ruling on a timely filed motion for rehearing or en banc reconsideration. *See* TEX. R. APP. P. 53.7.

D. Accept the Judgment and Opinion

Most appeals end after the opinion and judgment are issued by the court of appeals. The judgment becomes final when all timelines for rehearing and petitions for review have passed, and the clerk of the court of appeals issues the mandate. *See* TEX. R. APP. P. 18.1(a). The next task is to return to the trial court for any appropriate action.

VIII. CONCLUSION AND A WORD ON PROFESSIONALISM AND CIVILITY

Common processes that follow an appeal are re-setting the case for trial, entering a final judgment consistent with the opinion handed down, enforcing the judgment as final, or simply following the instructions provided by the opinion and judgment. Throughout this process it is best to act with professionalism and civility.

Since a favorite section of the Texas Bar Journal is the disbarments and disciplinary section, it goes without saying, lawyers are bound by the Texas Disciplinary Rules of Professional Conduct. Additionally, lawyers are encouraged to adhere to the Texas Lawyers Creed. Appendix B. Has is it been a while since you read the Texas Lawyers Creed? If so, go read it today. The Creed is full of instruction on how, when, and to whom our civility must be extended.

The Creed's overwhelmingly active approach highlights the fact that civility requires actual effort. For example, to be civil you show kindness, you show patience, you listen actively, you temper difficult conversations, you concede when appropriate, and you strive to find agreement. Of course, civility can also be achieved through some restraint, as it is achieved by resisting negative emotions, avoiding disagreement where possible, and eliminating personal attacks. No matter how it is achieved, civility is the cornerstone of every truly successful legal career.

True leaders exhibit and encourage active civility. This leadership may be seen by both the least and most experienced in the profession alike. It is truly one area where a newer attorney can win, whether in negotiations, in the courtroom, or with clients. Alternatively, an experienced attorney can demonstrate that a reputation of civility and years of active civil and professional behavior can pay dividends in those same arenas and may be called upon to get yourself out of a sticky situation. Age and experience do not matter when engaging in and leading civility.

Finally, civility does not denote defeat or victory, rather it embodies the very process by which a great lawyer performs their work. Be a great lawyer by both following the rules of professional conduct and committing yourself to the Texas Lawyer's Creed.

APPENDIX A:

Helpful Checklists

Appeal Process Checklist

- ☐ Obtain appealable order or judgment (pre-requisite)
- ☐ Preservation of the issue (pre-requisite)
- ☐ Perfect the appeal/file the notice
- ☐ Gather the record (clerk's and reporter's)
- ☐ Present your argument in briefs
- ☐ Present your argument in oral argument (if applicable)
- ☐ Take action (or not) on the disposition

Appealable Order Checklist (must check one)

- ☐ Final Judgment
- ☐ Interlocutory
- ☐ Permissive
- ☐ Original Proceeding (excepts prerequisite of appealable order)

Notice of Appeal Content Checklist

- ☐ Trial Court
- ☐ Cause number
- ☐ Case style
- ☐ Date of judgment or order being appealed.
- ☐ Identity of party appealing
- ☐ Court of Appeals
- ☐ Name of each party filing the notice
- ☐ Optional items:
    - o State if accelerated
    - o State if parental termination case
    - o State it child protection case
    - o Restricted appeal information and verification
    - o Indigency statement

Appellant's Brief Checklist

- ☐ Identity of Parties and Counsel
- ☐ Table of Contents (with page numbers and subject matter of each issue)
- ☐ Index of Authorities (alphabetically with pages)
- ☐ Statement of the Case
- ☐ Statement regarding Oral Argument
- ☐ Issues presented
- ☐ Statement of Facts (supported by record references)
- ☐ Summary of the Argument
- ☐ Argument (citation to authorities and record)
- ☐ Prayer
- ☐ Appendix; required items (unless voluminous or impracticable):
    - o Judgment or order appealed
    - o Jury charge and verdict

- Finding of facts and conclusions of law
- Text of rule, regulation, statute, etc.
- Optional contents, any other item pertinent to issues

Appellee's Brief Checklist

- ☐ Table of Contents (with page numbers and subject matter of each issue)
- ☐ Index of Authorities (alphabetically with pages)
- ☐ Statement regarding Oral Argument
- ☐ Statement of Facts (supported by record references)
- ☐ Summary of the Argument
- ☐ Argument (citation to authorities and record)
- ☐ Prayer

APPENDIX B:

The Supreme Court of Texas and The Court of Criminal Appeals Texas Lawyer's Creed A Mandate for Professionalism

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. Lawyer To Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. Lawyer To Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. Lawyer And Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Also available at:
https://www.txcourts.gov/media/276685/texaslawyerscreed.pdf (last viewed 07/27/2023)

APPENDIX C:

Sample Notice of Appeal

CAUSE NO. [_____]

[NAME],	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	[_____] COUNTY, TEXAS
	§	
[NAME],	§	
	§	
Defendant.	§	
	§	[_____] JUDICIAL DISTRICT

[Party Identity]'S NOTICE OF APPEAL

[IDENTIFY PARTY] states [HER/HIS/ITS] comes now to appeal the [FINAL JUDGMENT OR IDENTIFY ORDER] signed on [Date], in [CASE INFORMATION, STYLE, COUNTY, ETC.]. Pursuant to Texas Rule of Appellate Procedure 25.1, this appeal is taken to the Court of Appeals for the [IDENTIFY COURT OF APPEALS] in [LOCATION OF COURT OF APPEALS].

[IDENTIFY RELATED APPEALS OR STATE NONE]

Respectfully submitted,

[STANDARD SIGNATURE LINE
FOR COURT FILINGS]

[STANDARD CERTIFICATE OF SERVICE]

The Appellate Advocate
Appellate Section, State Bar of Texas
Volume 34 – No. 1, Fall 2024

CHECKLIST FOR YOUR FIRST APPEARANCE AS APPELLATE COUNSEL IN TRIAL COURT

MIA LORICK, *Houston*
Locke Lord, LLP

HON. LAUREN REEDER, *Houston*
Judge, 234th Civil District Court

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Partner
Locke Lord, LLP
600 Travis, Suite 2800
Houston, Texas 77002

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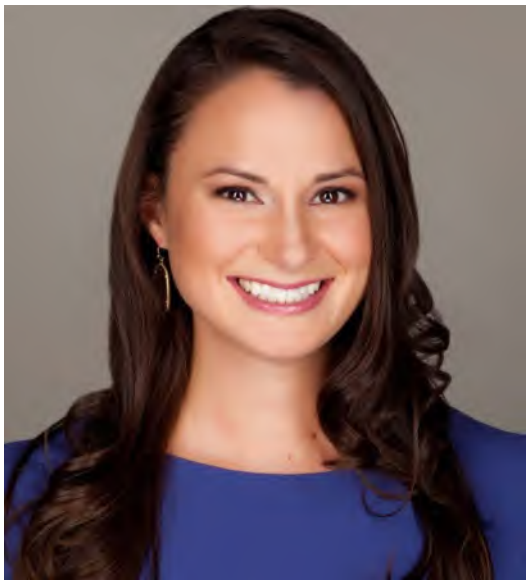
Mia.Lorick@lockelord.com

BACKGROUND, EDUCATION, AND PRACTICE

Mia Lorick is Board Certified by the Texas Board of Legal Specialization in civil appellate law and concentrates her practice on real estate litigation, commercial litigation, and civil appeals. She has tried jury trials, bench trials, and has argued before the Texas Supreme Court as well as numerous intermediate courts of appeals. Mia has been named a Woman to Watch by the Houston Business Journal and a Rising Star by both Texas Super Lawyers and the University of Houston Law Center.

Prior to law school, Mia was a modern dancer in New York City. She earned her Bachelor of Fine Arts from North Carolina School of the Arts and earned her Juris Doctor from the University of Houston Law Center. Most recently, Mia founded the Suited for Success Scholarship—a scholarship that awards law students with a business suit for interviewing.



Lauren R. Reeder

Lauren Reeder is the Judge of the 234th Civil District Court in Harris County and has been on the bench since January 1, 2019. Prior to taking the bench, she practiced commercial and business litigation at a large global law firm and a Houston-based litigation boutique. Most recently, she served as an Assistant District Attorney with the Harris County District Attorney's office, where she tried dozens of cases to verdict. As member of the Public Corruption division of the Harris County District Attorney's Office, she investigated and prosecuted public servants accused of committing crimes in the scope of their public duties. She graduated from Harvard Law School, where she was the Co-Chair of La Alianza and a member of the Women's Law Association. She holds an undergraduate degree from New York University. She is on the faculty of the National Institute for Trial Advocacy, and is active in a variety of professional organizations including the National Association of Women Judges.

TABLE OF CONTENTS

CHECKLIST FOR YOUR FIRST APPEARANCE AS APPELLATE COUNSEL IN TRIAL COURT

I. INTRODUCTION

Normally, when most lawyers think of appellate counsel, they think of the lawyer that handles the appeal after there is a judgment in the trial court. But seasoned trial and appellate practitioners understand the value an appellate lawyer can add in the trial court. As an appellate practitioner, you should be familiar with how you can assist in the trial court and offer your assistance early in the case. This paper will provide a checklist that you can use when making your first appearance as appellate counsel in the trial court.

II. OBJECTIVES AS TRIAL COUNSEL V. APPELLATE COUNSEL

Trial lawyers are tasked with telling a compelling story to persuade the jury to find for their client. They focus on themes and phrases that resonate with the jury so that the jurors understand the complex issues.

Appellate lawyers focus on ensuring that the facts presented to the jury are supported by the evidence and that any facts that are needed to support the asserted claims and defenses are memorialized in the record. Many appellate lawyers aren't engaged until closer to trial. If you're lucky enough to be brought in earlier, consider getting involved in the following pre-trial motions:

III. INITIAL MOTION CHECKLIST

There are several appellate considerations that arise at the outset of litigation. Consider the following motions and be sure to discuss them with trial counsel as early as possible.

- □ Motions to Transfer Venue
- □ Special Appearances
- □ Rule 91a Motions to Dismiss
- □ TCPA Motions to Dismiss
- □ Pleas to the Jurisdiction

A. Motions to transfer venue

Pursuant to Texas Rule of Civil Procedure 86, an objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.[1] The most important thing about motions to transfer venue is the due order of pleadings. This motion must be asserted before or with the first defensive pleading, but not before a special appearance, as discussed *infra*.

The motion to transfer venue must state the legal and factual basis for transferring venue. While the motion does not need to be verified, it can be accompanied by an affidavit. If there are factual statements you rely upon to establish mandatory venue, you should attach an affidavit to support those factual statements.

Texas Rule of Civil Procedure 87 governs the determination of a motion to transfer venue. Under Rule 87, motions to transfer venue require 45 days' notice. The evidence a trial court considers in deciding a motion to transfer venue are the pleadings, supporting and opposing affidavits, and any stipulations of the parties. Because the hearing on a motion to transfer venue is non-evidentiary, the court will only consider the pleadings, any stipulations made between the parties, and such affidavits and attachments. It is important as an appellate practitioner to understand and advise on the contents and procedural requirements related to venue.

B. Special Appearances

Under Texas Rule of Civil Procedure 120a, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over a defendant. The objection to jurisdiction under this Rule is that such party or property is not amenable to process issued by the courts of the State. A special appearance may be made as to an entire proceeding or as to any severable claim involved in the proceeding.

A special appearance must be the first defensive pleading filed in response to a lawsuit under the due order of pleadings. The motion must be sworn and filed prior to a motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent; and may be amended to cure defects.

[1] Tex. R. Civ. P. 86

Hearings on special appearances are evidentiary. Therefore, it is appropriate for appellate counsel to attend. If you assert a special appearance, you should be prepared to present oral testimony and evidence at the hearing. Failure to do so may result in you not meeting your burden to properly object to the court's jurisdiction.

C. Rule 91a Motions to Dismiss

Pursuant to Texas Rule of Civil Procedure 91a, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.[2] The Rule is meant as a mechanism for the early and speedy resolution of baseless claims. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

Procedural Timeline:

A motion to dismiss under Rule 91a must be:

- filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;
- filed at least 21 days before the motion is heard; and
- granted or denied within 45 days after the motion is filed.[3]

Rulings on motions to dismiss under Rule 91a may be reviewed by petition for writ of mandamus. As such, appellate counsel are often involved in the drafting and argument of these motions in the trial court.

D. Motions to Dismiss Pursuant to the Texas Citizen's Participation Act

The Texas Citizens Participation Act ("TCPA"), codified in Chapter 27 of the Texas Civil Practice and Remedies Code, is also known as the Anti-SLAPP statute. It allows a defendant to file a motion to dismiss the lawsuit within 60 days of being served with the legal action.

Procedural Timeline

Appellate practitioners should be aware of the procedural requirements under the TCPA, as failure to adhere to notice requirements under the statute could give your opponent a basis to move to strike your motion and evidence.

The following is a checklist of the procedural requirements under the TCPA:

- A Motion to Dismiss under Chapter 27 must be filed "not later than the 60th day after the date of service of the legal action."[4]
- All discovery is stayed.[5]
- There is a 21-day notice requirement for the hearing on the motion to dismiss.[6]
- The nonmovant's response to the motion to dismiss is due 7 days before the hearing.[7]
- The hearing on the motion must be set not later than the 60th days after the date of the service of the motion unless good cause or docket conditions prevent a hearing within 60 days but in no event later than 90 days after service of the motion.[8]
- The court must rule on the motion within 30 days after the hearing.[9]

Because the hearing on TCPA motions to dismiss are non-evidentiary hearings, the evidence you rely upon must be attached and filed with the motion to be considered.

The denial of a motion to dismiss under the TCPA is subject to interlocutory appeal under Section 51.014 of the Texas Civil Practice and Remedies Code. Because of this, appellate lawyers are often consulted for the drafting, hearing, and likely appeal on the motion.

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[2] Tex. R. Civ. P. 91a.
[3] Tex. R. Civ. P. 91a.3(a).
[4] Tex. Civ. Prac. & Rem. Code § 27.003(b).
[5] Tex. Civ. Prac. & Rem. Code § 27.003(c).
[6] Tex. Civ. Prac. & Rem. Code § 27.003(d).
[7] Tex. Civ. Prac. & Rem Code § 27.003(e).
[8] Tex. Civ. Prac. & Rem Code § 27.004.
[9] Tex. Civ. Prac. & Rem Code § 27.005.

IV. INTERLOCUTORY APPEAL CHECKLIST

Under Section 51.014 of the Texas Civil Practice and Remedies Code, the following orders are subject to interlocutory appeal. Be sure to check this list to consider whether you need to file a notice of appeal after one of the following interlocutory orders is signed.

- □ appoints a receiver or trustee
- □ overrules a motion to vacate an order that appoints a receiver or trustee
- □ certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure
- □ grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65
- □ denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state
- □ denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73
- □ grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code
- □ grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001
- □ denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351
- □ grants relief sought by a motion under Section 74.351(l)
- □ denies a motion to dismiss filed under Section 90.007
- □ denies a motion to dismiss filed under Section 27.003
- □ denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022
- □ denies a motion filed by a municipality with a population of 500,000 or more in an action filed under Section 54.012(6) or 214.0012, Local Government Code

V. CHECKLIST FOR DISCOVERY ISSUES

Discovery issues are commonplace for trial lawyers. But as appellate counsel, you may consider getting involved for the following issues:

- □ Motions to Compel Written Discovery
- □ Motions to Compel Depositions
- □ Objections to Third-Party Subpoenas

Once there is an adverse ruling against your client on a motion to compel, you should also consider whether a petition for writ of mandamus may be appropriate. If a Judge orders the production or deposition of the following, you should consider whether it warrants seeking mandamus relief:

- □ Discovery related to Net Worth
- □ Apex Depositions
- □ Attorney-Client Privilege Waiver

VI. SUMMARY JUDGMENT

The most common pre-trial motions that appellate lawyers assist with are motions for summary judgment. It has become more common that appellate lawyers draft and even argue the motion to the trial court.

Rule 166a requires that a motion for summary judgment be served 21 days before the time specified for the hearing. The motion must state the specific grounds being asserted and any evidence must be competent summary judgment evidence.

The evidence permitted by Rule 166a:

- deposition transcripts
- interrogatory answers
- other discovery responses referenced or set forth in the motion or response
- the pleadings

- admissions
- affidavits
- stipulations of the parties, and
- authenticated or certified public records, if any, on file at the time of the hearing

A common pitfall in filing summary judgment evidence is lack of authentication. All evidence attached to your motion for summary judgment must be in admissible form. Meaning, documents that may be subject to a hearsay objection must fall under an exception to hearsay. Most often, a business records affidavit is used or certified copies of public records are obtained. Without authenticating your evidence, you give your opponent a basis to move to strike your evidence. If the evidence is striken, it is unlikely that you will succeed on the motion.

No-evidence motions for summary judgment are governed by Texas Rule of Civil Procedure 166a(i). After an adequate time for discovery, a party may move for summary judgment on the basis that there is no evidence of one or more essential elements of a claim or defense. The motion must state the specific elements being attacked. Be careful in submitting evidence with a no-evidence motion for summary judgment, as the other side may be able to use evidence you submitted to defeat the motion. Instead, a no-evidence motion puts the burden on the non-movant to present competent summary judgment evidence to raise a genuine issue of material fact.

Hearings on motions for summary judgment are non-evidentiary. While the court will hear arguments of counsel, there is no testimony or evidence at the hearing. However, because motions for summary judgment are typically case dispositive, appellate lawyers often collaborate with trial counsel in the presentation of argument to the trial court. Orders on most motions for summary judgment are not subject to an interlocutory appeal. But you may want to consider whether a request for a permissive appeal is appropriate.

VII. CHECKLIST FOR PERMISSIVE APPEALS

To seek a permissive appeal, the trial court must first grant permission. As appellate counsel you should file a motion with the trial court and identify the controlling area of law as to which there is a substantial ground of difference of opinion and state why an immediate appeal may materially advance the ultimate termination of the litigation.

If the trial court permits an appeal from an interlocutory order that is otherwise not appealable, then permission to appeal must be stated in the order.

The party seeking the appeal must also petition the Court of Appeals for permission to appeal. Under Texas Rule of Appellate Procedure 28.3, the petition to the Court of Appeals must be filed within 15 days after the order to be appealed is signed or within 15 days of the amended order containing the permission is signed. The Petition must include the following:

- □ Notice of Appeal information
- □ Copy of Order being appealed
- □ Table of Contents
- □ Issues on Appeal
- □ Statement of Facts
- □ Why the appeal involves a controlling area of law and substantial ground for difference of opinion; and how the immediate appeal may materially advance the ultimate termination of litigation

VIII. YOU'VE BEEN HIRED AS APPELLATE COUNSEL FOR TRIAL, NOW WHAT?

If you are hired to help trial counsel right before trial and did not have the opportunity to assist before the pre-trial conference, there are still a lot of significant issues you will need to be familiar with. Before pre-trial make sure you:

- □ Review the Pleadings
- □ Review the Key Depositions
- □ Review Prior Dispositive Motions
- □ Review the Applicable Law on the claims
- □ Review the Trial Court's Local Rules
- □ Review the Trial Court's Pre-Trial Order

IX. PRE-TRIAL CONFERENCE

As appellate counsel, you should be involved and assist trial counsel in framing the issues for trial. Take your direction from trial counsel and let them know that you're there as support—not to take over. The following are the typical documents and issues you will help prepare and argue during the pretrial conference:

- □ Motion in Limine
- □ Motions to Exclude
- □ Jury Charge
- □ Pending Expert Issues
- □ Exhibit List

A. Motion in Limine

A motion in limine asks the trial court to consider limiting certain issues, testimony, or topics from being mentioned to the jury. You should be prepared to argue why certain issues may be prejudicial and have supporting case law for your position. While the Motion is typically filed and exchanged prior to the pre-trial conference, the trial court will expect argument on each part of your motion during pre-trial.

The motion and responses do not by themselves preserve error. If a court grants a part to the motion in limine then the party must make an offer of proof to preserve error during trial. If the court denies the motion in limine, then the party must object during trial, re-urge the motion, and obtain a ruling.

You should note that if the trial court is pre-admitting exhibits on the record during pre-trial, then you should state your objection and not wait until the exhibit is first introduced at trial to object.

B. Jury Charge

The jury charge is the blueprint for trial and appeal. Let the trial lawyers argue the facts and let them use you to argue the law for specific areas. The jury charge will be revised throughout trial, so come prepared with a Word document to offer the trial court Judge and be prepared to make revisions throughout trial.

The jury charge is often drafted well before pretrial. You should review the claims and defenses asserted and consult the Texas Pattern Jury Charge as a framework for your first draft. When crafting the jury charge consider how it reads to a juror who is not as familiar with the case. Is it easy to follow? Does it clearly state the issues? Does it clearly and accurately state the law? Because the jury charge is the single most important document in a jury trial, you should work with trial counsel to ensure the jury charge presents all instructions, definitions, and questions.

X. TRIAL

As the appellate lawyer at trial, you will likely assist or handle the following:

- □ Voir Dire
- □ Offers of Proof
- □ Directed Verdict
- □ Jury Charge Conference

A. Voir Dire

Voir dire is the only opportunity the lawyers have to speak directly with the jurors. Therefore, it is important to develop the theme of the case and applicable analogies beforehand. Most trial lawyers will handle voir dire as it helps them build rapport with the jury, but it is not uncommon that appellate lawyers either handle voir dire or handle the strikes and preservation of error issues. Either way, ask the trial lawyer how you can best assist her during voir dire.

1. Jury Shuffle

Once you receive the list of the jury pool, you should quickly review it with trial counsel to determine whether you want a jury shuffle. The rules allow one shuffle per case and you must request a jury shuffle before voir dire begins otherwise it is waived.

2. Prohibited Questions

If a court prevents an attorney from asking certain questions, then to preserve error the attorney must:

(1) make a record showing the questions it would ask; and
(2) obtain a ruling on its request to ask those questions.

3. Improper Questions

If the opposing attorney asks an improper question, then you should object and if sustained you should ask for an instruction that the jurors disregard. If the prejudice is incurable, you should also move for mistrial.

4. Not Enough Time

If your side thinks that it did not have enough time for voir dire then you should:

(1) request additional time;
(2) make a bill of exceptions showing what questions it would have asked if allowed the time; and
(3) show that she did not needlessly prolong voir dire and that the questions she would have asked were proper and were questions that the panel was unable to examine

5. Challenges for Cause

If a juror is categorically disqualified from being a juror (example = racial bias) then you should make a challenge for cause. There is no limit on challenges for cause but if the court overrules one of the challenges then you must preserve error by using a peremptory challenge on the juror that should have been stricken for cause, exhaust all remaining peremptory challenges and show that you used all peremptory challenges and thus are unable to use a peremptory to strike the disqualified juror, and before the jury is seated you must also make the court aware of the objectionable juror that you would have used a peremptory on before submitting its peremptory strike list. If the objectionable juror is then seated on the jury, you have preserved your complaint.

6. Peremptory Challenge

Each side gets six peremptory challenges. If you believe your opponent is using peremptory challenges to strike jurors based on race or gender, then must make a Batson Challenge prior to the jury being empaneled and sworn. The burden shifts to the opposing attorney to provide a race or gender-neutral reason for the strike.

B. Offers of Proof

An offer of proof is an informal bill that offers proof of substance that is excluded from the trial. The offer of proof must be made before the jury is charged and it is included in the reporter's record for review on appeal.

If the trial court sustains an objection as to testimony or evidence being excluded the attorney offering the evidence should preserve error by making an offer of proof.

The offer of proof:

(1) Must be done outside the presence of the jury
(2) Must be on the record
(3) Must be made before the jury is charged.

The trial court has discretion on whether the offer of proof is done is summary format or question and answer. If the offer of proof includes exhibits, then you should offer the exhibits as "court only" exhibits and specifically request that the court reporter include the summary, testimony, and exhibits in the offer of proof. At the end of the offer of proof you must re-ask that the evidence be admitted and obtain an adverse ruling to preserve error.

C. Directed Verdict

A motion for directed verdict is used to argue that there are no factual issues for the jury to consider and that the Judge can rule as a matter of law. The Motion can be made after plaintiff rests, defense rests, or when all parties close. If defense makes motion after plaintiff rests but then proceeds to put on evidence, the defense must make the motion again after defense rests to preserve error. If the plaintiff puts on rebuttal evidence, the defense must make the motion again at the close of all of the evidence to preserve error.

D. Jury Charge Conference

Appellate lawyers add the most value during the informal and formal jury charge conference. The informal conference is important because you gain insight into how the Judge thinks the jury charge should read. Consider the informal jury charge like a discussion with the court and opposing party. You should aim to be helpful in guiding the court to a jury charge that supports the pleadings and evidence presented. Have your proposed jury charge in Word format and be ready to take notes and revise as needed.

Be ready to step in and take charge of the discussion. You should have various proposed instructions and questions ready to discuss with the Court. Take note of how the charge will likely read but be sure to not abandon your proposed instructions, definitions, and questions before the formal charge conference. The informal conference is not on the record; therefore error is not preserved. You will need to make sure to assert your objections during the formal charge conference.

At the formal conference, have your proposed jury charge submissions and write a script for your tenders and objections. Have copies of each proffered instruction, definition, and question for the Court to sign.

Your objections to the jury charge must be specific. You cannot adopt or incorporate an objection made to a previous question. You must re-state each objection for each objectionable instruction, definition, or question. If you bear the burden of proof then you will need to object to an omitted or improper instruction, definition, or question and tender your proposed instruction, definition, or question to the court. The tender to the court is required to preserve error and it must:

(1) Must be in writing. Requests for submission of a question or instruction to be included in the charge, must be made separate and apart from the objections to the charge.
(2) Must be in substantially correct format and law. You need correct statement of law and correct form.
(3) Must be "refused" by the trial court and include a signature. To make this easier for the Court, come prepared with each submission on a separate page and include a place for the judge to signed "accepted" or "refused." Once the Judge signs all your requested submissions, make sure that the signed submissions are filed into the record.

XI. CONCLUSION

Assisting as appellate counsel in trial can be extremely beneficial when you ultimately handle the appeal post-judgment. You will be familiar with the issues, and you will have had a hand in preserving error. The days of appellate counsel only stepping in post-judgment are over, appellate lawyers are highly sought after at the outset of litigation so be sure to familiarize yourself with the issues presented here to ensure you provide the best support possible.

The Appellate Advocate
Appellate Section, State Bar of Texas
Volume 34 – No. 1, Fall 2024

COMMON APPELLATE ISSUES FOR THE NEW PRACTITIONER - APPELLANT AND APPELLEE BRIEF CHECKLISTS

HELEN TURNER, *Houston*
Locke Lord

Helen Turner

Ms. Turner's experience spans the intersection of the global digital economy, finance, and law. As an attorney for Locke Lord LLP, she defends Fortune 500 banking lenders and mortgage servicing firms in state and federal court matters involving bankruptcy, mortgage securitization, secured transactions, and commercial and consumer financial litigation claims. She also provides investment and technology consultation to various venture companies in the technology and media & entertainment sectors. She has a background as a finance attorney and a media law professor. Additionally, she engages in global finance policy work. For instance, a paper that she co-authored entitled, "Incentivizing Cybersecurity Governance in Emerging Markets Private Equity Investments via the World Bank–IFC Asset Management Company," was used to support a recently published Bretton Woods Committee policy brief on security issues in cryptocurrencies. Early in her career, Helen was a Staff Attorney for the Honorable Sarah Beth Landau of the Court of Appeals for the First District of Texas and a Career Law Clerk to the Honorable Jeff Bohm in the U.S. Bankruptcy Court for the Southern District of Texas. She is an alumna of Harvard University and Thurgood Marshall School of Law.

TABLE OF CONTENTS

APPELLANT'S BRIEF CHECK LIST

Rule 38.1 of the Texas Rules of Appellate Procedure provides detailed requirements for an appellant's brief.[1] Appellant's brief must, under appropriate (bolded) headings and in the order here indicated, contain the following:

☐ **Identity of Parties and Counsel - Tex. R. App. P. 38.1(a)**

- ☐ All Trial Counsel
  - ☐ Name
  - ☐ Firm or Office Name
  - ☐ Mailing Address
  - ☐ Telephone Number
  - ☐ Email Address
- ☐ All Appellate Counsel
  - ☐ Name
  - ☐ Firm or Office Name
  - ☐ Mailing Address
  - ☐ Telephone Number
  - ☐ Email Address

☐ **Table of Contents - Tex. R. App. P. 38.1(b)**

- ☐ Include references to page numbers
- ☐ Include references to the subject matter of each issue or point of error

☐ **Index of Authorities - Tex. R. App. P. 38.1(c)**

- ☐ Arrange legal authorities alphabetically
- ☐ Include references to page numbers where the authorities are cited

[1] Helen Turner created this check list as a practical and interactive visual aid and guide for appellate practitioners. This check list is for informational purposes only. This check list is not intended to be exhaustive or comprehensive. Please refer to the Texas Rules of Appellate Procedure, the Local Rules, and all other applicable rules, as the Rules are subject to change.

☐ **Statement of the Case - Tex. R. App. P. 38.1(d)**

- ☐ Concisely address the following:
  - ☐ The nature of the case
  - ☐ The court of the proceedings
  - ☐ The trial court's disposition of the case
- ☐ Omit any facts and arguments
- ☐ Ensure that this section is less than one-half page

☐ **Brief Statement Regarding Oral Argument - Tex. R. App. P. 38.1(e)**

- ☐ Is there a need for oral argument?
  - ☐ Yes
    - ☐ Add a short statement explaining (1) why oral argument should be permitted and (2) how the court's decisional process would be aided by oral argument
    - ☐ Add a short note on the front cover of the brief requesting oral argument, as required by Tex. R. App. P. 39.7
  - ☐ No
    - ☐ Add a short statement explaining (1) why oral argument should not be permitted and (2) how the court's decisional process would not be aided by oral argument
- ☐ Ensure that this section is one page or less, preferably a few sentences

☐ **Issues Presented - Tex. R. App. P. 38.1(f)**

- ☐ Concisely state all issues or points presented for review
- ☐ Arrange issues from strongest to weakest issue(s) or point(s) of error
- ☐ If certain issues or points of error can be combined, then do so

☐ **Statement of Facts - Tex. R. App. P. 38.1(g)**

- ☐ Concisely state the relevant and pertinent facts relating to the issue(s) or point(s) presented
- ☐ Does this section include any arguments?
  - ☐ Yes

- ☐ Remove all arguments

☐ No

- ☐ Continue to the next step

☐ **Summary of the Argument - Tex. R. App. P. 38.1(h)**

- ☐ Summarize the arguments made in the body of the brief in a succinct, clear, and accurate statement

☐ **Argument - Tex. R. App. P. 38.1(i)**

- ☐ Include the applicable standard of review
- ☐ Create headings for each issue or point of error
- ☐ Create subheadings, if necessary

☐ **Prayer - Tex. R. App. P. 38.1(j)**

- ☐ Include a short conclusion that clearly states the nature of the relief sought
- ☐ Ensure that the relief is appropriately actionable by the court

☐ **Appendix in Civil Case - Tex. R. App. P. 38.1(k)(1)**

- ☐ Include the following documents in the appendix:
  - ☐ A copy of the trial court's judgment or other appealable order from which relief is sought
  - ☐ The jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any
  - ☐ The text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument

☐ **Optional Contents - Tex. R. App. P. 38.1(k)(2)**

- ☐ Include any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material.

☐ Print one-sided copies if paper submissions are required - Tex. R. App. P. 9.4(a)

☐ Use white paper that is 8 1/2 by 11 inches - Tex. R. App. P. 9.4(b)

☐ Ensure that the document has at least one-inch margins on all sides - Tex. R. App. P. 9.4(c)

- ☐ Ensure that the text is double-spaced, unless the text is a footnote, block quotation, short list, and issue or point of error - Tex. R. App. P. 9.4(d)
- ☐ Ensure that the brief is typed using a conventional typeface using 14-point font; footnotes must be 12-point font - Tex. R. App. P. 9.4(e)
- ☐ Ensure that the brief is appropriately bound and covered - Tex. R. App. P. 9.4(f)
- ☐ Ensure that the contents of the cover page include all necessary information - Tex. R. App. P. 9.4(g)
- ☐ Make sure the appendix is bound either the document to which it is related or separately - Tex. R. App. P. 9.4(h)
- ☐ Add signature block - Tex. R. App. P. 9.4(i)
- ☐ Add Certificate of Compliance and verify if word and/or page limit complies - Tex. R. App. P. 9.4(i)
- ☐ Add Certificate of Service - Tex. R. App. P. 9.4(i)
- ☐ Convert the brief to a text-searchable PDF document - Tex. R. App. P. 9.4(j)
- ☐ Proofread
    - ☐ Check for grammatical, spelling, and punctuation errors
    - ☐ Ensure the brief is concise and factually and legally accurate
    - ☐ Use active voice
    - ☐ Verify verb tense
    - ☐ Cite check
        - ☐ the authorities (case law, statutes, and other authorities) to make sure they are applicable, relevant, and operative; Shepardize or KeyCite each legal authority
        - ☐ the record cites to make sure they accurately correspond to the record for factual support
    - ☐ Peer review for feedback
        - ☐ Does the brief make sense?
        - ☐ Are the arguments clear?
        - ☐ Is the relief requested readily apparent and appropriately actionable by the court?

☐ Review the Local Rules for the assigned appellate court and comply with or apply any applicable rule

APPELLEE'S BRIEF CHECK LIST

Rule 38.2 of the Texas Rules of Appellate Procedure provides detailed requirements for an appellant's brief.[2] Appellee's brief must, under appropriate (bolded) headings and in the order here indicated, contain the following:

☐ **Identity of Parties and Counsel - Tex. R. App. P. 38.1(a), 38.2(a)(1)(A)**

- ☐ Do you need to supplement or correct Appellant's list of counsel?
  - ☐ No
    - ☐ Omit this section from the brief
  - ☐ Yes
    - ☐ All Trial Counsel
      - ☐ Name
      - ☐ Firm or Office Name
      - ☐ Mailing Address
      - ☐ Telephone Number
      - ☐ Email Address
    - ☐ All Appellate Counsel
      - ☐ Name
      - ☐ Firm or Office Name
      - ☐ Mailing Address
      - ☐ Telephone Number
      - ☐ Email Address

☐ **Table of Contents - Tex. R. App. P. 38.1(b), 38.2(a)(1)**

- ☐ Include references to page numbers

[2] Helen Turner created this check list as a practical and interactive visual aid and guide for appellate practitioners. This check list is for informational purposes only. This check list is not intended to be exhaustive or comprehensive. Please refer to the Texas Rules of Appellate Procedure, the Local Rules, and all other applicable rules, as the Rules are subject to change.

- ☐ Include references to the subject matter of each responsive issue or point of error

☐ **Index of Authorities - Tex. R. App. P. 38.1(c), 38.2(a)(1)**

- ☐ Arrange legal authorities alphabetically
- ☐ Include references to page numbers where the authorities are cited

☐ **Statement of the Case - Tex. R. App. P. 38.1(d) , 38.2(a)(1)(B)**

- ☐ Are you dissatisfied with Appellant's statement of the case?
  - ☐ No
    - ☐ Omit this section from the brief
  - ☐ Yes
    - ☐ Concise statement addressing
      - ☐ The nature of the case
      - ☐ The court of the proceedings
      - ☐ The trial court's disposition of the case
    - ☐ Omit any facts and arguments
    - ☐ Ensure that this section is less than one-half page

☐ **Brief Statement Regarding Oral Argument - Tex. R. App. P. 38.1(e), 38.2(a)(1)**

- ☐ Is there a need for oral argument?
  - ☐ Yes
    - ☐ Add a short statement explaining (1) why oral argument should be permitted and (2) how the court's decisional process would be aided by oral argument
    - ☐ Add a short note on the front cover of the brief requesting oral argument, as required by Tex. R. App. P. 39.7
  - ☐ No
    - ☐ Add a short statement explaining (1) why oral argument should not be permitted and (2) how the court's decisional process would not be aided by oral argument
- ☐ Ensure that this section is one page or less, preferably a few sentences

☐ **Issues Presented - Tex. R. App. P. 38.1(f), 38.2(a)(1)(B), (b)**

- ☐ Are you dissatisfied with Appellant's statement of the issues or points of error presented? Did the trial court ender a judgment notwithstanding the verdict ("JNOV") on one or more questions? (Note: Check "Yes" if your answer affirmatively to at least one of the questions.)
  - ☐ No
    - ☐ Omit this section from the brief
  - ☐ Yes
    - ☐ Concisely state all issues or points presented for review
    - ☐ Arrange issues from strongest to weakest issue(s) or point(s) of error
    - ☐ If certain issues or points of error can be combined, then do so
    - ☐ Did the trial court render a JNOV
      - ☐ No
        - ☐ Omit this section from the brief
      - ☐ Yes. Include one of the following points:
        - ☐ The verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact
        - ☐ The verdict should be set aside because of improper argument of counsel

☐ **Statement of Facts - Tex. R. App. P. 38.1(g), 38.2(a)(1)(B)**

- ☐ Are you dissatisfied with Appellant's statement of facts?
  - ☐ No
    - ☐ Omit this section from the brief
  - ☐ Yes
    - ☐ Concisely state the relevant and pertinent facts relating to the issue(s) or point(s) presented
    - ☐ Does this section include any arguments?

☐ Yes

☐ Remove all arguments

☐ No

☐ Continue to the next step

☐ **Summary of the Argument - Tex. R. App. P. 38.1(h), 38.2(a)(1), (2)**

☐ Summarize the arguments made in the body of the brief in a succinct, clear, and accurate statement

☐ Respond to and address each argument in the order Appellant presented its arguments

☐ **Argument - Tex. R. App. P. 38.1(i)**

☐ Include the applicable standard of review, even if you agree with Appellant's standard of review

☐ Create headings for each issue or point of error in the order Appellant presented those issues or points

☐ Create subheadings, if necessary

☐ **Prayer - Tex. R. App. P. 38.1(j)**

☐ Include a short conclusion that clearly states the nature of the relief sought

☐ Ensure that the relief is appropriately actionable by the court

☐ **Appendix in Civil Case - Tex. R. App. P. 38.1(k)(1), 38.2(a)(1)(C)**

☐ Only include items not already contained in Appellant's appendix

☐ **Optional Contents - Tex. R. App. P. 38.1(k)(2)**

☐ Include any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material.

☐ Print one-sided copies if paper submissions are required - Tex. R. App. P. 9.4(a)

☐ Use white paper that is 8 1/2 by 11 inches - Tex. R. App. P. 9.4(b)

☐ Ensure that the document has at least one-inch margins on all sides - Tex. R. App. P. 9.4(c)

☐ Ensure that the text is double-spaced, unless the text is a footnote, block quotation, short list, and issue or point of error - Tex. R. App. P. 9.4(d)

- ☐ Ensure that the brief is typed using a conventional typeface using 14-point font; footnotes must be 12-point font - Tex. R. App. P. 9.4(e)
- ☐ Ensure that the brief is appropriately bound and covered - Tex. R. App. P. 9.4(f)
- ☐ Ensure the contents of the cover page include all necessary information - Tex. R. App. P. 9.4(g)
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- ☐ Add signature block - Tex. R. App. P. 9.4(i)
- ☐ Add Certificate of Compliance and verify if word and/or page limit complies - Tex. R. App. P. 9.4(i)
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- ☐ Convert the brief to a text-searchable PDF document - Tex. R. App. P. 9.4(j)
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    - ☐ Check for grammatical, spelling, and punctuation errors
    - ☐ Ensure the brief is concise and factually and legally accurate
    - ☐ Use active voice
    - ☐ Verify verb tense
    - ☐ Cite check
        - ☐ the authorities (case law, statutes, and other authorities) to make sure they are applicable, relevant, and operative; Shepardize or KeyCite each legal authority
        - ☐ the record cites to make sure they accurately correspond to the record for factual support
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- ☐ Review the Local Rules for the assigned appellate court and comply with or apply any applicable rule

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BRIEF WRITING: TIPS FOR MAKING A BRIEF HELPFUL AND PERSUASIVE

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Alexander Dubose & Jefferson, LLP

Robert Dubose is a partner in the Houston office of the civil appellate firm Alexander Dubose & Jefferson LLP.

A graduate of Harvard Law School, Robert taught appellate advocacy courses at the University of Houston from 1998 to 2010.

Robert authored the book, *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World*. He also is the editor and chapter author of the book *Texas Practitioner's Guide to Civil Appeals*.

TABLE OF CONTENTS

BRIEF WRITING: TIPS FOR MAKING A BRIEF HELPFUL AND PERSUASIVE

I. INTRODUCTION

This paper identifies specific tools for making a brief more helpful and persuasive. Part II of this paper suggests general goals for writing a winning appellate brief. Part III provides specific advice for each brief section. Although this paper focuses on briefs in the court of appeals, most of the goals and advice are equally effective for trial courts motions and briefs, as well as briefs on the merits in the Supreme Court of Texas.

II. THE CHARACTERISTICS OF A WINNING BRIEF.

The purpose of writing an appellate brief is different from many other types of writing. The purpose of fiction is to entertain. The purpose of academic journals and law review articles is usually to edify. The purpose of personal journals is usually to express oneself. But the purpose of an appellate brief is to persuade the judge that your client should win.

To win, a brief writer must think of a brief differently from other writing. We do not write the same way we would write a law review article or fiction. Because the purpose of a brief is to persuade the reader, writing a successful brief requires understanding the perspective, and the needs, of the reader.

A. A winning brief is written from the perspective of the reader, not the writer.

The biggest problem for many appellate briefs is that they are written for the wrong audience. The two most common wrong audiences are (1) the writer, and (2) the ideal judge.

First, too many lawyers write briefs for the audience in their own head. It is in our nature to write *from* our own perspective, which often results in writing *to* our own perspective. For instance, when we write a document, we understand exactly what we mean. We wrongly assume that readers will understand our writing as well as we do.

This becomes a problem when lawyers finish working on a brief when they are persuaded by their own arguments. It requires much more work to make a brief understood, and persuasive, to someone else. It requires more work because most of us write with a voice in our head that provides all of the necessary emphasis and explanation for our own writing. For instance, a long, complex sentence can make perfect sense to the writer, yet be completely incomprehensible to the reader. It takes work to make our writing as clear as possible so that our audience will understand it.

The second wrong audience is the ideal judge. The ideal judge has full knowledge of the law and great interest in the case. This ideal judge has infinite time to read, research, and consider the arguments. This ideal judge also reads briefs in a quiet, library-like setting. Many authors routinely write briefs under the assumption that, if the judges are smart and fair, the judges will certainly agree with the author's side of the issue because they will understand and be persuaded by it.

The reality, of course, is that judges rarely meet this ideal. Second Circuit Judge Ruggero J. Aldisert identified the difficult reading environment that judges face:

> Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.

Judge Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 24-25 (rev. 1st ed. 1996).

Judges often not experts on the particular issue in a case. For most briefs you write, you will know more about the subject area of the law than the judge does. You also will have far more interest in the issue than most judges will. Most judges also do not have the same incentives or the amount of time to read, research, and consider arguments nearly as much as you have.

In their speeches and papers, more and more judges are asking us to do more to help them do their job. As Supreme Court Justice Ruth Bader Ginsburg said about appellate briefs:

> The cardinal rule: it should play to the audience. . . . The best way to lose that audience is to write the brief long and cluttered. . . . The concentration of court of appeals sittings means that the judges will lack time to ferret out bright ideas buried in complex sentences.

Justice Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

To understand how judges read our briefs, it is important to place ourselves in the shoes of real judges and the circumstances in which they typically read briefs. Real judges want to be able to understand the argument quickly, and

they need to quickly understand the most persuasive reasons why you should win.

B. A winning brief helps the court understand the argument more quickly.

Because reading briefs is a difficult task, often performed in difficult circumstances, judges often criticize legal writing that does not help make it easier to understand the argument. Judge Aldisert explained that judges frequently criticize briefs for these reasons:

- Absence of organization.
- Uninteresting and irrelevant fact statements.
- Failure to prepare an accurate table of contents.
- Failure to set forth a summary of argument before proceeding into a discussion of each point.
- Unclear, incomprehensible, irrelevant statements of reasons.
- Discussing unnecessary details of precedents and compared cases.

Aldisert at 23-24.

A common theme in these complaints of judges is that we need to do a better job to help judges understand the argument of a legal brief more quickly. Judges frequently admonish us to make our briefs easier to read through organization and clarity. Most judges desire briefs that are easy to read and understand quickly.

C. A winning brief is persuasive.

The other important goal of brief writing is to help judges understand why your position is more persuasive. If you want your writing to persuade, you must understand the perspective of the judge. Advocates often are locked in the point of view of their own side. Although it is essential that you understand and argue for your client's point of view, you also should understand the point of view of the judge. If you who understand the judge's point of view – if you can step into their shoes – then it is becomes easier to know what it takes to persuade your judge in your client's favor.

D. The most important stage in brief writing is not writing, but editing.

A key step in making a written argument both easier to read and more persuasive is editing. The key is to edit it from the perspective of the judge, rather than your own perspective. Ideally, you should wait a few days between drafting and editing a written argument. This allows you to step back from the tone and emphasis that you intended as a writer, and to experience the tone and emphasis as a reader.

As an editor, it is important to ask these questions:

- Is this written argument easy to follow and understand?
- Could a judge skim this written argument quickly and still understand the main points?
- Does the argument address both sides of the issue, and then explain why your side should prevail?
- Are the most important arguments emphasized?
- Is the argument interesting, so that it will maintain the judge's attention?

Asking these questions when editing should help you produce a final product that is more comprehensible and more persuasive to the judge.

III. ADVICE FOR SPECIFIC BRIEF SECTIONS.

This section provides specific advice for each required section of a court of appeals brief.

A. Cover: the most persuasive cover is a professional cover.

Texas Rules of Appellate Procedure 9.4(g) provides the required contents for brief covers. Tex. R. App. P. 9.4(g). The required contents include the case style, the case number, the document title, the party's name, and counsel's name, state bar number, mailing address, phone number, fax number, and email address. *Id*. If a party would like to request oral argument in the court of appeals, that request must appear on the front cover. *Id*. Usually, that request is designated with the phrase "Oral Argument Requested" at the bottom of the cover.

Because the cover is the first part of the brief that the reader sees, the cover is the first step in persuasion. The cover can give counsel credibility. Or it can detract from counsel's credibility. When a cover looks professional and follows standard formatting conventions, it suggests that counsel is professional and has experience in the court of appeals. When a cover is not professionally formatted or when it fails to follow standard conventions, it gives the opposite impression.

B. Identity of parties and counsel: list all counsel, not just current counsel.

Rule 38.1 requires that an Appellant's Brief include "a complete list of all parties to the trial court's judgment or order appealed from" and "a complete list of the names of all counsel appearing in the trial or appellate courts; their firm or office name at the time of the appearance; and, for counsel currently appearing, their mailing address, telephone number and email address." Tex. R. App. P. 38.1(a); *see also* Tex. R. App. P. 55.2(a) (petitioner's brief on the merits in the Texas Supreme Court). A list of parties and counsel is not required in an Appellee's Brief "unless necessary to supplement or correct the appellant's list." Tex. R. App. P. 38.2(a)(1)(A); *see also* Tex. R. App. P. 55.3(a) (respondent's brief on the merits in the Texas Supreme Court).

From the court's perspective, this list serves several purposes: it helps the court identify the parties; it provides the court with contact information for counsel; and it provides the necessary information for a conflict of interest check.

It can be a serious problem for the court when the list of parties and counsel is not a complete list of all parties and counsel, including all former counsel in the case. An illustration of this problem is *Tesco American, Inc. v. Strong Industries, Inc.*, 49 Tex. Sup. Ct. J. 448, 2006 WL 662740 (Tex. March 17, 2006). In *Tesco*, the law firm of Baker & Botts had briefly appeared in the case for the Appellee before being replaced by other counsel. *Id*. at *1. In the court of appeals, the case was assigned to a panel that included a justice who had worked at Baker & Botts at the time the firm had appeared in the case, but the justice had no involvement with the case when she worked for the firm. *Id*. at *1. Because the briefs did not mention Baker & Botts's brief involvement in the case, the justice was not aware of a potential conflict of interest. *See id.* at *1. Nonetheless, the Texas Supreme Court held that the justice was disqualified. *Id*. at *3. The lesson of *Tesco* is that judges have no way to learn of possible conflicts of interest unless the parties list all former counsel in the list of parties and counsel.

C. Table of contents and index of authorities: make the tables clean; make them right.

The TRAPs require that all briefs include (1) a "table of contents with references to the pages of the brief"; and (2) an "index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited." Tex. R. App. P. 38.1(b), Tex. R. App. P. 38.1(c), Tex. R. App. P. 38.2(a)(1), Tex. R. App. P. 55.2(c), Tex. R. App. P. 55.2(d), Tex. R. App. P. 55.3.

Several aspects of the table of contents and index of authorities are important. First, the table of contents is required to "indicate the subject matter of each issue or point, or group of issues or points." Tex. R. App. P. 38.1(b), Tex. R. App. P. 55.2(b). If the issues in the statement of the issues are short, it can be a good practice to copy them into the table of contents. Alternatively, the argument outline in the table of contents should be sufficiently detailed that it identifies the issues or points.

Second, although not required by the rules, the standard convention is for the "Argument" section of the table of contents to include the outline of all of the argument headers in the argument section in the brief. This not only helps judges locate the page on which a specific argument is made; it also allows judges to see an outline of the entire argument in one place. Providing an argument outline in the table of contents allows the judge to see the logical relationship between primary argument headers in the outline and the subordinate headers.

Third, you gain credibility when your table of contents and index of authorities look clean and professional, follow standard conventions, and provide accurate page numbers. These portions of the brief are the most difficult portions to format, and usually must be prepared after all other parts of the brief are completed because page numbers often change with editing. Thus, it is always important to complete the rest of the brief early enough to allow time for the table of contents and index of authorities to be accurately prepared.

D. Statement of the case: include only the information required by the rule.

Rule 38.1(d) requires that an appellant's brief include a "statement of the case," which accomplishes the following:

> The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

Tex. R. App. P. 38.1(d). A statement of the case is not required in the appellee's brief unless the appellee is dissatisfied with the statement in the appellant's brief. Tex. R. App. P. 38.2(a)(1)(B). A statement of the case in a petitioner's brief on the merits in the Texas Supreme Court also requires additional information: the name of the judge who signed the order or judgment appealed from; the designation of the trial court and the county in which it is located; the parties in the court of appeals, the district of the court of appeals; the names of the justices who participated in the court of appeals decision and the identity of the authors of all opinions; a citation for the court of appeals' opinion; and the disposition by the court of appeals. Tex. R. App. P. 55.2(d).

The best approach for a statement of the case is to provide the required information and *only* the required information. The statement of the case is not an opportunity to discuss facts, provide a thorough procedural history, or to make arguments. The rules specifically prohibit any discussion of facts. Tex. R. App. P. 38.1(d), Tex. R. App. P. 55.2(d). The rule governing the statement of the case in the court of appeals also suggests that the length should not be more than one-half a page. Tex. R. App. P. 38.1(d); *but see* Tex. R. App. P. 55.2(d) (not mentioning the desired length for the statement of the case in a brief on the merits in the Supreme Court of Texas).

E. Issues presented: balance the need for brevity with the need for persuasive detail.

A brief must "state concisely all issues or points presented for review." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). A statement of the issues is not required in the appellee's brief or a respondent's brief on the merits. Tex. R. App. P. 38.2(a)(1)(B), Tex. R. App. P. 55.3(c). But it is a mistake for an appellee to omit this section because it provides a valuable opportunity to frame the issues persuasively.

There are three strategic issues to consider when drafting issues presented. How many issues is too many? How short or long should an issue be? Should the statement of the issues sound objective or persuasive? These questions are the subject of many different opinions and debate among practitioners. Nonetheless, the goals of brief writing in Part II suggest some answers to these questions.

1. Number of issues.

There is such a thing as too many issues. An appellant's brief can list so many issues in a brief that individual issues are diluted and counsel's credibility is damaged. Judges frequently complain about briefs that present too many issues. Aldisert at 120-21. Chief Justice Lucas of the California Supreme Court advises counsel to "spend time on issues with potential merit; shotgun approaches that do not distinguish between important and insignificant claims weaken your presentation." *Id*. at 121.

But how many issues is too many? Judge Aldisert suggests, in general, when an appellant's brief lists more than three issues, the lawyer's credibility begins to slip. When a brief lists eight issues, there is a "strong presumption that no point is worthwhile." *Id*. at 120.

In rare instances, counsel may have a strategic interest in demonstrating that the trial judge made many errors and that the cumulative effect of those errors resulted in an unfair trial. In these instances, it may be possible to raise the cumulative errors under a single issue. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f).

2. The length of issues: one sentence versus the "deep issue".

Since the 1997 amendments to the Texas Rules of Appellate Procedure, appellate lawyers have had more freedom in framing the issues than they did historically. Part of that freedom is the ability to depart from the prior convention of points of error. That freedom has led to two common approaches to statements of the issue.

One approach is to use a one-sentence issue. The rules provide that this issue may be stated as a question or a positive statement about the error the trial court committed. Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). This is the more common, and the most traditional, approach.

Another approach is Brian Garner's "deep issue." A Garner deep issue consists of separate sentences, contains no more than 75 words, incorporates enough detail to convey a sense of the story, and ends with a question mark. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 1 (1994/1995). In practice, most deep issues include one or two sentences about the relevant law or the key facts of the case, followed by a question that poses the legal issue.

In choosing the best approach in a particular case, a brief writer should consider two goals. First, courts have expressed their desire that issues be short. The United States Supreme Court Rules require that a statement of the issue be "short and concise." U.S. Sup. Ct. R. 14.1(a) (1991). Similarly, the Texas rules require that the issues be stated "concisely." Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f). The brief writer has the opportunity to summarize the argument in the summary of argument section of the brief. There is no need to summarize the entire argument in the statement of the issue. For instance, consider this long "deep issue" from a brief filed with the Texas Supreme Court:

> This Court in *In re Perry*, 60 S.W.3d 857 (Tex. 2001) confirmed that immunity afforded to legislators extends beyond mere immunity from liability, and includes immunity from the burdens of defense, including discovery. The unanimous Court ruled that the district court abused its discretion when it *permitted* discovery from members of the Legislative Review Board and its staff regarding their individual acts and communications concerning a redistricting plan adopted by the Board. The Court of Appeals in this case has held that the district judge abused her discretion when she *failed to permit* the deposition of Mr. Joe, a city councilman, pertaining to his "individual acts concerning the moratorium" adopted by the Irving City Council. *Is an elected member of a*

> *city council entitled to the same immunity from discovery as a member of the Legislative Review Board*?

Although this issue provides a great deal of persuasive detail, it is so long that it hardly serves as a "short" or "concise" statement of the issue. Apart from the final question mark, this statement of the issue looks more like a summary of the argument, and takes about as long to read.

Second, an issue is an opportunity to frame the legal issue in terms of the most persuasive reasons for ruling in favor of your side. An issue that is too general tells the court nothing. For instance, one issue presented in a Texas Supreme Court brief asked simply:

> Whether the court of appeals erred in reversing the trial court's summary judgment in favor of Delta and Perez, and against Black?

Apart from telling the court that the case concerns a summary judgment, this issue is so general that it tells the court nothing about the case. It is neither helpful nor persuasive.

The best issue is both short and detailed enough to persuade. One sentence is often sufficient to clearly frame the issue with some persuasive details. For instance, consider this effective one-sentence issue:

> Does a liability insurer have a duty to defend its insured against a claim involving an injury allegedly resulting from multiple causes, when the injury would not have occurred, and thus the claim would not exist, "but for" conduct expressly excluded from coverage under the policy?

Brief of Petitioner Utica National Insurance Company of Texas at ix, *Utica Nat. Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004) (No. 02-0090). This one-sentence issue is specific enough to frame the legal issue persuasively, but not so long that it takes more than thirty seconds to read and understand.

In some instances, more than one sentence may be required to adequately frame the issue. In these instances, the "deep issue" format may be the best approach. In other instances, however, the "deep issue" format is counterproductive because it encourages brief writers to make issues longer than they need to be.

3. Objective issues vs. persuasive issues.

A final strategic consideration in drafting an issue is whether to phrase the issue (1) objectively, or (2) positively and persuasively. The rules do not speak to this issue. *See* Tex. R. App. P. 38.1(e), Tex. R. App. P. 55.2(f).

The best approach is usually to use the question to persuasively suggest the answer without stating it. A survey of Texas appellate judges indicated that 58 percent preferred a positive statement of the issue that suggests the answer. Daryl L. Moore and Amy Hennessee, *Judicial Response to the Questionnaire*, *in* STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 5, at 1-2 (2003). Because most judges prefer a persuasive issue, it makes sense to use the issue as an opportunity to persuade.

F. Statement of facts: avoid argument, but use the opportunity to persuade.

Rule 38.1 provides that the appellant's brief in the court of appeals "must state concisely and without argument the facts pertinent to the issues or points presented." Tex. R. App. P. 38.1(f). Similarly, Rule 55.2 provides that a petitioner's brief on the merits "must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. Tex. R. App. P. 55.2(g). The appellee or the respondent is only required to provide a statement of facts if they are "dissatisfied with the statement" in their opponent's brief. Tex. R. App. P. 38.2(1)(a)(B); Tex. R. App. P. 55.3(b). But all parties should almost always provide a statement of facts because it is the opportunity to tell their side of the story.

The best statement of facts tells a persuasive story without argument. The key is to persuade without argument. There are several methods for achieving that goal.

1. Avoid inferences, legal conclusions, and unnecessary adjectives and adverbs.

Rule 38.1(f) prohibits "argument" in the statement of facts. Tex. R. App. P. 38.1(f). But what is argument? The most obvious type of argument is an inference or legal conclusion made from a fact. For instance, it is permissible to state in a statement of facts:

> Jenny Francis testified that she saw Smithers' car run the red light.

It is improper argument, however, to conclude that Smithers ran the red light based on an inference from the evidence:

> Because Francine Jones had a green light as she crossed the intersection from the cross street, Smithers necessarily ran a red light when he entered the intersection from the perpendicular direction.

This sort of inference needs to be reserved for argument. Similarly, it is improper argument to draw a legal conclusion in the statement of facts:

> Smithers' negligence was established by Jenny Francis's testimony that she saw Smithers' car run the red light.

Legal concepts, such as negligence, should rarely appear in a statement of facts because they ordinarily constitute improper argument.

A less obvious type of argument is the improper use of adjectives and adverbs in a statement of facts. "Adjectives are opinions about facts and therefore generally don't belong in a fact section." Steven D. Stark, *Writing to Win* 106 (1st ed. 1999). Similarly, adverbs often are opinions about facts. Of course, adjectives and adverbs are appropriate when they are contained in quotes from witnesses' testimony. They are also appropriate when the adjective or adverb is not a characterization of the fact, but an objective, observable fact, such as "the light was red."

2. Organize the facts persuasively.

Although the statement of facts cannot use argument, it is an opportunity for the writer to organize the facts in a persuasive manner. It is helpful to consider the organization of facts on both the level of the larger narrative and the level of the individual sentence.

On the level of the larger narrative, brief writers frequently make the mistake of falling back on a chronological ordering of facts, when a non-chronological ordering is more persuasive. For instance, consider the following paragraph with a non-chronological ordering:

> On September 17, 2005, WidgetCorp.'s President, Thurston Grey, announced in a shareholder meeting that the corporation's financial health "is excellent and is almost certain to improve for the remainder of the year." But one week earlier, Grey received a memo from WidgetCorp.'s CEO stating "WidgetCorp. may face a serious financial crisis in October 2005 when the government releases its safety report." Only a few days before the September 17 meeting, Grey was told by the company's Vice President of regulatory compliance that, "this safety report may do us in."

Like the movie *Pulp Fiction*, this narrative jumps around in time, but it does so with a purpose. The President's representation is followed by earlier events that demonstrate he knew his representation was false.

Organization can be equally important at the sentence level. Readers remember best the information at the end of a sentence. George D. Gopen, *The Sense of Structure: Writing from the Reader's Perspective* 35 (2004). Readers remember least the information in the middle of a sentence. *Id*. Thus, if it is important to emphasize a fact, it should appear at the end of a sentence. If it is important to disclose but minimize a fact, the writer may want to place that fact in the middle of a sentence. Professor Gopen offers a useful example:

> 4a. Although Fred's a nice guy, he beats his dog.
> 4b. Although Fred beats his dog, he's a nice guy.

Id. at 51. Although these sentences use almost identical words, sentence 4b paints a much more positive picture of Fred. It buries the bad fact that Fred beats his dog in a subordinate clause in the middle of the sentence. It emphasizes a good fact, that Fred is a nice guy, at the end of the sentence.

3. Disclose bad facts.

The example about Fred raises a question: If you represent Fred, why mention that he beats his dog? In the statement of facts, it is important to disclose this type of bad fact when it is relevant because the other side will almost certainly tell it to the court. If you do not disclose it, you lose credibility because it looks like you are trying to hide from important facts. "One would think that after Watergate, Iran-contra, and the Lewinsky matter, lawyers would realize that the coverup is almost always worse than the crime." Stark at 101-02. The most effective approach is often to disclose the bad facts, but use the organization of the statement of facts to minimize their importance in the story.

G. Summary of argument: it is not just a summary.

A summary of argument is required in every appellate brief. *See* Tex. R. App. P. 38.1(g), Tex. R. App. P. 38.2(a)(1), Tex. R. App. P. 53.2, Tex. R. App. P. 55.2. A summary of argument should be "a succinct, clear, and accurate statement

of the arguments made in the body of the brief." Tex. R. App. P. 38.1, Tex. R. App. P. 55.2(h). It "must not merely repeat the issues or points presented for review." *Id*.

The summary of argument is one of the most important parts of the brief. It is where readers expect you to crystalize your best arguments in a short statement about why you should win. As Professor Stark explains:

> Unless readers know right up front where you're heading and why, it's very difficult for them to follow a complicated explanation or argument, much less be convinced by it.

Stark at 6-7.

Ideally, a judge should be able to look at the summary and quickly identify the following information: (1) a roadmap of the argument; and (2) the most persuasive specific arguments for your position. The summary should get to the heart of the argument in as few words as possible, rarely more than one page. A survey of appellate judges showed that one-third responded that a summary should never be more than one page. Moore and Hennessee at 2. More than two thirds said a summary should never be more than two pages. *Id*.

For a summary to be persuasive and convey the heart of the argument, it cannot be merely general. It should identify specific, persuasive reasons for your position, even if the legal and factual support will require substantial development later in the body of the argument. If possible, these arguments should include specific examples rather than general concepts. This is a sample summary from an appellee's brief:

> The trial court judgment should be affirmed, and the arguments in AB's brief rejected, because AB's arguments fail to follow the correct rule of law and the evidence in this case. First, the rule of law suggested by AB's brief greatly expands the fiduciary duties of a departing employee – far beyond the duties recognized by Texas courts. Previously, Texas law has recognized that a departing employee has the right to make plans to compete with his employer, the right to secretly join other employees in the endeavor, and the right to keep these plans secret from his employer. AB, however, would change Texas law by requiring the departing employee to disclose the plans to compete and by preventing the employee from hiring other employees after the employee has resigned.
>
> Second, AB's Brief also ignores the evidence and inferences favoring the jury's verdict. There was substantial evidence to support the jury's verdict that Arizpe did not breach any fiduciary duty when other employees joined his new company after he resigned. There was evidence that Arizpe did not know other employees would follow him until after he left AB. There also was substantial evidence that other employees left, not because of any inducement by Arizpe, but because of their deep-seeded resentment of AB's management. The record in this case establishes no more than a former employee's legal competition with his former employer.

This summary provides the two important parts of a summary. First, it provides a roadmap, which appears in the last part of the first sentence ("the correct rule of law and the evidence in this case") and in the words "first" and "second." Those words provide the roadmap because the argument that follows has two parts, the first about the correct rule of law and the second about the evidence in the case.

Second, the summary includes specific, persuasive arguments, not just general conclusions. For instance, the first paragraph explains how the rule proposed in the other side's brief would specifically change the legal requirements placed on departing employees. The second paragraph points to specific facts that demonstrate that the Appellee did not breach his fiduciary duty.

H. Argument: winning with persuasion.

The rules require that the argument section "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(h), Tex. R. App. P. 55.2(i). This rule provides few constraints, and little guidance, about how to draft an argument. But professors, commentators, and judges have offered extensive advice about argument in a brief. In this section, I will catalogue some of the suggestions I have found most helpful.

1. Lead with the best argument and the best support.

Except in exceptional circumstances, the best, most persuasive arguments should appear first. *See* Stark at 126. There are several reasons for this approach. First, if the judge has limited time, the judge is likely to devote the most attention to the argument that appears first. Because the first argument may be your best chance to catch the judge's attention, that argument should be the most persuasive one. Second, most judges expect lawyers will lead with their best argument. If a very good argument appears after a weaker argument, the judge may have rejected the first argument, and then assume

that the second argument is even weaker. Third, it is important to establish your credibility early in the written argument, rather than giving the judge the impression you are wasting the court's time by focusing on weaker arguments.

2. Join the issue.

The job of a judge is not limited to understanding the legal arguments in favor of both sides. The ultimate job of the judge goes one step further: the judge must choose which side's legal position should prevail.

Brief writers often miss the opportunity to help the judge choose which argument is better. They miss this opportunity because they fail to even acknowledge the best arguments for the other side. Brief writers often make the mistake of seeing only their own arguments, from their own point of view, without acknowledging the best aspects of the other side's argument, let alone acknowledging that a point raised by the other side may have some merit.

The best way to help judges make a decision is to directly clash with the other side's arguments. In other words, the brief should "join the issue." Joining the issue is an emphasis tool because it is a method to focus the judge on the primary reason why your arguments are superior. It involves three steps:

(1) Make the best arguments for your position;
(2) Acknowledge briefly the best arguments for the other side's position; and
(3) Explain why your arguments should prevail over the best arguments for the other side.

Most brief writers accomplish the first step — explaining their own arguments. The second and third steps, however, appear all too rarely in legal writing. This is unfortunate because a brief writer who skips the second and third steps often loses an opportunity to persuade the judge.

Many briefs avoid the second step — acknowledging the other side's best arguments — for several reasons. First, some brief writers simply do not listen to the other side's argument. Second, some brief writers hope that the judge may not have understood the other side's arguments and see no need to explain them to the judge. Third, some brief writers fear that openly acknowledging the other side's arguments is a sign of weakness.

These reasons ignore that acknowledging the other side's arguments can be a sign of strength. If you acknowledge the best arguments for the other side, you will come across as more credible, more honest, and more intelligent. Acknowledging the other side's arguments demonstrates that you do not fear those arguments. But most importantly, it is necessary to give you the opportunity to move to the crucial third step in the process — explaining why your position should prevail.

In the third step, you weigh the arguments for both sides and explain why the scales tip in your client's favor. This may involve explaining why the other side's arguments are weaker, or it may involve explaining why your arguments are stronger, or both.

The following is an example of a portion of a legal brief that acknowledges the other side's position, and then explains why the other side's arguments are weaker:

> Crown argues that a party must object before expert testimony is admitted in order to preserve an argument that the testimony is no evidence. There are two problems with Crown's approach. First, it is based on a view that prior Texas cases are incoherent, even though they can be easily harmonized. As demonstrated above, *Maritime Overseas* can easily be squared with *Schaefer*. Second, Crown's proposed rule would require courts to make a difficult, and false, distinction between "reliability" challenges and "no evidence" challenges. But Crown does not even attempt to define this purported distinction.

This example goes beyond mere argument for the client's position. The first sentence acknowledges the heart of the other side's position. The remainder of the paragraph then explains why the Court should reject the other side's position because it is based on the premise that Texas Supreme Court decisions are in conflict. This example joins the issue by giving the judge a rational basis to choose one side's arguments over the other side's argument.

Joining the issue is easier in an appellee's brief or a reply brief, when the other side already has articulated its appellate arguments. It is more difficult to join the issue in an appellant's brief when the other side has not presented any arguments to the appellate court. Often, however, the other side has previously stated its position in the trial court. In that situation, you can use the other side's arguments in the trial court in your Appellant's Brief as a foil for comparison.

3. Write an argument, not a law review article or a court opinion.

Many brief writers had early experiences as a legal writer doing one of two jobs: writing for law review; or drafting opinions as a law clerk for a judge. Although these experiences are helpful, the style of writing a brief should be very different.

The purpose of writing a brief is different from writing a law review article or judicial opinion. Most law review

articles seek to offer an academic, objective summary of the law, even if they advocate a particular position on changing the law. Similarly, judicial opinions are designed to not only explain a result, but also to provide a set of neutral rules that serve as precedent in later cases. In contrast, the purpose of a brief is to win. Although judges expect that brief to be honest about the law and facts, there is no requirement or expectation by judges that an argument in a brief will sound academic, objective, or neutral. Rather, an argument in a brief should provide an "argument" for "contentions." *See* Tex. R. App. P. 38.1(h), Tex. R. App. P. 55.2(i).

There are a few specific conventions from law review articles and judicial opinions that should not be followed in briefs. First, unlike a thorough law review article, a brief need not include every authority for a proposition or long string cites. Usually, one authoritative citation is sufficient.

Second, unlike the "law" portion of an opinion, an argument should not begin with a long listing of broad, neutral legal principles that apply generally to the issue. Rather, a brief should jump right into the argument. For instance, one opinion began a discussion in an insurance case with a neutral summary of construction rules:

> In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex.1995); *Gen. Am. Indem. Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660, 661 (1960); *see Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 156, 157 (2003). Viewing the policy in its entirety furthers our objective to give effect to the written expression of the parties' intent. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex.1999) (citing *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex.1998); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex.1994)).

Provident Life and Acc. Ins. Co. v. Knott,128 S.W.3d 211, 216 (Tex. 2003). This type of discussion is completely appropriate in a judicial opinion that announces the general principles of law to be followed in future cases. But it is not persuasive argument. It is neutral and detached from the parties in the case. It cites more authority than is necessary to persuade a court that the legal principles are correct.

In contrast, an effective brief that cites the same principle sounds very different:

> Dominion's interpretation relies solely on one clause in a policy provision, and ignores other language in the same clause, as well as two other provisions, that contradict its interpretation. Thus, Dominion violates this Court's admonition against isolating "particular sections or provisions from the contract as a whole." *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex.1995).

This example is far more persuasive because it does not waste space espousing general legal principles, but instead concisely applies the relevant principle to explain why one side should win.

4. Use short summaries and topic sentences.

Another effective tool in writing an argument is to summarize the argument of a paragraph in the first sentence, or first few sentences, of the paragraph. This tool is often referred to as the "topic sentence."

The topic sentence serves a number of useful functions. First, much like headers in an outline, a topic sentence helps the reader understand the argument that follows. The topic sentence tells the reader that the various details in the paragraph will explain or support the main argument found in the topic sentence. In legal writing, the topic sentence is particularly useful because it tells the reader the argument that the paragraph will make.

Second, when a judge has time only to skim the brief, for instance before an oral argument, the judge may simply read the first few sentences of each paragraph to try to understand the argument quickly. This approach gives the judge more detail than a quick review of argument headers, but it still requires much less time than reading every sentence in each paragraph.

Many advocates make the mistake of not identifying the argument of a paragraph until the end of the paragraph. This often leaves judges wondering until the end of the paragraph about what the main point is going to be. One problem with this approach is the judge does not know how to analyze the supporting reasons that are given throughout the paragraph because the judge does not know the main point or conclusion that those reasons are being offered to support. Another problem with this approach is that impatient judges often will not finish the paragraph in an effort to find the point. Instead, they may simply move on to the next paragraph, or argument, or, even worse, the other side's brief.

The following paragraph demonstrates why it is harder to read a paragraph when the main argument of the paragraph does not appear until the last sentence:

> In *Johnson v. Brewer & Pritchard*, the Texas Supreme Court specified duties that a departing employee does not owe. 45 Tex. Sup. Ct. J. at 474. First, "[a]n at-will employee may properly plan to go into competition with

> his employer and may take active steps to do so while still employed . . . .” *Id*. Second, “[s]uch an employee has no general duty to disclose his plans to his employer . . . .” *Id*. Third, “generally he may secretly join other employees in the endeavor without violating any duty to his employer . . . .” *Id*. Thus, Texas law does not impose the specific kinds of fiduciary duties that the plaintiff seeks to impose in this case.

This paragraph begins by telling the reader the topic of the paragraph – duties not owed by a departing employee – but it does not tell the reader the argument that the paragraph is making. That argument only becomes clear in the last sentence: “Thus, Texas law does not impose the specific kinds of fiduciary duties that the plaintiff seeks to impose in this case.” It is far easier for the judge to analyze that discussion of various duties if the judge knows that the paragraph is arguing that the Texas Supreme Court has specifically rejected the duties asserted by the other side.

5. Organize the argument around effective headers and a logical argument outline.

Although not required by any rule, the convention for appellate briefs in Texas is to organize an argument with argument headers arranged in an outline format. There are several aspects to this approach.

a. Effective headers

Argument headers help the judicial reader in a number of respects.

1 — Headers provide a quick summary of the argument that follows the header. Judges should be able to read only the headers in the argument section of the brief and have a good overall idea of the argument, even if they have only a few minutes to look at the brief before a conference or oral argument.

2 — When judges read the entire argument, headers provide a welcome break in the legal prose. They break the often hypnotic flow of argument and authorities. They give judges a chance to take a mental breath so that they can prepare to absorb the next argument.

3 — Headers often provide judges with much-needed transitions. They provide a signal that readers should shift their mental gears because they are about to read a different point.

4 — Headers encourage reading by demonstrating organization. They provide an immediately visible structure that reassures judges that the argument is organized and that they are not going to have to work too hard to follow it.

5 — Headers make a brief easier to use. If judges want to find a specific portion of an argument, an effective header tells them where that portion of the argument appears.

The ideal argument header is a one sentence summary of a portion of the argument that appears following an outline letter or number. Headers are usually set apart from the rest of the text single spaced in bold font.

Headers are more effective when they are not just a phrase, but a complete sentence. Headers that are phrases, instead of sentences, do no more than identify the general subject of the argument. They do not provide a persuasive summary. For instance, the following header says nothing persuasive:

> Standard of Review

This header does not convey any argument that helps the judge understand the argument of the brief. A more effective header is a complete sentence that makes a persuasive point, such as:

> The Court should only reverse the trial court’s exclusion of the Tanner Report if the trial court abused its discretion.

This header places the discussion of the standard of review in the context of the main argument of the brief. The sentence is not just a mere label that says the following discussion will concern the relevant standard of review; it is an argument why the standard of review weighs in favor of affirmance.

Headers also should be phrased as a positive argument for your position. Neutral headers do not persuade. For instance, because the following header simply states a legal rule, without explaining why the author’s position is superior, the header is not persuasive:

> The existence of a duty to disclose is an element of fraudulent concealment.

This header may contain a legal rule that is an important step in the logic of your argument, but it fails to explain why that rule is significant or why the rule means that you should win. This header is more persuasive:

The summary judgment should be affirmed if there was no evidence that Smith owed a duty to disclose.

This header is more persuasive because it places the rule in the context of the particular parties, the particular legal issue, and the result. Even if the header is only the first step of a complete argument, the header explains how the legal rule directly relates to why the other side should lose the issue.

Headers are usually more effective if they are limited to one thought or argument. The human mind usually processes each sentence as a single thought. It is harder for the mind to process multiple thoughts in a single sentence. For instance, the following header contains multiple arguments:

The Tanner Report was properly excluded because it is irrelevant hearsay.

Although this header is short, it contains two separate arguments – (1) that the report was irrelevant, and (2) that the report was hearsay. It is easier for a judge to recognize that you are making two independent arguments when the argument is broken into two headers:

The Tanner Report was properly excluded because it is irrelevant.

The Tanner Report was properly excluded because it is inadmissible hearsay.

With two headers, it is easier for the judges to see that there are two separate arguments because there are two separate headers.

b. Logical outline structure

An outline structure contains argument headers, ordered by letters and numbers that demonstrate the role of each header in the overall argument structure. An outline is not only an organizational tool, but a method to show the logic of the argument.

The outline structure also provides additional advantages. First, effective outlines show a visible logic. An effective outline shows the reader the structure and hierarchy of the argument. The reader can easily see which points are the main points, and which points are support for the main points.

Second, an outline of argument headers summarize the argument of the brief. In this sense, an outline is a different kind of a summary of argument. With an effective outline structure, a judge should be able to read only the header outline of the argument and conclude, "if the brief can prove each of these points, then this argument should win." Thus, the conclusion that the brief should win should follow from the logic of the structure, so long as the individual points are proven.

An effective outline has several characteristics. First, each header in an outline should directly support the header under which it falls in the outline structure. For instance, when main point I is followed by subsidiary points A, B, and C, then the A, B, and C headers should be logical support for the primary argument in I. The outline in this example is not effective because subpoints A and B support a different point than the point in I:

I. A content based statute is one with the impermissible purpose of restricting the content of speech.

   A. The Billboard Act is content neutral because it is justified by a desire to control the secondary effects of billboards on the landscape.
   B. The Billboard Act is content neutral because both the sign restriction and election exception apply to a broad range of subject matter.

In the above example, it may be difficult for readers to immediately see the relationship between the point in I and subpoints A and B. The following example is more effective because point I has been reworked so that the subpoints support it:

I. Although the Billboard Act has subject matter-based exceptions, the Act remains content neutral.

   A. The Billboard Act is content neutral because it is justified by a desire to control the secondary effects of billboards on the landscape.
   B. The Billboard Act is content neutral because both the sign restriction and election exception apply to a broad range of subject matter.

The above example uses the outline format to demonstrate to the reader that subpoints A and B are independent arguments that support the main point in I. As rewritten, the outline shows an easy-to-follow logic.

Second, an outline should be ordered in a logical, progressive sequence, not randomly ordered. The brief writer should take care to keep related points together and unrelated points separate.

Third, an outline should provide enough layers of detail so that the judicial reader can fully appreciate the argument from the outline alone. If an outline gives enough detail, the judge should be able to use it as an additional tool for a quick summary of the argument. In this respect, an outline is another tool of summarization, like the summary of argument.

6. Lead with conclusions.

It is helpful to think of each paragraph of argument as making its own separate argument. Each paragraph is a building block for the overall argument. It is a common tendency of writers to place the argument, or conclusion, of the paragraph at the end of the paragraph. For many types of professional writing, this approach makes sense because one place readers expect to find the point or conclusion of a paragraph is at the end. *See* Gopen, at 117-21.

But in writing a legal argument, it is important to begin with the conclusion and follow with support. *See* Stark at 128-30. Judges need to know the paragraph's conclusion before they can evaluate its support. If the judge reads all of the support before first understanding the conclusion of the argument, the judge may not know how to evaluate the support.

It is particularly important for a brief to lead with a conclusion when it includes a long discussion about case authority. In most instances, it is not necessary to write more than one or two sentences about a case. Most legal rules are well-established and do not need more support than a citation to a single case. In these instances, it is enough to state the rule, cite the case, and perhaps provide a short quote from the case. But in some instances, the details of a particular case are very important and need to be developed in depth. You may need to develop a cited case in depth because its facts are highly similar to your case. You may need to explain why that similar case should be followed or distinguished. At other times, you may need to discuss a cited case in depth because the scope of the legal rule announced in that case is not clear, and the details of the case help explain the proper scope of the legal rule.

If a brief discusses a cited case for more than a few sentences, the judge needs to know as quickly as possible *why* the case is being discussed. The first or second sentence of that discussion should explain how you are using the cited case.

If the judge sees only a detailed summary of the facts of the cited case, without first seeing any explanation about why those facts are relevant, the judge probably will fail to understand why case discussion is necessary. And the judge may even ignore that factual discussion altogether. For instance, in the following example, the judge is given no explanation for how the cited case might even be relevant:

> In *White*, the informant not only described the suspect in significant detail, but also described the suspect's itinerary, which police were able to corroborate with independent investigation. *White*, 496 U.S. at 332. The officers went to the apartment complex where the informant said the suspect was located, observed a car exactly matching the description given, saw the defendant leave the building, get in the car, and leave. *Id*. Police did not stop the defendant until they verified that she was en route to the exact destination the informant predicted. *Id*. Because the informant accurately predicted the suspect's behavior, the Court held that it was reasonable for the police to rely on the informant's knowledge of the suspect's illegal activity. *Id*.

This paragraph would be far more helpful to the court if it began with an explanation for why the author is citing *White*:

> The *White* case is distinguishable from this case because, unlike this case, the informant in *White* had given detailed information that the police were able to corroborate before making the custodial stop.

When the paragraph begins with an explanation of *White's* significance, then it would be easier for the Court to see how the relevant details in *White* support the author's position.

7. Weave facts and law: discuss legal rules in the context of the relevant facts and discuss the facts in the context of relevant law.

Judges often find it easier to read an argument that argues law and facts together, rather than separately. For instance, it is more difficult to read a summary of the relevant legal rules without first knowing how those rules will be relevant to the facts of the author's case. Similarly, it is more difficult to read a long factual argument, without first knowing the relevant legal rules to which that factual argument will be applied.

Consider this example which discusses legal rules without any explanation of how those rules bear on the author's case:

> A party can de-designate a testifying expert and re-designate the expert as a "consulting only" expert as long as they do not do so for an improper purpose. *Castellanos v. Littlejohn*, 945 S.W.2d 236, 239 (Tex. App.–San Antonio 1997, no pet.). Re-designating a witness as "consulting only" in order to suppress testimony or to conceal facts is considered an improper purpose. *In re State Farm Mut. Automobile Ins. Co.*, 100 S. W.3d 338 (Tex. App.–San Antonio 2002,no pet.).

This statement of the legal rules can be much more effective if it is framed in terms of the parties and the facts of the particular case.

> Federated can de-designate its testifying expert and re-designate her as a "consulting only" expert only if it does not do so for an improper purpose. *Castellanos v. Littlejohn*, 945 S.W.2d 236, 239 (Tex. App.–San Antonio 1997, no pet.). Federated, however, re-designated the witness as "consulting only" in order to suppress testimony or to conceal facts, which Texas courts have held is an improper purpose. *In re State Farm Mut. Automobile Ins. Co.*, 100 S. W.3d 338 (Tex. App.–San Antonio 2002,no pet.).

If the legal rule is presented in the context of the particular facts of the author's case, then it is easier for the court to see immediately how the rule should be applied.

8. Instead of using synonyms, repeat important words and phrases.

Judges often find it difficult to follow a written argument when that argument uses different terms to describe the same thing or concept. Consider the following poorly written example:

> The insurer tendered a defense with a reservation of rights. Then the defendant insisted that the defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion Insurance instructed its retained counsel to stop work on the case.

This paragraph is very difficult to follow because it uses different words for the same parties. The words "insurer," "defendant" and "Dominion Insurance" each refer to a single entity, as do the words "defense counsel" and "retained counsel." It is easy to edit the paragraph to make it easier for the court to read, as follows:

> Dominion Insurance tendered a defense with a reservation of rights. Then Dominion Insurance insisted that its retained defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion Insurance instructed its retained defense counsel to stop work on the case.

Although both paragraphs are equally simple, the second paragraph is much easier to follow because it repeats the important words rather than using synonyms.

Particularly in brief writing, precision is very important. When a brief uses different words, the legal reader typically assumes that the writer is referring to a distinct thing or concept. For this reason, you should avoid using synonyms in legal writing.

9. Omit unnecessary arguments, law, facts, and words.

Judges often complain about legal writing that includes too much information — too many arguments, citations or facts. For instance, judges frequently complain about string cites. String cites are only useful in a few circumstances, such as when it is important to demonstrate that a legal rule is a majority rule or to demonstrate a trend. But string cites are never useful to demonstrate that you found more than one case. Worse, unnecessary string cites are a waste of space and a waste of the reader's time when a single citation is sufficient to state the law. As Steven Stark explained, "I've yet to meet the judge who looks at the fifth case cited in a long string cite and exclaims, 'I love that case! You win!'" Stark at 132.

Similarly, a good argument can be lost in a sea of mediocre arguments. When ten arguments are listed in a legal motion or brief and the third and fourth arguments are weak, many readers will assume that the later arguments are also weak. Thus, the poor arguments can detract from the credibility of the better arguments.

When writing or editing a written argument, decide what information the court needs to decide the issue. When information is not necessary, consider deleting it.

10. Maintain the Court's attention.

Legal writing is often dull. Judges often find it difficult to focus for hours at a time on dry legal issues, such as contract construction and evidentiary rules. Judges can become much more attentive, however, when a case involves a

new and exciting legal issue, or interesting facts.

The philosopher and psychologist Williams James said, "What holds attention determines action." Aldisert at 20. When one side's brief holds the court's attention better than the other, the court is likely to be more receptive to its arguments.

There are many techniques to catch and maintain a judge's attention. These techniques cannot be explained with a simple formula. Attention-grabbing writing is, by definition, not formulaic. But it is possible to identify some successful techniques.

First, legal writing is more likely to inspire excitement when the author is excited. When you are trying to enliven an issue, ask yourself, "What aspect of this issue is exciting?" Excitement can sometimes be found in some aspect of the facts of the case: a simple contract dispute that involved a heated exchange of correspondence with colorful language; a discovery dispute in which the other side's conduct was not only obstructionist, but bizarre; or a business disparagement case where one competitor accused the other of participating in the occult. Excitement also can be found in some aspects of the legal issue: a legal issue that has never been resolved in Texas, but is the subject of debate among courts in other states; an issue about which Texas courts are in conflict; or an issue about which the Texas Supreme Court has signaled that it may change the relevant legal rule in a later case.

Brief writers far too often run from the exciting aspect of the case by arguing that the issue is not unusual, the law is not in conflict, and the answer is clear. In some instances, however, you may actually have a better chance of persuading the judge by starting from the proposition that the issue is exciting and unresolved and should be resolved in your favor.

Second, even if a set of facts or a legal issue is not exciting, it may be helpful to make an analogy to other facts or legal issues that are exciting. For instance, a dull business disparagement case involving false assertions by one chemical company about the other company's manufacturing processes may be made more interesting if the brief writer makes an analogy to another type of alleged disparagement that is more interesting, such as an analogy to a case involving accusations by vegetarian celebrities about the Texas meat industry.

Third, legal writing should not ignore visual aids. Although most trial lawyers are well aware of the importance of visual aids with juries, appellate advocates often ignore the role of visual aids in legal briefs. With computer programs, it is now not only possible, but easy, to create charts or graphs to explain complex legal rules, case law holdings, facts, and data. It is also possible to insert relevant diagrams and even photos within the text of a legal brief. For most judges, a visual aid is not only a welcome break in the steady stream of text, but in many cases a visual aid may be far more persuasive than pages of textual argument.

I. Request for relief: carefully consider the relief you request.

"The brief must contain a short conclusion that clearly states the nature of the relief sought." Tex. R. App. P. 38.1(i), Tex. R. App. P. 55.2(j). It is important for the request for relief to specify the relief requested. In a brief of an appellant or petitioner, the request should be for reversal and rendition, reversal and affirmance, reversal and remittitur, or reversal and modification. In the brief of an appellee or respondent, the request should be that the judgment below be affirmed, unless that party has urged cross-points. When a party fails to request the correct relief, the court may hold that the relief was waived because it was not requested.

J. Appendix: use an appendix only for documents that are required or very important.

Rule 38.1(j) requires that an appellant's brief in a civil case contain an appendix that includes: the trial court's judgment or other appealable order; the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based and any contract or other document that is central to the argument. Tex. R. App. P. 38.1(j). The appendix may include optional contents such as excerpts from relevant court opinions, and documents from the record. *Id*.

The purpose of an appendix is to attach the key documents that the judges are likely to need to review, without having to review the entire record. An appendix should not be so large that it makes it impracticable for the judge to carry the brief home in a brief case. So the appendix should include only the required items plus the additional items that the court is likely to need to review.

IV. CONCLUSION

Although this paper describes a number of different tools for organization and emphasis, it only scratches the surface of what a brief can do to help appellate judges. The key to exploring all the ways to help judges is adopting the right attitude about advocacy. That attitude requires you to focus on your audience — the court — rather than writing from your own perspective. It requires understanding that you do not write for yourself, but for the judge. Brief writers who embrace this goal and view their case from the point of view of the judge will discover many different techniques that are useful in helping courts understand arguments more quickly and in persuading courts to rule in their favor.

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ISSUES TO WATCH IN SUMMARY-JUDGMENT APPEALS

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TABLE OF CONTENTS

ISSUES TO WATCH IN SUMMARY-JUDGMENT APPEALS[1]

Susan A. Kidwell

I. OVERVIEW

Summary judgments have become an essential part of modern trial practice. Used properly, they can be an effective tool to resolve an entire case, eliminate certain claims, or obtain resolution of threshold legal questions. As summary judgments become more common, so do summary-judgment appeals. The issues to watch in summary-judgment appeals are closely related to issues to watch in moving for (and opposing) summary judgment at the trial level. The following overview of summary-judgment practice highlights issues that commonly arise in the trial court and in summary-judgment appeals.

II. GENERAL CONSIDERATIONS

A. The purpose of summary judgment

Forty-five years ago, the Texas Supreme Court stated that "[t]he function of the summary judgment is not to deprive a litigant of his right to trial by jury, but to eliminate patently unmeritorious claims and untenable defenses." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979). However, the legal issues decided on summary judgment are frequently complex—and they may even turn on first-impression questions of law. If the viability of a claim or defense turns on a novel legal issue, it is probably not "patently unmeritorious" or "untenable." Thus, the purpose of summary judgment has more recently been described in broader terms—"to 'provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact.'" *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 296-97 (Tex. 2011) (quoting *Gaines v. Hamman*, 358 S.W.2d 557, 563 (Tex. 1962)); *see also Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999) (same language). Even that seems overly narrow, because summary judgment can be used to narrow the issues or claims in a case, thereby reducing the time and expense of litigating true fact issue at trial. *See* TEX. R. CIV. P. 166a(e) (allowing partial summary judgments). In the trial court, summary judgment is a power tool that can be used to streamline issues – or eliminate the need for trial altogether. Not surprisingly, summary-judgment appeals are common; and, issues resolved on summary judgment often define the issues presented on appeal.

B. The procedural requirements

Summary judgments are governed by Rule 166a of the Texas Rules of Civil Procedure. A thorough understanding of the nuances of this rule is necessary to handle summary-judgment appeals. Here is an overview of the essentials:

- Subsection (a) permits a claimant, *i.e.*, "[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment," to move for summary judgment "at any time after the adverse party has appeared or answered[.]" The rule specifically authorizes a trial court to render an interlocutory summary judgment "on the issue of liability alone although there is a genuine issue as to amount of damages."
- Subsection (b) permits a defending party, *i.e.*, "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought" to move for summary judgment "at any time."
- Subsection (c) sets forth the procedural requirements for Traditional Motions for Summary Judgment. These requirements are discussed more thoroughly in Section III of this paper.
- Subsections (f), (g), and (h) set forth the requirements for affidavits as well as the procedures for using unfiled discovery, obtaining a continuance to obtain information to support an affidavit, and imposing sanctions on parties who file affidavits in "bad faith." These procedures are discussed more thoroughly in Sections III.D and V.G of the paper.
- Subsection (i) sets forth the requirements for "No-Evidence" Motions for Summary Judgment, which are discussed more thoroughly in Section IV of the paper.

C. Strategic and practical considerations

Whether and when to file a motion for summary judgment depends on various considerations. If an opponent's case seems "patently unmeritorious," summary judgment can be filed early, as an alternative to having a case "resolved

[1] This paper was originally written and presented as "Summary Judgment: Tips, Traps, and Trends" (SBOT 101 Civil Appellate Practice, Sept. 6, 2017). It was subsequently updated for new presentations in 2018 (by Karlene Poll) and in 2020 (by the author). This is a newly updated and revised version that reflects the author's comprehensive review of summary-judgment cases decided over the past three years.

expeditiously under Rule 91a's dismissal procedures …." *King Street Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 739 (Tex. 2017). More typically, motions for summary judgment are filed after the obtaining discovery to support potential summary-judgment grounds.

Balancing the pros and cons depends on the nature of the claim or issue and whether you need discovery materials to support your grounds for summary judgment. If you have a purely legal issue that does not require any discovery, it may be advantageous to file early to avoid the expense of discovery or, at minimum, streamline the issues. But if your legal issue is mixed, *i.e.*, it turns on facts, it may be better to wait to "'lock in' the opponent's evidence and testimony." *See* W. Alan Wright & Thomas E. Kurth, *Tactical Considerations in Summary Judgment Practice*, 64 THE ADVOC. (TEX.) 15, 17 (Fall 2013).

III. TRADITIONAL MOTIONS FOR SUMMARY JUDGMENT

A. The standard

Rule 166a(c) sets forth the standard for traditional motions for summary judgment:

> The motion for summary judgment shall *state the specific grounds* therefor. *** The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion of response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is *no genuine issue as to any material fact* and the *moving party is entitled to judgment as a matter of law on the issues expressly set out* in the motion or in the answer or any other response.

TEX. R. CIV. P. 166a(c) (emphasis added). The highlighted language imposes three critical requirements: (i) the motion must "state specific grounds"; (ii) the summary judgment evidence must conclusively establish the material facts on which the motion is based, *i.e.*, show that there are no "fact issues"; and (iii) there must be some reason why the movant is entitled to "judgment as a matter of law." *See id*. Each of these requirements is discussed in turn.

B. Summary judgment grounds

1. Motion must state specific grounds

"In a traditional summary-judgment motion, a movant must state specific grounds, and a defendant who conclusively negates at least one essential element of a cause of action or conclusively establishes all the elements of an affirmative defense is entitled to summary judgment." *KCM Fin., LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *see also Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc*., 663 S.W.3d 569, 576 (Tex. 2023) ("A party moving for summary judgment must prove that no genuine issue of material fact exists and it is entitled to judgment as a matter of law."); *Draughon v. Johnson*, 631 S.W.3d 81, 88 (Tex. 2021) ("A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense."). The motion "must itself expressly present the grounds upon which it is made." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). "In determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence." *Id*.; *see also Armour Pipe Line Co. v. Sandel Energy, Inc.*, 546 S.W.3d 455, 463 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (recognizing that the moving party "cannot raise summary-judgment grounds in a brief in support of their summary-judgment motion"). "'Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal' of summary judgment." *Li v. Pemberton Park Cmty. Ass'n*, 631 S.W.3d 701, 704 (Tex. 2021). Even so, "'a party sufficiently preserves an issue for appeal by arguing the issue's substance, event if the party does not call the issue by name.'" *Id*. (quoting *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020)). Thus, although "appellate courts 'do not consider *issues* that were not raised … below,' parties 'may construct new *arguments* in support of issues' that were raised." *Id*. (quoting *Greene v. Farmers Ins. Exch*., 446 S.W.3d 761, 764 n.4 (Tex. 2014)). For example:

- In *Li*, the appellant argued that certain deed restrictions were "'selectively enforced' against her." *Id*. "Although she did not use the words 'arbitrary, capricious, or discriminatory'" her complaint on appeal was sufficiently preserved. *Id*. at 705.
- Conversely, in *ETC Marketing Ltd. v. Harris County Appraisal District*, 518 S.W.3d 371 (Tex. 2017), because the ground raised on appeal was not presented "at all, let alone specifically," the Court held that the argument raised on appeal was waived. *Id*. at 377.

There is an important corollary. Because the motion must state specific grounds, "[g]ranting a summary judgment on a claim not addressed in the summary judgment motion therefore is, as a general rule, reversible error." *G & H Towing*, 347 S.W.3d at 297. However, there is a limited exception that applies "when the omitted ground was intertwined with, and precluded by, a ground addressed in the motion." *Id*. "If the defendant has conclusively disproved an ultimate fact or element which is common to all causes of action alleged, or the unaddressed causes of action are derivative of the addressed cause of action, the summary judgment may be affirmed." *Id*. (quoting TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 3.06[3] at 3-20 (3d ed. 2010)); *see also Jones v. Coppinger*, 642 S.W.3d 51, 63 (Tex. App.—El Paso 2021, no pet.) (recognizing "limited exception … when a plaintiff has brought multiple causes of action against a defendant, which all have a common element or require proof of the same 'ultimate fact,' and when the defendant has challenged that element or ultimate fact in its motion with respect to one claim, but omits the challenge with respect to other claims."); *Yeske v. Plaza del Arte, Inc.*, 513 S.W.3d 652, 674-75 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (recognizing "limited exceptions to the general rule when (1) the movant has conclusively proved or disproved a matter that would also preclude the unaddressed claim as a matter of law, or (2) when the unaddressed claim is derivative of the addressed claim and the movant proved its entitlement to summary judgment on the addressed claim"). This exception requires a "very tight fit." *Yeske*, 513 S.W.3d at 674. "Although a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case." *G&H Towing*, 347 S.W.3d at 298.

2. Specific grounds must be tied to elements of claim

"[I]n order to conclusively establish the requisite essential element or elements, the motion must [also] identify or address the cause of action or defense and its elements." *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). If a motion "fail[s] to identify or address the causes of action … or their essential elements, … the granting of summary judgment [i]s error." *Id*.

3. Grounds may be limited to claims or defenses actually pled

"A plaintiff, when moving for summary judgment, is not under any obligation to negate affirmative defenses." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Instead, "[i]n order to show a disputed fact issue that will preclude the rendition of summary judgment for the plaintiff, the defendant must offer summary judgment proof on each element of at least one of the affirmative defenses it has pleaded." *Kirby Exploration Co. v. Mitchell Energy Corp.*, 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Similarly, "Defendants are not required to guess what unpleaded claims might apply and negate them." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). Thus, a defendant's motion for summary judgment based on the statute of limitations "need not negate the discovery rule unless the plaintiff has pleaded it." *Id*.; *see also Draughon*, 631 S.W.3d at 89 ("the defendant 'cannot be expected to anticipate' whether the plaintiff will contend [the discovery rule] applies"). However, if the plaintiff has pleaded the discovery rule, "issues affecting the limitations calculation also become part of the defendant's traditional summary judgment burden[.]" *Draughon*, 631 S.W.3d at 89. Conversely, if the plaintiff "assert[s] the discovery rule for the first time in its summary judgment response, [the defendant] ha[s] two choices: it could object that the discovery rule has not been pleaded, or it could respond on the merits and try the issue by consent." *Id*.

4. Address counterclaims

"If a summary judgment does not refer to or mention issues pending in a counterclaim, then those issues remain unadjudicated." *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990). That makes the summary judgment "interlocutory," not final, "until all of the issues are either adjudicated or ordered severed by the trial court." *Id*.

That said, do not assume that you can readily convert an interlocutory (partial) summary judgment into a final one by severing claims. A claim is not properly severable unless "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if properly asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *F.F.P. Operating Partners v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007); *see also* TEX. R. CIV. P. 41. Unless these requirements are met, you will need to wait to appeal from a final judgment.

C. Procedural requirements

1. Deadlines

Except on leave of court, the motion "shall be filed and served at least twenty-one days before the time specified for hearing," and the other side may file and serve a response "not later than seven days prior to the day of hearing." TEX. R. CIV. P. 166a(c).

2. Service

A motion for summary judgment must be served on opposing counsel. *Id*. Rule 21a sets forth various methods of service. TEX. R. CIV. P. 21a. Documents filed electronically "must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager." TEX. R. CIV. P. 21a(a)(1). If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney … in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct." TEX. R. CIV. P. 21a(a)(1), (2).

"Receipt is an element of service." *Cruz v. Sanchez*, 528 S.W.3d 104, 111 (Tex. App.—El Paso 2017, pet. denied) (quoting *Strobel v. Marlow*, 341 S.W.3d 470, 476 (Tex. App.—Dallas 2011, no pet.)). The certificate of service is "presumptively valid and binding as prima facie evidence of receipt unless challenged." *Id*.; *see also* TEX. R. CIV. P. 21a(e).

Cruz illustrates some service issues that could easily arise with e-filing. There, the certificate of service indicated that the movant used two alternative methods of service: service through EFM and service by email. *Cruz*, 528 S.W.3d at 111. However, the movant could not establish that he used either in a manner reasonably calculated to successfully provide notice. *Id*. There was no evidence the non-moving party was registered with EFM, and the movant could not provide proof of receipt (*e.g.*, a copy of the receipt automatically generated by the e-service provider). *Id*. The attempted service by email also failed, because the movant conceded he sent the motion to an incorrect email address. *Id*. "[S]imply stating that [the movant] sent the document to an email address he wrongly but in good faith believed belonged to the Cruzes and dispatching process into the digital ether, hoping it meets its intended target, is not enough to effectuate service." *Id*. at 114. Under those circumstances, actual service was not established and, therefore, the summary judgment was reversed. *Id*. at 115.

3. Notice of hearing

Although an oral hearing on a motion for summary judgment is not required, notice of a hearing or submission date is, because that date "determines the time for response to the motion." *Martin v. Martin, Martin & Richards*, 989 S.W.2d 357, 359 (Tex. 1998). The notice "must inform the nonmovant of the exact date of hearing or submission." *B. Gregg Price, P.C. v. Series 1 – Virage Master LP*, 661 S.W.3d 419 (Tex. 2023). Without notice of the hearing or submission date, "the respondent cannot know when the response is due." *Martin*, 989 S.W.2d at 359. Thus, a trial court errs by granting a motion for summary judgment without notice to the respondent. *Id*. However, if the court fully considers a response and denies a motion for reconsideration, the error is harmless. *Id*. (holding that a court need not "vacate the summary judgment and then reinstate it" if the motion was granted without proper notice); *see also Rasheed v. Tex. Fair Plan Ass'n*, No. 01-15-00887-CV, 2016 WL 3162584 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (applying harmless error analysis and affirming summary judgment granted on less than 21-days' notice when nonmovant filed a response and did not seek a continuance or a new trial based on insufficient notice).

ISSUES TO WATCH

Rescheduled hearings: "A new hearing requires a new notice." *B. Gregg Price*, 661 S.W.3d at 423 (trial court abused its discretion in striking motion for leave to file late response and denying motion for new trial when nonmovant did not receive amended notice of hearing); *accord PDG, Inc. v. Abilene Village, LLC*, 668 S.W.3d 947, 952 (Tex. App.—Eastland 2023, pet. denied) (holding that, "once a hearing on a motion for summary judgment is canceled, the initial notice of hearing is nullified" and the nonmovant is entitled to a new notice"). However, the courts of appeals are split on how much notice is required for a reset hearing. *See PDG*, 668 S.W.3d at 954 (detailing split). Some courts require seven days' notice. *Id*. (citing *Int'l Ins. Co. v. Herman G. West, Inc.*, 649 S.W.2d 824, 825 (Tex. App.—Fort Worth 1983, no writ), and *Thurman v. Fatheree*, 325 S.W.2d 183, 185 (Tex. App.—San Antonio 1959, writ dism'd)). Others require only three days' notice. *PDG*, 668 S.W.3d at 954 (citing *Brown v. Cap. Bank, N.A.*, 703 231, 233 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)). After considering the split, the Eastland Court held that, "where the nonmovant has not yet filed a response[,] 'reasonable notice' of a reset hearing on a motion for summary

judgment" requires at least seven days' notice, whereas when the nonmovant has already filed a response, "as few as three days may be appropriate." *PDG*, 668 S.W.3d at 955.

Unsigned orders: The Eastland Court of Appeals recently held that an unsigned order setting a specific time and date for a hearing provides sufficient notice. *See Barrientos v. Barrientos*, 675 S.W.3d 399, 408 (Tex. App.—Eastland 2023, pet. denied) (citing cases from First and Thirteenth Courts of Appeals). The Texarkana Court reached a similar conclusion, holding that lack of notice was not shown on face of record where movant served unsigned order setting November 19, 2021, hearing on September 21, and order setting hearing was signed on September 23. *Hooten v. Yeager*, 654 S.W.3d 185, 193 (Tex. App.—Texarkana 2022, no pet.). Because "[n]othing in the record affirmatively indicates that [the nonmovant] did not timely receive a copy of this order or otherwise timely receive actual notice of the hearing date," the trial court's order granting summary judgment was affirmed. *Id*. at 194.

Preservation of error: "A nonmovant who complains of receiving less than twenty-one days' notice of a summary judgment hearing but also admits to knowing and being aware of the scheduled hearing date before it actually occurs waives the defense of insufficient notice if he fails to bring the complaint to the trial court's attention at or before the scheduled hearing or submission date." *Barrientos*, 675 S.W.3d at 406. In such circumstances, the nonmovant "must move for a continuance or raise a late-notice complaint in writing." *Id*. "To hold otherwise would allow a party who participated in a hearing to 'lie behind the log' until after summary judgment is granted and then raise the complaint of late notice for the first time in a post-judgment motion." *Id*.

D. Summary-judgment evidence

Rule 166a(c) identifies different types of evidence that may be used to support a traditional motion for summary judgment: deposition transcripts, interrogatory answers, other discovery responses, pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records. TEX. R. CIV. P. 166a(c). The following overview highlights some of the issues to watch. For a more comprehensive discussion, *see* Judge David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, *Summary Judgments in Texas: State and Federal Practice*, 62 S. TEX. L. REV. 99, 154-91 (2023).

1. Formal requirements

Admissible: "Summary judgment evidence must be presented in a form that would be admissible at trial." *Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 124 (Tex. App.—Houston 14th Dist. 2013, pet. denied); *see also Sanchez v. Barragan*, 624 S.W.3d 832, 838 (Tex. App.—El Paso 2021, no pet.) (same).

Authenticated: "A document may only be considered authentic if a sponsoring witness vouches for its authenticity or if the document otherwise meets the requirements of authentication as set out in the rules of evidence." *Gunville v. Gonzales*, 508 S.W.3d 547, 559 (Tex. App.—El Paso 2016, no pet.); *see also Paselk v. Rabun*, 293 S.W.3d 600, (Tex. App.—Texarkana 2009, pet. denied) ("Merely attaching unauthenticated documents and photographs to a response does not make the attachments competent summary judgment evidence."). Under the Rules of Evidence, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). For example, a witness with personal knowledge may testify that the item is what it is claimed to be. *Id*. 901(b). The Rules of Evidence also include a list of items that are self-authenticating and do not need extrinsic evidence of authenticity to be admitted. TEX. R. EVID. 902. In addition, a party's production of a document in discovery authenticates that document for use against that party. TEX. R. CIV. P. 193.7; *see also McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994) (per curiam) (recognizing that Rule 166a(d), which sets forth procedures for use of unfiled discovery products, does not contain an authentication requirement).

Attached: The evidence must be "attached thereto or served therewith." TEX. R. CIV. P. 166a(f). A party can satisfy that requirement by physically attaching the evidence to the motion, or "either by requesting in the motion that the court take judicial notice of the evidence that is already in record or by incorporating that document or evidence in the party's motion." *Rogers v. RREF II CB Acquisitions, LLC*, 533 S.W.3d 419, 430 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.) (quoting *Steinkamp v. Caremark*, 3 S.W.3d 191, 194 (Tex. App.—El Paso 1999, pet. denied)). The court need not announce it has taken judicial notice. *Id*. at 431. Nor does a court abuse its discretion by considering documents incorporated by reference. *Id*. Thus, as long as evidence is "'on file' with the court at the time of the summary-judgment hearing," a movant's failure to *attach* the evidence to a summary-judgment motion does not create "a complete absence of evidence [that] constitutes substantive error" and requires reversal. *Lance v. Robinson*, 543 S.W.3d 723, 732-33 (Tex. 2018).

2. Types of summary-judgment evidence

a. Testimony

"A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to a subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c); *see also Lofton v. Tex. Brine Corp*., 777 S.W.2d 384, 386 (Tex. 1989) ("Testimony by an interested witness may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct, and positive, and there are no circumstances tending to discredit or impeach it."). Testimony that is conclusory, riddled by internal inconsistencies, and contradicted by "impeaching circumstances" does not meet this standard. *Lofton*, 777 S.W.2d at 386.

- "'Could have been readily controverted' does not mean that the summary judgment evidence could have been easily and conveniently rebutted, but rather indicates that the testimony could have been effectively countered by opposing evidence." *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). For example, in *Trico*, a wrongful-termination case, the defendant supported its motion for summary judgment with an affidavit stating that the affiant-employer would not have hired an employee if the affiant had known that the employee had lied on a physical examination questionnaire. *Id*. at 309. The Texas Supreme Court held that the affidavit "could have been readily controverted if in discovery [the employee] had inquired about instances where [the employer] refused to hire applicants or discharged employees who similarly falsified employment applications." *Id*. at 310. Because the employee made no effort to controvert the statement, "the affidavit was competent summary judgment evidence." *Id*.

Deposition transcripts: "[D]eposition excerpts submitted as summary judgment evidence need not be authenticated." *McConathy*, 869 S.W.2d at 341 (holding that Rule 166a(d) supersedes requirement that "excerpts from unfiled depositions offered as summary judgment evidence must be authenticated" by "includ[ing] a copy of the court reporter's certificate, as well as an original affidavit certifying the authenticity of the copied excerpts"). That is because "[a]ll parties have ready access to depositions taken in a cause, and thus deposition excerpts submitted with a motion for summary judgment may be easily verified as to their accuracy." *Id*. at 342.

Affidavits: "Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such *facts* as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f) (emphasis added).

- *Personal knowledge*: "An affidavit must disclose the basis on which the affiant has personal knowledge of the facts." *Rogers*, 533 S.W.3d at 428. For example, "[a]n affiant's position or job responsibilities may demonstrate the basis of her personal knowledge." *Id*. at 429. "Review of the pertinent records may also establish an affiant's personal knowledge in some situations." *Id*. Finally, "[t]he personal knowledge requirement may be satisfied if the affidavit sufficiently describes the relationship between the affiant and the case so that it may be reasonably assumed that the affiant has personal knowledge of the facts stated therein." *Id*.
- *Facts*: "Affidavits consisting only of conclusions are insufficient to raise an issue of fact." *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). For example, an affidavit "stating that [a] contractual obligation had been modified … assert[s] nothing more than a legal conclusion." *Id*. To raise a fact issue, the affidavit "should have gone further and specified factual matters such as the time, place, and exact nature of the alleged modification." *Id*. Put another way, "[t]o avoid being conclusory, an affidavit must contain specific factual bases, admissible in evidence, from which any conclusions are drawn." *Padilla v. Metro. Transit Auth. of Harris Cnty.*, 497 S.W.3d 78, 86 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

b. Discovery responses

Interrogatory answers: "Generally, a party cannot rely on its own answer to an interrogatory as summary judgment evidence." *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000). However, an interrogatory answer may become competent evidence if it is used as a deposition exhibit and the answering party is subject to cross-examination about the truth of the assertions contained in the answer. *Id*.

Admissions: "Admissions of *fact* on file at the time of a summary judgment hearing are proper summary judgment proof and will, therefore, support a motion for summary judgment." *Cedyco Corp. v. Whitehead*, 253 S.W.3d 877, 880 (Tex. App.—Beaumont 2008, pet. denied). "However, a request for admission asking a party to admit or deny a purely legal issue is improper, and a deemed admission involving a purely legal issue is of no effect." *Id*. Similarly, requests

that a party "admit that he had no cause of action or ground of defense" are improper and, therefore, cannot support a summary judgment. *See Soto v. Gen. Foam & Plastics Corp.*, 458 S.W.3d 78, 83 (Tex. App.—El Paso 2014, no pet.).

Deemed admissions: Deemed admissions may also be used to support summary judgment. *Sosa v. Williams*, 936 S.W.2d 708, (Tex. App.—Waco 1996, writ denied). However, the movant must conclusively establish proper service. *Id*. In addition, the movant must show "flagrant bad faith or callous disregard," as required to support a merits-preclusive sanction. *Soto*, 458 S.W.3d at 83-84.

c. Pleadings

Although pleadings are mentioned in Rule 166a(c), "pleadings generally do not qualify as summary-judgment 'evidence,' even when they are sworn or verified." *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818 (Tex. 2021). But there are important exceptions. For example, judicial admissions, *i.e.*, "assertions of fact, not pleaded in the alternative," in a pleading can support summary judgment. *Lyons v. Lindsey Morden Claims Mgmt., Inc.*, 985 S.W.2d 86, 92 (Tex. App.—El Paso 1998, no pet.); *see also Trimcos, LLC v. Compass Bank*, 649 S.W.3d 907, (Tex. App.—Houston [1st Dist.] 2022, pet. denied) (allowing use of an admission in an abandoned pleading as long as it is an admission against interest). In short, "a party cannot rely on its *own* pleaded allegations as evidence of facts to support its summary-judgment motion or to oppose its opponent's summary-judgment motion." *Regency*, 622 S.W.3d at 819. However, courts may grant summary judgment based on deficiencies in an *opposing party's* pleadings." *Id*.; *see also Washington v. City of Houston*, 874 S.W.2d 791, 794 (Tex. App.—Texarkana 1994, no writ) (allowing defendant to use the plaintiff's petition to support summary judgment if the pleadings affirmatively negate the plaintiff's claim). Even so, "summary judgment should not be granted based on a pleading deficiency that could be cured by amendment." *In re B.I.V.*, 870 S.W.2d 12, 13 (Tex. 1994).

d. Other evidence

Documents: Documents submitted as summary-judgment evidence must be sworn to or certified. *See* TEX. R. CIV. P. 166a(f). "Simply attaching a document to a pleading neither makes the document admissible as evidence, dispenses with proper foundational evidentiary requirements, or relieves a litigant of complying with other admissibility requirements." *Gunville*, 508 S.W.3d at 558-59 (quoting *United Rentals, Inc. v. Smith*, 445 S.W.3d 808, 814 (Tex. App.—El Paso 2014, no pet.)).

Business records: Business records are commonly used to support motions for summary judgment. Such records can be authenticated with an affidavit that satisfies the requirements set forth in Rule 166a as well as Texas Rules of Evidence 803(6) and 902(10). Because "special concerns may arise if the subject of the business records affidavit is a document which originated from a third party, … '[d]ocuments received from another entity are not admissible under rule 803(6), if the witness is not qualified to testify about the entity's record keeping.'" *Rogers*, 533 S.W.3d at 432 (quoting *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.). Third-party records may be admissible if the sponsoring witness can testify that "(1) the document is incorporated and kept in the course of the testifying witness's business, (2) that business typically relies upon the accuracy of the document's content, and (3) the circumstances otherwise indicate the document's trustworthiness." *Id*. at *9.

Video evidence: In 2007, The United States Supreme Court opened the door to using video evidence on summary judgment. *See Scott v. Harris*, 550 U.S. 372, 381 (2007) (reversing denial of summary judgment because Court of Appeals "should have viewed the facts in the light depicted by [a] videotape"). The plaintiff in *Scott* alleged that a county deputy used excessive force during a high-speed chase. The district court denied the deputy's motion for summary judgment based on qualified immunity, because it concluded there was a fact issue about whether the deputy "was driving in such fashion as to endanger human life." *Id*. at 380. However, because the record included a videotape that "so utterly discredited" the plaintiff's version of events that "no reasonable jury could have believed him[,]"the deputy was entitled to summary judgment. *Id*. at 380, 386. *Scott* thus establishes that, "[d]espite the usual rule that courts should adopt the plaintiff's version of the facts when the defendant moves for summary judgment, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" *Garcia v. Orta*, 47 F.4th 343, 350 (5th Cir. 2022) (quoting *Scott*, 550 U.S. at 378, 380). The "record" is not limited to videotaped evidence; it also applies to "other types of evidence capable of utterly discrediting the plaintiff's version of the facts." *Id*. at 350 n.2 (noting application to still photographs, taser logs, and dashcam audiotapes).

Although *Scott* and many cases applying it involve qualified immunity, the Fifth Circuit has also applied the *Scott* exception in slip-and-fall cases. *See Abgonzee v. Wal-Mart Stores Tex., L.L.C. #772*, No. 21-20395, 2023 WL 3137428, at *2 (5th Cir. Aug. 5, 2023) (collecting cases). And the Amarillo Court of Appeals has applied the *Scott* exception in a case involving the emergency exception to the Texas Tort Claims Act. *City of Austin v. Kalamarides*, No. 07-23-00400, 2024 WL 1422741, at *2 (Tex. App.—Amarillo Apr. 2, 2024, no pet. h.) (reversing denial of plea to the

jurisdiction). Given the increased use of dashcams, cellphone videos, surveillance cameras, and social media postings, the *Scott* exception may become more common.

IV. NO-EVIDENCE MOTIONS FOR SUMMARY JUDGMENT

"After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). Because you are complaining that the other side lacks evidence to support a claim or defense, a no-evidence summary judgment is only proper on an element that the *other* side has the burden to prove.

A no-evidence motion "is essentially a motion for a pretrial directed verdict." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). Once the motion is filed, the burden shifts to the non-movant to present evidence raising a fact issue on each element specified in the motion. *Id*. at 582. In determining whether there is any evidence, courts apply the well-known legal sufficiency standard and sustain a "no evidence" point "when the record discloses one of the following situations: (1) a complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact." *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005) (quoting Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)).

Two issues that arise in appeals from no-evidence summary judgments are: (i) whether there was an "adequate" time for discovery; and (ii) whether the no-evidence grounds were sufficiently stated. Each of these is discussed in turn.

A. Adequate time for discovery

"Whether a nonmovant has had an adequate time for discovery for purposes of Rule 166a(i) is 'case specific.'" *Tempay, Inc. v. TNT Concrete & Constr., Inc.*, 37 S.W.3d 517, 522 (Tex. App.—Austin 2001, pet. denied) (quoting *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.)). "Although some lawsuits that present only questions of law may require no or minimal discovery, other actions may require extensive discovery." *Id*. So, adequacy depends on the nature of the case. In determining whether an adequate time has passed, courts may consider "(1) the nature of the cause of action; (2) the nature of the evidence necessary to controvert the no evidence motion; (3) the length of time the case has been active in the trial court; (4) the amount of time the no evidence motion has been on file; (5) whether the movant has requested stricter time deadlines for discovery; (6) the amount of discovery that has already taken place; and (7) whether the discovery deadlines that are in place are specific or vague." *Neurodiagnostic Tex, LLC v. Pierce*, 506 S.W.3d 153, 172 (Tex. App.—Tyler 2016, no pet.). Time periods ranging from 14 months to over two years have been considered adequate. *See Stierwalt v. FFE Transp. Servs., Inc.*, 499 S.W.3d 181, 190 (Tex. App.—El Paso 2016, no pet.) (compiling cases).

B. Clearly state the elements that you contend are not supported by any evidence

"In a no-evidence summary-judgment motion, the movant contends that no evidence supports one or more essential elements of a claim for which the nonmovant would bear the burden of proof at trial." *KCM Fin.*, 457 S.W.3d at 79. "The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (quoting TEX. R. CIV. P. 166a(i) Comment—1997). "The underlying purpose of this requirement 'is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment.'" *Id*. at 311 (quoting *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978)).

One common use of no-evidence motions is to challenge an element of a cause of action that requires proof by expert testimony. *See, e.g.*, *Helena Chem. Co. v. Cox*, 664 S.W.3d 66, 73 (Tex. 2023) (no-evidence challenge to expert testimony on causation); *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839-40 (Tex. 2010) (same); *Mack Trucks*, 206 S.W.3d at 583 (same). In such cases, if the expert's opinion is not reliable, it is no evidence and will not defeat a no-evidence motion for summary judgment." *Helena Chem*., 664 S.W.3d at 73.

No-evidence motions may also be used to challenge lack of subject-matter jurisdiction based on governmental immunity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551-52 (Tex. 2019) (resolving split in authority). "Because jurisdiction may be challenged on evidentiary grounds and the burden to establish jurisdiction, including waiver of a government defendant's immunity from suit, is on the plaintiff," the Texas Supreme Court saw "no reason

to allow jurisdictional challenges via traditional motions for summary judgment but to foreclose such challenges via no-evidence motions." *Id*.

However, the grounds for a no-evidence motion must be stated specifically. "If a no evidence motion for summary judgment is not specific in challenging a particular element or is conclusory, the motion is legally insufficient as a matter of law and may be challenged for the first time on appeal." *Neurodiagnostic*, 506 S.W.3d at 175; *see also Wyly v. Integrity Ins. Solutions*, 502 S.W.3d 901, 907 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (recognizing that it would be improper to grant a motion that "does not single out the elements as to which there is no evidence"). The following examples illustrate the distinction:

Sufficient ground: In *Timpte Industries v. Gish*, the defendant (Timpte) filed a no-evidence motion challenging a products-liability claim filed by the plaintiff (Gish). 286 S.W.3d at 310. The issue was whether Timpte's motion was sufficient to challenge not only an allegation that a design defect was the producing cause of Gish's injury, but also, "that there was a defect rendering the product unreasonably dangerous." *Id*. To resolve that question, the Texas Supreme Court focused on the motion's language. "After setting forth the elements of a design defect claim, Timpte's motion stated that '[p]laintiff has presented no evidence of a design defect which was a producing cause of his personal injury.'" *Id.* at 311. In addition, the conclusion stated there is "no evidence of the product being defective or unreasonably dangerous, and there is no evidence the trailer was the proximate or producing cause of the Plaintiff's injuries." *Id*. The Court held that language to be sufficient to give fair notice that Timpte "was challenging both whether the alleged defect rendered the trailer unreasonably dangerous and whether the defect was the producing cause of [plaintiff's] injury." *Id.*

Insufficient ground: Conversely, in *Neurodiagnostic v. Pierce*, the Tyler Court of Appeals considered a motion alleging that "Plaintiff presents no evidence of breach of fiduciary duty while employed." 506 S.W.3d at 177. The court "decline[d] to extend a 'fair notice' exception to the requirements of Rule 166a(i)." *Id*. Instead, the court construed the motion as making "only a general argument that [Plaintiff] has no evidence to support its breach of fiduciary duty cause of action." *Id*. That was legally insufficient and, therefore, the trial court erred in granting the motion. *Id*.

V. THE RESPONSE

"The non-movant must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement [to summary judgment]." *McConnell*, 858 S.W.2d at 343. This is especially critical for no-evidence motions, because, if the non-movant fails to respond and raise a fact issue, the motion "must" be granted. TEX. R. CIV. P. 166a(i); *see also Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605, 608 (Tex. 2017) ("As the [plaintiffs] never responded to [defendant's] no-evidence point, the trial court properly granted [defendant's] summary-judgment motion.").

For either type of motion, a well-considered response is critical to avoiding summary judgment in the trial court and preserving error on appeal. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."); *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 300 S.W.3d 740, 743 (Tex. 2009) (quoting same). Absent a response, "the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant." *McConnell*, 858 S.W.2d at 343. But what constitutes "a response"?

ISSUE TO WATCH

There is a split in authority about whether filing only an affidavit in response to a motion for summary judgment is sufficient to raise a fact issue. The majority view appears to be that an affidavit alone is an adequate response to a summary judgment motion. *See, e.g.*, *Tabe v. Texas Inpatient Consultants, LLLP*, 555 S.W.3d 382, 387 (Tex. App.—Houston [1st Dist.] July 26, 2018, pet. denied) (agreeing with majority view because "the rules of civil procedure allow a party to file either an opposing affidavit *or* a written response to a summary judgment motion, and do not require both. *See* TEX. R. CIV. P. 166a(c)"); *Crown Constr. Co. v. Huddleston*, 961 S.W.2d 552, 555–56 (Tex. App.—San Antonio 1997, no pet.) (following majority view because affidavit provides notice of fact issues but noting split among the courts of appeals). Other courts have held that, although an affidavit filed in opposition to a motion for summary judgment "may state facts that would raise a fact issue with respect to an affirmative defense, if the answer to the motion or other written response fails to point out the fact issue raised by the affidavit," the affidavit alone is insufficient. *See, e.g.*, *Holmes v. Dallas Int'l Bank*, 718 S.W.2d 59, 60 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Eubank v. First Nat'l Bank of Bellville*, 814 S.W.2d 130, 134 (Tex. App.—Corpus Christi 1991, no writ) (same). The sufficiency of an "affidavit alone" may depend on whether a cross-motion was filed and on the purpose for which the affidavit is being use, e.g., to raise a fact issue on the movant's grounds or to

raise a fact issue on an unpleaded affirmative defense. There is no reason to make new law on this issue. If you want to file an affidavit in opposition to a motion for summary judgment, attach it to a short response that identifies the fact issue raised.

A well-considered response should address arguments on the merits, *e.g.*, raise legal and factual issues on all elements of a claim or defense. Depending on circumstances, the nonmoving party may also need to file a cross-motion for summary judgment, file special exceptions, amend the pleadings, seek a continuance, and/or object to the summary-judgment evidence.

A. Procedural requirements

Deadline for response: "Except on leave of court, a party resisting summary judgment may file a response 'not later than seven days prior to the day of hearing.'" *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002) (quoting TEX. R. CIV. P. 166a(c)). The rule is permissive, because, as just explained, a "nonmovant has no burden to respond to a [traditional] summary judgment motion unless the movant conclusively establishes its cause of action or defense." *M.D. Anderson Hosp. & Tumor Instit. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

There is an important distinction between insufficient (or late) notice and no notice. If, as respondent, you did receive insufficient or late notice of the hearing date, object at the earliest opportunity and seek leave to file a late response. *See Carpenter*, 98 S.W.3d at 683 (recognizing that Rule 166a provides the non-movant "an opportunity to obtain leave to file a late response"). If a respondent receives insufficient or late notice but is nevertheless aware of the hearing date, the respondent must move for a continuance and/or object at the hearing. *See Barrientos*, 675 S.W.3d at 406. In objecting to insufficient notice, respondents should also show harm, *i.e.*, explain why they were unable to fully respond to the motion. *See Rasheed*, 2016 WL 3162584, at *3. Absent a proper objection, a complaint about insufficient notice is waived. *Barrientos*, 675 S.W.3d at 406; *see also Ready v. Alpha Bldg. Corp.*, 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (holding that complaints about lack of notice were preserved in motion for new trial filed "promptly" after the non-movant learned about the trial court's ruling). In contrast, "[a] trial court that grants summary judgment without notice of the hearing to the nonmovant errs in granting it." *B. Gregg Price*, 661 S.W.3d at 423; *see also BP Auto. LP v. RML Waxahachie Dodge*, 517 S.W.3d 186 (Tex. App.—Texarkana 2017, no pet.) (reversing summary judgment granted without proper notice of submission); *Ayele v. Jani-King of Houston, Inc.*, 516 S.W.3d 630 (Tex. App.-Houston [1st Dist. 2017, no pet.) (same).

If necessary, seek leave to file a late response: A non-movant who misses the deadline to respond to the motion should seek leave to file a late response. *See Carpenter*, 98 S.W.3d at 684. Leave "should be granted when the non-movant establishes good cause by showing that the failure to respond (1) was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment." *Id*. The explanation for the failure to timely respond should be supported by affidavits or other evidence. *Id*. at 688. A bare assertion that counsel "miscalendared" a deadline is not enough. *Id*. If the respondent does not establish good cause, the trial court does not abuse its discretion in denying the motion for leave. *Id*.

The good-cause standard set forth in *Carpenter* applies if the respondent discovers the mistake *before* the summary-judgment hearing and, therefore, has an opportunity to seek relief under Rule 166a(g). *Id*. at 686. A respondent who discovers the mistake *after* summary judgment has been granted should move for a new trial under the standard set forth in *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939). *See B. Gregg Price*, 661 S.W.3d at 423-24. Under that standard, a defaulting party is entitled to a new trial "when: '(1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff.'" *Id*. (quoting *Craddock*, 133 S.W.2d at 126) (emphasis added). If a respondent "fails to appear due to lack of proper notice, the subsequent judgment is constitutionally infirm." *Id*. at 424. "In that situation, the meritorious defense element of *Craddock* is not required." *Id*.

Get a ruling: It is always advisable to get an express ruling on the record showing that "a late-filed summary judgment response was filed with leave of court." *Stierwalt*, 499 S.W.3d at 195. Otherwise, appellate courts "must presume that the trial court did not consider the response, and therefore, [they] cannot consider it on appeal." *Id*. However, that presumption has been significantly narrowed—and the door to implied rulings opened. *See B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259-62 (Tex. 2020). Although "a 'silent record' on appeal supports the presumption 'that the trial court did not grant leave,' courts should examine whether the record 'affirmatively indicates' the late-filed response was 'accepted or considered.'" *Id*. at 260 (quoting multiple sources). A general recital that the trial court considered "the pleadings, evidence, and arguments of counsel" is generally sufficient to overcome the presumption. *Id*. at 262

Similar principles apply to late-filed evidence. *See Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263, 271-72 (Tex. 2018). "Summary judgment evidence, either supporting or opposing the motion, may be filed late only with leave of court." *Id*. at 271. Courts "presume the trial court did not consider late-filed evidence when nothing in the record indicates the trial court granted leave." *Id*. at 271-72. Although an order denying a motion to strike evidence "does not equate to granting leave to file evidence late," *id*. at 272 (holding that late-filed summary-judgment evidence was not part of the record), an order granting summary judgment and stating that the court considered "all competent summary judgment evidence" may be sufficient. *See Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 163 (Tex. 2018) (holding that Allstate failed to obtain a ruling from the trial court on its objections to the [opposing] affidavit's form, the court of appeals wrongly disregarded it); *see also Steak N Shake*, 598 S.W.3d at 262 (holding that similar language indicated that the trial court considered late-filed evidence).

B. Clearly state the reasons why summary judgment should be denied

"If a movant has established it is entitled to summary judgment as a matter of law, the non-movant must expressly present to the trial court reasons it avoids summary judgment." *Urias v. Owl Springs North, LLC*, 662 S.W.3d 561, 569 (Tex. App.—El Paso 2022, no pet.). In addition, "[w]hen responding to a summary judgment motion, the nonmovant must expressly and specifically identify the supporting evidence on file he wants the trial court to consider." *Walker v. Eubanks*, 667 S.W.3d 402, 409 (Tex. App.—Houston [1st Dist.] 2022, no pet.). "Merely citing generally to voluminous summary judgment evidence in response to either a no-evidence or traditional motion for summary judgment is not sufficient to raise a fact issue to defeat summary judgment." *Id*. (quoting *Nguyen v. Allstate Ins. Co.*, 404 S.W.3d 770, 776 (Tex. App.—Dallas 2013, pet. denied)); *see also State v. Three Thousand, Seven Hundred Seventy-Four Dollars and Twenty-Eight Cents U.S. Currency (3,774.28)*, No. 07-23-00297-CV, 2024 WL 347933, at *6 (Tex. App.—Amarillo Mar. 5, 2024, pet. filed) (affirming no-evidence summary judgment because nonmovant failed to attach evidence to the response and failed to specifically identify which parts of a previously filed, 40-page affidavit supports its claims). Whether in the trial court or on appeal, you should make it as easy as possible for "the court to give you what you want." *See Three Thousand, Seven Hundred Seventy-Four Dollars*, 2024 WL 347933, at *1 ("'Let's make it as difficult as possible for the court to give you what you want,' said no one ever.").

C. If there is a pure question of law, file a cross-motion

If the issue raised by the motion presents a question of law that could also be conclusively resolved in your favor, consider filing a cross-motion for summary judgment. *See, e.g.*, *Point Energy Partners Permian, LLC v. MRC Permian Co.*, 669 S.W.3d 796, 804 (Tex. 2023) (cross-motions on contract-construction issue). The main advantage is that, if the trial court grants the other side's motion and you prevail on appeal, the appellate court can render judgment in your favor rather than remand the case for further proceedings. *See id.* (on cross-motions, appellate court should "render [the] judgment that the trial court should have rendered").

D. If there is a fact question, raise a fact issue on all elements of a claim or an affirmative defense

Claims: To defeat a no-evidence motion, a non-movant must raise a fact issue on all challenged elements, because the failure of a single element condemns the claim as a matter of law. For example, raising a fact issue on liability is not enough to defeat summary judgment when there is an alternative ground – no evidence of damages. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (holding that court of appeals erred by not considering that alternative ground). To raise a fact issue, you also need competent summary-judgment evidence. Evidence may be filed late, *i.e.*, less than seven days before the hearing, but only with leave of court. *See* TEX. R. CIV. P. 166a(c). As explained above, be sure to get a ruling showing that the trial court granted leave and considered the evidence. *See Tex. Windstorm Ins. Ass'n*, 561 S.W.3d at 271-72.

Affirmative defenses: The non-movant should also raise any fact issues on any affirmative defenses to the claims for which summary judgment is sought. *See Clear Creek*, 589 S.W.2d at 678. It is not enough to have alleged an affirmative defense in a pleading. That is because "[t]he terms 'answer' and 'response' as used in the context of the [summary judgment] rule clearly refer to the motion and not to the pleadings generally." *Id*. Thus, "[t]he mere pleading of an affirmative defense will not prevent the rendition of summary judgment for a plaintiff who has established conclusively the absence of disputed fact issues in his claim for relief." *Kirby*, 701 S.W.2d at 926. Instead, if a non-movant has affirmative defenses that provide grounds to avoid summary judgment, he must raise those grounds – and present summary judgment evidence to raise a fact issue – in the trial court. Otherwise, the only argument that can be made on appeal is that the movant's grounds are legally insufficient to support summary judgment. *McConnell*, 858 S.W.2d at 343; *see also Brownlee*, 665 S.W.2d at 112 ("If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment."). If the non-movant fails to produce any evidence on an affirmative defense, the movant is not required to conclusively negate that defense. *See Rogers*, 533 S.W.3d at 438.

As a general rule, respondents should raise fact issues on affirmative defenses at least seven days before the summary-judgment hearing. *See* TEX. R. CIV. P. 166a(c). However, *Samson Exploration, LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766 (Tex. 2017), illustrates a narrow exception that may apply to partial summary judgments. In *Samson*, the plaintiff obtained a partial summary judgment on its "unpooling claims." *Id*. at 781. The defendant (Samson) filed a motion for rehearing that incorporated by reference Samson's contemporaneously filed cross-motion for summary judgment on various affirmative defenses. *Id*. The plaintiff argued that was an untimely response to its motion for summary judgment, but the Texas Supreme Court disagreed. After reciting the general requirements to preserve error under TEX. R. APP. P. 33.1, the Court framed the issue as whether Samson complied with TEX. R. CIV. P. 166a(c), which says "[i]ssues not expressly presented to the trial court by written motion, answer or other response, shall not be considered on appeal as grounds for reversal." *Id*. at 782. The Court had previously held that a non-movant waives an issue asserted for the first time in a motion for new trial. *Id*. (citing *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998)). The Court had also held that a "non-movant must expressly present to the trial court any reasons seeking to avoid movant's entitlement …." *Id*. at 783 (quoting *Clear Creek*, 589 S.W.2d at 678-79). But neither case resolved the issue in *Samson*, because Samson did not wait until after a final judgment was entered to raise the affirmative defense; it raised the defense *before* the unpooling claims had been fully adjudicated. *Id*. Under those circumstances, the trial court had discretion to consider and rule on the issue, and, because Samson obtained a ruling, that was "sufficient to meet the preservation requirements of Rule 33.1." *Id*. at 784.

E. If the motion is unclear, file special exceptions

If the grounds for summary judgment are not clear, the opponent should file special exceptions to the motion. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995). As the Texas Supreme Court explained:

> An exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear of ambiguous. … Prudent trial practice dictates that such an exception should be lodged to ensure that the parties, as well as the trial court, are focused on the same grounds. This prevents the non-movant from having to argue on appeal each and every ground vaguely referred to in the motion. The practical effect of failure to except is that the non-movant loses his right to have the grounds for summary judgment narrowly focused, thereby running the risk of having an appellate court determine the grounds it believes were expressly presented in the summary judgment.

McConnell, 858 S.W.2d at 342–43.

"However, even when a non-movant fails to except, the court of appeals cannot 'read between the lines' or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set for before the trial court." *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). For example, the motion for summary judgment in *Nall* stated the issue as "Whether [the Nalls] have any duty to [Plunkett] in the factual scenario plead by [Plunkett]." *Id*. at 556. The Nalls argued that "Texas law does not recognize social host liability," but Plunkett did not specially except. *Id*. The court of appeals construed the motion as addressing Plunkett's negligence claim only as social-host liability claim, and not as negligent-undertaking claim. *Id*. But the Supreme Court construed the motion as making a two-part argument about the absence of duty in both the social-host and the undertaking contexts. *Id*. The court of appeals thus erred by reversing the summary judgment on a procedural ground (that Nall failed to address negligent-undertaking theory in his motion). *Id*. However, because Plunkett only briefed that procedural issue in the court of appeals, the Texas Supreme Court also held that he waived the issue of whether summary judgment was proper on the merits. *Id*.

F. If the motion exposes a pleading defect, amend the pleadings

"[S]ummary judgment should not be based on a pleading deficiency that could be cured by amendment." *B.I.V.*, 870 S.W.2d at 13-14, *quoted in Chico Auto Parts & Serv., Inc. v. Crockett*, 512 S.W.3d 560, 575 (Tex. App.—El Paso 2017, pet. denied). "Instead, a trial court should grant summary judgment dismissing a plaintiff's claims based on pleading deficiency, only after giving the plaintiff the opportunity to amend his pleadings through a special exception." *Chico Auto Parts*, 512 S.W.3d at 5758. That said, a non-movant waives any complaint that summary judgment was improperly granted by failing to ask to amend pleadings. *Id*.

An amended pleading must be filed at least seven days before the summary-judgment hearing. *See Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996); TEX. R. CIV. P. 63 (requiring pleadings to be filed at least seven days of the date trial or, if later, "only after leave of the judge"). An amended pleading filed less than seven days before the hearing is "untimely unless filed with leave of court." *Kiefer*, 920 S.W.2d at 276. "[L]eave of court is presumed when a summary judgment states that all pleadings were considered, and when, as here, the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise." *Id*.; *see also Yeske*, 513 S.W.3d

at 671 ("an appellate court will presume that the trial court granted leave to amend when the summary judgment states that all pleadings were considered, the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise").

G. If you need additional time for discovery, move for a continuance

If you do not have the evidence needed to raise a fact issue, consider moving for a continuance. But do not assume your motion will be granted. The burden is heavy, and the trial court's ruling is unlikely to be overturned on appeal.

"The trial court may order a continuance of a summary judgment hearing if it appears 'from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition.'" *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004) (quoting TEX. R. CIV. P. 166a(g)). An order denying a motion for continuance is reviewed very deferentially, under a "clear abuse of discretion" standard. *Id*. The following nonexclusive factors are considered "when deciding whether a trial court abused in discretion in denying a motion for continuance seeking additional time to conduct discovery: the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought." *Id*. Several recent cases show how Texas appellate courts are applying that standard:

- In *Mr. W Fireworks, Inc. v. NRZ Investment Group, LLC*, 677 S.W.3d 11, 22 (Tex. App.—El Paso 2023, pet. denied), the defendant (NRZ) filed a no-evidence and traditional motion for summary judgment. The plaintiff (Mr. W) "neither filed a verified affidavit nor a motion explaining why it believed additional discovery was necessary, what evidence it sought through discovery, and why such evidence would have been material to its case." *Id*. Under these circumstances, the court of appeals concluded that "Mr. W failed to preserve its argument that additional time for discovery was necessary before the trial court could enter summary judgment in NRZ's favor." *Id*.
- In *Bock v. State Farm County Mutual Insurance Co. of Texas*, 675 S.W.3d 36, 44 (Tex. App.—San Antonio 2023, no pet.), after State Farm paid benefits on a UIM claim, Bock's remaining claims ("bad faith") were dismissed for want of prosecution. Eight months after the case was reinstated, State Farm filed a no-evidence motion for summary judgment, and Bock sought a continuance, arguing that State Farm's motion was "premature, because the case was 'in its infancy.'" *Id*. at 45. The trial court denied the continuance and granted summary judgment. *Id*. The court of appeals affirmed. Applying the established factors, the court of appeals concluded that "the trial court applied the law correctly and some evidence reasonably supports its ruling." *Id*. at 46 (holding that "the trial court could have reasonably concluded that Bock's allowing the case to be dismissed for want of prosecution and his delay in seeking discovery showed he did not exercise due diligence to get the information he sought").
- In *Malone v. Harden*, 668 S.W.3d 39, 45-46 (Tex. App.—Houston [1st Dist.] 2022, no pet.), Harden filed a no-evidence motion more than two years after being named as a defendant. *Id*. at 46. The trial court denied Malone's motion for continuance to conduct additional discovery and dismissed the claims against Harden. *Id*. The court of appeals affirmed. *Id*. Because "Malone has not shown how this additional discovery will reveal evidence that had not already come to light," the court of appeals could not say that the trial court abused its discretion. *Id*.

Complaints about orders denying continuances are common. Even so, the deferential standard of review makes it very difficult to show an abuse of discretion as required to prevail on appeal.

H. If the summary-judgment evidence is defective, object and obtain a ruling

"Summary judgment evidence must be presented in a form that would be admissible at trial." *Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 124 (Tex. App.—Houston 14th Dist. 2013, pet. denied); *see also Seim*, 551 S.W.3d at 163 ("The same evidentiary standards that apply in trials also control the admissibility of evidence in summary-judgment proceedings."). "Defects in the *form* of affidavits or attachments will not be grounds for reversal unless *specifically pointed out by objection* by an opposing party with opportunity, but refusal, to amend." TEX. R. CIV. P. 166a(f) (emphasis added). However, objecting, by itself, will not, preserve error. To complain about a formal defect on appeal, "a party must (1) complain to the trial court by way of 'a timely request, objection, or motion; and (2) the trial court must rule or refuse to rule on the request, objection, or motion.'" *Seim*, 551 S.W.3d at 164 (quoting *Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314, 317-18 (Tex. 2012) (per curiam)). "Even unobjected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.'" *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017) (quoting *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin 2003, no pet.)). These preservation requirements highlight several issues for summary-judgment appeals.

1. Form vs. substance

By its plain language, Rule 166a(f) only requires objections to defects in *form*; defects in *substance* may be raised for the first time on appeal. *See Seim*, 551 S.W.3d at 166. Thus, to know whether an objection is required, you need to know whether a defect is formal or substantive. That is not always easy to determine.

Formal defects include:

- Hearsay. An objection that an affidavit contains hearsay is an objection to a defect in form that must be raised and ruled on in the trial court to preserve error for appeal. *See, e.g.*, *Hibernia Energy III, LLC v. Ferae Naturae, LLC*, 668 S.W.3d 745, 763 (Tex. App.—El Paso 2022, no pet.) (hearsay objections go to form rather than substance of summary-judgment evidence); *see also Tex. Commerce Bank v. New*, 3 S.W.3d 515, 517 (Tex. 1999) ("unobjected to hearsay constitutes probative evidence").
- Defective authentication. An objection about the authentication of summary-judgment evidence is also an objection to form that must be preserved for appeal. *See, e.g.*, *1776 Energy Partners, LLC v. Marathon Oil EF, LLC*, No. 04-20-00304-CV, 2023 WL 2669669, at *11 (Tex. App.—San Antonio 2023, no pet.); *Hibernia Energy*, 668 S.W.3d at 763; *In Estate of Guerrero*, 465 S.W.3d 693, 706 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
- Lack of notarization. An objection that an affidavit is not notarized is another objection to form that must be preserved for appeal. *See Seim*, 551 S.W.3d at 166 (obvious defect in affidavit, including absence of notary's signature, must be objected to and ruled on by the trial court).
- Business records. An objection that an affidavit does not comply with the requirements for the business records exception to the hearsay rule is an objection to form that must be preserved for appeal. *See, e.g.*, *McFarland v. Citibank (South Dakota), N.A.*, 293 S.W.3d 759, 762 (Tex. App.—Waco 2009, no pet.).
- Sham affidavits / interested witnesses. The "sham-affidavit rule" provides that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition without explaining the contradiction or attempting to resolve the disparity." *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 85 (Tex. 2018) (quoting *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999)). Sham affidavits are insufficient to raise a fact issue and, therefore, may be disregarded. *See id*. However, the courts of appeals generally treat a complaint about a sham affidavit as an objection to form that must be preserved for appeal. *See, e.g.*, *Escamilla v. Cadena*, No. 13-22-00041-CV, 2023 WL 3015390, at *3 (Tex. App.—Corpus Christi – Edinburg Apr. 20, 2023, no pet.) (citing cases). Similarly, a complaint that an affidavit comes from an interested witness is a formal objection that must be preserved for appeal. *See, e.g.*, *Polecat Hill, LLC v. City of Longview*, 648 S.W.3d 315, 331 (Tex. App.—Texarkana 2021, no pet.).

Substantive defects include:

- Conclusory statements. "A conclusory statement is one that does not provide the underlying facts to support the conclusion and, therefore, is not proper summary-judgment proof." *Rogers*, 533 S.W.3d at 436. Conclusory statements in summary judgment affidavits are errors of substance and not form, and therefore can be urged for the first time on appeal. *See, e.g.*, *In re Estate of Zerboni*, 556 S.W.3d 482, 487 (Tex. App.—El Paso 2018, no pet.); *Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.—Dallas 2014, no pet.); *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.).
- Unreliable expert opinions. Unreliable expert testimony "is no evidence and will not defeat a no-evidence motion for summary judgment." *Helena Chem*., 664 S.W.3d at 73.
- Party's own discovery responses. A party's own discovery responses are incompetent summary-judgment evidence and may not be used to avoid a non-evidence challenge, even if there is no objection in the trial court. *See, e.g.*, *Crooks v. Moses*, 138 S.W.3d 629, 641 (Tex. App.—Dallas 2004, no pet.); *ANA, Inc. v. Lowry*, 31 S.W.3d 765, 770 n.2 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

ISSUES TO WATCH

Lack of personal knowledge. The Texas Supreme Court has made some inconsistent statements regarding complaints about lack of personal knowledge, and that has generated confusion among the courts of appeals. In *Grand Prarie Independent School District v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990), the Court held that the failure to object to an affidavit that, on its face, did not show that the witness was "testifying from personal knowledge and was competent to testify about the matters stated," resulted in waiver. That indicates

that lack of personal knowledge is a defect in *form*. However, without overruling *Vaughan* (or addressing the potential inconsistency), the Court affirmed a decision by the Dallas Court of Appeals treating lack of personal knowledge as a *substantive* defect. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Willmer*, 904 S.W.2d 656 (Tex. 1995). Fifteen years later, the Court appeared to confirm that approach by stating that "[a]n affidavit not based on personal knowledge is legally insufficient." *See Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 666 (Tex. 2010). Nevertheless, most courts of appeals currently treat lack of personal knowledge as a defect in form that must be objected to and ruled on in the trial court to preserve error for appeal. *See, e.g., Washington DC Party Shuttle, LLC v. IGuide Tours*. 406 S.W.3d 723, 733-35 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (compiling cases). Only the Austin and El Paso courts appear to take the opposite view. *See Fernandez v. Peters*, No. 03-09-00687-CV, 2010 WL 4137491, at *4 (Tex. App.—Austin Oct. 19, 2010, no pet.); *Villanova v. Fed. Deposit Ins. Corp.*, 511 S.W.3d 88, 95 (Tex. App.—El Paso 2014, no pet.) ("legally insufficient"); *but see Landry's Seafood Restaurants, Inc. v. Waterfront Cafe, Inc.*, 49 S.W.3d 544, 551 (Tex. App.—Austin 2001, pet. dism'd) ("This Court has determined that the failure to object to the form of an affidavit on the ground that it does not show personal knowledge waives the complaint on appeal.").

Unsigned, unsworn affidavits: Some courts of appeals have held that an *unsigned and unsworn* affidavit is legally insufficient to support summary judgment, regardless of whether an objection was lodged in the trial court. *See, e.g.*, *Nevarez Law Firm, PC v. Investor Land Servs., LLC*, 645 S.W.3d 870, 884 (Tex. App.—El Paso 2022, no pet.); *Bernsen v. Live Oak Ins. Agency, Inc.*, 52 S.W.3d 306, 310 (Tex. App.—Corpus Christi 2001, no pet.); *but see Lam v. PNR Invs., Inc.*, No. 14-23-00005-CV, 2024 WL 2753214, at *4 (Tex. App.—Houston [14th Dist.] 2024, no pet. h.) (concluding that "same rationale expressed in *Mansions* with respect to error preservation concerning an unsworn affidavit applies equally to an unsigned affidavit").

Rather than gamble on how your defect might be classified on appeal, the better practice is to object and obtain a ruling in the trial court. Without a ruling, consider focusing on "substantive" issues on appeal.

2. Specificity

Rule 166a(f) also requires an objection to be *specific*. That means the objecting party must make specific objections to each component part of a particular piece of evidence in order to preserve error. *Stovall & Associates, P.C. v. Hibbs Fin. Ctr., Ltd*., 409 S.W.3d 790, 797 (Tex. App.—Dallas 2013, no pet.). Blanket objections are insufficient to preserve error. *See id*.

3. The trial court's ruling

Timing: The best practice is to obtain a written ruling "on all objections to summary-judgment evidence at, before, or *very near* the time the trial court rules on the motion for summary judgment or risk waiver." *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (emphasis added). How near is "very near"? One court of appeals has held that objections could be preserved by an order signed *after* the summary judgment, as long as the objections were made and ruled on before the summary judgment order was signed. *See Wolfe v. Devon Energy Prod. Co., LP*, 382 S.W.3d 434, 447 (Tex. App.—Waco 2012, pet. denied). Under those circumstances, the written order "merely 'memorializ[es] what the Court thought' during the earlier hearing." *Id*. Obviously, an order signed after the trial court's plenary power expires is not "near" enough to preserve error. *Id*. at 448 (discussing *Rankin v. Union Pac. R.R. Co.*, 319 S.W.3d 58, 65 (Tex. App.—San Antonio 2010, no pet.)).

Explicit vs. implicit: "[A]n order granting a party's motion for summary judgment does not in itself clearly imply a ruling sustaining the party's objections to summary judgment evidence, at least where 'sustaining the objections was not necessary for the trial court to grant summary judmgnet.'" *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist*., 642 S.W.3d 829, 837 (Tex. 2022) (quoting *Seim*, 551 S.W.3d at 166). Thus, absent an express ruling (written or oral), any objections to formal defects are waived. *Id*. at 837-38.

VI. THE REPLY

Although Rule 166a does not mention replies, filing one is necessary to preserve objections to the respondent's summary-judgment evidence. It also provides an opportunity to respond to legal arguments bearing on the movant's grounds for summary judgment.

It is equally important to understand what should *not* be done in a reply brief. As explained, summary judgments "stand or fall on the grounds expressly presented *in the motion*." *See McConnell*, 858 S.W.2d at 341 (emphasis added). The corollary is that "the movant is not entitled to use its reply to amend its motion for summary judgment or to raise new and independent summary judgment grounds." *Wylie v. Integrity Ins. Solutions*, 502 S.W.3d 901, 907 (Tex.

App.—Houston [14th Dist.] 2016, no pet.); *see also ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 546 (Tex. 2017) (declining to consider issue not presented in the motion). If something comes up in the response that raises a need to present a new ground, amend your motion. It is better to start the clock running again in the trial court than have a summary judgment reversed on subsequent appeal.

Another issue to consider on reply is how you want to respond to new issues raised in the response. For example, if you move for summary judgment based on limitations and, in response, the plaintiff raises the discovery rule *for the first time*, you have two options: (i) "object that discovery rule has not been pleaded"; or (ii) "respond on the merits and try the issue by consent." *Via Net*, 211 S.W.3d at 313. If you choose the latter course, then the issue is "placed squarely before trial and appellate courts." *Id*.

Finally, consider the impact of amended pleadings and determine whether any additional claims or issues are conclusively proven (or negated) by your existing grounds. As a general rule, "[w]hen a summary-judgment movant amends his or her pleadings after filing the motion for summary judgment, the movant must ordinarily amend or supplement the motion to address the new claims." *Stillwell v. Stevenson*, 668 S.W.3d 844, 852 (Tex. App.—El Paso 2023, pet. denied). However, there is an exception that applies when "the original motion is broad enough to encompass later asserted claims." *Id*.; *see also Konogeris v. Pinnacle Health Facilities GP I, LLC*, 657 S.W.3d 421, 427 (Tex. App.—El Paso 2022, no pet.) (affirming summary judgment because movant "preemptively addressed the vicarious liability theory issue in its summary judgment motion"); *Jones*, 642 S.W.3d at 65 (motion that "expressly challenged [plaintiff's] theory of damages[] was broad enough to include the newly-raised factual allegations in her First Amended Petition"). If the original motion is broad enough to encompass the new claims, any error in granting the motion would be harmless. *See G & H Towing*, 347 S.W.3d at 298 (Tex. 2011). If not, you will need to amend your motion to address the new claim. *See id*. But note the timing. Leave is required to amend a pleading after a summary-judgment hearing (but before the court rules). *See MedStar Funding, LC v. Willumsen*, 650 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2022, no pet.). "Because an untimely amended petition filed without leave does not supersede the prior petition, the summary judgment movant need not amend or supplement its motion to address any new claims asserted in the amended petition." *Id*.

VII. THE TRIAL COURT'S DECISION

A. The hearing

Motions for summary judgment are decided based on the pleadings and written evidence (or lack thereof). *See* TEX. R. CIV. P. 166a(c), (i). Hearings provide an opportunity for counsel to present legal arguments; oral testimony is not permitted. *See id*.; *see also Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992) (stating that live testimony may not be considered at a summary-judgment hearing). Because they are not evidentiary, summary-judgment hearings need not be transcribed. However, you may need a record to show that the trial court ruled on evidentiary objections. *See, e.g.*, *FieldTurf USA*, 642 S.W.3d at 838 (objections preserved by "on-the-record, unequivocal oral ruling"). In addition, a record may be helpful if the other side limits or waives an issue at the hearing. Finally, a written transcript is often helpful in preparing for appeal because it provides appellate counsel with an opportunity to review questions raised by the trial court and arguments made by opposing counsel.

B. The trial court's decision

The legal standards for making a decision are well-established. However, there is no requirement that the trial court actually make a decision. "The court may act as soon as the date of submission or as late as never." Hittner, Liberato, Rutter & Dunbar, *Summary Judgments in Texas*, 62 S. TEX. L. REV. at 146. "Never" is particularly problematic if, for example, a case involves a breach of contract claim and the motion for summary judgment raises threshold issues of contract construction (including the question of whether the contract is ambiguous). Yet, litigants have little recourse. "[E]ven though the delay in ruling on the motion causes expense and inconvenience to the litigants, mandamus is not available to compel the trial judge to rule on the pending motion for summary judgment." *Id*. (quoting *In re Am. Media Consol.*, 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, no pet.) (quoting TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 7.04 (3d ed. 2011))); *see also In re Coleman*, No. 06-13-00038-CV, 2013 WL 1858083, at *2 (Tex. App.—Texarkana 2013, orig. proceeding) (denying mandamus relief and noting distinction between failure to rule and refusal to rule).

C. The form of the order

A summary-judgment order may be granted on specific grounds, or it may be "general," *i.e.*, an order that grants the motion without specifying particular grounds or reasons. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996). As explained more fully in Section VIII, even if an order is "specific," appellate courts can still consider all grounds that were presented to the trial court (and preserved for appellate review). *See id*. Because there

is no real advantage to appealing from a specific order, it is usually not worth fighting over specific grounds to include in the order. Instead, focus on avoiding bigger traps related to evidentiary rulings and finality issues.

1. Include evidentiary rulings

As explained above (§ V.H), it is critical to get a ruling on any formal objections to summary-judgment evidence. Otherwise, any complaints about that evidence may not be preserved for appellate review. *See* TEX. R. CIV. P. 166a(f); *FieldTurf USA*, 642 S.W.3d at 838.

2. Ensure that the order is "final" (or subject to interlocutory appeal)

Another issue to watch concerns finality, *i.e.*, whether the summary-judgment order shows that the trial court intended to enter a final judgment. If not, it will not be appealable – unless it is subject to interlocutory appeal.

A summary-judgment order "is final *either* if 'it actually disposes of every pending claim and party' *or* 'it clearly and unequivocally states that it finally disposes of all claims and all parties.'" *Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020 (quoting *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 204 (Tex. 2001)). "Although no 'magic language' is required, a trial court may express its intent to render a final judgment by describing its action as (1) final, (2) a disposition of all claims and parties, and (3) appealable." *Id*. "If the judgment clearly and unequivocally states that it finally disposes of all claims and parties, the assessment is resolved in favor of finding finality, and the reviewing court cannot review the record." *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151, 154 (Tex. 2023). The analysis "begin[s] by determining whether the Judgment is clearly and unequivocally final on its face." *Id*. If so, the order is appealable—"even if review of the record would undermine finality." *Bella Palma*, 601 S.W.3d at 801. "If, however, an order's finality is not clear and unequivocal, then a reviewing court must examine the record to determine whether the trial court intended the order to be final." *In re R.R.K.*, 590 S.W.3d 535, 540 (Tex. 2019).

Given the Texas Supreme Court's recent guidance, it should be "easy" for "[c]areful lawyers and trial judges [to] place unambiguous finality language in orders they intend to be final." *Schneider v. Quintana Energy Servs., LLC*, No. 14-22-00803-CV, 2024 WL 2753311 (Tex. App.—Houston [14th Dist.] May 30, 2024, no pet. h.) (Spain, J. dissenting). However, recent cases confirm that "finality" remains an issue to watch:

- The "Final Judgment" in *Faith P. and Charles L. Bybee Fdn. v. Knutzen*, 681 S.W.3d 818 (Tex. App.—Austin 2023, no pet.), stated "[(1)] This is a FINAL JUDGMENT, [(2)] disposing of all claims and parties. [(3)] This judgment is appealable." *Id*. at 825. Although the judgment awarded more relief than requested, the majority concluded that the "three-part statement" was "a 'clear indication' of finality, mak[ing] the summary judgment the final judgment in the suit." *Id*., n.2. The dissenting justice reached the opposite conclusion and would have dismissed the appeal for want of jurisdiction. *Id*. at 843 (Smith, J., dissenting).
- The order in *Garcia v. Ramirez*, No. 08-23-00117-CV, 2024 WL 2801931 (Tex. App.—El Paso May 31, 2024, no pet. h.), stated "'These judgments dispose of all claims and defenses between the parties *made the subject of the above-referenced summary judgments*.' (emphasis added)." *Id*. at *3. Because "the July 2014 order was both ambiguous and failed to dispose of all claims and all parties," the majority opinion concluded that "the order was not final and appealable" and, therefore, an appeal taken from a subsequent order (September 2022) was timely. *Id*. at *4. But, because the September 2022 order was interlocutory, the appeal was dismissed for want of jurisdiction. *Id*. The concurring/dissenting justice would have concluded the July 2014 order "was a final and appealable order when rendered, as it contained clear and unequivocal finality language." *Id*. at *5 (Palafox, J., concurring and dissenting). Thus, because the trial court's plenary power expired long before it signed the order on appeal, the concurring/dissenting opinion agreed the case should be dismissed for want of jurisdiction. *Id*.
- The three defendants in *Schneider v. Quintana Energy Services*, moved for summary judgment, but the substantive argument and prayer only mentioned one of the defendants. 2024 WL 2753311 at *10. Nevertheless, the trial court "rendered judgment that [plaintiff's] 'claims against [defendants] are dismissed with prejudice.'" *Id*. at *2. The majority concluded that "the summary judgment dismissing with prejudice all the plaintiffs' claims against all the defendants is final and appealable" (but erroneous, because it granted more relief than requested). *Id*. at *11. Expressing surprise that "trial courts and litigants still struggle with finality language," the dissenting justice concluded that the order did not "actually dispose[] of all claims and all parties" and, therefore, was not "an appealable final judgment." *Id*. at *12-14.

If a summary-judgment order is not final on its face and the record confirms as much, a trial court abuses its discretion by signing a subsequent order (nine months later) purporting to confirm that the original order was final. *See In re McDermott*, No. 04-22-00497-CV, 2023 WL 2004410, at *3 (Tex. App.—San Antonio Feb. 15, 2023, orig proceeding) (granting mandamus relief from "Order on Finality of Summary Judgment" as "consistent with the Supreme Court's

instruction that litigants should be able to calculate appellate timetables with certainty so they do not inadvertently lose the ability to seek appellate review").

This should not be "rocket science," but pay close attention to the language in the proposed judgment, make sure that language is consistent with the record (*i.e.*, the pleadings and the summary-judgment grounds), and if the order is intended to be final, state "**THIS JUDGMENT FINALLY DISPOSES OF ALL PARTIES AND ALL CLAIMS AND IS APPEALABLE**." *See Schneider*, 2024 WL 2753311, at *12 (Spain, J., dissenting). Conversely, do not include finality language if the order is not intended to be final. And, if the trial court's plenary power has expired, do not ask the court to delete finality language under the guise of correcting a "clerical error." An order that is erroneous but final is "judicial error," and once plenary power expires, the trial court cannot change the order. In that instance, "err on the side of appealing or risk losing the right to appeal." *Lehmann*, 39 S.W.3d at 196, *quoted in In re Elizondo*, 544 S.W.3d 824, 829 (Tex. 2018).

D. Post-judgment motions

1. Motions for rehearing (or reconsideration)

"A trial court has the inherent authority to change or modify an interlocutory order or judgment at any time before the judgment becomes final." *Note Inv. Group, Inc. v. Assocs. First Capital Corp.*, 476 S.W.3d 463, 494 (Tex. App.—Beaumont 2015, no pet.). And, even after a trial court enters a final summary judgment, parties sometimes file motions for rehearing (or reconsideration). *See, e.g.*, *Padilla v. La France*, 907 S.W.2d 454, 457 (Tex. 1995) ("Motion for Reconsideration on his Motion for Summary Judgment"). Such motions are not required to preserve error, and they do not necessarily extend the appellate timetable. *See* TEX. R. CIV. P. 329b; *but see Padilla*, 907 S.W.2d at 459 (construing motion for reconsideration as motion to modify the judgment, which "operated to extend the appellate timetable"). The safest practice is to combine a motion for rehearing with a motion for new trial or a motion to modify the judgment to avoid any question about appellate deadlines. *See* Hittner, Liberato, Rutter & Dunbar, *Summary Judgments in Texas*, 62 S. TEX. L. REV. at 152.

2. Motion for new trial

A motion for new trial is not required to preserve complaints raised in the summary-judgment response. *Lee v. Braeburn Valley West Civic Ass'n*, 786 S.W.2d 262, 263 (Tex. 1990); *see also* TEX. R. CIV. P. 324(a). But "[a] motion for new trial is not necessarily inappropriate following entry of a summary judgment." *Torres v. W. Cas. & Sur. Co.*, 457 S.W.2d 50, 51 (Tex. 1970). Such a motion may be necessary to preserve complaints about lack of notice of the summary-judgment hearing. *See, e.g.*, *Ready v. Alpha Building Corp.*, 467 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Tivoli Corp. v. Jewelers Mut. Ins. Co.*, 932 S.W.2d 704, 710 (Tex. App.—San Antonio 1996, writ denied). It may also be used to present newly discovered evidence. *See Fulton v. Duhaime*, 525 S.W.2d 62, 64 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). It also serves to extend appellate deadlines. *See Torres*, 457 S.W.2d at 51.

3. Findings of fact and conclusions of law

Requests for findings of fact and conclusions of law "have no place in a summary judgment proceeding[.]" *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994). That is because, "[w]hen a trial court grants a summary judgment, it makes a determination that no material issues of fact exist." *Thomley v. Southwood-Driftwood Apts., Ltd.*, 961 S.W.2d 6, 7 (Tex. App.—Amarillo 1996, no writ). And, even when a court denies a motion because it determines that fact issues exist, "it does not decide the issues." *Id*. Thus, a request for findings of fact will *not* extend the deadline to appeal. *Linwood*, 885 S.W.2d at 103; *see also Willms v. Americas Tire Co.*, 190 S.W.3d 796, 810 (Tex. App.—Dallas 2006, pet. denied).

VIII. APPEAL

Many of the issues that arise in summary-judgment appeals are directly related to the topics discussed above. This section summarizes the procedures, standards of review, and issues to watch at the appellate level.

A. Procedures for appeal

Appealable orders: Orders granting summary judgments are generally appealable as long as they are "final," *i.e.*, they dispose of all claims and all issues in the case. (*See supra*, § VII.C.2.) Orders denying motions for summary judgment are interlocutory and, therefore, are generally not appealable – unless the denial was done in conjunction with granting a cross-motion for summary judgment. Err on the side of appealing. "If the final judgment is deficient, the remedy comes by appeal, not by the deprivation of appellate jurisdiction." *Bella Palma*, 601 S.W.3d at 802.

Although appeals from final judgments used to be the general rule, that is no longer the "the general rule." *See Indus. Specialists, LLC v. Blanchard Refining Co. LLC*, 652 S.W.3d 11, 14 (Tex. 2022) (quoting *Dallas Symphony*

Ass'n v. Reyes, 571 S.W.3d 753, 760 (Tex. 2019)). The interlocutory-appeal statute permits appeals from 17 categories of interlocutory orders, including orders denying summary judgment based on claims of official immunity, First-Amendment media rights (freedom of speech and press), governmental immunity, matters involving electric utilities, and matter involving contractors. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5), (6), (8), (13), and (17). And, if an order denying a motion for summary judgment on a claim that permits an interlocutory appeal, the entire order may be appealable. *See Reyes*, 571 S.W.3d at 760 (reviewing order denying motion based on defenses to defamation and tortious interference claims under provision permitting interlocutory appeal of order denying motion for summary judgment based on defense of immunity, because specific statutory provision did not limit scope of appeal). Subsequent appeals from subsequent interlocutory orders are permitted as long as "the second motion is a new and distinct motion and not a mere motion to reconsider previous grounds for summary judgment." *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 789 (Tex. 2019).

> **ISSUE TO WATCH**
> If you have a case that appears to fall within one of the interlocutory-appeal categories, study the language in the statute closely, as it will determine whether you may appeal from your specific order and, if so, the scope of the issues that may be decided on appeal. *See Reyes*, 571 S.W.3d at 759-60 (clarifying scope of appeal in free-speech case). Also, depending on the category, taking an interlocutory appeal may stay the commencement of trial and, in some instances, all other proceedings until the appeal is resolved. TEX. CIV. PRAC. & REM. CODE § 51.014(b).

Issues presented on summary judgment may also be appropriate for permissive appeal if the order (1) involves a controlling question of law, (2) an immediate appeal may materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d). "When these requirements are satisfied, granting a permissive appeal spares litigants and courts 'the inevitable inefficiencies of the final judgment rule in favor or early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation." *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 146 (Tex. 2022) (quoting *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019)).

File a notice of appeal: The deadline to appeal is 30 days after a final judgment is signed (or 90 days after the judgment is signed if any party files a motion for new trial or a motion to modify the judgment). *See* TEX. R. APP. P. 26.1(a). If you are appealing from an interlocutory order, the deadlines are accelerated; the notice of appeal must be filed within 20 days after the order is signed. *See* TEX. R. APP. P. 26.1(b).

Request the record: The appellant has the burden to bring forward a record that is sufficient to decide the issues on appeal. *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam). Be sure to include all items required by TEX. R. APP. P. 34.5 (Clerk's Record). For an appeal from a summary judgment, you will want the relevant pleadings, the motion(s) for summary judgment, along with any responses and replies, all summary judgment evidence, any special exceptions, any objections and rulings on evidentiary matters, any motions related to issues on appeal (*e.g.*, motions for continuance and motion for leave to file a late response, late evidence, or to amend pleadings), and all relevant orders. In addition, if the trial court made oral rulings on evidentiary issues, or if the other side made concessions limiting the issues, a written transcript of the hearing will be necessary and should be included in the appellate record. *See FieldTurf USA*, 642 S.W.3d at 838.

B. Standards of appellate review

The appellate standards of review are directly related to the requirements in Rule 166a, which set the standards used by trial courts in deciding whether to grant summary judgment in the first instance. Because summary judgments turn on issues that can be decided as a matter of law, Texas courts "review summary judgment de novo." *Wal-Mart*, 663 S.W.3d at 576. In so doing, courts "take as true all evidence favorable to the non-movant, and [they] indulge every reasonable inference in favor of the non-movant and resolve any doubts in the non-movant's favor." *Id*. (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

Traditional motions: In reviewing traditional summary judgments, appellate courts determine whether the party that moved for summary judgment met its burden to "demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Energen Res. Corp. v. Wallace.*, 642 S.W.3d 502, 509 (Tex. 2022) (citing TEX. R. CIV. P. 166a(c)).

No-evidence motions: Similarly, appellate courts "review the evidence presented by a no-evidence motion for summary judgment and response 'in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'" *Gonzalez v. Ramirez*, 463 S.W.3d 499, 504 (Tex. 2015) (quoting *Mack Trucks*,

206 S.W.3d at 582). "The court must grant such a 'no-evidence' motion unless the non-moving party responds with 'evidence raising a genuine issue of material fact.'" *Helena Chem*., 664 S.W.3d at 73 (quoting *Valence Operating*, 164 S.W.3d at 661).

Hybrid motions: When a party moves for traditional and no-evidence summary judgment, appellate courts "first consider the no-evidence motion. If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion as it necessarily fails. Thus, [courts] first review each claim under the no-evidence standard. Any claims that survive the no-evidence review will then be reviewed under the traditional standard." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017) (citations omitted). Although this is the general rule, appellate courts are not required to consider no-evidence motions first. *See Steak N Shake*, 598 S.W.3d at 260-61.

Cross-motions: "When both parties move for summary judgment and the trial court grants one motion and denies the other, as here, we review both sides' summary judgment evidence and render the judgment the trial court should have rendered." *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) (cross-motions on preemption issue). However, this rule only applies when both parties moved for summary judgment on the same issue. *See Rustic Nat. Res. LLC v. DE Midland III LLC*, 669 S.W.3d 494, 505 (Tex. App.—Eastland 2022, pet. filed) (reversing and remanding).

Scope of review: Thirty years ago, if a trial court granted summary judgment on specific grounds, Texas courts generally limited their review to those grounds. *See Cates*, 927 S.W.2d at 626. Then, in 1996, the Texas Supreme Court held that "courts of appeals should consider all summary judgment grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal when reviewing a summary judgment." *Id*. However, the Court also recognized that "rule 166a does not prevent an appellate court from affirming the judgment on other grounds the parties properly raised before the trial court, when the trial court grants summary judgment specifically on fewer than all grounds asserted." *Id*. at 625. Because the rules of appellate procedure permit appellate courts to "render the judgment or decree that the court below should have rendered," the Court broadened the scope of review by permitting appellate courts to "consider other grounds that the movant preserved for review and trial court did not rule on in the interest of judicial economy." *Id*. at 626. The practical effect of this change is that "[t]he advantage of obtaining an order from the trial court specifying the basis for the summary judgment—usually a fruitless endeavor anyway—has been removed." Hittner, Liberato, Rutter & Dunbar, *Summary Judgments in Texas*, 62 S. TEX. L. REV. at 149. Any arguments properly raised in the trial court can be used to uphold a summary judgment on appeal.[2]

C. Presenting argument and avoiding waiver on appeal

Awareness of the issues highlighted above should put you in a good position to challenge – or uphold – a summary judgment on appeal. Here are some additional considerations:

Appellant: The de novo standard of review is in your favor, but you lost in the trial court, so you need to figure out a way to prevail on appeal.

- Start with the judgment itself. Is it final, or is there an argument that the appeal should be dismissed for want of jurisdiction?
- Consider procedural defects preserved for review. Was the judgment entered without sufficient notice of the hearing? If so, it is subject to reversal on appeal. Also consider whether the trial court abused its discretion in denying leave to amend pleadings or file a late response (or evidence), or in denying a request for continuance.
- Focus on substantive errors – especially if complaints about procedural defects were not properly preserved. Show why the movant failed to meet his burden. Or show that the summary judgment that is based on a ground that was not raised in the motion. *See, e.g.*, *G&H Towing*, 347 S.W.3d at 297. A summary judgment that grants more relief than requested must also be reversed. *See, e.g.*, *Knutzen*, 681 S.W.3d at 826.
- If you are challenging a "general" judgment, be sure to challenge every ground on which judgment could have been based. Otherwise, the judgment will be affirmed. *See Flores v. Hull Assocs. North, LP*, 657 S.W.3d 68, 75 (Tex. App.—El Paso 2022, no pet.) ("When the trial court's order does not state the

[2] "Where, as here, a trial court does not specify the grounds on which it granted the motion for summary judgment, we must affirm if any of the grounds asserted in the motion are meritorious." *See, e.g.*, *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017).

grounds on which the summary judgment is based, the appellant must show that none of the grounds proposed support the judgment granted.").

- Provide "adequate" briefing on each issue. The rules of appellate procedure require briefs to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i); *see also* 53.2(i), 55.2(i) (same requirements for briefs to Texas Supreme Court). There is no precise standard, but cases provide some guidelines. For example, the Houston [14th Dist.] Court has held that the failure to cite any legal authorities or to provide any analysis or legal citations is not "adequate," even with a liberal interpretation of appellate briefs. *Tooker v. Alief Indep. Sch. Dist.*, No. 14-15-00124, 2017 WL 61833, at *5 (Tex. App.—Houston [14th Dist.] Jan. 4, 2017, no pet.); *see also Hall v. Houstonian Inv. Group, LLC*, 635 S.W.3d 449, 453 (Tex. App.—Texarkana 2021, pet. denied) ("broad issue questioning whether the trial court erred by rendering summary judgment in favor of [appellee]" is, by itself, insufficient). It is also "well settled that a party may not simply incorporate trial court arguments by reference and must actually present arguments on appeal." *Rogers v. City of Houston*, 627 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2021, no pet.). Nor will appellate courts "research the law that may support appellant's contentions or review the appellate record for facts to support those contentions to determine if there was error." *See id*. If you are trying to overturn a summary judgment, be sure to brief your legal arguments and provide specific record cites or risk having your issues waived on appeal.
- Consider what relief you want to request. Reversal and rendition of a judgment in your favor is the best possible result, and that may be appropriate if the appellate court is reviewing cross-motions. But do not forget to request, at least in the alternative, a remand for further proceedings on specified issues. *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) ("A party generally is not entitled to relief it does not seek."). On a related note, if you are appealing from a jury trial that was conducted after the trial court denied a motion for summary judgment, consider the impact of that denial on further proceedings. If the trial was affected, *e.g.*, by a party's failure to develop evidence, a remand in the interest of justice might be appropriate. *See Innovate Tech. Solutions, L.P. v. Youngsoft, Inc.*, 418 S.W.3d 148, 153-54 (Tex. App.—Dallas 2013, no pet.).

Appellee: One of the most important things to realize is that, even though you won in the trial court, the standard of review on appeal is *not* in your favor. Thus, it is not enough to rebut the appellant's arguments; you must affirmatively show that you met the applicable summary-judgment burden and, therefore, the trial court was correct in granting judgment as a matter of law. *See, e.g.*, *Atlantic Mut. Ins. Co. v. Crow Design Centers*, 148 S.W.3d 743, 744-45 (Tex. App.—Dallas 2004, no pet.) (reversing summary judgment that was insufficient to establish the appellee was entitled to judgment as a matter of law); *see also* Hittner, Liberato, Rutter & Dunbar, *Summary Judgments in Texas*, 62 S. TEX. L. REV. at 233 ("Because the appellate court will be reviewing the summary judgment with all presumptions in favor of the appellant, it is not enough for the appellee to rest on the decision of the trial court.").

- Base your arguments to uphold the judgment on grounds presented in the motion. Otherwise, you may find that your appellate arguments have been waived. *See, e.g.*, *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 566 (Tex. 2016) (declining to affirm summary judgment based on unraised "no duty" ground). That said, do not confuse "issues" with "arguments." Although appellate courts "do not consider issues that were not raised in the courts below, [the] parties are free to construct new arguments in support of issues properly before the Court." *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014).
- Look for waiver of issues raised by the appellant. Although the Texas Supreme Court may be reluctant to dispose of cases based on waiver, *see, e.g.*, *First United Pentecostal Church*, 514 S.W.3d at 221, recent cases indicate that the courts of appeals are more likely to resolve at least some issues presented in summary-judgment appeals based on waiver. *See, e.g.*, *Lam*, 2024 WL 2753214, at *3 (evidentiary objection); *Escamillo*, 2023 WL 3015390, at *3 (same); *Mr. W Fireworks*, 677 S.W.3d at 22 (argument for continuance); *Jones*, 642 S.W.3d at 66 (issue as alternative ground for relief).
- If the trial court grants summary judgment on specific grounds, *i.e.*, does not rule on all grounds presented by the motion, the appellee should present alternative grounds for affirmance "in an issue or cross-point" to preserve them on appeal. *See Westchester Fire & Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 178 (Tex. App.—Fort Worth 2004, no pet.) (citing *Cates*, 927 S.W.2d at 625-26).

IX. CONCLUSION

Summary judgment is a technical practice. However, an awareness of issues that commonly arise in summary-judgment appeals will increase your chances of success in the trial court and help you obtain relief on appeal.

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IMPLICATIONS OF ERROR PRESERVATION RULINGS

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SELLING YOUR CASE AT TRIAL, SELECTING APPELLATE ISSUES TO PURSUE, AND OTHER IMPLICATIONS OF ERROR PRESERVATION RULINGS

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With many thanks for editing help to

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Hannah and Henry edited earlier versions of this paper
(If you find mistakes, it's because Steve ignored their advice, or has added stuff since then)

AWARDS/PRESENTATIONS

- Dr. Death: Exploring the Intersection of Civil and Criminal Law (January 2019)
- National Collegiate Equestrian Association Distinguished Alumni - Business (2017)

ADMISSIONS

- State Bar of Texas
- Northern District of Texas
- 5th Circuit Court of Appeals
- United States Supreme Court

REPORTED CASES

- *Hallman v. State*, 620 S.W.3d 931 (Tex. Crim. App. 2021)
- *Wheeler v. State,* 616 S.W.3d 858 (Tex. Crim. App. 2021)
- *McBurnett v. State,* 629 S.W.3d 660 (Tex. App.—Fort Worth 2021, pet. ref'd)
- *Alvarez v. State*, 571 S.W.3d 435 (Tex. App.—Fort Worth 2019, pet. ref'd)
- *Maxion v. State*, No. 02-18-00176-CR, 2019 WL 3269324 (Tex. App.—Fort Worth July 18, 2019, pet. ref'd) (*en banc*)
- *Griggs v. Brewer*, 841 F.3d 308 (5th Cir. 2016)
- *Durant v. Anderson*, No. 02-14-00283-CV, 2016 WL 552034 (Tex. App.—Fort Worth Feb. 11, 2016), *aff'd in part, rev'd in part*, 550 S.W.3d 605 (Tex. 2018)
- *Texas Department of Public Safety v. Randolph*, No. 02–13–00025–CV, 2014 WL 1875826 (Tex. App.—Fort Worth May 8, 2014, pet. denied)
- *Mead v. State*, No. 02-20-00041-CR, 2021 WL 5933786 (Tex. App.—Fort Worth Dec. 16, 2021, no pet. h.) (mem. op.)
- *Clayborn v. State*, No. 02-19-00214-CR, 2021 WL 2843825 (Tex. App.—Fort Worth July 8, 2021, pet. ref'd) (mem. op.)
- *Walter Cortez v. State*, No. 07-20-00024-CR, 2021 WL 923035 (Tex. App.—Amarillo Mar. 10, 2021, pet. ref'd) (mem. op.)
- *McGlothlin v. State*, No. 02-19-00413-CR, 2021 WL 1919644 (Tex. App.—Fort Worth May 13, 2021, pet. ref'd) (mem. op.)
- *Davis v. State*, No. 02-19-00406-CR, 2021 WL 1229971 (Tex. App.—Fort Worth Apr. 1, 2021, pet. ref'd) (mem. op.)
- *Nowden v. State*, No. 02-20-00098-CR, 2021 WL 210747 (Tex. App.–Fort Worth Jan. 21, 2021, pet. ref'd) (mem. op.)
- *Mason v. State*, No. 02-19-00226-CR, 2020 WL 7253380 (Tex. App.—Fort Worth Dec. 10, 2020, no pet.) (mem. op.)
- *Wisenbaker v. State*, No. 08-19-00034-CR, 2020 WL 6867067 (Tex. App.—El Paso Nov. 23, 2020, no pet.) (mem. op.)

- *Sharp v. State*, No. 07-19-00227-CR, 2020 WL 6750815 (Tex. App.—Amarillo Nov. 17, 2020, pet. ref'd) (mem. op.)
- *Nyakeo v. State*, No. 01-19-00780-CR, 2020 WL 6494189 (Tex. App.—Fort Worth Nov. 5, 2020, pet. ref'd) (mem. op.)
- *Scoggins v. State*, No. 02-19-00209-CR, 2020 WL 5241197 (Tex. App.—Fort Worth Sept. 3, 2020, pet. ref'd) (mem. op.)
- *O'Donnel v. State*, No. 01-19-00792-CR, 2020 WL 4689200 (Tex. App.—Houston [1st Dist.] Aug. 13, 2020, pet. ref'd) (mem. op.)
- *In the Interest of E.C.*, No. 02-20-00022-CV, 2020 WL 2071755 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (mem. op.)
- *Chandler v. State*, No. 02-19-00261-CR, 2020 WL 1949020 (Tex. App—Fort Worth Apr. 23, 2020, no pet.) (mem. op.)
- *Moreno v. State*, No. 02-19-00298-CR, 2020 WL 1465993 (Tex. App.—Fort Worth Mar. 26, 2020, pet. ref'd) (mem. op.)
- *Atkins v. State*, Nos. 07-18-00361-CR, 07-18-00362-CR, 07-18-00363-CR, 07-18-00364-CR, 2020 WL 1294909 (Tex. App.—Amarillo Mar. 18, 2020, pet. ref'd) (mem. op.)
- *Gidney v. State*, Nos. 07-18-00292-CR, 07-18-00293-CR, 2020 WL 1239670 (Tex. App.—Amarillo Mar. 13, 2020, pet. ref'd) (mem. op.)
- *Delangelhernandez v. State*, No. 02-19-00022-CR, 2020 WL 1010879 (Tex. App.—Fort Worth Jan. 9, 2020, no pet.)
- *Byrd v. State*, No. 02-19-00218-CR, 2019 WL 5792809 (Tex. App.—Fort Worth Nov. 7, 2019, no pet.) (mem. op.)
- *Thomas v. State*, No. 02-18-00433-CR, 2019 WL 4122608 (Tex. App.—Fort Worth Aug. 29, 2019, pet. ref'd) (mem. op.)
- *Weathers v. State*, No. 02-19-00032-CR, 2019 WL 4010359 (Tex. App.—Fort Worth Aug. 26, 2019, pet. ref'd) (mem. op.)
- *Juarez v. State*, No. 02-18-00116-CR, 2019 WL 3955212 (Tex. App.—Fort Worth Aug. 22, 2019, pet. ref'd) (mem. op.)
- *Hestand v. State*, No. 07-18-00371-CR, 2019 WL 2751322 (Tex. App.—Amarillo July 1, 2019, pet. ref'd) (mem. op.)
- *Demps v. State*, No. 01-18-00448-CR, 2019 WL 2528192 (Tex. App.—Houston [1st Dist.] June 20, 2019, no pet.) (mem. op.)
- *Folau v. State*, No. 02-18-00127-CR, 2019 WL 2455613 (Tex. App.—Fort Worth June 13, 2019, pet. ref'd) (mem. op.)
- *Kemp v. State*, No. 02-18-00238-CR, 2019 WL 2223209 (Tex. App.—May 23, 2019, no pet.) (mem. op.)
- *Orr v. State*, No. 02-18-00058-CR, 2019 WL 1285321 (Tex. App.—Mar. 21, 2019, pet. ref'd) (mem. op.)

- *Brackens v. State*, No. 02-17-00328-CR, 2019 WL 1179383 (Tex. App.—Fort Worth Mar. 14, 2019, no pet.) (mem. op.)
- *Lindsey v. State*, No. 02-17-00261-CR, 2019 WL 1065906 (Tex. App.—Fort Worth Mar. 7, 2019, no pet.) (mem. op.)
- *Johnson v. State*, No. 01-18-00446-CR, 2019 WL 758329 (Tex. App.—Houston [1st Dist] Feb. 21, 2019, no pet.) (mem. op.)
- *Benitezv. State*, No. 07-17-00381-CR, 2019 WL 362010 (Tex. App.—Amarillo Jan. 29, 2019, no pet.) (mem. op.)
- *Carbajal v. State*, No. 02-18-00141-CR, 2019 WL 165999 (Tex. App.—Fort Worth Jan. 10, 2019, pet. ref'd) (mem. op.)
- *Waters v. State*, No. 02-17-00368, 2018 WL 6565939 (Tex. App.—Fort Worth Dec. 13, 2018, pet. ref'd) (mem. op.)
- *Dunn v. State*, No. 02-17-00206-CR, 2018 WL 4022503 (Tex. App.—Fort Worth Aug. 23, 2018, pet. ref'd) (mem. op.)
- *Santoro v. State*, Nos. 02-18-00039-CR, 02-18-00040-CR, 2018 WL 3153564 (Tex. App.—Fort Worth June 28, 2018, no pet.) (mem. op.)
- *Miller v. State*, No. 02-17-00330-CR, 2018 WL 2727952 (Tex. App.—Fort Worth June 7, 2018, pet. ref'd) (mem. op.)
- *Aleman. v. State*, No. 02-17-00346-CR, 2018 WL 2440392 (Tex. App.—Fort Worth May 31, 2018, no pet.) (mem. op.)
- *Rich v. Range Resources Corp.*, 535 S.W.3d 610 (Tex. App.—Fort Worth 2017, pet. denied)
- *Lindemann Properties, Ltd. v. Campbell*, 524 S.W.3d 873 (Tex. App.—Fort Worth 2017, pet. denied)
- *Glasgow v. Parker*, No. 02-15-00378-CV, 2017 WL 2686474 (Tex. App.—Fort Worth June 22, 2017, no pet.) (mem. op.)
- *Nicholson v. XTO Energy, Inc.*, No. 02-16-00045-CV, 2016 WL 6648755 (Tex. App.—Fort Worth Nov. 10, 2016, no pet.) (mem. op.)
- *Regal ware, Inc. v. CFJ Manufacturing, L.P.*, No. 11-13-00044-CV, 2015 WL 1004380 (Tex. App.—Eastland Feb. 27, 2015, no pet.) (mem. op.)

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- State Bar of Texas
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    - Life Fellow, Texas Bar Foundation
- Tarrant County Bar Association (1993-2020; Director, 2005-2008, 2013-2015, 2020)
    - Appellate Law Section (Chair, 2007-2008)
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- Texas Association of Defense Counsel

TABLE OF CONTENTS

Implications of Error Preservation Rulings

1. Other Error Preservation Resources.

Before getting to the rest of this paper, I want to flag certain other error preservation resources which merit your attention. Because this paper does not purport to be a comprehensive error preservation discussion, some of these other resources may provide more ready or helpful answers to your specific problems. There are volumes of such good error preservation papers. They populate the Advanced Civil Litigation Seminars, Advanced Civil Appellate Seminars, and Appellate Law 101 Seminars conducted by the State Bar of Texas, and the State and Federal Appeals Seminars and Civil Litigation Seminars conducted by the University of Texas. Three particular papers which you might want to make part of your trial notebook are these:

1) Christina Crozier and Polly Graham, *Preservation of Error at Trial*, State Bar of Texas Advanced Trial Strategies (2015);
2) Andrew Sommerman, *Preserving Error and How to Appeal*, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013);
3) Jadd Masso, *Tops Traps in Preserving Error for Appeal*, State Bar of Texas 36th Annual Litigation Update Institute (2020);
4) Steven K. Hayes, *Anticipation and Prevention of Error Preservation Ambushes*, State Bar of Texas 42nd Annual advanced Civil Trial Seminar (2019); and
5) Steven K. Hayes, updated by Dabney Bassel, *Error Preservation Post-Trial: How to Avoid that Sinking Feeling*, SBOT Civil Appellate Practice 101 (2012);

The Crozier/Graham and Hayes/Bassel papers are arranged chronologically, and might make suitable trial notebook materials. My paper on anticipating and preventing preservation ambushes covers complaints your opponents can raise for the first time on appeal–or after it is too late for you to fix the problem, and its table of contents provides a checklist of such complaints which you need to anticipate and fix ahead of time. *See*, Appendix 5.

For summary judgment practice, you really ought to obtain and use David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis. Finally, make sure you get Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you sort out preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

If you have a discrete topic you would like to research for error preservation decisions, let me suggest this search matrix, which is what I use:

Take whatever error preservation subject you have, and (using your favorite legal search engine) add that to the following search phrases:

Implications of Error Preservation Rulings

- 33.1 and –cv (and, to find decisions of the Texas Supreme Court, instead of –cv, use COURT (Supreme)); &
- "did not waive" or preserv! or waive! w/s error or object! or challenge! or "do not address" or "by consent" or "first time on appeal" or "not presented" or present! or "does not argue' or "argues only" or analogous or "comport with" and -cv and not 33.1 and –cv [and, instead of –cv, use COURT (Supreme) for decisions of the Texas Supreme Court).

If you are interested in criminal cases, you can replace the "-cv" with "-cr," and "COURT (Supreme)" with "COURT (Criminal)."

Finally, I want to mention one more resource, an error preservation blog I post every couple of weeks, which I call "Update on Error Preservation in Texas Civil Cases." In it, I compile the error preservation decisions I found in Texas civil cases for the prior couple of weeks, and I have them sorted by category and correlated to the various elements of TRAP 33.1. There are usually 20-30 new error preservation decisions which you and your trial lawyers can scan relatively quickly, to see if anything has popped up which applies to things you find yourself doing. I always share it on my LinkedIn page (if you follow me there, you should get it), and there is a link to it on the resume page on my website.

2. Implications of Error Preservation: A tool to sell your case, a prism through which to pick winning issues on appeal.

This paper continues to grow like Topsy. A big portion of it looks like a paper presented at the 2015 Advanced Civil Appellate Practice Seminar. However, those portions of the paper have been updated to include error preservation cases through the fiscal year ending May 31, 2021. Additionally, a new section deals with error preservation rulings of the Texas Supreme Court for the four fiscal years ending August 31, 2014-2017. After making those additions, I think the overall message for trial lawyers, and appellate lawyers assisting at trial, remains the same: use TEX. R. APP. P. 33.1, the general error preservation rule, as a tool to sell your case in the trial court. But for lawyers embarking on the appeal of the case–which in the post-verdict/post-judgment stage, long before the notice of appeal–I think a different message exists: as you try to winnow the potential appellate issues to a winning combination, evaluate those potential issues which face a preservation problem through two prisms:

1) the error preservation tendencies of the Supreme Court, as reflected in this paper; and

2) the really fine work reflected in Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you identify preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

Implications of Error Preservation Rulings

Knowing the Supreme Court's tendencies as to error preservation, and the error preservation topics which the Supreme Court might need to address to resolve disagreements among courts of appeals, will help you evaluate the likelihood that an error preservation problem might attract the Supreme Court to write on the merits on your case–or the likelihood that such a problem will preclude the Supreme Court addressing an appellate issue–or a case involving such an issue–on the merits. As I pointed out in the 2015 paper (and will repeat in this paper), an issue facing an error preservation problem is not a free swing at the fences; it is fraught with potential negative ramifications for your likelihood of success on the appeal.

So let's take a look at error preservation, the opportunities it provides us, and the problems which result from initiating an error preservation fight which we lose. Let's start by looking at the general error preservation rule. That rule, TEX. R. APP. P. 33.1, not only lays out the predicate for preserving error, but it gives us carte blanche to do so in a way that sells our cases to our trial court audience.

3. Carte Blanche for selling your case while you preserve error: TRAP 33.1.

The general error preservation rule in Texas (for both civil and criminal cases) is TEX. R. APP. P. 33.1. It became effective September 1, 1997.

When you look at TRAP 33.1, you see that it is not merely a protective device–it is a magic wand which transforms your opponent's challenge or tactic into an open-ended invitation to sell your case while preserving error. It allows you to point out to the court that you are *mandated* to complain to the court and to *state the grounds on which you seek the trial court's ruling with sufficient specificity* to make the trial court aware of your complaint. TRAP 33.1. Not only that, it allows you to point out to the court that you need a ruling from the court on your objection, and that you have to object if the trial court fails to rule.

Specifically, TRAP 33.1 requires that, as a prerequisite to presenting a complaint for appellate review, the record must show:

1) the complaint was made:

   a) to the trial court;

   b) by a timely request, objection, or motion;

2) the request, objection, or motion must have

   a) stated the grounds for the ruling being sought

I) with sufficient specificity to make the trial court aware of the complaint; or

ii) the specific grounds were apparent from the context; or

b) complied with the requirements of the Texas rules of evidence or civil or appellate procedures

3) the trial court:

a) expressly or implicitly ruled on the request, objection, or motion; or
b) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TRAP 33.1(a). On trials to the court, legal and factual sufficiency complaints may be made for the first time on appeal. TRAP 33.1(d).

Now, let's look at the error preservation opportunities to sell a case which we allowed to get away. First, we will look at the universe of error preservation decisions in civil appeals, to see what trends and tendencies in those cases might tell us, and then we will look at specific examples of opportunities that got away.

4. The Opportunities as Shown by the Statistics.

A. The Universe: civil cases decided by the courts of appeals in Fiscal Years 2014 through 2016

According to my interpretation of the annual reports from the Office of Court Administration, in fiscal years 2014 through 2016, the courts of appeals issued 6,919 opinions on the merits in civil cases.[1] In those same fiscal years, I found 1,351 opinions from courts of appeals which dealt with error preservation issues in civil cases. Collectively, those opinions contained 1,583 holdings concerning error preservation. I won't tell you I caught all the error preservation rulings by courts of appeals in civil cases in fiscal years 2014 through 2016, but I'm pretty sure that I caught almost all, if not all, the opinions which cited TEX. R. APP. P. 33.1 (1,059). I also know I caught a lot of opinions in those fiscal years which ruled on error preservation issues without citing Rule 33.1 (524).

[1] I include in this number the cases OCA designated as: Cases affirmed; Cases modified and/or reformed and affirmed; Cases affirmed in part and in part reversed and remanded; Cases affirmed in part and in part reversed and rendered; Cases reversed and remanded; and Cases reversed and rendered.

Implications of Error Preservation Rulings

B. Overwhelmingly, we took advantage of opportunities to sell our cases.

The numbers indicate that, as a rule, parties overwhelmingly agree as to what issues were raised in the trial court-i.e., we overwhelmingly agree as to what the case was about. In roughly 80.5% of the cases decided on the merits during FYE 2014-2016, and roughly 94.3% of the issues in cases decides on the merits in those three years, the parties seem to agree there is no error preservation issue.

Why do I say that? Well, only about 19.5% of the cases decided on the merits during FYE 2014 through 2016 involved error preservation–meaning that nearly 80.5% did not. As to the percentage of issues which involve error preservation, assume with me for a moment that, on average, civil appellate cases decided on the merits by courts of appeals during fiscal years 2014 through 2016 involved four issues. I cannot tell you that I kept track of how many issues were raised in the error preservation cases I profiled, much less in all the cases decided by the courts of appeals. But I can tell you that I published a summary of the issues raised in civil appeals in the Second Court of Appeals for about 12 years. Based on that experience, I believe that four issues per case is a safely conservative estimate. *See Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals*, compiled and updated by Steven K. Hayes; copyright 2003 to present.

If each of the 6,919 opinions on the merits in civil cases handed down by appellate courts in Texas in FYE 2014 through 2016 had 4 issues each (on average), that means the cases decided by those opinions raised about 27,676 issues. I only found 1,583 issues (more or less) on which error preservation was challenged–i.e., only about 5.7% of the issues dealt with on the merits by the courts of appeals on civil cases in fiscal years 2014 through 2016. That means that the parties agreed that roughly 94.3% (or possibly more) of the issues on appeal were appropriately raised in the trial court. That's not bad.

C. However, when parties disagreed as to whether an issue was preserved, courts almost always held it was not.

The sobering news is that, in those 5.7% or so of the issues where the parties disagree as to whether error was preserved, the courts of appeals hold that error was not preserved about 81% of the time, for these reasons:

- 52.9%, complaint not raised at all in the trial court;
- 13%, complaint was not timely, or did not comport with other rules;*
- 8.1%, failure to obtain a ruling or failure to make a record;*
- 5.6%, complaint raised at trial is different than raised on appeal;
- 3.8%, complaint in the trial court was not specific enough.

Total: 83.4%, more or less.*

Implications of Error Preservation Rulings

* For FYE 2014, I lumped together the cases in which error was not preserved for failure to obtain a ruling or make a record with those cases in which error was not preserved because of untimeliness or failure to comport with the other rules. I did separate those categories for 2015 and 2016. Hence, the sum of the separate categories will vary a little from the total percent of cases in which error was not preserved.

Think about the foregoing numbers. More than half the time, the courts of appeal held that error was not preserved because the complaint simply was not raised at all in the trial court. These were opportunities to sell our cases which we collectively missed. In yet another fifth of the error preservation decisions, the courts of appeals hold that error was not preserved because of what I refer to as "mechanical" deficiencies, to wit:

- the party did not raise the complaint in a timely fashion;
- the complaint failed to comply with the governing rule (e.g., TRE 103 concerning an evidentiary ruling, or TRCP 251-254 for continuances);
- the party did not get a ruling on the complaint; or
- the record does not reflect the complaint or the ruling.

Nearly 10% of the time, making a record or obtaining a ruling might have preserved error.

The following table shows the foregoing:

Table 1. Error Preservation Rates: Why Courts of Appeals Hold Error Was Not Preserved

Error was Preserved	Error Not Preserved	Obj. specific enough	Obj. not specific enough	Obj. not raised at all	Other (no ruling or record, not timely, d/n follow rules)	No record or no ruling	Issue on appeal diff. than at trial	D/n have to raise issue at trial
FYE 2014								
13.3%	81.3%	13.3%	5.8%	51.7%	18.9%	*	4.9%	5.4%
FYE 2015					Not timely, d/n follow rules**	No record, no ruling**		

Implications of Error Preservation Rulings

10.4%	81.9%	10.6%	3.4%	53.7%	8.4%**	8.8%**	7.5%	7.7%
FYE 2016								
12.1%	77.6%	12.1%	2.4%	51.8%	12.3%	7.1%	4.0%	7.5%
All Yrs.								
12.1%	80.9%	12.1%	3.8%	52.9%	13%**	8.1%**	5.6%	7.0%

* I did not separately compile this data for FYE 2014; **Since data was not compiled separately for these components in FY 2014, these reflect only the 2015 data.

As you can see, the reasons error preservation failed remained remarkably constant over the three years. I will refer to these combined numbers for the three fiscal years as "The Average." First, we will talk about what that "Average" tells us about lost opportunities to sell our cases in the trial courts. Then we will look at error preservation decisions on specific topics to see if they might identify future opportunities for us to sell our cases while preserving error.

D. Other lessons from "The Average": While in the trial court, make a record, get a ruling, and repeatedly contemplate what your case is about.

What do I take from "The Average?" First, "The Average" should remind us to make a record of, and get a ruling on, our objections. Rule 33.1 not only entitles us to both, it demands that we do both. Getting a ruling and making a record might change the error preservation outcome nearly 10% of the time. After all–why wouldn't we want a record to show us selling our case, and get some feedback from the judge on what we're selling? If nothing else, that feedback from the judge might give us a heads up about how to argue our case during the rest of the time it's in the trial court.

Much more than that, "The Average" suggests we might not spend as much time as we should thinking about all the issues our cases involve, or how to properly preserve and use them. When preservation was challenged, over 60% of the time parties apparently thought of an objection or complaint after it was too late to raise it. I am not going to say that lawyers can realistically anticipate every complaint that might arise at trial. No one can. And perhaps identifying the complaints involved in our cases 95% of the time is as much as we can realistically hope for.

But maybe we can do better. I categorized the error preservation holdings in 2014, 2015, and 2016. Here are those categories, listed in descending order (i.e., ranked in order of the most to the fewest error preservation holdings) for the three years:

Table 2. The Most Common Error Preservation Issues

Implications of Error Preservation Rulings

FYE August 31 for the following years: % of Total Error Preservation Decisions in Civil Cases for the following years consisted of decisions as to the following topics:						
Issue	**2014**	**2015**	**2016**	**2022***	**Annual Avg.**	**Annual Average Running Total**
Evidence	10.10%	11.10%	15.70%	13.55%	12.61%	12.61%
Jury Charge (incl. Jury Instructions)	5.80%	7.50%	7.00%	4.98%	6.32%	18.93%
Summary Judgment	7.90%	5.20%	3.40%	7.97%	6.12%	**25.05%**
Attorney's Fees	3.00%	5.40%	5.00%	2.19%	3.90%	28.95%
Legal Sufficiency	3.40%	4.50%	2.50%	3.19%	3.40%	32.34%
Affidavits	3.20%	3.60%	2.90%	3.59%	**3.32%**	35.67%
Constitutional Challenges**	1.70%	2.00%	4.30%	3.19%	2.80%	38.46%
Continuance	3.40%	2.00%	1.80%	2.99%	2.55%	41.01%
Expert Witness	3.90%	2.90%	1.80%	1.20%	2.45%	43.46%
Discovery	3.00%	1.80%	1.40%	2.39%	2.15%	**45.61%**
Pleadings	1.70%	2.50%	1.60%	2.19%	2.00%	47.61%
Due Process	3.00%	0.90%	1.40%	2.59%	1.97%	49.58%
Notice	1.10%	2.50%	1.80%	1.79%	1.80%	51.38%
Judgment	1.50%	0.70%	2.10%	1.99%	1.57%	52.95%
Sanctions	0.90%	1.80%	1.20%	1.20%	1.28%	54.22%
Factual Sufficiency	1.50%	1.40%	1.40%	0.60%	1.23%	55.45%
Testimony	1.50%	0.40%	1.60%	0.00%	0.88%	56.32%
Jury Argument	1.50%	1.10%	0.50%	0.00%	0.78%	57.10%

* Does not include opinions issued approximately 10/7-10/21/2021.
** Not including Due Process claims.

Some things jump out from the foregoing table. As with the reasons courts of appeals hold that error was not preserved, the twelve issues which most often involve error preservation rulings–which comprise nearly half of the error preservation issues the courts of appeals deal with–remained relatively constant for the three years covered here. Eight of the eleven most frequent error preservation categories relate to things it would seem lawyers have the time to prepare for (e.g., Jury Charge, Summary Judgment, Attorney's Fees, Affidavits, Constitutional Challenges,

Continuance, Discovery, and Pleadings). That same thing can also be said about at least five of the next seven most common categories (Due Process, Notice, Sanctions, and Judgments). Maybe this indicates that it would not hurt for all of us to periodically spend some quiet time reflecting about our cases, and perhaps getting a second set of eyes to assist us in that exercise. Perhaps one way to couch our ongoing case reviews is to periodically ask ourselves the following questions on each aspect of our cases:

> What will I argue if the court disagrees with me on this?
>
> What will the other side argue in response to my position on this?
>
> What will the other side do to try to thwart my efforts to raise this issue, present this piece of evidence, or make this argument?
>
> How can I take these opportunities to sell my case?

Just a thought.

5. The Big Picture from looking at preservation rates as to the most common individual error preservation issues.

I've compiled a table showing the preservation rates for the most common error preservation issues in Appendix 1. That table also compares, for each category, the error preservation rates for FYE 2014 through 2016. That table also shows whether, for FYE 2016, the party which claimed error was preserved won, or won in significant part, or lost on the merits of the appeal (I did not keep track of all those numbers in FYE 2014 and 2015). The numbers in Appendix 1 show some things.

A. The appellate lawyer must ruthlessly evaluate the error preservation issue. Those who lose on the error preservation fight fair dismally on the merits.

Successful, seasoned appellate practitioners will advise their parties to ruthlessly pare their appeals down to the three or four strongest, most viable issues. We probably should follow that same advice when deciding whether to pursue an issue on appeal as to which there is an error preservation problem–and when deciding to challenge whether error has been preserved. Let me tell you why I've come to that conclusion.

For this subsection of the paper, I want to set a baseline. In their exhaustive paper on why courts of appeals reverse trial courts, Lynne Liberato and Kent Rutter sliced and diced a year's worth of appellate decisions concerning why courts of appeals reverse–that is, why Appellants win. *See* Lynne Liberato and Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUSTON

Implications of Error Preservation Rulings

LAW REVIEW 994 (2012) (for a paper which looks at the reasons for reversal in FYE 8/31/2019, *see* Kent Rutter & Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 Hous. L. Rev. 671 (2020)). Overall, they found there was about a 36% reversal rate on civil cases in Texas courts of appeals in FYE 2011–a figure that dropped to 30% in FYE 2019. 2012 paper at 999, 2020 paper at 676. For their study, a "reversal" meant the "court of appeals reversed a significant part [though not necessarily all] of the judgment," and an affirmance meant that the court of appeals at most "reversed or modified only a relatively small" part of the judgment. *Id.*, at 1024-1025. Neither 30% nor 36% are terribly high success rates–that's not an evaluation of the courts of appeals, that's just an observation that the odds disfavor the appealing party.

I do not have success rate numbers for FYE 2014-2015 comparable to those Lynne and Kent compiled. But for FYE 2016, I kept track of whether the party claiming error was preserved won outright on the merits of the appeal, won in significant part on the merits, or lost outright on the merits. I realize that whether a party won in "significant part" an appeal is probably in the eye of the beholder, and the way I see that criteria may not match how Lynne and Kent viewed it. But what I can tell you is that, for FYE 2016:

1) not quite half of the most commonly seen error preservation issues correlate with a win on the merits at a level seen by Lynne and Kent in their study;
2) the average rate of success on the merits for the seventeen most commonly seen error preservation issues is about one-fifth less than the average success rate for appeals seen by Lynne and Kent; and
3) parties that unsuccessfully *challenge* error preservation see their opponents win on the merits at a rate nearly twice the average success rate seen by Lynne and Kent.

The following tables show why I come to those conclusions:

Table 3. Correlating Error Preservation Issues With Success on Merits of the Appeals.*

Issue	Percent of Error Pres. Decisions+	Associated with success on the merits for party claiming preservation-
Evidence	10.7%	22.7%
Jury Charge (incl. Jury Instructions)	6.7%	39.5%
Summary Judgment	6.5%	33.3%
Attorney's Fees	4.3%	35.7%
Legal Sufficiency	4.0%	42.9%

Implications of Error Preservation Rulings

Issue	Percent of Error Pres. Decisions+	Associated with success on the merits for party claiming preservation-
Affidavits	3.4%	25.0%
Expert Witness	3.3%	10.0%
Constitutional Challenges*	1.9%	0.0%
Continuance	2.6%	10.0%
Discovery	2.3%	0.0%
Pleadings	2.2%	33.3%
Notice	1.9%	10.0%
Due Process	1.9%	12.5%
Factual Sufficiency	1.5%	12.5%
Jury Argument	1.3%	33.%
Judgment	1.1%	41.7%
OVERALL AVERAGE		**27.2%**

* None of these involve known Pro Se appeals.
\+ The numbers in this column are the totals for the three fiscal years FYE 2014-2016.
\- The numbers for this success rate column are for only FYE 2016.
** Not including Due Process claims.

I feel certain that getting more data will affect the foregoing numbers. But, in the meantime, only seven of the sixteen issues which most often involve error preservation disputes are associated with a winning percentage on the merits that rival even the average success rate found on appeal by Lynne and Kent. Those seven categories are (in order of frequency) Jury Charge, Summary Judgment, Attorney's Fees, Legal Sufficiency, Pleading, Judgment, and Jury Argument. More than half of the issues most commonly involving error preservation disputes were associated with winning on the merits no more than about 2/3 as often as the average reported by Lynne and Kent–and, for FYE 2016, nearly half of the issues most commonly involving error preservation disputes were associated with winning on the merits at only about 1/3 the rate of the averages reported by Lynne and Kent. The point here is that it is terribly difficult to reverse a trial court ruling on appeal, the issues most commonly involved in error preservation fights do not, as a rule, correlate with improving those odds, and most often those issues correlate with diminishing the odds of success on the merits.

Let's flesh out this out a little bit by looking at the rates of success on the merits for those parties which unsuccessfully claim error was preserved, and which unsuccessfully challenge whether error was preserved, as compared to the average success rate on the merits found by Lynne and Kent

Implications of Error Preservation Rulings

in their study. Here is a table which does that:

Table 4. Correlating Success on Error Preservation With Success on the Merits.

Category	Complaining party's winning % (on the merits) on appeal.
Overall Average, Liberato/Rutter, 2012	36%
Preservation cases in which error was not preserved, FYE 2016	17.8%
All error preservation cases, FYE 2016	27.2%
Preservation cases in which error was preserved, FYE 2016	60.3%
Preservation cases in which error did not have to be preserved FYE 2016	68.2%

See Appendix 3.B. The foregoing numbers eliminate error preservation cases involving the commitment of sexually violent predators, the termination of parental rights, and pro se cases, because those discrete kinds of cases have preservation and merits success rates which are almost zero.

Folks, the numbers in the foregoing table are significant. Lynne and Kent found that an appeal nets a significant reversal 36% of the time. In FYE 2016, when a party pursued an issue on which it failed to preserve error, it only won significant relief on the appeal as a whole about 17.8% of the time–less than half of the success rate found in Lynne and Kent's study. And when a party *unsuccessfully* contends that error was *not* preserved (either because error was preserved or because it did not have to be raised at trial), the likelihood its opponent will significantly prevail on the merits of the appeal skyrockets to nearly 60-68%–nearly twice the reversal rate found in the study done by Lynne and Kent. So unsuccessfully challenging error preservation correlates with nearly doubling the success rate of your opponent.

What does that tell us about cases involving error preservation in the courts of appeals? That both pursuing an issue which has not been preserved below, or challenging an issue as to which error has been preserved, correlates to losing on the merits at a much higher rate than normal.

I doubt that being on the wrong side of an error preservation issue disposes the courts against us; I think it more likely being on that wrong side indicates that we have grasped at straws in a desperate situation. But I do know the above-mentioned correlations exist. And I think that

Implications of Error Preservation Rulings

correlation behooves us to carefully evaluate whether to pursue an issue where error preservation is an issue–or whether to challenge preservation on an issue which has probably been preserved. Or, perhaps, when we find ourselves in either of those situations, perhaps we should carefully, and candidly, evaluate the strength of our position on appeal, and talk to the client about the strengths and weaknesses of the case, and what options the client might have. Every product has a shelf life, and it may be best to sell our appeal, or our trial court judgment, before that shelf life expires.

In ruthlessly evaluating whether to assert an issue as to which there is a preservation problem, or whether to challenge an issue as to which our opponent probably preserved error or can raise for the first time on appeal, consider the following observations from the patterns I've seen in the last two to three years.

1. Do not unwittingly succumb to that most frequent and perhaps unfulfilling of error preservation sirens, to wit, complaints about evidence.

The most common error preservation topic is Evidence. Evidence accounts for about thirteen percent of the error preservation docket. Evidentiary complaints survive a preservation challenge on appeal only about 15% of the time, for all the reasons you would expect in what is usually a situation necessitating immediate reaction and constant diligence:

- thirty percent of the time, the complaint was untimely, did not comply with other rules, was not ruled on or on the record–nearly double the rate of the Average;
- nearly forty percent of the time, the complaint was not raised at all.

Keep in mind, too, that an evidentiary complaint will only succeed on appeal if we show an abuse of discretion, and show that the incorrect evidentiary ruling resulted in an erroneous judgment. *See* Sec. 5.E, *infra*. That does not happen terribly often–when an evidentiary complaint was challenged on error preservation grounds, the party claiming the evidentiary complaint was preserved obtained a favorable judgment from the court of appeals only about 23% of the time.

In a world where the courts of appeals tell us to limit the number of our issues to no more than six, and preferably as few as three, and with a huge hill to climb in order to prevail on this most frequently pursued, and overwhelmingly unsuccessful, error preservation issue, it makes sense to at least make sure that the complaint passes the mechanical requirements of TRAP 33.1. If your complaint about an Evidence ruling is questionable in any respect, you might be well off to place it at the top of your list to cull from your brief.

2. Complaints with error preservation problems about factual sufficiency in a jury trial are more unfulfilling than complaints about evidence.

In a non-jury trial, you can raise factual sufficiency complaints for the first time on appeal.

Implications of Error Preservation Rulings

Not so in jury trials–in a jury trial, you *must* raise a factual sufficiency complaint in a motion for new trial, or it is not preserved. Tex. R. Civ. Pro. 324(b)(2).

The error preservation rate for a factual sufficiency complaint averages about 12.5%, and roughly 90% of the time the party claiming it preserved error as to a factual sufficiency complaint failed to obtain a judgment on appeal that was favorable in any respect.

3. A complaint about a continuance which has error preservation problems is not often associated with a favorable judgement for the party asserting the complaint.

Only about 10% of the time did the preservation-challenged party complaining about the granting or denying of a continuance obtain a judgment which was favorable in any respect. Nearly half of the preservation-challenged complaints about continuances failed because they did not satisfy the mechanical requirements of TRAP 33.1–that is, the complaint was not timely, did not comply with other rules, or the party did not get a ruling or make a record. Given the really poor success rate on appeal for preservation-challenged parties asserting a complaint about continuances, it really looks like appeals involving a preservation-challenged complaint about continuances are a bit desperate. Keep that in mind.

4. Similarly, if you have a preservation problem concerning a constitutional complaint, ruthlessly evaluate whether to raise that complaint on appeal.

In terms of decisions involving error preservation, 90-100% of the time Constitutionality and Due Process issues fail because they are not raised at all in the trial court, and (as you would expect) their error preservation rate is abysmal (3% or less, overall). Furthermore, the parties asserting a preservation-challenged complaint concerning a constitutional issue other than due process issue never got a favorable judgment on appeal, and the due process complainers only obtained a favorable judgment on appeal about 12%.

4. Other issues which have poor preservation rates and merits success rates also bear ruthless evaluation: complaints about attorney's fees, expert witnesses, continuances, and notice.

A review of Appendix 1 will identify complaints about other issues which have low error preservation rates and merits success rates. Those include complaints about attorney's fees, expert witnesses, continuances, and notice. It remains true that every complaint, and appeal, succeeds or fails on its own merits, and that is true as to appeals which involves complaints about these issues. But the experience of others suggests that complaints about these issues, if associated with an error preservation problem, may correlate with an overall weak appeal.

Implications of Error Preservation Rulings

B. Parties claiming error is preserved lose that fight at an overwhelming rate. Only one of the issues most commonly facing an error preservation challenge survive that challenge more than a third of the time. Most of those issues survive that challenge 20% of the time or less.

If you look at the first column in Appendix 1, you will notice some pretty wild swings in error preservation rates between 2014 through 2016 on some issues. For example, error was preserved on legal sufficiency challenges 40% of the time in 2014, not at all in 2015, and 21.4% in 2016. But you will also notice that, for the three most common categories (the "Big Three"–Evidence, Jury Charge, and Summary Judgment) the error preservation rates were pretty consistent between 2014 through 2016. It could be that, unless you have at least 30 error preservation decisions a year (such as you have with the Big Three), you get swings like we see from year to year (if you only look at a group of 15 decisions, for example, one decision can swing the numbers by 6%).

But the point is, only one does well from an error preservation standpoint. On legal sufficiency complaints, 60% of the time the complaining party preserves error or the complaint could be raised for the first time on appeal. But the overwhelming bulk of those cases come from the parties which challenge preservation not realizing that a legal sufficiency complaint concerning a bench trial can be raised for the first time on appeal. Even the most promising issue–Jury Argument–saw error preserved only about 25% of the time. All the remainder of the most common error preservation issues saw error preserved about 20% of the time or less, most were at 10% or less, and none of the remainder had a combined preservation rate/can raise for the first time on appeal rate of no more than about 22%. There are no common error preservation issues where the courts have indicated a tendency toward leniency, and the parties claiming that error was preserved overwhelmingly lose on the preservation fight

C. Except for legal (and factual) sufficiency in a bench trial, none of the issues which can be raised for the first time on appeal are among the most common error preservation issues.

In addition to legal and factual sufficiency in a bench trial, there are other issues which can be raised for the first time on appeal (jurisdiction, etc.), and we will mention them later. But note that none of these other issues are really among the most commonly raised error preservation issues. Perhaps everyone understands they can be raised for the first time on appeal, and we should be surprised if they were more commonly involved in error preservation decisions.

D. Two of the six most frequent error preservation issues on appeal–Summary Judgment and Attorney's Fees–most often fail because the complaints were not raised at trial. This may be explained by the time constraints in Summary Judgment practice, and a failure to treat a claim for attorney's fees as a significant cause of

action.

Summary Judgment and Attorney's Fees are the third and fourth most common error preservation issues on appeal, respectively, counting for nearly 10% of the error preservation docket. And yet, despite the frequency with which they appear on the error preservation docket, most of the time these complaints fail because they were not raised at trial (49% of the time Summary Judgment complaints fail because they are not raised at trial; that is true 70% of the time as to Attorney's Fees complaints).

As to Summary Judgments, I think a large part of the problem comes from the time constraints we face in summary judgment practice. Many times, we have three weeks–often in the middle of an otherwise busy practice and in a case which is coming down to the trial or to other trial-related deadlines–to respond to a motion for summary judgment, and fully object to that motion and the evidence supporting it. We have only a third that long to object and reply to a response. And, despite the protections which discovery and special exceptions practice affords us, summary judgment practice may be the moment when our opponents' position first completely comes into focus for us. Three weeks (or less) in the middle of a hectic schedule is not necessarily the best time to think of everything which can thwart your opponents' arguments and tactics.

As to Attorney's Fees, I think we often do not fully embrace, or address, the fact that attorney's fees can comprise a really significant part of an adverse judgment. We need to approach, from the very beginning, the claim for attorney's fees as a separate, distinct, element-driven cause of action, and that it deserves as much of our attention as the other causes of action in the case. If we intend to thwart–or prosecute, depending on which side we are on–a claim for fees, we cannot treat that claim as an afterthought if we intend to preserve error for appeal.

The "failure to raise in the trial court" aspect of both of these error preservation categories reinforce the argument that we should periodically review and reflect on the issues in our cases, and think about what we will need on appeal as to each cause of action should the case go wrong in the trial court.

E. You have to make a record of your complaint and get a ruling on it. We see the failure to do so most frequently regarding complaints about affidavits (41.2%), discovery (29.4%), continuances (21.1%), and summary judgments (13%). Draft an order for, and use the order during, the hearing on the same.

The Supreme Court periodically reminds us that "[i]n the absence of a record, we presume the evidence was sufficient to support the trial court's findings. See *In re D.S.*, 602 S.W.3d 504, 510 n.9 (Tex. 2020)." *In the Interest of G.X.H.*, 627 S.W.3d 288, 300 (Tex. 2021). Similarly, "[w]here, as here, the trial court held an oral hearing on the proposed extension and the parties failed to bring forth the record of that hearing on appeal, we will presume the trial court made the necessary

findings to support the extension orally on the record at the hearing." *Id.*, at 299. "[T]o preserve their complaints about the absence of a record of the hearing," a party has to raise that complaint in the trial court or it will be waived." *Id.*

These issues probably demonstrate more than any other areas the need to have a well-drafted order before your hearing, and to make sure the judge uses it at the hearing. Judges will tell you such an order is an invaluable road map for them, and an essential checklist for you. As the Supreme Court has most recently said, in a case involving summary judgment objections, "***the best practice for a party objecting to summary judgment evidence*** is to secure a written order on the objection from the trial court." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838-39 (Tex. 2022) , *emphasis supplied*. The same is true on other complaints, as well. Not only does a signed order confirm the judge has ruled, it helps remind you of all the things you need to cover, and should remind you to create a record of the same, as well.

6. The most frequent error preservation categories: specific examples of additional opportunities to sell our cases.

The three categories with the most frequent error preservation holdings-evidence, jury charge, and summary judgment-account for nearly one fourth of the total error preservation decisions in fiscal years 2014 through 2016. If we throw in the error preservation decisions involving affidavits, that total rises to a little over 27% of those error preservation decisions. The ten issues with the most frequent error preservation holdings account for nearly half of the error preservation decisions in fiscal years 2014 through 2016. The eighteen issues which most frequently see error preservation fights account for nearly 60% of those fiscal years' error preservation decisions. So the remainder of this paper will deal substantively with those issues which most frequently see error preservation fights. You may be surprised about the opportunities which exist to sell your case in these categories.

A. Affidavits.

Error preservation decisions concerning affidavits come up most frequently in the context of summary judgment practice. But because the use of affidavits also occurs in other settings, this paper addresses error preservation disputes about affidavits as a standalone category.

Before discussing the affidavit cases, I really need to mention two great resources on affidavits, both of which address them in the context of summary judgment practice. Those two resources are: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Now for the cases. In an error preservation context, lawyers are less likely to make a record

Implications of Error Preservation Rulings

for a complaint about an affidavit, or get a ruling on that complaint, than any other issue. So remember, as to your complaints about affidavits:

- Prepare an Order;
- Make a record of the hearing; and
- Get the judge to sign the Order.

Don't be reluctant to get a hearing on your objections. If the other side's evidence is improper, then why should the judge allow that improper evidence to tarnish the justness of your cause? Perhaps an objection to an affidavit is accompanied by a "we'll sort it out later" attitude driven by time-constraints. Just remember, the time for sorting it out is at the hearing where the affidavit is used, if not before. And if you do not feel strongly enough about the complaint to bring it to the trial judge's attention and get a ruling, then don't bring it up on appeal–unless, of course, your complaint is one of the few which can be raised on appeal for the first time.

It is out of the "first time on appeal" category that a (perhaps) unexpected warning coming out of this area for the lawyer who *submits* an affidavit to the trial court: not all objections to an affidavit have to be made in the trial court. This means you might get all the way to the court of appeals–or the Supreme Court, for that matter–without knowing you have a defective affidavit that requires a reversal of the judgment you won in the trial court. In that regard, here is a summary of the substantive law concerning preserving error as to affidavits:

> Texas law divides defects in summary judgment affidavits into two categories: (1) defects in form and (2) defects in structure. For the first category, defects in form, the complaining party must make an objection in the trial court and obtain a ruling at or before the summary judgment hearing . . . . For the second category, defects in substance, the complaining party may raise the issue for the first time on appeal.

Coward v. H.E.B., Inc., 2014 WL 3512800, 2014 Tex. App. LEXIS 7637, 5-6 (Tex. App.–Houston [1st Dist.] July 15, 2014, no pet.).

So let's break this down, and deal first with defects in form–as to which complaints must be made and ruled on in the trial court. These defects include:

(1) the absence of a jurat on the affidavit (*Mansions in the Forest, L.P., v. Montgomery County*, 365 S.W.3d 314, 317-318 (Tex. 2012)); the failure of the notary to sign the affidavit (*Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161, 165-166 (Tex. 2018)); or the fact that the jurat is completely in a foreign language. *In re Sandoval*, 619 S.W.3d 716, 722 (Tex. 2021)

(2) a failure to affirm that assertions in the affidavit are true and correct. *Parker v. Hunegnaw*, 2014 WL 800998, 2014 Tex. App. LEXIS 2257, 15-17 (Tex. App.-Houston [14th Dist.] Feb. 27, 2014, no pet.);

Implications of Error Preservation Rulings

(3) a failure to state, or demonstrate, that the affidavit is made on personal knowledge. *Isaac v. Vendor Res. Mgmt.,* 2016 Tex. App. LEXIS 7547, *5-8 (Tex. App. Austin July 15, 2016, no pet.); *Everbank v. Seedergy Ventures, Inc.*, 2016 Tex. App. LEXIS 7319, *21-22 (Tex. App.–Houston [14th Dist.] July 12, 2016, no pet.); *Fjell Tech. Group v. Unitech Int'l, Inc.*, 2015 Tex. App. LEXIS 966, 11-13 (Tex. App.–Houston [14th Dist.] Feb. 3, 2015); *CMC Steel Fabricators v. Red Bay Constructors*, 2014 WL 953351, 2014 Tex. App. LEXIS 2693, 15-17 (Tex. App.-Houston [14th Dist.] Mar. 11 2014, no pet.). However, see below concerning the substantive defect in an affidavit which affirmatively reflects on its face that the affiant does not have personal knowledge.

(4) the affidavit contains hearsay. *Hanks v. Huntington Nat'l Bank*, No. 01-15-00188-CV, 2016 Tex. App. LEXIS 3179, *22 (Tex. App. Houston 1st Dist. Mar. 29, 2016, pet. denied) (held, hearsay objection is not sufficiently specific to preserve objection about hearsay within hearsay as to attachments to business records affidavit); *Cedillo v. Immobiliere Jeuness Establissement*, 2015 Tex. App. LEXIS 9017, *10-11 (Tex. App.– Houston [14th Dist.] Aug. 27, 2015); *Fjell*, 2015 Tex. App. LEXIS 966, at *11-13; *Clef Constr. v. CCV Holdings*, 2014 Tex. App. LEXIS 9534 (Tex. App.–Houston [14th Dist.] July 17, 2014, pet. denied);

(5) inconsistencies caused by errors made in affidavits. *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);

(6) the fact that the affiant is an interested witness, and her testimony is not clear, positive and direct, and free from contradictions and inconsistencies, thus failing to satisfy the requirement of TRCP 166a(c) as to the type of affidavit on which a trial court could grant summary judgment. *Shepherd v. Mitchell*, No. 05-14-01235-CV, 2016 WL 2753914, 2016 Tex. App. LEXIS 4926, *9 (Tex. App.–Dallas May 10, 2016, no pet.); *Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2012, no pet.);

(7) a complaint that the affidavit is a "sham" in that it contradicted the affiant's deposition testimony. *Bowser v. Craig Ranch Emergency Hosp., L.L.C.*, 2015 Tex. App. LEXIS 6631, *5-6 (Tex. App.–Dallas June 29, 2015); *Am. Idol, Gen., LP v. Pither Plumbing Co.*, 2015 Tex. App. LEXIS 4431, 7 (Tex. App.–Tyler Apr. 30, 2015); and

(8) an unauthenticated attachment to an affidavit. *Avery v. LPP Mortg., Ltd.*, No. 01-14-01007, 2015 WL 6550774, 2015 Tex. App. LEXIS 11136, *7 (Tex. App.–Houston [1st Dist.] Oct. 29, 2015, no pet.).

Stop and think about it–objections as to all these issues give you a chance to complain about evidence that is so weak that your opponent will not, or cannot, even properly prove it up. You can rail about this to the trial court, in the context of talking about the justness of your case. And as to these objections about defects in form, don't just merely complain that the affidavit is defective. Because you must state the specific defect (e.g., that the affidavit lacked personal knowledge or contained hearsay) really stand up and shout about it. *Clef Constr,*, 2014 Tex. App. LEXIS 9534 at *7.

Another warning. While it is true that TRAP 33.1 "relaxe[d] the requirement of an express

Implications of Error Preservation Rulings

ruling and codifie[d] caselaw that recognized implied rulings," don't rely on such an implied ruling. Instead, have the trial judge to rule expressly on this objection about evidence which is worthless. The Supreme Court has most recently reaffirmed the need for an express ruling, where it said two things:

1) "A trial court's on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing." *But*
2) "As a practical matter, sometimes summary judgment hearings are transcribed, and sometimes they are not; ***the best practice for a party objecting to summary judgment evidence*** is to secure a written order on the objection from the trial court. But if no such order is issued, and the reporter's record of the hearing reveals an unequivocal oral ruling on the objection, that ruling is sufficient for error-preservation purposes." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838-39 (Tex. 2022) , *emphasis supplied*. Also expounding on the requirement for an express ruling on such objections are *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017); *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 165-166 (Tex. 2018); *see also Capitol Wireless, LP v. XTO Energy, Inc.*, 2014 WL 3696084, 2014 Tex. App. LEXIS 8028, 14-15 (Tex. App.–Fort Worth July 24, 2014, no pet.). Keep in mind, the court of appeals may not consider a notation on a docket sheet to constitute a ruling–even one which says "denied obj's." *Goins v. Discover Bank*, No. 02-20-00128-CV, 2021 WL 1136077, 2021 Tex. App. LEXIS 2310, at *3 n.3 (Tex. App.—Fort Worth Mar. 25, 2021, no pet. hist.) (memo op. on reh'g). In addition to the opportunity to get the trial judge engaged in your endeavor by ruling, there is another practical reason you should not count on an implied ruling. Not only do informal reports from former staff attorneys reflect that courts of appeals are very reluctant to find such implied rulings, none of the 2014 cases found such an implied ruling. "Merely granting or denying the summary judgment is, in and of itself, insufficient" to provide a ruling on an objection to a summary judgment affidavit. *Id.* Get. An. Express. Ruling. On. Your. Objection. If the trial court fails to rule, ask it to rule, file a motion requesting it to rule, and file a written objection to its failure to rule. *CMC*, 2014 Tex. App. LEXIS 2727, at *16-17; TRAP 33.1(a)(2)(B).

Now let's move to defects in substance–as to which complaints may be raised for the first time on appeal. These defects include:

(1) that statements in an affidavit are conclusory. *Lenoir v. Marino*, 2014 Tex. App. LEXIS 12703 (Tex. App.–Houston [1st Dist.] July 2, 2015); *Coward*, at 5-6. This conclusory nature can be shown by the contents of an exhibit controverting the averments in an affidavit. *Akins v. FIA Card Servs., N.A.*, 2015 Tex. App. LEXIS 1729, 7-8 (Tex. App.–Amarillo Feb. 23, 2015, no pet.); *County Real Estate Venture v. Farmers & Merchants Bank*, 2015 Tex. App. LEXIS 1409, 3 (Tex. App.– Houston [1st Dist.] Feb. 12, 2015, no pet.). But keep in mind–just because an affiant draws a conclusion in an affidavit does not make the affidavit conclusory, when the affiant "identified the facts on which that conclusion is based." *Nationwide Coin & Bullion Res., Inc. v. Thomas*, Nos.

14-19-00632-CV, 14-19-00633-CV, 2020 WL 6741694, 2020 Tex. App. LEXIS 8909, at *8 (Tex. App.—Houston [14th Dist.] Nov. 17, 2020, no pet. hist.) (memo op.);

(2) an affidavit that affirmatively demonstrates the affiant's lack of personal knowledge. *Old Republic Ins. Co. v. Cross*, No. 05-14-01204-CV, 2015 WL 8014402, 2015 Tex. App. LEXIS 12400, *5 (Tex. App.–Dallas Dec. 7, 2015, no pet.)

(3) that the evidence in the affidavit is legally insufficient. *Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.–Dallas 2014, no pet.);

(4) the "failure to attach an affidavit or otherwise authenticate their expert report" means the report amounts to no evidence. *Kolb v. Scarbrough*, No. 01-14-00671-CV, 2015 Tex. App. LEXIS 2943, 9-11 (Tex. App.–Houston [1st Dist.] Mar. 26, 2015, no pet. h.); and

(5) whether unanswered requests for admission attached to and referenced in an affidavit are deemed admitted under Rule 198.2(c)). *Ordonez v. Solorio*, 480 S.W.3d 56, 63 (Tex. App.—El Paso 2015, no pet.) .

So, just because an affidavit you filed does not draw an objection in the trial court, don't think that you are necessarily out of the woods. You may find out on appeal that the affidavit was impermissibly conclusory, or contained legally insufficient evidence. This means that you have to be doubly sure at the trial court level that your affidavit passes muster.

B. Attorney's Fees.

On only two of the common error preservation issues did parties fare worse, in terms of surviving an error preservation challenge, than they did on a complaint about attorney's fees (those other two issues involved due process complaints and other constitutional complaints). About 70% of the failures of parties to preserve error about complaints regarding attorney's fees came from failing to make any objection at all about the issue in the trial court. I wonder if this reflects some innate reluctance to challenge the testimony of another lawyer. In any event, I think this abysmal preservation rate concerning complaints about attorney's fees underscores the need to treat a claim for fees as a discrete, potentially very valuable claim *from the very beginning of the lawsuit*–and to prepare to either prove or disprove the elements of that claim or the affirmative defenses to it.

Examples of objections concerning attorney's fees which you will fail to preserve if you do not present them to the trial court include the following:

(1) a failure to segregate fees between claims on which fees are recoverable and those on which they are not. *Helms v. Swansen*, No. 12-14-00280-CV, 2016 WL 1730737, 2016 Tex. App. LEXIS 4540, *23 (Tex. App.–Tyler Apr. 29, 2016, pet. denied); *Garcia v. Baumgarten*, No. 02-14-00267-CV, 2015 WL 4603866, 2015 Tex. App. LEXIS 7878, *19-20 (Tex. App.-Austin July 30, 2015, no pet.); *Parham Family L.P. v. Morgan*, 434 S.W.3d 774, 791 (Tex. App.-Houston [14th Dist.] no pet.). The complaint about segregation must also be timely–when summary judgment proceedings result in an award of fees, the complaint about the failure to segregate must come in the

Implications of Error Preservation Rulings

response to the motion for summary judgment seeking fees–"a post-summary judgment hearing letter brief and a motion to disregard the court's prior finding" are too late. *Weaks v. White,* 479 S.W.3d 432, 440 (Tex. App.—Tyler 2015, pet. denied). Other authority suggests that one must object during trial or request a jury instruction regarding the segregation of fees in order to preserve a complaint about a failure to segregate. *Hill v. Premier IMS, Inc.*, No. 01-15-00137-CV, 2016 WL 2745301, 2016 Tex. App. LEXIS 4911, *22 (Tex. App.–Houston [1st Dist.] May 10, 2016, no pet.).

As to a failure to segregate complaint coming out of a bench trial, we have a quagmire. As the Dallas Court of Appeals noted:

> One of our sister courts has noted that "there is as yet no consistent rule about when an objection to the failure to segregate attorneys' fees must be raised in a case tried without a jury," Home Comfortable Supplies, Inc. v. Cooper, 544 S.W.3d 899, 908 (Tex. App.—Houston [14th Dist.] 2018, no pet.), and some courts have ruled that an objection to failure to segregate must be made "before the trial court issues its ruling." Huey-You v. Huey-You, No. 02-16-00332-CV, 2017 Tex. App. LEXIS 8750, 2017 WL 4053943, at *2 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.); see also Cooper, 544 S.W.3d at 908-09 (collecting cases).

Anderton v. Green, 555 S.W.3d 361, 372 n.4 (Tex. App.—Dallas 2018, no pet.). One court has held that since legal and factual insufficiency points in a bench trial may be raised for the first time on appeal, and this would include a complaint that there is factually insufficient evidence to support an award of fees which equaled the unsegregated amount. *Bos v. Smith*, 2016 Tex. App. LEXIS 2490, *53-54 (Tex. App.–Corpus Christi Mar. 10, 2016) supplemental petition at 2016 Tex. App. LEXIS 3389 (pet. denied); *see also Young v. Terral*, No. 01-14-00591-CV, 2015 WL 8942625, 2015 Tex. App. LEXIS 12422, *14 (Tex. App.–Houston [1st Dist.] Dec. 8, 2015, no pet.). However, the Corpus Court has subsequently held that a failure to segregate complaint in a bench trial must be raised in the trial court, or that complaint is waived. *Allstate Fire & Cas. Ins. Co. v. Rodriguez*, No. 13-18-00616-CV, 2021 WL 3777165, 2021 Tex. App. LEXIS 7095, at *8-9 n.4 (Tex. App.—Corpus Christi Aug. 26, 2021, no pet.hist.)(mem.op.);

(2) a party's failure to comply with the applicable attorney's fee statute. *Enzo Invs., LP v. White*, 468 S.W.3d 635, 651 (Tex. App.-Houston [14th Dist.] 2015, pet. denied) (holding that fees cannot be recovered under TCPRC 38.001 against a partnership); *Coffin v. Bank of Okla*., 2014 WL 198410, 2014 Tex. App. LEXIS 578, *2 (Tex. App.-Dallas Jan. 16, 2014, no pet.). This would also include a complaint that a party failed to present the claim as required by the relevant statute that provides for attorney's fees. *Cannon v. Castillo*, 2014 WL 3882190, 2014 Tex. App. LEXIS 8656, 7-8 (Tex. App.–Eastland Aug. 7, 2014, no pet.). It would also include a complaint that a party failed to serve a copy of an attorney's fee affidavit under TCPR Sec. 18.001(d). *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.-El Paso 2014, no pet.);

(3) a complaint that the party did not incur fees, or that fees were excessive. *Tom Bennett & James B. Bonham Corp. v. Grant*, 2015 Tex. App. LEXIS 2639, 85 (Tex. App.–Austin Mar. 20, 2015); *Davis v. Chaparro*, 431 S.W.3d 717, 727 (Tex. App.-El Paso 2014, pet. denied); and

(4) a complaint that the copies of time records supporting the fees were redacted. *Bosch v.*

Implications of Error Preservation Rulings

Frost Nat'l Bank, 2015 Tex. App. LEXIS 7481, *18 (Tex. App.–Houston [1st Dist.} July 21, 2015);

(5) a complaint that the jury, and not the judge, should make the finding about reasonable and necessary attorney's fees. *Jefferson County v. Ha Penny Nguyen*, 2015 Tex. App. LEXIS 8052, *74-75 (Tex. App.–Beaumont July 31, 2015);

(6) that there was no evidence to support the jury's award of $-0- in attorney's fees. *Daugherty v. Highland Capital Mgmt., L.P.*, No. 05-14-01215-CV, 2016 Tex. App. LEXIS 9117, *25-27 (Tex. App.–Dallas Aug. 22, 2016, no pet. history). Keep in mind–if you do not object to the failure to award fees at the first trial (including appellate fees), or fail to prove up the same in that trial, there is authority that you cannot pursue that attorney's fee claim at the second trial. *Cimco Refrigeration, Inc. v. Bartush-Schnitzius Foods Co.*, 518 S.W.3d 57, 62 n.9 (Tex. App.—Fort Worth 2015), reversed and remanded 518 S.W.3d 432, 438 (Tex. 2017), reaffirmed on issue on remand, 518 S.W.3d 57, 62 n.9 (Tex. App.—Fort Worth 2015, pet. denied); *Hill v. Premier IMS, Inc.*, No. 01-15-00137-CV, 2016 WL 2745301, 2016 Tex. App. LEXIS 4911, *26-27 (Tex. App. Houston [1st Dist.] May 10, 2016, pet. denied);

(7) an objection that fees are not just or equitable under the Declaratory Judgment Act–and a mere general objection to the award of fees because the other side's arguments lack merits will not preserve an objection as to whether the fee award was equitable or just. *City of Helotes v. Cont'l Homes of Tex., LP*, No. 04-15-00571-CV, 2016 WL 3085924, 2016 Tex. App. LEXIS 5742, *10-11 (Tex. App.–San Antonio June 1, 2016, no pet.);

(8) that the only claim on which the opposing party could recover relief did not allow for the recovery of attorney's fees. *Swinnea v. ERI Consulting Eng'rs, Inc.*, 481 S.W.3d 747, 758 (Tex. App.—Tyler 2016, no pet.); and

(9) the method of calculating fees. *Dias v. Dias*, 2014 Tex. App. LEXIS 12676, 30-31 (Tex. App.–Corpus Christi Nov. 25, 2014).

Also, if you are an attorney ad litem and want your fees, ask for them in the trial court; otherwise, you will not have preserved an objection as to the trial court's failure to award you fees. *In re Estate of Velvin*, 2013 WL 5459946, 2013 Tex. App. LEXIS 12267 (Tex. App.–Texarkana Oct. 1, 2013, no pet.).

C. Constitutional Challenges (and see Due Process, below).

An argument that a client's constitutional rights have been violated must be raised in the trial court or it is not preserved. *Matzen v. McLane*, No. 20-0523, 65 Tex. Sup. Ct. J. 181, 2021 WL 5977218, 2021 Tex. LEXIS 1192, at *25 (Dec. 17, 2021) (held, complaints that a commitment "must be subjected to 'strict scrutiny'" and about the need to "narrowly tailor[]" "infringement of [a] 'fundamental liberty interests" must be raised in the trial court to be preserved.) "Both we and the United States Supreme Court have held that constitutional error was waived in comparable circumstances [i.e., a due process complaint]." *In the Interest of L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *see also Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 544-45 (Tex. 2021); *In re M.R.*, No.

02-15-00221-CV, 2015 WL 6759249, 2015 Tex. App. LEXIS 11297, *20 (Tex. App.–Fort Worth Nov. 3, 2015, no pet.). In one respect, error preservation decisions involving constitutional issues are similar to decisions involving attorney's fees: of the more than 30 error preservation decisions in fiscal years 2014 through 2016 which involved a party complaining of a constitutional rights violation, all but two of those decisions held that error had not been preserved because the party had failed to raise the complaint in the trial court.

If the constitutions of this nation or state protect your client, make sure that you say so in the trial court. Those constitutions are the basis of our legal system(s), and if your case involves such complaints, you should never pass up an opportunity to say so.

Having said that, in the criminal sphere–and perhaps carrying over in the related civil area of forfeiture, and beyond–is the concept that the "constitutional prohibition of ex post facto laws has been held to be a *Marin* category-one, 'absolute requirement' that is not subject to forfeiture by the failure to object. *See Ieppert v. State*, 908 S.W.2d 217 (Tex. Crim. App. 1995). *See also Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex. Crim. App. 2003). On the other hand, an 'as applied' constitutional challenge to a statute's retroactivity is subject to a preservation requirement and therefore must be objected to at the trial court in order to preserve error. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014)." *Tafel v. State*, 524 S.W.3d 642, 680 (Tex. App.—Waco 2016)) (Grey, C.J., dissent), reversed and remanded on other grounds, *Tafel v. State*, 536 S.W.3d 517, 523 (Tex. 2017)

D. Continuance.

In fiscal years 2014 through 2016, parties were more effective at preserving error about continuances (or, more accurately, the lack thereof) than they were on all but four of the issues most commonly involving error preservation.

However, it does appear that parties may have let the circumstances surrounding the need for a continuance panic them a little bit in terms of dotting the i's and crossing the t's. For example, parties were more likely to fail to comply with certain mechanical requirements of TRAP 33.1 (untimely complaint, failing to comply with other rules) concerning a complaint about continuances than they were as to any other error preservation category. They were also more likely to fail to comply with the other mechanical requirements of TRAP 33.1 (failure to make a record, failure to get a ruling) than they wee as to all but two of the other issues which commonly involve error preservation fights. So, with that in mind:

- make sure that you comply with the requirements of TRCP 251–i.e., file a written motion, and support it by an affidavit, or make sure that the other party agrees to the continuance, or confirm that the operation of law mandates the granting of a continuance. *M. F. v. State*, No. 03-15-00666-CV, __ WL __, 2016 Tex. App. LEXIS 7106, *4 (Tex. App.–Austin July 7,

2016, pet. denied); *Gonzalez v. Reyna*, 2015 Tex. App. LEXIS 6764, *4 (Tex. App.–Corpus Christi July 2, 2015); *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);

- make sure that you make a record of the hearing on the continuance. *Gonzales*, 2015 Tex. App. LEXIS, *4; *Lane-Jones v. Estate of Jones*, 2014 WL 3587377, 2014 Tex. App. LEXIS 7900, 6-7 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); and
- make sure that you get a ruling from the trial court. *Wilson v. Dorbandt*, No. 03-14-00553-CV, 2016 WL 768143, 2016 Tex. App. LEXIS 1837, *19 (Tex. App.–Austin Feb. 24, 2016, pet. denied); *Gonzales*, 2015 Tex. App. LEXIS 6764, *4; *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494 (Tex. App.–Dallas Nov. 25, 2013, pet. denied). This is always the safe bet, even though courts of appeals do seem to be inclined to find that a trial court implicitly denied a motion for continuance by proceeding with the hearing in which a continuance was sought. *Roper v. Citimortgage, Inc.*, 2013 WL 6465637, 2013 Tex. App. LEXIS 14518 (Tex. App.–Austin Nov. 27, 2013, pet. denied) (memorandum opinion).

And keep in mind–not opposing another party's motion for continuance is *not* the same thing as joining in the motion and asking for the relief, and will not preserve a complaint that the trial court erred by not granting the continuance. *Heat Shrink Innovations v. Medical Extrusion Technologies*, No. 02-12-00512-CV, 2014 WL 5307191, 2014 Tex. App. LEXIS 11494, 25-26 (Tex. App.–Fort Worth Oct. 16 2014, pet. denied).

There was one other indication that parties may have let a sense of panic adversely affect their continuance motions: as compared to "The Average," parties complaining on appeal about a continuance ruling were more likely to pursue a different issue on appeal than was true on all but one other error preservation category (namely, the Jury Charge).

So, for purposes of pursuing a continuance, the lesson here might be to take a moment, make sure you're thinking about all the reasons a continuance should (or should not be) granted, make sure you have complied with TRCP 251, and then make sure you make a record and get a ruling from the trial court. And let the trial court know why the justness of your case will not see the full light of day unless you have a little more time.

E. Discovery.

We do a little worse preserving complaints about discovery than we do with the Average, largely because we don't raise the complaint in the trial court, or fail to do so in a timely fashion and in keeping with specific pertinent rules. So remember, object to the discovery request before the discovery becomes due. *In the Interest of T.J.S.*, No. 05-15-00138-CV, __ WL ___, 2016 Tex. App. LEXIS 8282, *12-13 (Tex. App.–Dallas Aug. 2, 2016, no pet. history); *In re Lowery*, No. 05-14-01509-CV, 2014 Tex. App. LEXIS 13633, 7-8 (Tex. App.–Dallas Dec. 18, 2014, no pet.). If you

have not gotten something in discovery which you requested, file and have the motion to compel heard and ruled on before the pertinent trial or hearing on the motion for summary judgment. *In re Dong Sheng Huang*, 491 S.W.3d 383, 385 (Tex. App.—Houston [1st Dist.] 2016); *Lewis v. Ally Fin. Inc.*, No. 11-12-00290-CV, 2014 Tex. App. LEXIS 13004, 11-12 (Tex. App.–Eastland Dec. 4, 2014, no pet.). If deadlines in rules, statutes, or scheduling order make discovery impossible to comply with, ask for a continuance or to reset deadlines, where possible–otherwise, you will waive your complaint about those deadlines interfering with discovery. *St. Germain v. St. Germain*, No. 14-14-00341-CV, 2015 WL 4930588, 2015 Tex. App. LEXIS 8633, *13-15 (Tex. App.–Houston [14th Dist.] Aug. 18, 2015, no pet.). If you failed timely to disclose discovery or to identify witnesses, ask the court to find that there was good cause timely to supplement the discovery or that the failure would not unfairly surprise or prejudice the other parties–and remember that you have the burden to make that showing. *In the Interest of T.K.D-H*, 439 S.W.3d 473, 478 (Tex. App.–San Antonio 2014, no pet.), TRCP 193.6(a), (b). And, if you do timely object to the production of documents, don't thereafter later offer those documents for production–doing so will render your objection irrelevant. *In re Ramsey*, No. 10-16-00003-CV, 2016 WL 3564407, 2016 Tex. App. LEXIS 6857, *3-4 (Tex. App.–Waco June 29, 2016, no pet. history).

The Supreme Court has recently held that a party can preserve a complaint about the overbreadth and irrelevance of documents sought by the other side by first asserting the same in a response to a motion to compel–assuming, of course, that the first time the pertinent documents were sought was in that motion to compel, and not in a prior request for production. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) . But the point here is that the first time you have an objection about any discovery matter, assert the objection.

F. Due Process.

In the three years covered by this study, when error preservation was at issue, only one due process complaint was preserved. The reason the remainder of the complaints were not preserved is that none of them were raised at trial. Only 12.5% of the time did a party asserting a challenged due process complaint get any kind of a favorable judgment on appeal. That makes due process complaints on appeal look, collectively, somewhat desperate. If you have a due process complaint, raise it in the trial court.

G. Evidence.

As mentioned earlier, evidentiary issues have consistently been the single biggest category of error preservation decisions. In addition to the error preservation decisions which involved affidavits (none of which are examined in this section), nearly twelve percent of the error preservation decisions in FYE 2014 through 2016 involved evidentiary rulings (including decisions regarding affidavits raises that number to about 15%). There are at least 190 error preservation decisions in the three years covered by this study that involve evidentiary complaints. Studying

Implications of Error Preservation Rulings

those decisions is probably a paper in and of itself. We cannot cover all those decisions here.

But we can fairly say that the dynamics of how we fare on appeal regarding these issues should further incentivize us to try to anticipate, and prepare for, evidentiary problems. Such preparation can help us do two things better:

1) decide whether the evidentiary fight on appeal is worth the powder; and
2) improve our chances at making an evidentiary objection which passes muster on appeal.

Let's take these in order.

Is the fight worth the powder? No one can dispute that both objecting to improper evidence, and defeating an improper objection to your evidence, are important. Not only does such evidence impede, or enable (as the case may be), the telling of your story. Additionally, error preservation practice allows you the opportunity to expound on the justness of your cause. But if we do not anticipate the particular evidentiary fight, then it is forced on us unexpectedly, and we have to react on instinct and fight back. This means that we don't have the time to analyze whether the fight is really worth it in the greater scheme of things. And that go-no go decision on the evidentiary fight is a very important part of the error preservation picture. As Justice Michael Massengale pointed out in a presentation that he and I made at the Advanced Civil Appellate Seminar of the State Bar in 2014, error on appeal "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." TRE 103(a)(1), entitled "Rulings on Evidence." Also keep in mind that appellate courts:

(1) review a trial court's ruling on evidentiary matters under an abuse of discretion standard;
(2) must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling; and
(3) will not reverse a judgment based on a claimed error in admitting or excluding evidence absent a showing that the error probably resulted in an improper judgment.

Willie v. Comm'n for Lawyer Discipline, 2015 Tex. App. LEXIS 2466, 27 (Tex. App–. Houston [14th Dist.] Mar. 17, 2015); see also *In re Heinemann*, No. 09-14-00303-CV, 2016 WL 349119, 2016 Tex. App. LEXIS 880, *3-4 (Tex. App.–Beaumont Jan. 28, 2016, no pet.). That is a very high threshold to cross. It does not mean you should not fight about evidentiary matters in the trial court. But it does mean that, to the extent reasonably possible, you should pick the fights you really want to push on appeal, and avoid the ones that are not worth it.

TRAP 33.1 requires that our complaints in the trial court satisfy the specific pertinent rules and statutes, and Rule 103(a)(1) specifically requires a *timely* objection, "stating the *specific* ground of objection, if the specific ground was not apparent from the context."

Implications of Error Preservation Rulings

In terms of making a specific enough objection concerning evidence, be aware that "'a general objection to an insufficient predicate'" or the fact that you "did not 'think the entire predicate ha[d] been laid'" does not preserve an objection. *In the Interest of A.A.*, 2013 WL 6569922, 2013 Tex. App. LEXIS 14997 (Tex. App.-Houston [1st Dist.] Dec. 12, 2013, pet. denied); see also *State v. Stockton Bend 100 Joint Venture*, No. 02-14-00307-CV, ___ WL ___, 2016 Tex. App. LEXIS 6167, *40-44 (Tex. App.–Fort Worth June 9, 2016, pet. denied) and *Schreiber v. Cole*, 2015 Tex. App. LEXIS 5098, *15 (Tex. App.–Amarillo May 19, 2015, no pet.).

So, anticipating potential evidentiary problems and challenges will not only help us decide whether the fight will really help our situation, but it also will assist in making sure that, at least on appeal (and perhaps at trial), we win the fights we pick.

Once we decide the fight is worth having, what other problems do we face, in addition to not making our evidentiary objections specific enough? Well:

- **If your evidence is excluded, make an offer of proof**. TRE 103 requires you not only to make that offer but also to make that offer "as soon as practicable, but before the court's charge is read to the jury." Rule 103(b). While " an offer of proof is not a work-around for the foundational requirement that an expert's qualifications be proven," the offer of proof requirement can be satisfied by an oral representation of (for example) an expert's qualifications "referencing page and line numbers of the same deposition testimony they sought to present by video." *Gunn v. McCoy*, 554 S.W.3d 645, 667 (Tex. 2018) Remember, making that offer gives you a free shot at selling your case to the trial court. In FYE 2014 through 2015, roughly 20% of the failures to preserve error concerning evidentiary complaints saw the party fail to make an offer of proof. "Error may be predicated on a ruling that excludes a party's evidence only if the substance of the evidence was made known to the court by the offer, or was apparent from the context within which questions were asked. TRE 103(a)(2); TRAP 33.1 (a)(1)." *In re Commitment of Lovings*, 2013 WL 5658426, 2013 Tex. App. LEXIS 12927, *2-3 (Tex. App.–Beaumont Oct. 17, 2013, no pet.); see also *Polsky v. State*, No. 03-14-00068-CV, 2016 WL 2907975, 2016 Tex. App. LEXIS 5081, *40-41 (Tex. App.–Austin May 13, 2016), pet. granted, jdgmt vacated, remanded for settlement, *Polsky v. State*, No. 16-0747, __WL__, 2017 Tex. LEXIS 460, at *1 (May 12, 2017); *Qui Phuoc Ho v. MacArthur Ranch, LLC*, 2015 Tex. App. LEXIS 9175, *15-17 (Tex. App.–Dallas Aug. 28, 2015). "'To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court.'" *City of San Antonio v. Kopplow Dev., Inc.*, 441 S.W.3d 436, 440-441 (Tex. App.–San Antonio 2014, pet. denied).

- **Get a ruling on your objection**. In roughly ten percent of the error preservation decisions related to evidence, the party failed to obtain a ruling as to its objection. An instruction to 'move along' is not a ruling." *Nguyen v. Zhang*, 2014 Tex. App. LEXIS 9311 (Tex.

App.–Houston [1st Dist.] Aug. 21, 2014, no pet.); see also *Qui Phuoc Ho*, 2015 Tex. App. LEXIS 9175, *15-17. Get the judge involved and interactive–the court's ruling on the offer may give you insight into how to structure the rest of your case.

Finally, keep in mind that a "ruling on a motion in limine preserves nothing for review." *Blommaert v. Borger Country Club*, 2014 WL 1356707, 2014 Tex. App. LEXIS 3682, *6-7 (Tex. App.–Amarillo 2014, pet. denied); see also *Rivera v. 786 Transp., LLC*, 2015 Tex. App. LEXIS 6676, *10-11 (Tex. App.–Houston [1st Dist.] June 30, 2015, no pet.). You must make a timely and specific objection when the offending evidence is offered at trial. *Id.*

H. Expert Witness.

For starters, "a party wishing to complain that expert testimony is legally insufficient to support the judgment because the witness is not qualified must challenge the admission of the testimony before trial or object when it is offered at trial." *In the Int. of C.E.*, 687 S.W.3d 304 (Tex. 2024).

One aspect of error preservation about expert witnesses should put fear in the heart of each of us who offers the testimony of an expert witness: "a party need not object in order to challenge the expert testimony as conclusory or speculative on its face; it need only preserve a challenge to the legal sufficiency of the evidence, which it may do post-verdict." *Pike v. Tex. EMC Mgmt.*, LLC, 610 S.W.3d 763, 786 (Tex. 2020); *see also City of Hous. v. Sauls*, No. 22-1074, 67 Tex. Sup. Ct. J. 690 , 2024 Tex. LEXIS 340, at *7, 13-14 (May 10, 2024), and cases cited therein (categorizing that an objection that an expert's opinion in a written declaration that was "speculative, conclusory, and assumes facts that are contrary to those on the face of the record" as "evidentiary challenges that may [in the summary judgment context] be raised for the first time on appeal."). This would include a complaint that an expert's "assumed sales price per ton has no basis in fact," and that "his projections for years after 2011 were based on unfounded assumptions about the Partnership's sales increase" (*Pike*, at *44), and that an expert's opinions were "baseless and that he ignored his own methodology." *In re Hood*, No. 09-16-00012-CV ___ WL ___. 2016 Tex. App. LEXIS 8751, *12-13 (Tex. App.–Beaumont, Aug. 11, 2016, no pet.). In other words, as is true with affidavit testimony, you may not realize that you have a problem with the conclusory nature of your expert's testimony until it is too late to do anything about it.

Contrast the objection about the conclusory nature of the expert's testimony with the objection that the expert's opinion is unreliable (at least one subset of which is that the expert's methodology is improper). These unreliability objections must be asserted, and a ruling obtained on them, before trial or when the testimony is offered. *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197, 204 (Tex. 2021) (held, objection that expert failed to opine as to whether the compressor's dangerousness was unreasonable is apparently not included in objection about expert testifying that the compressor was dangerous); *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 787 (Tex. 2020)

Implications of Error Preservation Rulings

(a complaint about an expert's "failure to deduct certain costs [when calculating damages for losses] is a challenge to the formula he used to determine EBITDA," and thus is a challenge to the expert's reliability); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816-81 (Tex. 2009); *In re Guardianship of Westbo*, No. 01-14-00705-CV, 2016 WL 262282, 2016 Tex. App. LEXIS 613, *20-21(Tex. App.–Houston [1st Dist.] Jan. 21, 2016, pet. denied); *Transcon Realty Investors, Inc. v. Wicks*, 442 S.W.3d 676, 681-682 (Tex. App.–Dallas 2014, pet. denied); *Vega v. Fulcrum Energy, LLC*, 415 S.W.3d 481, 490-491 (Tex. App.–Houston [1st Dist.] 2013, pet. denied). This kind of objection would include a complaint that the expert failed to deduct certain operational costs when calculating earnings. *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 787 (Tex. 2020) . Similarly, if your complaint is that revealing the facts or data underlying the expert's opinion would violate TRE403 (unfair prejudice outweighs probative value)) or TRE 705 (said facts and data are unfairly prejudicial), you must also object at or before the time evidence is admitted, and obtain a ruling on our objection. *In re Commitment of Brooks*, 2014 WL 989700, 2014 Tex. App. LEXIS 2802, *1 (Tex. App.–Beaumont Mar. 13, 2014, pet. dismissed w.o.j.). For an example of how to preserve a complaint about the reliability of an expert, see *Acadia Healthcare Co. v. Horizon Health Corp.*, 472 S.W.3d 74, 87 (Tex. App.—Fort Worth 2015), affirmed in part and reversed and remanded in part, all on other grounds, 520 S.W.3d 848, 887 (Tex. 2017).

I'll admit that the whole conclusory/reliability spectrum causes my head to hurt. Justice Harvey Brown and Melissa Davis made a presentation at the 2015 Advanced Civil Appellate Seminar, complete with paper, concerning issues related to Expert Witnesses. I would encourage you to get that paper. Hon. Harvey Brown, Melissa Davis, *Eight Gates for Expert Witnesses: 15 Years Later*, SBOT 29th Annual Advanced Civil Appellate Practice Seminar (2015). Justice Brown also has an earlier paper on the subject. Justice Harvey Brown, *Expert Witness, 2012 Update*, SBOT 28th Annual Advanced Personal Injury Course (2012). Additionally you should consider referencing the following materials: Carlos Edward Cardenas, James W. Christian, Michael Emmert, Rebecca Simmons, *How to Effectively Use Expert Witnesses: Expert Witness 2014 Update*, SBOT 31st Annual Litigation Update Institute (2015).

Keep in mind, to be timely, your objection about an expert witness must satisfy a deadline earlier than the trial, if a docket control order sets such an earlier deadline for challenging expert testimony. *Lone Star Engine Installation Ctr., Inc. v. Gonzales*, No. 05-14-01616-CV, 2016 WL 2765079, 2016 Tex. App. LEXIS 5006, *28-29 (Tex. App.–Dallas May 11, 2016, pet. denied) (memo op.).

I. Factual Sufficiency.

In a bench trial, you do not need to raise a factual sufficiency complaint in the trial court *at all*–that is, you can raise it for the first time on appeal. In fact, the Supreme Court has pointed out in the default judgment context that "Texas Rule of Appellate Procedure 33.1(d) specifically offers a defaulting party an appellate remedy to challenge the sufficiency of the evidence in a case tried to

the bench...for the first time on appeal"–even if the defaulting party did not assert or was unsuccessful in pursuing a motion for new trial under *Craddock*. *In re Marriage of Williams*, 646 S.W.3d 542, 544-45 (Tex. 2022) (held, trial court's property division was not supported by the evidence, which is a sufficiency challenge that may be raised for the first time on appeal). This is because of "the differences between a sufficiency challenge and a *Craddock* motion;" a "motion under *Craddock* does not attempt to show an error in the judgment; rather, [but] seeks to excuse the defaulting party's failure to answer by showing the Craddock elements," while "a complaint of legally or factually insufficient evidence assails the judgment, seeking to show that it is not supported by evidence presented in the trial court." *In re Marriage of Williams*, 646 S.W.3d 542, 545 (Tex. 2022)

But in a jury trial, you do have to raise the complaint in the trial court, and there is only one way to preserve a factual insufficiency point in such cases–you *have* to raise it in a *motion for new trial*. *In the Interest of D.T.*, 625 S.W.3d 62, 75 n.8 (Tex. 2021); *L.C. v. Tex. Dep't of Family & Protective Servs.*, 2015 Tex. App. LEXIS 5770, *3-4 (Tex. App.–Austin June 8, 2015); *W. B. v. Tex. Dep't of Family & Protective Servs*., 2014 Tex. App. LEXIS 9173, 1-2 (Tex. App.–Austin Aug. 20, 2014, no pet.); TEX. R. CIV. PRO. 324(b)(3). That may explain the fact that 84% of the time parties fail to preserve a factual sufficiency complaint, they fail: (1) to raise the complaint at all; and/or (2) to comply with the pertinent rule, i.e., Rule 324.

There are also other complaints that can be preserved only through a motion for new trial: that a jury finding is against the overwhelming weight of the evidence; the inadequacy or excessiveness of the damages found by the jury; incurable jury argument (see below); or any complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a judgment by default. TRCP 324(b). We will talk about jury argument in a minute. The other bases which require a new trial motion to preserve error do not come up often enough to be included here.

A lot of times, the last thing you want at the end of the trial is another trial. You've told your story, and you are physically and mentally exhausted. But if the jury got it wrong, you are entitled to another go. In a jury trial, if you think that the evidence is factually insufficient to support the verdict, file a motion for new trial saying so. Once again, this gives you the opportunity to rail about the justness of your case, and how wrong the jury was. Take advantage of that opportunity.

J. Judgment.

There are not many cases dealing with error preservation as to Judgments–it barely made the top sixteen error preservation categories, with only twenty-two decisions in three years. Its rarity may have something to do with the fact that, when Judgment formation time comes around, everyone's focus has really sharpened. The trial or summary judgment hearing has happened and–absent getting the bum's rush–we have had time to think about what to do to wrap it up for the

Implications of Error Preservation Rulings

trip to the appellate court. Nonetheless, the fact that error preservation cases about judgments rank in the top sixteen show that we ought to take note of some of the lessons these cases offer.

First, I would argue that, when you prepare your petition or your answer, draft a proposed judgment which outlines all relief you think your client entitled to–and then draft the proposed judgment which you think your opponent would say allows all the relief he/she/they/it are entitled to. It is true that most cases are settled, and the dispositive document for those cases is often just a nonsuit or take nothing judgment. But those cases involve a settlement, and you cannot anticipate what you will need to settle a case if you have not thought about the best case scenario for both parties. For those cases which end with a trial, summary or evidentiary, you will need a judgment to end the case. Your exercise in drafting these judgments will not be wasted–they will tell you where this case may go, and they will inform what you need to do to win, or to preserve error if you lose.

When you get to the end of the case and the drafting of the judgment which will become effective, think through what you will argue on appeal about why the Judgment is insufficient or incorrect–for example, the judgment gives more relief than was asked for. As a rule, those arguments must be made in the trial court in order to preserve them. *Teri Rd. Partners, Ltd. v. 4800 Freidrich Lane L.L.C.*, 2014 WL 2568488, 2014 Tex. App. LEXIS 5957, 18-19 (Tex. App.–Austin June 4, 2014, pet. denied). The same can be said for an objection that the written judgment does not conform to the judge's earlier oral pronouncements. *In re Marriage of Williams*, No. 14-15-000-90-CV, 2016 WL 2997094, 2016 Tex. App. LEXIS 5426, *2-3 (Tex. App.–Houston [14th Dist.] May 24, 2016). Similarly, if the judgment is merely "voidable" (i.e., is contrary to a statute, constitutional provision, or rule) as opposed to "void" (i.e., the trial court has no jurisdiction), then you must raise that challenge to the judgment in the trial court. In the Interest of M.L.G.J., No. 14-14-00800-CV, __ WL __ 2015 Tex. App. LEXIS 2750, 8 (Tex. App.–Houston [14th Dist.] Mar. 24, 2015, no pet.); *see In re Ayad*, No. 22-0078, __WL __ (Tex. Dec. 16, 2022) (opinion on rehearing). If you want something in the judgment–for example, an attorney's fee award–then you have to ask for it in the trial court, or you will have waived the same. *Kelley/Witherspoon, LLP v. Armstrong Int'l Servs.*, 2015 Tex. App. LEXIS 7720, *14-15 (Tex. App.–Dallas July 27, 2015)

Furthermore, if you are the losing party, always make sure that you never sign a judgment in such a way that waives your right to appeal–I have a friend who will never even approve a judgment as to form only. Having said that, noting such a limitation on your signature probably preserves your complaint, especially if you make it clear that you are objecting to the judgment. *Seeberger v. BNSF Ry. Co.*, 2013 WL 5434141, 2013 Tex. App. LEXIS 12108, *5, 13 (Tex. App.–Houston [1st Dist.] Sept. 26, 2013, pet. denied). Don't think you can agree to something in the Mediated Settlement Agreement and then think you can complain about that on appeal if you don't object to the judgment containing that same language. *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893, 2016 Tex. App. LEXIS 6335, *12-13 (Tex. App.–Austin June 16, 2016, no pet.) Be especially careful about signing a document, like an Agreed Order, which consents to an Agreed

Implications of Error Preservation Rulings

Judgment. Doing so without reservation, and doing so without withdrawing your prior consent to the Agreed Judgment may waive any right you have to challenge the sufficiency (legal or factual) of the evidence supporting the Judgment. *Gonzalez v. Wells Fargo Bank, N.A.*, 441 S.W.3d 709, 713-714 (Tex. App.–El Paso 2014, no pet.). In a similar vein, if you file a post-judgment motion attacking the judgment, and proposing another judgment, you cannot complain on appeal about judgment language which you included in the form of the judgment you proposed. *Robles v. Mann*, No. 13-14-00211-CV, 2016 WL 1613316, 2016 Tex. App. LEXIS 4135, *15-16 (Tex. App.–Corpus Christi Apr. 21, 2016, no pet.).

There are some really good papers, as well some good things to think about regarding judgment formation. You should get and review those every time you begin creating or reviewing a draft of a judgment. On a pretty routine basis, either the SBOT Advanced Civil Appellate Seminar or the Appellate Law 101 Seminar include such papers. *See* Justice Brett Busby, Anne Johnson, *Trial Judgment Traps*, SBOT 27th Annual Advanced Civil Appellate Seminar (2013); Anne Johnson, *Translating a Jury Verdict into a Judgment*, SBOT 26th Annual Advanced Civil Appellate Seminar (2012).

K. Jury Argument.

Interestingly, there are also not many cases involving error preservation issues about jury argument. That may reflect the much-discussed decline in jury trials. But the following findings may also indicate that (most of the time) we have in fact given a lot of thought to, and react pretty well to, what should or should not come up in jury arguments:

- the relatively few error preservation decisions about jury arguments–it is the second least common category among the top seventeen, having only 13 decisions in two years; and
- the fact that courts hold that objections about jury arguments were preserved far more often than any of the other most frequent error preservation categories–which, at only a 30% error preservation rate, may be like bragging that one is the least ugly man, but it is still something.

If the jury argument to which you object is curable, you have to assert the objection at the time the argument is made, and ask for an instruction that the jury disregard the argument, or you will waive it. *In re Tesson*, 413 S.W.3d 514, 524 (Tex. App.–Beaumont 2013, pet. denied). If the jury argument at issue is incurable, then you must raise that complaint no later than your motion for new trial, or you will waive it. TRCP 324(b)(5); *In re Lopez*,462 S.W.3d 106, 114 (Tex. App.–Beaumont Apr. 9, 2015, pet. denied); *Cowboys Concert Hall-Arlington v. Jones*, 2014 WL 1713472, 2014 Tex. App. LEXIS 4745, *62 (Tex. App.–Fort Worth May 1, 2014, pet. denied). Not only that, but you must bring forth a record which allows the court of appeals to "consider the record as a whole to determine whether the argument was so extreme as to be incapable of cure." *In the*

Implications of Error Preservation Rulings

Estate of Davidson, No. 05-15-00432-CV, __ WL __, 2016 Tex. App. LEXIS 8801, *8-11 (Tex. App.–Dallas Aug. 11, 2016, no pet.). And if you invite the argument of the other side, then you really won't have a complaint on appeal. *In re Dodson*, 434 S.W.3d 742, (Tex. App.-Beaumont 2014, pet. denied). By the way, you can open the door (i.e, invite the other side's jury argument) as early as in opening statement. *Pojar v. Cifre*, 199 S.W.3d 317, 338 (Tex. App.–Corpus Christi 2006, pet. denied).

In terms of what are improper (though perhaps not necessarily incurable) jury arguments, consider re-reading the comment to TRCP 269 (which lists at least 24 improper jury arguments). Where is the dividing line between curable and incurable jury arguments? That discussion is really beyond the scope of this paper. But, generally speaking, incurable jury argument is argument which: (a) by its nature, degree and extent, constitutes such error that an instruction from the court, or retraction, could not remove its effect; and (b) probably caused rendition of an improper verdict. Bradley M. Whalen, *Opening Statement and Closing Argument*, 4th Annual Advanced Civil Trial Strategies (2015), citing *Living Centers of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (*per curiam*). One court has said that an argument was not incurable if "the argument was not so extreme that a 'juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument.'" *In re Pilgrim*, 2015 Tex. App. LEXIS 6476, *10-11 (Tex. App.–Beaumont June 25, 2015). Here are some examples of incurable jury argument, listed by *Penalver* and reported by Mr. Whalen:

a) likening opposing counsel's arguments concerning limiting damages to a Nazi Germany program under which the elderly were used for medical experiments and murdered;

b) appealing to racial prejudice;

c) unsupported, extreme and personal attacks on opposing counsel and witnesses;

d) accusing opposing counsel of manipulating witnesses in the absence of evidence of witness tampering; and

e) comments which impugn the court's impartiality, equality and fairness.

Id. The following, while objectionable, have been held to not constitute incurable jury argument:

a) referring to an opposing party as a "liar, a cheat, a thief, and a fraud" where there are allegations and some evidence of deceit. *Business Staffing, Inc. v. Viesca*, 394 S.W.3d 733, 749 (Tex. App.–San Antonio 2012, no pet.). *See also In the Estate of Davidson*, No. 05-15-00432-CV, __ WL __, 2016 Tex. App. LEXIS 8801, *8-11 (Tex. App.–Dallas Aug. 11, 2016, no pet.);

b) violating an order in limine not to mention a party's absence from the court house (harmless because a party's absence is obvious). *Id.* at 750;

c) violating an order in limine concerning mention of financial hardship should the jury fail to award damages. Id. at 750;

d) violating an order in limine concerning settlements among parties. *Columbia Med. Center of Las Colinas v. Bush*, 122 S.W.3d 835, 862 (Tex. App.–Fort Worth 2003, pet. denied); and

Implications of Error Preservation Rulings

e) "'inferring that [client] and his attorney . . . were engaged in [] criminal activity' that involved 'funneling payments on the aircraft back to [the attorney's] criminal client." *Tanguy v. Laux*, 2015 Tex. App. LEXIS 6495, *12-17 (Tex. App.–Houston [1st Dist.] June 25, 2015).

See, Whalen, *Opening Statement and Closing Argument*, supra.

L. Jury Charge (including instructions).

The second most numerous category of error preservation decisions involves the jury charge, including instructions. We do better in preserving error on Jury Charge than we do on all but one of the other issues most commonly involved in error preservation fights–but that still means that nearly 80% of the time courts hold that attorneys have not preserved error as to the charge. Nearly one fifth of the error preservation fights concerning the jury charge find the court of appeals holding that the issue raised on appeal is different than the issue raised in the trial court, and 40% of the time the complaint raised on appeal was not raised at all in the trial court.

I suspect most error preservation problems regarding the charge arise from the difficult nature of the charge itself, combined with the fact that-most of the time-the charge is put together very shortly after the evidence closes. The Supreme Court once said that "the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial." *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). *Payne* was an error preservation case under the former TEX. R. APP. P. 52(a), and I believe it was probably the seed bed of the language in Rule 33 which requires our complaints be specific enough to make the trial court "aware" of them. *Id.*, at 241.

What is the answer to preventing these problems with the charge? Goodness knows, we want to avoid these problems. After all, the charge is the place where we get the jury to tell us the facts that confirm the story we have tried to tell. Perhaps, on the difficult or unusual cases, we should schedule the charge conference(s) such that they begin in earnest weeks before the trial starts. We have the ability to make this happen by virtue of scheduling orders which we request from the trial courts. Doing so would address the daunting challenge faced by trial counsel which the Supreme Court noted in *Payne* over twenty years ago:

> The preparation of the jury charge, coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly subserves the fair and just presentation of the case. Yet that is our procedure. To preserve a complaint about the charge a party must sometimes request the inclusion of specific, substantially correct language in writing, which frequently requires that even well prepared

Implications of Error Preservation Rulings

counsel scribble it out in long-hand sitting in the courtroom.

Id., at 240.

Scheduling your jury charge conferences in advance of the trial will also give you the opportunity to discover what the trial court is inclined to do with your proposed charge, thereby potentially helping you to preserve error. In that regard, consider the following example from the Supreme Court of some pre-trial rulings about spoliation instructions:

> In light of Wackenhut's specific reasons in its pretrial briefing for opposing a spoliation instruction and the trial court's recognition that it submitted the instruction over Wackenhut's objection, there is no doubt that Wackenhut timely made the trial court aware of its complaint and obtained a ruling. Under the circumstances presented here, application of Rules 272 and 274 in the manner Gutierrez proposes would defeat their underlying principle. *See Payne*, 838 S.W.2d at 241. Therefore, we conclude that Wackenhut preserved error.

Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917, 920 (Tex. 2015).

The Supreme Court has also recently held that when a party's "objection to the [jury] question and its argument [about that question] in the court of appeals are similar in substance," the party has preserved error. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp*., 482 S.W.3d 559, 572 (Tex. 2016). In that regard, the Court has also held that when "[a]t the charge conference, defense counsel objected to the use of the federal [*7] regulations' definitions [of the word 'employee'] at all, arguing that the trial court should have used the Texas Pattern Jury Charge instead....[and] alternatively objected to the specific application of the federal regulations' definitions," the defendant preserved its complaint even though it "arguments on appeal are more nuanced than at the charge conference, but the upshot is the same: the jury charge should have used the common-law definitions from the Pattern Jury Charge, not the federal regulations' definitions." *JNM Express, LLC v. Lozano*, No. 21-0853, 67 Tex. Sup. Ct. J. 556, 2024 WL ____, *__, 2024 Tex. LEXIS 289, at *6-8 (Apr. 19, 2024).

And it has also held that when a party "rel[ies] on established precedent" at the charge conference to "request[] that the trial court define" an element (to wit, the "intent" required in an intentional injury workers' compensation charge), the party "preserved error." *Berkel & Co. Contrs. v. Lee*, 612 S.W.3d 280, 284 (Tex. 2020).

If you put an accelerated charge conference schedule in place, however, be ever vigilant as to any indication that the trial court has accelerated the deadline by which you must make your final objections to the charge. In fact, you might want to build a defined deadline for making such final objections into the scheduling order. TRCP 272 allows those objections to be made "before the charge is made to the jury." But if the trial court says something like "[T]omorrow when we come

Implications of Error Preservation Rulings

in, I'm not going to mess with this [charge] any further," you may be shut out of making further objections to the charge before the case goes to the jury the next morning. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 842 (Tex. 2014).

There really is no replacement for periodically reviewing the rules governing jury charges (i.e., TRCP 271-279). In a very brief and certainly not exhaustive nutshell, those Rules set at least the following error preservation bars you must clear:

> Rule 272–if you don't make an objection to the charge, it is waived;
> Rule 274–you must point out distinctly the objectionable matter in the charge and the grounds of your objection. Any complaint is waived unless specifically included in the objection.
> Rule 276–submit written instructions, questions, and definitions. Get the trial court to refuse them or to modify them in writing, which fundamentally preserves your objection, etc.
> Rule 278–while you are entitled to a question or instruction for any legally viable claim or defense supported by the pleadings and evidence, you cannot complain about a failure to submit a question unless you submit one in substantially correct wording, and the same is true for the failure to submit instructions or definitions.

In addition to the foregoing thumbnail sketch of this area on which pots of ink have been spilled, here are some examples for you to consider in terms of making your objection sufficiently specific and timely:

- if a broad form question involves valid and invalid theories, make a *Casteel* objection as to form, either by citing *Casteel* (*Acadia Healthcare Co. v. Horizon HealthCorp*., 472 S.W.3d 74, 99 (Tex. App.–Fort Worth 2015, affirmed in part and reversed and remanded in part, all on other grounds, 520 S.W.3d 848, 887 (Tex. 2017)) or *Casteel's* test (*Benge v. Williams*, 472 S.W.3d 684, 709 (Tex. App.–Houston [1st Dist.] 2015), aff'd 548 S.W.3d 466 (Tex. 2018); *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014). One court has held that this objection preserves a similar objection as to a question conditioned on the answer to the question which was objected tol *Hulcher Srvs. v. Emmert Indus. Corp.*, No. 02-14-00110-CV, __WL__, 2016 Tex. App. LEXIS 928, *58 (Tex. App.–Fort Worth Jan. 28, 2016, pet. denied).
- mentioning *Casteel* and its progeny, "a defendant must object to both the lack of evidence supporting a claim *and* an apportionment question predicated on more than one ground of recovery." *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197, 211 (Tex. 2021). Failing to timely object to an apportionment question which covers multiple liability questions waives the *Casteel* objection as to the apportionment question. *Id.*
- if answering one question should be conditioned on the answer to another question, say so, and object if an instruction requiring such conditioning is not included. *Trinity Materials, Inc. v. Sansom*, No. 03-11-00483-CV, 2014 WL 7464023, 2014 Tex. App. LEXIS 13884,

Implications of Error Preservation Rulings

*43 (Tex. App.–Austin Dec. 31, 2014, pet. denied); *Bishop v. Miller,* 412 S.W.3d 758, 782 (Tex. App.–Houston 2013, no pet.).

- if the other side improperly failed to segregate the evidence between recoverable and non-recoverable attorney's fees, object to the jury question, and request an instruction to the jury that it apportion attorney's fees among the various claims. *Aon Risk Servs. Southwest v. C.L. Thomas*, 2014 Tex. App. LEXIS 13652, 26-27 (Tex. App.–Corpus Christi Dec. 19, 2014, no pet.); *Metroplex Mailing Servs. v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 901 (Tex. App.–Dallas 2013, no pet.).
- while *Wackenhut* may give you some protection, you might want to wear both belt and suspenders just to be sure. For example, just because the trial court overruled your pre-trial objection to an instruction, don't stop objecting to it. Object to it every time the judge asks if you have objections, and don't submit proposed instructions on the subject without reservation or condition. *A & L Indus. Servs. v. Oatis,* 2013 Tex. App. LEXIS 13765, *30-31 (Tex. App.–Houston 2013, no pet.).
- if the damage question includes a period of time that was barred in part by the statute of limitations, you must object to the question in that regard. *Kamat v. Prakash*, 420 S.W.3d 890, 909-910 (Tex. App.-Houston [14th Dist.] 2014, no pet.). More broadly, if the damage question submits an improper measure of damages (for example, it fails to take into account the economic loss rule), you must object to that question. *Caldwell v. Wright*, No. 10-14-00244-CV, __ WL __, 2016 Tex. App. LEXIS 8633, *6-9 (Tex. App.–Waco Aug. 10, 2016, extension granted to file petition). An objection is also required to the charge on the grounds that the damage question would allow for a double recovery. *Premier Pools Mgmt. Corp. v. Premier Pools*, No. 05-14-01388-CV, __ WL __, 2016 Tex. App. LEXIS 8813, *24 (Tex. App.–Dallas Aug. 12, 2016, pet. denied);
- you have to submit a written instruction which you contend should be in the charge (*Lerma v. Border Demolition & Envtl., Inc.*, 459 S.W.3d 695, 700 (Tex. App.–El Paso 2015, pet. denied)) and object as to the failure to include the instruction (*Internacional Realty, Inc. v. 2005 RP West, Ltd.*, 449 S.W.3d 512, 532 (Tex. App.–Houston [1st Dist.] 2014, pet. denied)). Merely submitting a proposed question containing the instruction will not preserve your objection unless the record demonstrates that the trial court ruled on the proposed question. *Irika Shipping S.A. v. Henderson*, No. 09-13-00237-CV, 2014 Tex. App. LEXIS 13550, *22 (Tex. App.–Beaumont Dec. 18, 2014, no pet.). This is especially true if the trial court indicates it is not taking the time to read through objections which were filed. *Shamoun & Norman, LLP v. Hill*, 483 S.W.3d 767, 793 (Tex. App.—Dallas 2016), affirmed in part, reversed in part and remanded, both on other grounds, 544 S.W.3d 724, 744 (Tex. 2018);
- if you feel that a contract did not exist, then object on that basis to the court submitting *any question at all* which asks the jury to find whether a contract was breached. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 2014 WL 3107507, 2014 Tex. App. LEXIS 5691, 11-17 (Tex. App.-Corpus Christi May 29, 2014), reversed at 482 S.W.3d 559, 571 (Tex. 2016); see also *Martin v. Beitler*, No. 03-13-00605-CV, 2015 WL 4197042 2015 Tex. App.

LEXIS 6894, *20 (Tex. App.–Austin July 7, 2015, no pet.).

- your objection must be specific enough to make the trial court aware of your complaint–for example, merely asking to add the phrase "if you find there was a dealer franchise agreement" failed to "give the trial judge fair notice . . . [the party] was requesting a question and isntruction on its affirmative defense of excuse by a prior material breach." *Colo. Cnty. Oil Co. v. Star Tex Distribs., Inc*., No. 14-14-00905-CV, 2016 WL 2743452, 2016 Tex. App. LEXIS 4908, *17-18 (Tex. App.–Houston [14th Dist.] May 10, 2016, no pet.).

With regard to *Gulf Energy*, mentioned above, the Supreme Court reversed the court of appeals on a couple of error preservation issues. As to the holding mentioned above, the Court held that when the objection at trial was "similar in substance" to the issue on appeal and therefore was preserved. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572 (Tex. 2016). On another issue, the Court held that error was not waived "by [the defendant] failing to request a definition of good faith in conjunction with the question" which the defendant had submitted on its good faith defense. *R.R. Comm. v. Gulf Energy Exploration*, 482 S.W.3d 559, 571 (Tex. 2016). The requested question "generally tracked the pertinent statutory language" of the good faith defense set out in Tex. Nat. Res. Code §89.045, as the case law required, but the defendant did not "request an accompanying extra-statutory definition" of good faith. *Id.* The Court held that it was "particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be." *Id.*

If you do face a situation in which a complaint about a jury charge was not raised in the charge conference, keep in mind that a complaint that a question is immaterial because it asks the jury to answer a question of law does not have to be raised prior to the jury answering the charge. *Park Plaza Solo, LLC v. Benchmark-Hereford, Inc.*, No. 07-16-00004-CV, 2016 Tex. App. LEXIS 11487, at *9 (Tex. App.—Amarillo Oct. 24, 2016).

Finally, take advantage of the "Preservation of Charge Error (Comment)" which you can find in the PJC. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS, WORKERS' COMPENSATION PJC 32.1 (2014 ed.).

M. Jury Answers–Conflicting.

While courts do not typically write about this topic, the Supreme Court has muddied, and then clarified, this issue recently, and so we need to cover it here.

Recently, in applying TEX. R. CIV. P. 295, the Texas Supreme Court held that "a party who claims that jury answers fatally conflict must raise that objection with the trial court before the court discharges the jury," and failing to do so waives the objection. *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 787 (Tex. 2021). The Court recently reaffirmed, in an irreconcilable

Implications of Error Preservation Rulings

verdict case, that "[t]he lack of a timely objection to a jury's discharge may deprive a party of an appellate point" on that issue. *In re Rudolph Auto., LLC*, No. 21-0135, 66 Tex. Sup. Ct. J. 1111, 2023 Tex. LEXIS 524, at *20-21 (June 16, 2023).

Having said that, *Rudolph* actually held that, even in the absence of a timely objection to the jury's discharge, related to irreconcilable findings, "does not deprive the trial court of the authority to grant a new trial if the court concludes that the irreconcilability of a verdict prevents the rendition of a reliable judgment. Indeed, a trial court could come to that conclusion on its own." *Rudolph*, at *20. *Rudolph* held it was error for the trial court to deem the verdict irreconcilable. *Id.* But the Court also held that while "a party must object to discharging the jury to preserve its right to demand a new trial on this ground on appeal, no such objection is required for a party to insist that, when it renders a judgment, the court perform the legal duty of reconciling a verdict." *Rudolph*, at *22. And that harkens back to five years earlier, when a plurality of the Court (with only seven justices sitting) said that while "[g]enerally, a party should object to conflicting answers before the trial court dismisses the jury," the "absence of such an objection, however, should not prohibit us from reaching the issue of irreconcilable conflicts in jury findings." *USAA Lloyd's Co. v. Menchaca*, 545 S.W.3d 479, 526 (2018) (Green, J., plurality, joined by Chief Justice Hecht, Justices Guzman and Brown). The dissent noted that Rule 295 only says that if a purported verdict "is defective, the court *may* direct it to be reformed." *Id.*, at 527 (emphasis in dissent). The dissent said that holding that "the Rule 295 verdict-reformation process is the *only* remedy for conflicting jury answers . . . misconstrues Rule 295, misapplies our precedent, and ignores trial realities, as this case demonstrates." *Id.*, at 527. In discussing various cases in which post-judgment motions challenged allegedly conflicting jury answers, the four justice dissent said that they "do not believe our preservation requirements prevent us from ruling in USAA's favor or even from considering the issue of conflicting jury issues in this case." *Id.*, at 530.

The other three justices participating in the *Menchaca* decision held that "we have long held that a judgment will not be reversed 'unless the party who would benefit from answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury redeliberate on the issues or that the trial court grant a mistrial," and applied that same rule to conflicting answers. *Menchaca*, at 519. Having said that, this three justice majority opinion held that, because "of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case," a "remand is necessary here in the interest of justice," even though error was not preserved and the fatal conflict in the jury answers was not fundamental error which avoided the need to preserve error. *Menchaca*, at 521.

All of this is to say: if you have an objection about irreconcilably conflicting jury answers, raise that objection prior to the judge dismissing the jury. However, don't be surprised if your opponent raises such a complaint after the dismissal of the jury, and if you have a complaint about an irreconcilable verdict you should also not be reluctant to raise that complaint after the jury's discharge.

Implications of Error Preservation Rulings

Keep in mind, too: *Menchaca* dealt with "irreconcilable conflicts" in jury answers, not with incomplete jury answers or unresponsive jury answers. In all, I would not advise knowingly failing to object to irreconcilably conflicting jury answers until after the trial court dismisses the jury. You may have three Supreme Court justices on your side (one of the four dissenting justices, Justice Brown, has moved to the Federal district bench), but that strikes me as short of a winning hand. But at least one court of appeals has held–in its reasoned decision denying a mandamus, and over a dissent–that some post-verdict motions may preserve the complaint about conflicting jury answers despite the lack of an objection before the dismissal of the jury. *In re Auto*., No. 08-18-00149-CV, 2020 Tex. App. LEXIS 10387, at *19-23 (Tex. App.—El Paso Dec. 30, 2020, no pet. hist.) (mem. op.).

N. Legal Sufficiency.

In a *bench trial*, one does not need to object as to legal sufficiency in order to preserve a complaint to that effect on appeal. TRAP 33.1(d). That is true, for example, where the parties try the issue of attorney's fees to the court. *Exco Operating Co., LP v. McGee*, No. 12-15-00087-CV, __ WL __. 2016 Tex. App. LEXIS 8934, *2-3 (Tex. App.–Tyler Aug. 17, 2016, no pet.). Therefore, it should come as no surprise that a lot of the error preservation rulings recognize that fact. Just remember, if you are the party with the burden of proof in a non-jury trial, your opponent does not have to object in the trial court to the asserted lack of evidence, and thus you may not have a chance to fix this problem until the appeal, when it is too late to do so. *See* "Factual Sufficiency," *supra*, for a discussion of how a sufficiency challenge can first be raised on appeal to challenge a default judgment, even in the absence of having challenged the default via a *Craddock* motion.

But, when we focus on jury trials, we find that we do no better on preserving error on legal sufficiency claims than we do in The Average. There are numerous ways to preserve a legal sufficiency challenge to a jury verdict. For example, the Supreme Court has recently affirmed that one may preserve a legal sufficiency challenge by making that objection to the jury charge–meaning that it would "evaluate the sufficiency of the evidence against the charge the trial court should have given." *Berkel & Co. Contrs. v. Lee*, 612 S.W.3d 280, 284 (Tex. 2020).. To preserve your legal sufficiency challenge to the jury verdict, you must take advantage of at least one of the means for making that complaint in the trial court:

> After a jury trial, a legal-sufficiency challenge may be preserved in the trial court in one of the following ways: (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue, or (5) a motion for new trial. Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985). Preservation of a factual-sufficiency challenge requires a motion for new trial. M.S., 115 S.W.3d at 547 (citing Tex. R. Civ. P. 324(b)(2)).

Implications of Error Preservation Rulings

In the Interest of D.T., 625 S.W.3d 62, 75 n.8 (Tex. 2021) ; see also *Dudley Constr., Ltd. v. ACT Pipe & Supply, Inc.*, 545 S.W.3d 532, 542 (Tex. 2018), affirmed in part and reversed and remanded in part, both on other grounds, 545 S.W.3d 532, 542 (Tex. 2018); *In re A.L.P.*, No. 11-15-00011-CV, 2015 WL 5192066, 2015 Tex. App. LEXIS 8817, *11 (Tex. App.–Eastland Aug. 21, 2015, pet. denied). But remember: if you file a motion for directed verdict claiming that there is legally insufficient evidence, and the trial court denies that motion, and then you (or any other party) proceeds to elicit more evidence, you must renew your legal sufficiency complaint by one of the mechanisms recognized in TRCP 324, or you will waive your objection. *In the Interest of A.R.M.*, 2014 Tex. App. LEXIS 3744, *13-14 (Tex. App.–Houston [14th Dist.] Apr. 8, 2014, no pet.).

O. Notice.

Periodically, the Supreme Court reminds us that we waive our complaint about a failure to give or, or inadequacy of, notice of a hearing if we fail to raise that complaint in the trial court. *In the Interest of G.X.H.*, 627 S.W.3d 288, 300 (Tex. 2021).

We tend not to raise a complaint about notice, or not to raise it in a timely fashion or in compliance with specific rules, more often than is true with The Average. "To preserve a complaint of untimely notice under rule 21a, the complaining party must object under that rule, request additional time to prepare for the hearing, and obtain a ruling by the court on each objection or request." *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, 2014 Tex. App. LEXIS 12892, 16-17 (Tex. App.–Dallas Dec. 2, 2014, pet. denied). If you participate in a hearing without objecting as to the amount of notice concerning that hearing you will have waived any complaint as to the notice. If you complain you received no notice at all of the hearing (such as notice of submission of a summary judgment motion), you can preserve that complaint by a motion for new trial after the hearing. *Ready v. Alpha Bldg. Corp*., 467 S.W.3d 580, 584 (Tex. App.–Houston [1st Dist.] 2015, no pet.). And keep in mind that sometimes one can pitch a complaint about notice in a way that did not have to be raised in the trial court–for example, in a bench trial scenario, one can challenge the sufficiency of the evidence of notice for the first time on appeal. *Onabajo v. Household Fin. Corp. III*, No. 03-15-00251-CV, __ WL __, 2016 Tex. App. LEXIS 7454, *7 (Tex. App.–Austin July 14, 2016, no pet.).

P. Pleadings.

TRCP 90 provides that you will waive every omission, defect, or fault in a pleading which you do not specifically point out in writing and bring to the attention of the trial court before the instruction or charge to the jury, or (in a non-jury case) before the judgment is signed. If you have a problem with the other side's pleadings–including their insufficiency, or the failure to allege all conditions precedent to a claim or defense or required notice–then object, except, and get a hearing and ruling on the issue. This would include a complaint about the timeliness of the filing of your opponent's pleading. *Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 663 (Tex. App.--Dallas July

30, 2014, pet. denied). And then, when the trial occurs, object to evidence, claims, and defenses which are not supported by the pleadings. Otherwise, waiting until an appeal to complain about the pleadings will not bear much fruit. If you file a motion to strike a late filed pleading, get a ruling on the motion–or, just as if you failed to file such a motion or to object, you will not preserve your complaint. *Drew v. Elumenus Lighting Corp.*, 2015 Tex. App. LEXIS 4694, 13-14 (Tex. App.–Dallas May 7, 2015, pet. denied).

Furthermore, keep in mind any statutory schemes which may impose a duty on you to file a pleading–such as a plea in abatement if you are a defendant in a defamation claim who has not received a written request for a correction, clarification, or retraction. *Warner Bros. Entm't v. Jones*, 611 S.W.3d 1, 16 n.49 (Tex. 2020)

That leads us to the general rule that your "affirmative defense . . . must be pleaded unless tried by consent. Tex. R. Civ. P. 94." *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 882 n.3 (Tex. 2020)) (because the party "raised collateral estoppel for the first time at a summary judgment hearing and said nothing in writing on the matter until their appellate briefing, they forfeited the defense.").

The Court's comment in *Avalos* reminds us to avoid trying an unpleaded issue by consent. Rule 67; *Huth v. England*, No.03-14-00002-CV, 2016 WL 2907922, 2016 Tex. App. LEXIS 4978, *6-7 (Tex. App.–Austin May 12, 2016, no pet.). "Trial by consent applies in the exceptional case where the record as a whole clearly demonstrates that the parties tried an unpled issue. . . . To determine whether an issue was tried by consent, appellate courts 'must examine the record not for evidence of the issue, but rather for evidence of trial of the issue.' *Mastin*, 70 S.W.3d at 154." *In re Estate of Curtis*, 465 S.W.3d 357, 375 (Tex. App.—Texarkana 2015, pet. dismissed). For example, when "the evidence . . .was relevant to a pleaded issue . . . its admission without objection does not demonstrate a 'clear intent' by the parties to try the unpleaded issue of breach of an implied covenant against encumbrances." *Gharbi v. Hemmasi*, No. 03-07-00036-CV, 2015 WL 4746682, 2015 Tex. App. LEXIS 8209, *16-17 (Tex. App.–Austin Aug. 6, 2015, no pet.)

The Discovery Rule presents an especially tricky application of the trial by consent doctrine–if the plaintiff does not plead the Rule, the defendant's summary judgment motion does not have to address it. But if the plaintiff's msj response (or evidence at trial) raises the Discovery Rule, the defendant must complain that the Rule was not pled, and if the defendant fails to do so, it will have waived its complaint about the lack of pleading. *Gonzalez v. Vantage Bank Tex.*, No. 04-21-00285-CV, __WL__, 2022 Tex. App. LEXIS 7876, at *8-9 (Tex. App.—San Antonio Oct. 26, 2022, no pet. h.)(mem.op.)

Q. Sanctions.

I suspect that it is difficult to stay focused when one is accused of sanctionable conduct, but you must do so if you want to preserve error on the various issues involved in a sanctions situation.

Implications of Error Preservation Rulings

"A sanctions order is required to state the particulars of good cause supporting sanctions. Tex. R. Civ. P. 13. Failing to object to the form of the sanctions order, however, waives any error." *Grotewold v. Meyer*, 457 S.W.3d 531, 536 (Tex. App.–Houston [1st Dist.] 2015, no pet.), citing *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.—Austin 2008, pet. denied). The failure to object to the lack of particularized findings in the sanctions order will waive the complaint about a lack of such findings. *Estate of Anne Farish Huffhines*, No. 02-15-00293-CV, 2016 WL 1714171, 2016 Tex. App. LEXIS 4469, *29 (Tex. App.–Fort Worth Apr. 28, 2016, pet. denied, rehearing pending). There is at least some authority for the proposition that a "motion for new trial [which] generally alleged that the trial court erred in assessing sanctions but did not detail or address any evidence which [the sanctioned party] believed supported his claims" was not sufficient to preserve error about the lack of the particulars of good cause in the sanctions order. *John Kleas Co. v. Prokop*, No. 13-13-00401-CV, 2015 Tex. App. LEXIS 3162, *34 (Tex. App.–Corpus Christi Apr. 2, 2015, no pet.). But remember–even if you complain that the sanctions order lacks the requisite particularity, just in case you lose on that point, you still must also complain about the excessiveness of the fees or their lack of relation to the alleged sanctionable conduct to raise those points on appeal. *Shops at Legacy Inland v. Fine Autographs & Memorabilia Retail Stores*, No. 05-14-00889-CV, 2015 Tex. App. LEXIS 4724, 6-7 (Tex. App.–Dallas May 8, 2015, pet. denied). When you complain about that excessiveness, you do preserve that complaint. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 365 (Tex. 2014).

A party successfully preserved error when she "objected to the evidence submitted . . . in support of [the] sanctions request, specifically arguing that fees incurred before the misstatements were not related to her [sanctionable] conduct." *Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass'n*, 2015 Tex. App. LEXIS 3979, 29 (Tex. App.–Houston [1st Dist.] Apr. 21, 2015, no pet.). And at least one court has pointed out that a complaint "that there was no evidence to support the imposition of sanctions . . . . may be raised for the first time on appeal." *Wells v. May*, No. 05-12-01100-CV, | 2014 WL 1018135, 2014 Tex. App. LEXIS 1610, *1 (Tex. App.–Dallas Feb. 12, 2014, no pet.). Perhaps the same thing is true for a factual sufficiency complaint in a sanctions proceeding which was entirely a bench trial. TRAP 33.1(d).

R. Summary Judgment.

Here we are at the third of the big three categories of error preservation problems–Summary Judgments. Before launching in to the revelations of fiscal years 2014 through 2016, let me once again recommend to you the previously mentioned resources on summary judgment practice which you ought to consult: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Summary Judgment decisions comprise nearly 7% of all error preservation decisions covered by this paper. If combined with the Affidavit category, which this paper has already addressed,

Implications of Error Preservation Rulings

Summary Judgments would account for about 10% of the error preservation decisions studied here.

With regard to summary judgment practice, we are twice as likely to fail to get rulings on objections or to make a record than the "Average," and our objections are more likely than the Average to be untimely or to fail to comply with specific rules. With potentially the entire lawsuit riding on the procedure, coming at a point when everyone has had time to figure out what the lawsuit is about, and with at least some period of time to sit and reflect on what we are doing, why do we do so poorly on these aspects of error preservation in summary judgment practice?

In the first place, the general summary judgment rule, which TRAP 33.1 requires that we satisfy, in itself requires an express presentation of complaints to the trial court:

> The motion for summary judgment shall state the specific grounds therefore. . . . Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

TRCP 166a(c). And in a traditional summary judgment motion, the movant has the "burden to establish conclusively" its entitlement to summary judgment–and summary judgment "'may not be affirmed on appeal on a ground not presented to the trial court in the motion,'" such as one statutory prong on which summary judgment was not sought in the trial court. *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 515 (Tex. 2022), *quoting State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010).

You don't have to use language in your appellate briefs identical to what you said in your motion for summary judgment–for example, an appellate argument that one cannot be liable for defamation for "accurately reporting the allegations of chamber members" was preserved by "argu[ing] in its motion for summary judgment that statements in the articles regarding allegations that had been made against [plaintiff] were substantially true." *Scripps NP Operating, Ltd. Liab. Co. v. Carter*, 573 S.W.3d 781, 791 (Tex. 2019), citing Tex. R. Civ. P. 166a(c). Similarly, a summary judgment response which argued a homeowners' association "'selectively enforced' its restrictive covenants and failed to engage in 'fair dealing'...in an 'equal and same manner'" preserved a complaint that the HOA arbitrarily enforced its restrictive covenants for purposes of Property Code Section 202.004(a)–even if the non-movant "did not use the words 'arbitrary, capricious, or discriminatory,'" and did not cite the pertinent Code Section and instead cited a provision of the covenants. *Li v. Pemberton*, 631 S.W.3d 701, 704 (2021).

But there are a myriad of issues relating to a summary judgment which you must raise in the trial court in order to preserve them for appeal. Consider the following, and think about how each one would give you the opportunity to sell your case:

- if you contend that you have not had an adequate opportunity for discovery before a

Implications of Error Preservation Rulings

summary judgment hearing, you "must file either an affidavit explaining the need for further discovery or a verified motion for continuance." *Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736 (Tex. App.-Houston [14th Dist.] 2014, no pet.); *Morgan v. BAC Home Loans Servicing, LP*, 2014 WL, 2507661, 2014 Tex. App. LEXIS 5931 (Tex. App.-Houston [1st Dist.] June 3, 2014, no pet.); *Correa v. CitiMortgage Inc*., 2014 WL 3696101, 2014 Tex. App. LEXIS 8029, 3-4 (Tex. App.–Fort Worth July 24, 2014, no pet.)

● if the motion for summary judgment is unclear or ambiguous, challenge it through special exceptions (*Coleman v. Prospere*, 2014 Tex. App. LEXIS 10546, 28-29 (Tex. App.–Dallas Sept. 22, 2014, no pet.)) and if the motion for summary judgment was filed outside the time limits in the scheduling order, make that objection, too (*Wilson v. Colonial County Mut. Ins. Co.*, 2015 Tex. App. LEXIS 4261, 9-10 (Tex. App.–Dallas Apr. 27, 2015, no pet.)).

● if the other side moves for summary judgment on one of your claims which the trial court has already dismissed, you must raise the prior dismissal as an objection in the trial court in order to complain about that issue on appeal. *O'Carolan v. Hopper,* 414 S.W.3d 288, 310-311 (Tex. App.–Austin 2013, no pet.).

● in order to argue on appeal that a document in the summary judgment evidence was irrelevant and inadmissible, you must make that objection in the trial court. *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494, *8 (Tex. App.—Dallas Nov. 25, 2013, pet. denied); *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied) (same, hearsay); *Weeks v. Bank of Am., N.A.*, 2014 WL 345633, 2014 Tex. App. LEXIS 1093, *13 (Tex. App.–Fort Worth Jan. 30, 2014, no pet.) (same, hearsay objection); *Johnson v. McDaniel*, 2014 Tex. App. LEXIS 5705 (Tex. App.-Amarillo May 28, 2014, no pet.) (same, lack of authentication). You also must get a ruling on your objection. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied). Generally speaking, as pointed out with regard to affidavits, defects in substance may be raised for the first time on appeal, but defects as to form must be raised in the trial court or they are waived. *Id.*.; *Seaprints, Inc. v. Cadleway Props.*, 446 S.W.3d 434, 441 (Tex. App.–Houston [1st Dist.] 2014, no pet.).

● You have to get a ruling on your objections to summary judgment evidence. While a "trial court's on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing," and because "a reporter's record of such a [summary judgment] hearing is generally unnecessary for appellate purposes," "the best practice for a party objecting to summary judgment evidence is to secure a written order on the objection from the trial court." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838 (Tex. 2022)

● remember to refer to what this paper said, above, about affidavits, because your summary judgment practice will undoubtedly include affidavits, and the objections thereto.

Implications of Error Preservation Rulings

● get a ruling on your objections to summary judgment evidence *before* the rendition of summary judgment. *Johnson v. Bank of Am., N.A.*, 2014 Tex. App. LEXIS 11900, *9 (Tex. App.–Beaumont Oct. 30 2014, no pet.). And remember, the trial court can render summary judgment before it signs an order on the motion. Additionally, you should have the court rule on your objections "at, before, or very near the time the trial court rules on the motion for summary judgment." *Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 217 (Tex. App.–Houston 14th Dist. 2015, pet. denied). Do not assume that the court of appeals will presume that the trial court's granting or denial of a motion for summary judgment implies a ruling on your objections. *See* Patton, *Summary Judgments in Texas*, §6.10[4][e]. Some courts will presume such a ruling (Fort Worth); some will not (Austin, Beaumont, El Paso, Houston [14th] Dallas, Tyler); and some have gone both ways (Houston [1st and 14th], Waco, Texarkana, Corpus Christi). *Id.* No appellate court wants to have to deal with your leaving this situation unclear, and at best it will not inure to your benefit to do so. Get a ruling.

● if the trial court sustains the other side's objections to your summary judgment evidence, make sure that you have either responded to the other side's objection, or that you object to that ruling on the record and get a ruling on your objection–and it certainly wouldn't hurt to do both. *McMordie v. McMordie*, No. 07-14-00393-CV, 2015 WL 4536614, 2015 Tex. App. LEXIS 7702, *10 (Tex. App.–Amarillo July 24, 2015, pet. denied); *Villejo Enters., LLC v. C.R. Cox, Inc.*, No. 04-19-00882-CV, 2021 WL 185528, 2021 Tex. App. LEXIS 371, at *7 (Tex. App.—San Antonio Jan. 20, 2021, no pet.) (memo op.) *Cunningham v. Bobby Anglin*, 2014 WL 3778907, 2014 Tex. App. LEXIS 8416, 7-9 (Tex. App.–Dallas July 31, 2014, pet. denied); *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561, 568-569 (Tex. App.-Amarillo 2013, pet. denied). In the most recent edition of their seminal paper on summary judgment practice, the folks at Haynes Boone (and Judge David Hittner) posit that the foregoing rule may have been rescinded by the recent Supreme Court decision in *Browder v. Moree*, 659 S.W.3d 421, 423 (Tex. 2022. See Judge David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, Summary Judgments in Texas: State and Federal Practice, 62 S. Tex. L. Rev. 99, 165 (2023), https://www.stcl.edu/wpcontent/uploads/2023/06/Summary-Judgments-in-Texas-Hittner-62.2.pdf. In that case, the Supreme Court held, in the context of preserving a request for a jury trial, that "neither our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review. Once the trial court denied Browder's request for a jury trial, Browder had no choice but to go forward with the bench trial." *Id.*

The folks at Haynes Boone, and Judge Hittner, may be right, but the do have a cautionary condition as to their conclusion: "[i]f the proponent of the evidence has not articulated the basis for admission by responding to the objections, the proponent still 'might worry of the looming specter of waiver.' *Summary Judgments in Texas*,at 165, quoting Ryan Philip Pitts, A Couple Developments in Preserving Evidentiary Errors in Summary Judgment Practice, HOUS. BAR ASS'N APP. L AW (July 20, 2022). They may be right. But it's best to not be the test case, so you might want to

Implications of Error Preservation Rulings

expressly object to the trial court sustaining your opponent's objection to your summary judgment evidence.

● if a witness statement is not sworn to, you must object to it on that grounds to preserve the complaint for appeal. *Gonzalez v. S. Tex. Veterinary Assocs*., 2013 WL 6729873, 2013 Tex. App. LEXIS 15215, *9-10 (Tex. App.–Corpus Christi Dec. 19, 2013, pet. dism'd w.o.j.)

● if the trial court sustains the other side's motion to strike your response as late filed, object to that ruling and have the court rule on your objection. *Dotson v. Tpc Group*, 2015 Tex. App. LEXIS 2385, 9 (Tex. App.–Houston [1st Dist.] Mar. 12, 2015, no pet.);

● if you move for leave to file an affidavit late, get the motion heard and ruled on (before the summary judgment hearing), but don't set it for hearing after the summary judgment hearing, and then cancel the hearing on your motion for leave after the MSJ is granted. *Bailey v. Respironics, Inc.*, 2014 WL 3698828, 2014 Tex. App. LEXIS 8003, 22-23 (Tex. App.–Dallas July 23, 2014, no pet.).

● if you fail to get an order from the trial court granting or denying your no-evidence motion for summary judgment, you will fail to have preserved error as to the trial court's failing to grant your motion. *Cantu v. Frye & Assocs., PLLC*, 2014 WL 2626439, 2014 Tex. App. LEXIS 6384, 36-37 (Tex. App.-Dallas June 12, 2014, no pet.).

● if the trial court grants a summary judgment that exceeds the scope of the motion to which it is directed, you must raise that complaint in the trial court. *Haubold v. Medical Carbon Research Inst.*, 2014 WL 1018008, 2014 Tex. App. LEXIS 2863, *7 (Tex. App.-Austin Mar. 14, 2014, no pet.). The same is true if the other side files a motion to modify asking the trial court to enter a summary judgment order that grants more relief than was requested in the summary judgment motion. *Vanderpool v. Vanderpool*, 442 S.W.3d 756 (Tex. App.–Tyler 2014, no pet.).

● The Discovery Rule presents a tricky situation–if the plaintiff does not plead it, the defendant's summary judgment motion does not have to address it. But if the plaintiff's msj response raises the Discovery Rule, the defendant must complain that the Rule was not pled, and if the defendant fails to do so, it will have waived its complaint about the lack of pleading. *Gonzalez v. Vantage Bank Tex.*, No. 04-21-00285-CV, 2022 Tex. App. LEXIS 7876, at *8-9 (Tex. App.—San Antonio Oct. 26, 2022, no pet. h.)(mem.op.)

While we must raise all the foregoing complaints in the trial court in order to preserve them, we know that there are some kinds of complaints which do not have be raised in the trial court in order to preserve them for appeal. Such complaints are few in number, but let's look at some examples of them. These complaints show us the kinds of things movants must do correctly, because their opponents can lay behind the log until the appeal, when it is too late for the movant

Implications of Error Preservation Rulings

to correct the deficiency:

● if you file a no-evidence motion for summary judgment, you must specify the element or elements of the claim or defense as to which you claim there is no evidence. A no-evidence motion which fails to do so "is insufficient as a matter of law and does not require an objection." *Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 288 (Tex. App.—Dallas 2013, pet. den.); see also *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 120 (Tex. App.–El Paso 2015, pet. denied), vacated and remanded in part on other grounds by supplemental opinion, 474 S.W.3d 481, 482 (Tex. App.—El Paso 2015).

● as movant in a traditional summary judgment, you must make sure that your summary judgment evidence "prove[s] [your] entitlement to judgment as a matter of law on a traditional summary-judgment ground." *Thu Binh Si Ho v. Saigon Nat'l Bank*, 438 S.W.3d 871, 872-873 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); see also *Auz v. Cisneros*, 477 S.W.3d 355, 359 (Tex. App.–Houston 14th Dist. 2015, no pet.). This is a different question from whether a particular piece of evidence should not have been admitted because it did not prove the elements necessary to recover on the cause of action. *Id.* Put another way, the non-movant can challenge "the legal sufficiency of the evidence supporting summary judgment" for the first time on appeal. *Direct Adver., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV, __ WL __, 2016 Tex. App. LEXIS 3542, *8-9 (Tex. App.–Corpus Christi Apr. 7, 2016, no pet.); *Murray v. Pinnacle Health Facilities XV*, 2014 WL 3512773, 2014 Tex. App. LEXIS 7642, 6-8, n. 4 (Tex. App.– Houston [1st Dist.] July 15, 2014, pet. denied).

● And remember, as a movant on a traditional summary judgment: "'Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion.'" *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 515 (Tex. 2022), *quoting State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (holding that lack of actual knowledge as a ground for a traditional msj was not raised by a traditional motion which sought judgment because "Chapter 95 applied to plaintiffs' claims and that [defendant] neither exercised nor retained control over plaintiffs work under section 95.003(1).")

● as movant, be sure to file all of your evidence on time, or obtain leave of court to file evidence late. Failing to do one of those two things leaves you vulnerable on appeal to a complaint that your evidence should not have been considered. *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 154-155 (Tex. App.-Houston [14th Dist.] 2014, no pet.).

A complete absence of authentication of evidence is a defect of substance which may be raised for the first time on appeal. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied). There is a conflict as to whether a failure to attach sworn or certified copies of documents referenced in an affidavit filed in support of or opposition to a motion for summary judgment is a defect in form, not substance, that is waived by the lack of an objection in the trial

court. Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017).

S. Zoom trials.

I don't know how often we will see preservation problems revolving around Zoom trials–it seems clear that we will see Zoom trials, and certainly Zoom hearings, in the future. I think the watchword here is, if you have an objection to being forced into a Zoom trial or a hearing, make all your objections in a sufficiently specific manner as soon as you can and get a hearing and ruling on the same–even if your objection is based on the constitution. Early cases indicate the failure to do so will waive your complaint. *In re M.A.A.*, Nos. 04-22-00186-CV, 04-22-00187-CV, 04-22-00188-CV, __ WL__, 2022 Tex. App. LEXIS 8098, at *7-8 (Tex. App.—San Antonio Nov. 2, 2022, no pet. h.); *In the Int. of J.C.N.*, No. 05-21-01163-CV, 2022 WL 1284169, 2022 Tex. App. LEXIS 2894, at *12-13 (Tex. App.—Dallas Apr. 29, 2022) (A party cannot complain on appeal that the trial court took a specific action the complaining party requested."); *In re D.B.S.*, No. 05-20-00959-CV, 2021 WL 1608497, 2021 Tex. App. LEXIS 3153, at *14 (Tex. App.—Dallas Apr. 26, 2021) (no. pet. hist.) (held, in part, "Although the trial court indicated an understanding that Mother would prefer an in-person hearing, the objection did not apprise the court of the complaint made on appeal that the Confrontation Clause required an in-person hearing. We conclude the constitutional issues raised on appeal were not preserved in the trial court.")

7. Some Unusual Error Preservation Situations You Will Never See–Until You Do.

Having dealt with the most common error preservation problems, we will wrap up by dealing with a few unusual error preservation situations, the kind of thing that you might practice your entire career and not see. Which means these things have no importance to you at all–until you do see them.

If you need to disqualify opposing counsel on a conflicts basis, file the motion to do so as soon as the conflict becomes apparent to you. This advice holds true no matter what your grounds for disqualification. As soon as the grounds "became apparent" to you–which will always be a fact specific situation–move for disqualification. *In re Trujillo*, 2015 Tex. App. LEXIS 11394, *4-5 (Tex. App.-El Paso Nov. 4, 2015, no pet. h.). Cases indicate that waiting even 4 to 8 months will waive the disqualification. *Id.*, citing "*Buck v. Palmer*, 381 S.W.3d 525, 528 (Tex. 2012) (unexplained delay of seven months amounted to waiver); *Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex. 1994) (delay of six and a half months constituted waiver); *Enstar Petroleum Company v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.–San Antonio 1989, orig. proceeding)(finding waiver where party waited four months to file motion to disqualify)." Three and a half months may not be too long to wait to file the motion to disqualify-if the rest of the facts surrounding the delay are in your favor-but why run the risk. *See In re Kahn*, No. 14-15-00615-CV, 2015 Tex. App. LEXIS 12199, *6-7 (Tex. App.–Houston 14th Dist. Dec. 1, 2015) (orig. proceeding). File your motion

promptly.

If you intend to challenge the granting of a motion for new trial, file your petition for mandamus as soon as possible. Waiting seventeen months to file a mandamus challenging the granting of a new trial is too long. Laches will bar your petition. There are even cases which have held that delays of four to six months result in laches barring the mandamus. *In re Timberlake*, No. 14-15-00109-CV, 2015 Tex. App. LEXIS 12279, *6 (Tex. App.-Houston [14th Dist.] Dec. 3, 2015) (orig. proceeding).

If your opponent files an affidavit before trial asserting the reasonableness and necessity of their attorney's fees, don't thank them for the free discovery. Instead, challenge the affidavit in compliance with TEX. CIV. PRAC. & R. CODE §18.001. Otherwise, you may not get to cross-examine the other side's lawyer about the reasonableness and necessity of their fees. One court has even held that a complying affidavit can prove up the reasonableness and necessity of fees on appeal. *Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.–Houston [1st Dist.] 2007, no pet.). If your opponent fails to timely serve an attorney's fee affidavit, you must raise that complaint in the trial court or you will waive it. *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.–El Paso 2014, no pet.).

8. How Error Preservation Plays Out in the Various Courts of Appeals.

Our various courts of appeals have no discretion as to which cases they decide and which they do not–they are not courts of discretionary jurisdiction. So perhaps we should title this section "Decisions We Force On the Various Courts of Appeals." But let's take a look at these dynamics, and see what guidance they may offer in terms of how we raise or defend against error preservation arguments.

A. Error Preservation Land–a dark and foreboding place.

If you look at Appendix 2, you will see a table which compares and contrasts the error preservation practices of the various courts of appeals for FYE 2014. Appendix 3 does the same thing for the combined FYE 2014 through 2016. So comparing Appendix 3 to Appendix 2 gives you a feel for which way the trend went after 2014.

If you study the two tables, you also become aware of the danger which accompanies a trip to Error Preservation Land, regardless of the court. Even the brightest spots are dismally foreboding, and the darkest are places from which almost no one returns.

1. Avoid Error Preservation Land. It is an unforgiving place. Very, very, very few safely pass through it in any court.

Implications of Error Preservation Rulings

Two courts–Beaumont, on its non-Sexually Violent Predator cases, and Corpus Christi-Edinburg–held that error was preserved, or that a complaint did not have to be raised in the trial court to raise it on appeal, more than 25% of the time. Five courts–Amarillo, El Paso, Fort Worth, Houston 1st, and San Antonio–held that error was preserved or could be raised for the first time on appeal between 20-25% of the time. Each of the remaining 7 courts hold that error is preserved (or can be raised for the first time on appeal) a smaller percentage of the time. Eastland did so 10% of the time, Waco 5.4% of the time.

Those are poor chances of success. These statistics just underscore the need to evaluate whether you have preserved error–or had to–before raising an issue on appeal. If at least 70% of the time even the most lenient court will find that your complaint cannot survive an error preservation challenge, Error Preservation Land is not a forgiving or promising place to visit.

2. Parties in one court seem to find themselves in Error Preservation Land far more often than do parties in other courts.

Nearly a third of the civil cases decided on the merits in the Fourteenth Court in Houston involve error preservation issues. That's about fifty percent more than any other court of appeals, including that of its sister Houston First Court right across the hall. I don't know why that is, or what you can do about it, other than to be especially careful to vet your appeal for preservation issues before filing an appeal that might end up in that court. One other study does indicate that the Fourteenth Court may more strictly monitor its gates concerning permissive interlocutory appeals than the First Court, indicating that perhaps it views the various appellate thresholds as being higher than does the First Court. Rich Phillips and Justice Jane Bland pointed out that, at least through the first five years or so of permissive interlocutory appeals, the First Court was about three times as likely to accept a permissive appeal as was the Fourteenth Court. *See* Phillips, Richard B., Jr., and Bland, Justice Jane, *Strategies for Certified Interlocutory Appeals in State Court*, The University of Texas School of Law 26th Annual Conference on State and Federal Appeals (2016), pp. 6-7. The First Court allowed permissive interlocutory appeals 27% of the time (4 out of 15), while the Fourteenth Court only accepted such appeals about 10% of the time (1 out of 21).

As Cliff Robertson said in playing Cole Younger in *The Great Northfield Minnesota Raid*, it is a wonderment.

At first glance, it appears that Beaumont sees a greater percentage of its decisions on the merits involve error preservation than does any other court of appeals. However, if you eliminate the cases involving the commitment of sexually violent predators, the percentage of its decisions which involved error preservation would be about 9.3%, only about 2/3 the average of all the courts of appeals. I think it's legitimate here to eliminate those cases from any analysis involving the Beaumont Court. Why? Because in FYE 2015 and 2016, Beaumont handed down all but one of such SVO decisions coming out of the courts of appeals, and in none of those decisions did

Implications of Error Preservation Rulings

Beaumont hold that error had been preserved.

Like the Houston 1st Court, four of the other courts–El Paso, Dallas, Fort Worth, and Tyler–deal with error preservation in about 20% of their civil decisions on the merits. Six of the remaining eight courts do so on about 13-17% of civil cases decided on the merits. The two exceptions to the foregoing categorization are Beaumont (as to its Non-Sexually Violent Offender cases) and San Antonio, in which only about 9-11% of the civil cases involve error preservation.

3. For all but two of the courts, TRAP 33.1 will guide your journey through Error Preservation Land at least two-thirds of the time–but the increasing number of error preservation decisions may be causing a downward trend in that tendency.

All but two of the courts expressly invoked and follow the light of TRAP 33.1 in at least 60% of their trips through Error Preservation Land. Those two courts are the Houston 14th and San Antonio, which both expressly invoke TRAP 33.1 in at least 55% of their error preservation rulings.

A court's failure expressly to invoke TRAP 33.1 in addressing an error preservation question does not necessarily make its decision wrong. For example, if the particular objection in question did not comply with the requisites of another pertinent rule, like TRCP 272, *et seq*, for a jury charge matter or TRCP 166a for a summary judgment question, and it was on that basis that the court resolved the matter, then there was probably no harm in failing to mention TRAP 33.1. It is possible that the court addressed a general error preservation question without mentioning TRAP 33.1, but it was clear the court followed the directives of that Rule.

Having said that, it does bear considering whether to distinguish authority cited by your opponent which does not rely on TRAP 33.1. I won't go into the bases for that argument here, but you can see some of observations I have for that point in a prior paper on the subject. *See* Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 30-36.

And having said that, I will also say this: if you decide to challenge whether the other side has preserved error on a particular issue, it behooves you to tether your challenge to TRAP 33.1, for two reasons: (1) it's legally correct to do so; and, at least as important, if not more so (2) courts have shown that they are *more than twice as likely to find that error was preserved if they do not invoke TRAP 33.1 in their error preservation analysis*. *See* Appendix 3.A (Error Preserved 18.4% of the time when TRAP 33.1 is not invoked, compared to 8.9% of the time when it was).

4. There are some complaints which you can raise for the first time on appeal.

You might want to review the paper Heidi Bloch presented at the Advanced Civil Appellate

Implications of Error Preservation Rulings

Seminar in 2015 for her take on some things that can be raised for the first time on appeal. *See* Elizabeth G. "Heidi" Bloch (presenter) and Jennifer Buntz (author), *Unwaivable Error and Argument That Still Work Even if You Think of Them for the First Time on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015). During the 2014-2016 time frame, courts have found that about one in twenty issues which involve error preservation did not have to be raised below to be pursued on appeal. As you evaluate your appeal and the issues you will pursue, if you think you have hit upon something that is particularly strong that was arguably not raised below, screen it through the following filters before discarding it:

● lack of jurisdiction, one component of which can be standing. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993); *Legarreta v. Fia Card Servs., N.A.*, 412 S.W.3d 121, 124 (Tex. App.–El Paso 2013, no pet.); *but see Pike v. Texas EMC*, 610 S.W.3d 763, 778 (Tex. 2020) ("challenging [a party's] ability to recover the lost value of its interest in the Partnership" is a challenge to capacity, and "is not a matter of constitutional standing that implicates subject-matter jurisdiction" which may be first raised on appeal) *Jefferson Cty. v. Jefferson Cty. Constables Ass'n*, 546 S.W.3d 661, 666 (Tex. 2018) (held, "illegality [of a contract] is an affirmative defense to a claim, not an impediment to a party's standing to assert it. Tex. R. Civ. P. 94."). During a Summer 2021 airing of the State Bar's *Texas Supreme Court Update CLE* webinar, Professor Wayne Scott critiqued the idea that standing is a jurisdictional issue, pointing out that standing was not considered jurisdictional until *Tex. Ass's. of Bus. V. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993), when the Supreme Court held "standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."

● so long as the inadequacy of notice appears on the face of the record, failure to give the notice of trial required by Rule 245 in the context of a post-appearance default judgment is a complaint which can be first raised on appeal. *Fifteen-Thousand One-Hundred Ninety-Six Dollars & Forty-One Cents in United States Currency v. State*, No. 03-16-00015-CV, 2016 Tex. App. LEXIS 12294, at *3-8 (Tex. App.—Austin Nov. 18, 2016);

● the judgment is "void" (i.e., the trial court has no jurisdiction) as opposed to merely "voidable" (i.e., is contrary to a statute, or constitutional provision or rule) . *In the Interest of M.L.G.J.*, No. 14-14-00800-CV, __ WL __ 2015 Tex. App. LEXIS 2750, 8 (Tex. App.–Houston [14th Dist.] Mar. 24, 2015, no pet.). A subcategory of this issue is the temporary injunction order which fails to comply with the mandatory requirements of rule of civil procedure 683, which most courts of appeal hold creates a void order that can be challenged for the first time on appeal. *Freedom LHV, LLC v. IFC White Rock, Inc.*, No. 05-15-01528-CV, 2016 WL 3548012, 2016 Tex. App. LEXIS 6837, *4-5 , citing *El Tascaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744-745 (Tex. App.–Dallas 2011, no pet.) "(collecting cases)." *See also* concurring opinion of Chief Justice Frost in *Hoist Liftruck Mfg. v. Carruth-Doggett, Inc.*, 485 S.W.3d 120, 124 (Tex. App.–Houston [14th] 2016, no petition), for positions of various courts of appeals and rationale for changing the law.

●The ambiguity of a contract, at least in the context of appealing from the granting of a motion for summary judgment. *KSWO TV Co. v. KFDA Operating Co., LLC*, 442 S.W.3d 695, 704 (Tex. App.—Dallas 2014, no pet.). However, if the appeal follows a judgment based on a verdict

Implications of Error Preservation Rulings

or trial to the court, there is some difference of opinion as to whether ambiguity may be first raised on appeal, outside the trial by consent context. *See Crow-Billingsley Stover Creek, Ltd. v. SLC McKinney Partners, L.P.*, No. 05-09-00962-CV, 2011 WL 3278520, 2011 Tex. App. LEXIS 5986, at *23 (Tex. App.—Dallas Aug. 2, 2011, no pet.), commenting on *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 444 (Tex. 1993)

●mootness–whether that mootness existed, but no one complained about it, at the trial court level, or whether the mootness occurred after the case went up on appeal. *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227, 229 (Tex. 1993); *In the Interest of J.J.R.S.*, 627 S.W.3d 211, 225 (Tex. 2021);

●most versions of sovereign immunity. *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012); *Tex. DOT v. Self*, No. 22-0585, 67 Tex. Sup. Ct. J. 759, 2024 WL ____, *__, 2024 Tex. LEXIS 372, at *9 (May 17, 2024) (same, as to governmental immunity). This would include an argument that "there is no evidence that [plaintiff] had a good-faith, reasonable belief that she engaged in a protected activity under the TCHRA" because "for those suits where the plaintiff actually alleges a violation of the TCHRA" the "Legislature has waived immunity." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015). However (and thanks to Fred Junkins at Phelps for emphasizing this to me), some Supreme Court Justices have disagreed that a sovereign immunity claim equates to a lack of jurisdiction. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 102 (Tex. 2012) (Hecht, J., concurring: "the Court does not equate immunity to a lack of subject-matter jurisdiction....There are important differences between immunity from suit and lack of subject-matter jurisdiction." Lehrmann, J., concurring and dissenting: "While I agree that subject matter jurisdiction issues such as mootness and ripeness must be considered by an appellate court even if they were not first presented to the trial court, I disagree that sovereign immunity is of the same character.");

●attacks on void orders;

●defects in the substance of affidavits. As discussed earlier, these defects include:

(1) that statements in an affidavit are conclusory. *Coward*, at 5-6; and

(2) that the evidence in the affidavit is legally insufficient. *Bastida*, 444 S.W.3d at 105; and

(3) the failure to authenticate a report, as mentioned earlier. *Kolb*, at 9-11.

(4) There is a conflict as to whether a failure to attach sworn or certified copies of documents referenced in an affidavit filed in support of or opposition to a motion for summary judgment is a defect in form, not substance, that is waived by the lack of an objection in the trial court. Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017).

●questions about the judge's authority to hear the case, etc. *Sparkman v. Phillips*, 2015 Tex. App. LEXIS 2512, 4-5 (Tex. App.-Tyler Mar. 18, 2015);

●in a bench trial, legal and factual sufficiency points may be raised for the first time on appeal. TRAP 33.1(d). In addition, an attack on the legal sufficiency of the grounds for summary judgment raised by a movant–such as an attack on the legal sufficiency of the evidence respecting damages–may be raised for the first time on appeal. *Direct Adver., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV, __ WL __, 2016 Tex. App. LEXIS 3542, *8-9 (Tex. App.–Corpus Christi Apr.

Implications of Error Preservation Rulings

7, 2016, no pet.);

●the failure of the summary judgment motion to specify the ground on which a summary judgment is based. *Sanchez v. Roberts Truck Ctr. of Tex., LLC*, No. 07-17-00213-CV, ___ WL ___, 2018 Tex. App. LEXIS 8213, at *3-4 (Tex. App.—Amarillo Oct. 9, 2018, no pet. h.)

●a complaint that an expert's testimony is "wholly conclusory, is essentially a no-evidence claim; consequently, it is the type of claim that an appellant may raise for the first time in his appeal." *In re Dodson*, 434 S.W.3d 742, 750 (Tex. App.-Beaumont 2014, pet. denied);

●a new rule of law announced after the trial court's decision;

●fundamental error. However, if you intend to pursue a fundamental error argument, be aware of the following:

> In light of the strong policy considerations favoring the preservation-of-error requirement, the Supreme Court of Texas has called the fundamental-error doctrine 'a discredited doctrine." *See id.* [*20] At most, the doctrine applies when (1) the record shows on its face that the court rendering the judgment lacked jurisdiction, (2) the alleged error occurred in a juvenile delinquency case and falls within a category of error on which preservation of error is not required, or (3) when the error directly and adversely affects the interest of the public generally, as that interest is declared by a Texas statute or the Texas Constitution. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006); *In the Interest of B.L.D.*, 113 S.W.3d at 350-51.

In the Interest of M.M.M., 428 S.W.3d 389, 398 (Tex. App.–Houston [14th Dist.] 2014, pet. denied); see also *Cisneros v. Cisneros*, No. 14-14-00616-CV, 2015 Tex. App. LEXIS 2352, 4-6 (Tex. App.–Houston [14th Dist.] Mar. 12, 2015);

●a constitutional violation if the constitutional violation was not recognized before the case was appealed. *GM Acceptance Corp. v. Harris Cty. Mun. Util. Dist. #130*, 899 S.W.2d 821, 823 (Tex. App.—Houston [14th Dist.] 1995, no writ), citing *Jones v. Martin K. Eby Constr. Co.*, 841 S.W.2d 426, 428 (Tex. App.–Dallas 1992, writ denied). Under this "right not recognized' rule, failure to present a constitutional challenge to the trial court is excused if: 1) the claim was so novel that the basis of the claim was not reasonably available; or 2) the law was so well settled that an objection would have been futile. *Id*. If the Supreme Court has granted a petition on a related issue, the constitutional issue does not fall within this exception. *Id*.;

●In an administrative law context, typically one has to raise one's complaint before the administrative agency/at the administrative level in order to challenge the ruling of the administrative body/judge on that issue. However, this is not true if the agreement governing one's complaint does not place that issue within the purview of the administrative agency. *In the Interest of P.L.*, No. 07-18-00157-CV, 2018 WL 4039230, 2018 Tex. App. LEXIS 6770, at *4-8 (Tex. App.—Amarillo Aug. 23, 2018, pet. denied) (memo op.); or

●when the other side just doesn't notice that you have argued something your party did not argue below (the waiver of waiver). I would not count on this last one happening very often.

Implications of Error Preservation Rulings

For other instances of such error, *see* Martin Seigel, *How to Beat Waiver Arguments*, 28 TEXAS LAWYER 12, June 18, 2012, at 22.

5. Your complaint at trial must be sufficiently specific–but what exactly does that mean?

TRAP 33.1 provides that you must make your complaint at trial with "sufficiently specific to make the trial court aware of the complaint." That begs the question of when a complaint is "sufficiently specific."

I have another paper that addresses this topic in far greater detail. Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 42-44. There are several tests used by the courts in determining whether a complaint was, or was not, sufficiently specific. Most recently, the Supreme Court expressly applied the specificity requirement of TRAP 33.1 to hold that arguing that "arbitration was appropriate because the claims asserted . . .arose out of the agreement and [the other side] should not avoid arbitration after receiving the agreement's economic benefits" was "'sufficiently specific[] to make the trial court aware of the [direct-benefits estoppel] complaint.'" *Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders*, 603 S.W.3d 385, 400 n.26 (Tex. 2020). In a case which did not invoke Rule 33.1, the Supreme Court has indicated that when the charge objection at trial is "similar in substance" to the issue on appeal it will be sufficient. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*,482 S.W.3d 559, 572 (Tex. 2016). In another case which failed to mention Rule 33.1, the Court has held that a complaint was sufficient even though "it does not specify every reason" to support it. *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008) (held, motion for new trial asserting that evidence was legally insufficient to support damage award preserved error. Trial court had ordered a remittitur) (but, *see below*, for how courts of appeals have held complaints not preserved based on *Arkoma*' language decrying "stock objections" and exhalting the "cardinal rule" of preservation–i.e., "an objection must be clear enough to give the trial court an opportunity to correct it.'").

Nor does a party's failure to cite case law in the trial court preclude the party from relying on that case law on appeal, when the party's "trial-court arguments expressed the basic rationale for the objection" supported by the case law. *Comm'n for Lawyer Discipline v. Cantu*, 587 S.W.3d 779, 781-82 (Tex. 2019). And the Supreme Court has subsequently noted that "parties are free to construct new arguments" in support of unwaived issues properly before the court," commenting that "an 'issue' is a 'point in dispute between two or more parties.' Issue, BLACK'S LAW DICTIONARY (10th ed. 2014)." *State Office of Risk Mgmt. v. Martinez*, 539 S.W.3d 266, 273 (Tex. 2017); *see also Adams v. Starside Custom Builders, LLC,* 547 S.W.3d 890, 896 (Tex. 2018) (held, the complaining party "was not required on appeal or at trial to rely on precisely the same case law or statutory subpart that we now find persuasive"), citing *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 764 n.4 (Tex. 2014), a property insurance case. The Supreme Court continues to rely

Implications of Error Preservation Rulings

on *Greene* to confirm that, "while we do not consider unraised issues, 'parties are free to construct new arguments in support of issues properly before the Court,'" *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 252 n.36 (Tex. 2020). In *Riou*, the party arguing that she preserved a complaint "acknowledges that she 'did not expressly specify that the good cause per se standard was the wrong legal standard' before the school board. But she maintains she nonetheless 'argued against the sufficiency of the evidence used to support the [hearing examiner's] recommendation,'" which the Court held was an "argument [that] supports Riou's larger position that the Commissioner's decision lacks substantial evidence—a position she has maintained at every stage." *Id.*, at 252-253. The Supreme Court has held that a complaint was sufficiently specific–without mentioning TRAP 33.1–when the complaint at trial "included arguments that reasonably match the contentions carried forward in this appeal, including the arguments we ultimately find dispositive," and, while the complaints "did not have to fully elaborate the Teachers' argument....[t]hey adequately captured the essence of the timeliness argument the Teachers later advanced in more detail in the courts. This was sufficient to preserve error in this context" of whether teachers had timely filed their proceeding with the administrative agency. *Davis v. Morath*, 624 S.W.3d 215, 227 (Tex. 2021). And the Court has recently reaffirmed that "new arguments" can be first raised on appeal:

> This Court has 'often held that a party sufficiently preserves an issue for review by arguing the issue's substance, even if the party does not call the issue by name.' *St. Joh`n Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020). In the same vein, parties on appeal need not always 'rely on precisely the same case law or statutory subpart' on which they relied below. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018). And while appellate courts 'do not consider issues that were not raised . . . below,' parties may 'construct new arguments in support of issues' that were raised. *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014). These principles have been applied in reviewing grants of summary judgment. *See Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 791 (Tex. 2019); *Nath*, 446 S.W.3d at 365.

Li v. Pemberton Park Cmty. Ass'n, 631 S.W.3d 701, 704 (Tex. 2021) (footnotes omitted).

Here are some other tests invoked by the various courts of appeals, in cases in which they almost universally hold that the complaint was *not* sufficiently specific:

- Multiple courts of appeal have invoked language from the Supreme Court's decision in *Arkoma*–which, as set out above, held that a legal sufficiency complaint in a motion for new trial preserved error–to hold a complaint was *not* preserved. *See*, *Tex. Constr. Specialists, L.L.C. v. Ski Team VIP, L.L.C.*, No. 14-20-00124-CV, 2022 Tex. App. LEXIS 1475, at *23-24 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022, no pet. hist.)(mem.op.) (held, complaint that TCPRC Sec. 38.001 did not allow fee recover against an LLC not preserved by a Chapter 38 objection about failure to segregate fees, quoting *Arkoma* at 387: "'[T]he cardinal rule for preserving error is that an objection must be clear enough to give the trial

court an opportunity to correct it.'"); *In re Foster*, No. 03-21-00203-CV, 2022 Tex. App. LEXIS 1549, at *5-9 (Tex. App.—Austin Mar. 4, 2022) (held, complaint based on another state's law not preserved by a "general no-evidence point" challenging a single jury finding, quoting *Arkoma*'s "cardinal rule" language and "'stock objections may not always preserve error.'")

- whether the argument on appeal "comports with" the argument at trial. *L.H. v. N.H.*, NO. 02-15-00116-CV, 2015 WL 7820489, 2015 Tex. App. LEXIS 12319, *8 (Tex. App.–Fort Worth Dec.3, 2015).
- whether a complaint "specifically relates to" what was raised in the trial court. *Pointe West Ctr., LLC v. It's Alive, Inc., Pointe W. Ctr., LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 148 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *see also Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312 (n. 5) (Tex. App.– Houston [1st Dist.] 2011, no pet.) (dicta);
- whether the issues on appeal were "sufficiently similar" to the complaint at trial in order to be preserved. *Wilson v. Deutsche Bank Trust Co. Americas*, No. 01-12-00284-CV, 2014 Tex. App. LEXIS 9463, 8-9 (Tex. App.-Houston [1st Dist.] Aug. 26, 2014, no pet.); or
- whether "those expressions [used at trial] do not accurately capture their argument" made on appeal. *Kamat v. Prakash*, 2014 Tex. App. LEXIS 881, *35-36 (Tex. App.-Houston [14th Dist.] Jan. 28, 2014, no pet.);
- when the "complaint on appeal does not match the objection made in the trial court." *In re Commitment of Born*, No. 02-19-00272-CV, 2020 WL 6788213, 2020 Tex. App. LEXIS 8974, at *32 n.10 (Tex. App.—Fort Worth Nov. 19, 2020 no pet.) (memo op.) (a hearsay objection is not preserved by a complaint that evidence was "speculative," nor by a complaint that it was irrelevant).

However, one court held that a party could pursue a complaint on appeal even though the party did "not articulate the complaint in the same way [in the trial court] as they do on appeal." *SCC Partners, Inc. v. Ince*, 496 S.W.3d 111, 118 (Tex. App.—Fort Worth 2016, pet. dismissed).

Courts usually do not base their error preservation rulings on a lack of, or sufficient, specificity. The other elements of error preservation draw far more attention than specificity. It is maddeningly hard to find a specificity holding when you need one. You might check out my other paper (mentioned above) as a starting point, or search for the foregoing standards (and cases that cite the foregoing authority) to see what pops up.

B. There may be something about a given court's docket that we must allow for in analyzing its tendencies.

We've already talked about some characteristics of the courts of appeals in the foregoing sections. I will not necessarily repeat those comments here, but I will try to make a few observations about each court, below. Remember, none are very forgiving on error preservation, a couple seem

to deal with error preservation much more than the others, and all of them invoke TRAP 33.1 on the majority of their error preservation decisions–with all but a couple invoking TRAP 33.1 in the vast majority of their decisions. So consider the following sections of the paper against that background.

Furthermore, to the extent there are variations between the courts of appeals, we may need to ask if there is some docket-driven explanation for those variations. For example: the Sexually Violent Predator component of the Beaumont Court's docket, discussed above. To get a more accurate picture of the Beaumont court for most civil cases, we need to eliminate the SVP component of the Beaumont court's docket.

Additionally, we might need to try to adjust for the effect, if any, on the analysis of a court's tendencies from cases transferred pursuant to docket equalization. I've run out of steam to try to identify, and adjust the analysis for, cases the Supreme Court transferred from one court to another for docket equalization purposes. But, for FY 2015 and 2016, I looked at certain types of cases which are not subject to transfer for docket equalization purposes–i.e., arbitration cases, cases seeking dismissals in healthcare liability claims related to expert reports, Citizen Participation Act cases, and parental right termination cases. It appears that TRAP 33.1 is not invoked as frequently in error preservation decisions in those kinds of non-transferable cases as it is in all error preservation decisions (52.7% v. 64.25%). Appendix 3.D. That might explain why the analysis in this paper would show that a transferor court invoked TRAP 33.1 less frequently than a transferee court, but it would not explain why a court was less inclined to invoke TRAP 33.1 in non-transferrable cases. In error preservation decisions in the aforementioned non-transferable cases, courts held that error was preserved a little less frequently in non-transfer as transfer cases (9.6% to 11.4%). *Id*.

But the transferor/transferee message here is a little muddled–if we look at the tendencies of courts of appeals related to error preservation, we find (with a couple of minor exceptions) that both transferor and transferee courts are above and below the average, for any given tendency, in proportion to the percentage of all courts above and below average, and as in proportion to the relative numbers of transferor and transferee courts. See Appendix 3.C.

So I'm not sure what to say about the transfer docket factor, other than to speculate that it might signal parties are a little less adept than normal at preserving error in cases leading to interlocutory appeals.

If anyone has a suggestion as to reasons why the tendencies vary between courts of appeals, let me know and I'll see if I can drill down on it. But, otherwise, the search for the needle in fourteen haystacks will await some future epiphany.

C. Specific tendencies which may affect how you brief error preservation issues in the various courts of appeals.

Implications of Error Preservation Rulings

In prior versions of this paper, I tried to come up with something specific to say about all the courts of appeals. But, as indicated above, the fact of the matter is that the courts are, other than as set out above, remarkably similar to each other. When you start approaching an error preservation issue in a specific court of appeals, I would encourage you to view the tendencies shown on the spreadsheet in Appendix 3 to see if there is some tendency, specific to your court, which might influence your decision as to how to frame your error preservation challenge or defense, or that might direct your research in that court for specific authority.

9. And what of the Supreme Court?

I have profiled four years of merits opinions issued by the Supreme Court which involved error preservation. The four years ended August 31, 2014-2017. I have identified 39 merits opinions which addressed error preservation issues, involving 42 rulings on error preservation issues. In terms of spotting trends, that's not much of a population. Most of the Court's error preservation holdings are not striking, though some are. Before getting to those holdings, I want to look at some tendencies of the Court. While every case stands and falls on its own merits, I do think some of the Court's tendencies over the last three or four years seem so pronounced that they bear mentioning. I believe they will help you decide whether to pursue an appellate issue with error preservation problems.

A. The Supreme Court's error preservation tendencies and error preservation conflicts among the courts of appeals: Prisms through which you should view a potential appellate issue with an error preservation problem.

I do not know what percentage of the Court's cases involve an error preservation issue. Quite frankly, I don't have enough time to make that determination–one would need to examine every petition and response for error preservation arguments. Maybe some day I'll do that, or maybe Don Cruse will develop an algorithm which does it automatically. But if we look at the merits opinions which the Court issues, including those in which the Court addresses error preservation, we can glean some guidance as we try to decide whether to pursue certain appellate issues with potential error preservation problems. In fact, I think you should evaluate the pursuit of an appellate issue with error preservation problems through two prisms:

1) the tendencies of the Court, as reflected in this paper; and

2) the really fine work reflected in Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you identify preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

Implications of Error Preservation Rulings

Knowing the Supreme Court's tendencies as to error preservation, and the error preservation topics which the Supreme Court might need to address to resolve disagreements among courts of appeals, will help you evaluate the likelihood that an error preservation problem will preclude the Supreme Court addressing an appellate issue–or a case involving such an issue–on the merits.

1. First, a pet peeve: Why in the world does the Supreme Court only cite Rule 33.1 in less than one-third of the cases in which it addresses error preservation? Is it because practitioners don't invoke Rule 33.1 in their briefing?

For some reason, in more than seventy percent of its merits decisions which address error preservation, the Supreme Court does not cite TRAP 33.1. It only cited Rule 33.1 in 11 merits opinions, that I found, which is only about 28% of its 39 merits opinions in which it addressed error preservation. That is less than half the rate at which courts of appeals cite Rule 33.1 in their error preservation cases. *See* Section 7.A.3, *supra*. The Rule was promulgated by the Court, and the Court should expressly invoke it in every error preservation decision, if for no other reason than to promote uniformity in any area–error preservation–which affects about 20% of the civil cases going through the courts of appeals, and 10% of the Supreme Court's merits opinions.

For all I know, the fault is ours. Perhaps we practitioners with error preservation issues before the Court need to make sure that we invoke and apply Rule 33.1 in our error preservation briefing. At some ethereal level, our failure to invoke Rule 33.1 might hamstring the Court from invoking it on its own, to avoid discussing that which the parties have not raised. Perhaps we all need to remember to invoke Rule 33.1, which was adopted 20 years ago after much thought to carry on a rule-based tradition to error preservation now more than three-quarters of a century old. Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 22-29.

Rant over. On to more helpful stuff.

2. The Big Four: Half of the Court's error preservation rulings have involved jury charge, exemplary damages, summary judgment, or jurisdiction.

We should take note of things that happen more than half the time. Doing so gives us a road map which is more likely than anything else to get you where you want to go. Four areas–jury charge, summary judgment, exemplary damages, and jurisdiction–accounted for over half of the cases and issues in which the Supreme Court addressed error preservation in a merits opinion. To wit: 21 of the Court's 39 error preservation cases (54%), and 24 of the Court's 42 error preservation rulings (57%). The Court only addressed the remaining error preservation issues once or twice each during the four year period. When identifying issues which you might want to pursue, even though they have error preservation problems, these four bear keeping in mind as the most likely the Court will address in a merits opinion. Here is the breakdown:

Implications of Error Preservation Rulings

Preservation Issue	Cases (%)/ Issues(%)*
Jury Charge	9(23.4%)/ 12(28%)
Summary Judgment	6(15%)/ 7(17%)
Exemplary Damages	3(7.7%)/ 3(7.1%)
Jurisdiction	3(7.7%)/ 3(7.1%)

* 39 total merits opinions involving error preservation, 42 total preservation issues in those opinions.

Interestingly, you will recall that jury charge and summary judgment were two of the four topics which most frequently involved error preservation challenges in the courts of appeals. *See* Section 4.A, Table 3, *supra*.

3. The mere presence of an error preservation issue will not dissuade the Court from writing a merits opinion.

The Office of Court Administration determines the "Granted Petitions for Review Finally Disposed Of" by the Supreme Court for each fiscal year. In comparing the number of merits opinions which involve error preservation decisions to that "Granted/Disposed" number for the last four fiscal years,[2] we see that a couple of years only about 6% of the Court's merits opinions dealt with error preservation, while in a couple of years about 17-18% of its merits opinions addressed error preservation. The four year average was 11.8%:

Fiscal Year Ending 8/31	% of Merits Opinions Involving Error Preservation
2014	16.7%

[2] I got the number for FYE 2017 from Pam Baron, pending OCA's report for the year.

Implications of Error Preservation Rulings

2015	6.6%
2016	6.3%
2017	18.5%
Avg.	11.8%

So, the mere presence of an error preservation issue to dissuade the Court from taking a case it wants to write on. As the numbers below show, however, the cases the Court does write on do not generally have error preservation issues which preclude them writing on the substantive issues. So the numbers show that you should not shy away from presenting an issue which may face a preservation challenge–but you should make sure that you will win that preservation fight.

4. As you might expect with a court of discretionary jurisdiction, when the Court writes an opinion on the merits, it usually holds that error was not waived below.

In two-thirds of its error preservation rulings in merits opinions, the Court held that error had been preserved, or that the complaint could be first raised on appeal. The breakdown was as follows:

- error was preserved in 52.4% of those rulings;
- error could be first raised on appeal in another 14.3% of those rulings;
- a combined total of 66.7% of the Court's error preservation rulings held error had not been waived.

Those numbers held constant whether the party claiming that error was preserved was: the petitioner (error not waived in 75% of error preservation rulings); the plaintiff (ditto, 64.3%); or the defendant (same, 67.9%). Only when the respondent claimed that it had not waived error did the non-waiver rulings dip to a 50-50 proposition. Unless otherwise mentioned, you can find the table reflecting the foregoing numbers at Appendix 4.1.

These results should not surprise. One would not think the Court would hear oral argument on a substantive issue which faced an insurmountable preservation hurdle. So, if the Court sets the case for oral argument, you should assume the odds are against the Court holding that a party asking for relief failed to preserve error, and take that into account when you prepare for argument, and further evaluate your case.

5. If the Supreme Court sets the case for oral argument, Plaintiffs facing an error preservation challenge do not fare well on the merits–especially on the four most common error preservation topics addressed by the Court.

Implications of Error Preservation Rulings

If you examine Pam Baron's last paper on the subject, she concluded that (for the fiscal years ending 2014-2016) the Court reversed in about 80% of its merits-based opinions. Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, State Bar of Texas 30th Annual Advanced Civil Appellate Practice Course (2016), p. 2.

Does the presence of an error preservation issue impact the likelihood of reversal? I don't know–I did not compile reversal rates in cases involving error preservation to compare with Pam's overall numbers. But I did look at parties which faced error preservation challenges, and how often those parties won on the merits in merits-based opinions, at least for the three fiscal years ending 2015-2017 (which partially overlaps Pam's three years). For those three years, the party facing an error preservation challenge won outright on the merits, or won in significant part on the merits, about sixty percent (61.5%) of the time. Sixty percent of the petitioners facing error preservation challenges won on the merits, and 63.6% of such respondents won on the merits. Unless otherwise mentioned, you can find the table reflecting the foregoing numbers at Appendix 4.2.

But the foregoing generalizations only emphasize how poorly plaintiffs fare on opinions on the merits when facing error preservation challenges in the Supreme Court, at least when the plaintiff is also a respondent. For the three fiscal years 2015-2017, when plaintiffs faced error preservation challenges, they won (or won significantly) on the merits only 40% of the time. This abysmal performance is mostly attributable to how poorly plaintiffs who were respondents performed on the merits when they faced an error preservation challenge–those parties won on the merits only 23.1% of the time. Defendants which faced error preservation challenges, on the other hand, won (or won significantly) on the merits three quarters of the time. *Id.*

You might ask how this compares to how plaintiffs fared in the courts of appeals, as compared to defendants. Over the two years I've finished compiling (FYE 2015 and 2016), plaintiffs and defendants fared remarkably similarly in the courts of appeals–defendants found themselves the subject of error preservation challenges about twice as often as plaintiffs (roughly 618 cases to 332 cases) but both types of parties either preserved error, or presented an issue which could first be raised on appeal, about the same: 19.4% of the time for plaintiffs, and 19.8% of the time for defendants. The two parties also won or won in significant part about the same–roughly 25.8% of the time for plaintiffs, and roughly 30% of the time for the defendants. Appendix 3.E shows the break down.

The point of all this is that plaintiffs–or at least plaintiffs who are respondents–fare far worse in the Supreme Court than do defendants. If you represent a plaintiff respondent which faces an error preservation challenge on appeal, you face long odds of winning on the merits in the courts of appeal–but you those odds shine like a beacon on the hill compared to your odds in the Supreme Court.

B. Specific error preservation holdings.

Implications of Error Preservation Rulings

1. The Big Four: Jury charge, summary judgment, exemplary damages, and jurisdiction.

As to the Big Four (jury charge, exemplary damages, jurisdiction, and summary judgment), any numbers or percentages you see below are for the entire four years of the study period–i.e., FYE 2014-2017.

A. Jury Charge

The current test for whether a complaint is specific enough–i.e., made "with sufficient specificity to make the trial court aware of the complaint" (TRAP 33.1(a)(1)(A)–finds its roots in a jury charge case about a quarter century ago. *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) ("There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling."). As pointed out above, *Payne* discussed the difficulties presented by preserving a complaint about the charge, and opined that "preparation of the jury charge . . . ought to be simpler." *Id.*, at 240.

1. The Court seems a little more preservation-friendly as to the jury charge–a legacy of *Payne*?

Perhaps it is appropriate, or telling, that a quarter century after *Payne* and twenty years after the adoption of TRAP 33.1 the Supreme Court continues to deal with preservation of charge error more than any other preservation topic; in the four years of the study, it held that error was preserved the vast majority of the time. Only three times that I found did the Court hold that a party did not preserve a complaint about the charge–and two of those opinions were handed down on the same day. *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 678 (Tex. 2016); *Burbage v. Burbage*,447 S.W.3d 249, 258 (Tex. 2014); *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 847 (Tex. 2014). In those three instances a defendant claimed it had preserved error; in one case the party facing the error preservation challenge won on the merits, for the most part (*Burbage*); in two cases that party (the petitioner, both times) lost on the merits (*J & D Towing*; *King Fisher*).

During the four years of the study, about three quarters of the time, the Court held that charge error had not been waived. *See BP Am. Prod. Co. v. Red Deer Res., LLC* 526 S.W.3d 389, 402 (Tex. 2017); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 482 (Tex. 2017); *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 487 n.8 (Tex. 2018); *Brady v. Klentzman*, 515 S.W.3d 878, 885 (Tex. 2017); *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572 (Tex. 2016); *Wackenhut Corp. v. Gutierrez*, 53 S.W.3d 917, 918 (Tex. 2015).

2. The things that caused the Court to hold a party did not preserve charge error.

Implications of Error Preservation Rulings

The Court's most impactful holding from the 2014-2017 era that charge error was *not* preserved came in *King Fisher*. In *King Fisher*, the Court held that the party failed to preserve charge error by failing to comply with an unobjected-to, trial court-imposed deadline for objecting to the charge which was earlier than established by Rule 272. *King Fisher*, 443 S.W.3d at 847. That holding was a specific topic of conversation in several CLE programs that occurred in the immediate post-2014 time frame. The other two cases in which the Court held that a party did not preserve charge error were not particularly earth-shattering. In those cases, the Court held that:

- failing to assert a "*Casteel*-type objection to form" or a "specific objection to the submission of" questions about damages waived a complaint about "impermissibly combin[ing] valid and invalid theories of liability . . . [in] the broad-form damages question." *Burbage*, 447 S.W.3d at 258.

(As an aside, at the writing of this paper, the Supreme Court has heard oral argument in, but not yet decided, *W&T Offshore Inc. v. Wesley Fredieu*, case number 18-1134 from Harris County and Houston's 14th Court of Appeals. A couple of the issues in that case (according to Osler McCarthy's summation of the issues) are: (1) whether by failing to object to a broad-form borrowed-employee submission W&T waived error; and (2) whether such an employee's status is always a legal determination for the court. The trial court granted W&T's motion for judgment despite the verdict, ruling the borrowed-employee question to be one of law, not fact, but the appeals court reversed. *Fredieu v. W&T Offshore, Inc.*, 584 S.W.3d 200, 222 (Tex. App.—Houston [14th Dist.] 2018, pet. granted 2/14/20, oral arg. conducted). We will see whether the Supreme Court weighs in on the need to object to a broad-form jury submission, and whether this case involved such a submission.)

- in a case where it was not entirely clear to me whether the pertinent complaint related to "the jury charge or the amount of the damages" or both, the Court held that "attack[ing] only the legal availability of loss-of-use damages" in the trial court did not preserve an argument "that a remand was necessary to determine the proper amount of loss-of-use damages." *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 678 (Tex. 2016).

3. Pre-charge conference actions which preserved charge error: *Wackenhut* holds that a pre-charge conference charge objection can preserve a complaint-if the trial court says it kept that objection in mind.

In *Wackenhut*, the Court held that "the party opposing the [spoliation] instruction preserved error by responding to a pretrial motion for sanctions. . . [even though it] later fail[ed] to formally object to the instruction's inclusion in the jury charge until after it was read to the jury." *Wackenhut*, 53 S.W.3d at 918. The Court noted the "procedural rules governing jury charges state in pertinent part that objections to the charge 'shall in every instance be presented to the court . . . before the charge is read to the jury' and . . . 'must point out distinctly the objectionable matter and the grounds of the objection,'" *Id.*, citing Rules 272, 274. Invoking *Payne's* "test . . . whether the party made the

Implications of Error Preservation Rulings

trial court aware of the complaint," the Court held that the trial court's ruling, on the plaintiff's pre-trial motion for sanctions, that a spoliation instruction would be allowed, and its statements at the motion for new trial hearing that it had heard and ruled on the defendant's objections to the spoliation instruction, "confirms that the trial court was aware of, and rejected, Wackenhut's objection to the inclusion of a spoliation instruction before the charge was read to the jury." *Id.*

The lesson here: if you intend to argue that you preserved charge error, get the trial court to confirm on the record what it was aware of, and argue *Payne* in the Supreme Court.

4. Charge conference objections which preserved charge error: an objection at the charge conference preserves an appellate complaint which is "similar in substance."

The Court gave several lessons as to how an objection to the charge during the charge conference preserves a somewhat differently worded complaint on appeal. These all might prove useful by analogy, but the big takeaway here is the Court's holding that a complaint at trial preserves error for a complaint on appeal which is "similar in substance." *Gulf Energy*, 482 S.W.3d at 572. Unfortunately, the Court did not mention Rule 33.1 in *Gulf Energy*, an omissions in which it engages with distressing frequency in its error preservation decisions. But here are the decisions about charge conference objections:

Implications of Error Preservation Rulings

Charge Conference Objection	Argument on Appeal	Court Holding
Party objected "'to the failure to have a formation question with regard to the contract,' arguing: 'With the way [the question] is submitted now, it will allow a breach of contract prior to the meeting of the minds, which is antithetical to the law of breach of contract because it is vague and because also question one, the way it is worded, does not tie in when the actual agreement was reached and when the breach may have occurred.'" *Gulf Energy*, 482 S.W.3d at 572.	Party "argued that the trial court 'erred by instructing the jury that there was a legally binding contract . . . on May 19, 2008,' and that the submitted question 'erroneously assumes that the Railroad Commission entered into a legally-enforceable agreement to postpone plugging the well on May 19, 2008,'" and "further argued that, assuming the parties entered into a valid contract, 'it was not formed until June 9, so nobody breached the June 9 contract by plugging the well on May 26.'" *Gulf Energy*, 482 S.W.3d at 572.	"We agree with the Commission that its objection to the contract question and its argument in the court of appeals are ***similar in substance***. The Commission contended both at the charge conference and on appeal that the May 19 agreement was not binding and that the issue of contract formation should have been submitted to the jury." *Gulf Energy*, 482 S.W.3d at 572, ***emphasis supplied***.

Implications of Error Preservation Rulings

Charge Conference Objection	Argument on Appeal	Court Holding
"USAA did object . . . on the ground that the question impermissibly combined 'contractual damages from Question 1 and statutory damages from Question 2, [because] Texas courts have held that extra[-]contractual damages need to be independent from policy damages.' . . . USAA complained that submitting just one damages question for all damages arising either under the policy or under the statute or both would make it 'unclear potentially if we get 'yes' answers to [Questions] 1 and 2 what the damages are based on.'" *Menchaca*, at *6, n. 8.	"USAA contends that Menchaca cannot recover any amount of policy benefits because the jury failed to find that USAA breached its obligations under the policy. Although the jury did find that USAA violated the Insurance Code, USAA contends that Menchaca cannot recover policy benefits based on [*6] that finding alone." *Menchaca*, at *6.	"We conclude that USAA's objections were sufficient to make clear its position that contractual damages are independent from statutory damages and must be based on a finding that USAA breached the policy." *Menchaca*, at *6, citing *Payne*

In another case, the Court confirmed that the media defendants preserved error at trial by objecting that "the jury charge did not require Wade to prove them false. Neither did it require him to establish actual malice before obtaining punitive damages," and "went further, submitting in writing proposed questions requiring Wade to prove falsity and actual malice." *Brady*, 515 S.W.3d at 885.

5. Post-verdict actions which preserved charge error: a post-verdict objection preserves error as to "a purely legal issue" that does not affect the jury's role as fact-finder, or as to an otherwise immaterial issue.

There were three holdings in this category–and all three occurred in the last three months in which the Court handed down opinions in 2017. In these cases, the Court held that since the jury's answer to a question was immaterial–most often, because the objecting party's argument "raises purely a legal issue"–objections to the questions did not have to be submitted at the charge conference, but could be submitted in post-verdict motions:

- " BP preserved error on the immateriality issue by raising these concerns post-verdict

in a motion for judgment in disregard, in a motion for judgment notwithstanding the verdict, and in a motion for new trial." *Red Deer*, at 402. The question was immaterial because it asked the jury to determine capability of production in paying quantities on a different date than set in the shut-in clause and after constructive production under that clause took effect. *Id.*

- "We also conclude that USAA's argument [that plaintiff cannot recover any policy benefits because the jury found that USAA violated the insurance code, but failed to find USAA breached the policy] raises a purely legal issue that does not affect the jury's role as fact-finder, and that USAA thus preserved the argument by asserting it as a ground for its motion for judgment based on the jury's verdict." *Menchaca*, 545 S.W.3d at 487 n.8.
- "[W]e hold that USI preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict. *See Menchaca* . . . (. . . defendant's argument was a purely legal issue . . . preserved . . . in a post-verdict motion). . . . [C]it[ing] *Olivo* in support of its request for a take-nothing judgment [in its motion for judgment notwithstanding the verdict] . . . . gave the trial court notice of USI's complaint that the verdict was based on an immaterial theory of recovery that could not support Levine's recovery on a premises liability claim." *United Scaffolding*, 537 S.W.3d at 482. Observation: we don't know whether a defendant "invite[s] any charge error by opposing a premises liability submission requested by a different defendant." *HNMC, Inc. v. Chan*, 683 S.W.3d 373, 386 (Tex. 2024) (Supreme Court did not reach the question since the defendant did not appeal the court of appeals holding, over the dissent of Chief Justice Christopher, that the defendant did invite the error).

6. The Court is "loath" to require a jury question to include an extra-statutory definition of a statutory term when no statute or case law defines the term. Tracking the pertinent statutory language is good enough.

In *Gulf Energy*, the trial court refused to submit a question about one party's statutory good faith. *Gulf Energy*, 482 S.W.3d at 571. The Court said the party was entitled to the question–the opposing party said the question did not preserve error because it did not include a definition of "good faith." The Court announced it was "particularly loath to find waiver [of a complaint about a trial court's failure to submit a question to the jury] for failing to propose a definition of a statutory term [here, "good faith"] when no case law provided explicit guidance on what the proper definition of that term should be." *Gulf Energy*, 482 S.W.3d at 571. In *Gulf Energy*, the party had "generally tracked the pertinent statutory language" and thus "complied with Rule 278," and did not waive error "by failing to request an accompanying extra-statutory definition." *Id.*

7. A case study in the difficulties and disagreements regarding preserving charge error–*United Scaffolding*.

Implications of Error Preservation Rulings

United Scaffolding's 6-3 decision, holding that a charge error complaint was preserved by a post-verdict motion, emphasizes the difficulties which still remain in dealing with charge error–especially concerning those cases which involve an injury which arguably invokes the murky law at the confluence of negligence and premises liability. It also emphasizes the importance of distinguishing between the following:

- those situations in which a theory of recovery or defense is defectively submitted–which requires an objection to preserve error; and
- those situations in which the correct theory is entirely omitted, when no objection is necessary.

United Scaffolding involved the second trial of what the Supreme Court characterized as a "slip-and-fall case." *Id.*, *1 (June 30, 2017). The workman alleged he "slipped on a piece of plywood that had not been nailed down, causing him to fall up to his arms through a hole in the scaffold." Id.,*2. Come charge time, the Plaintiff requested "only a general-negligence theory of recovery, without the elements of premises liability as instructions or definitions." *Id.* In fact, "the court in the second trial simply used the same question [the Defendant] had proposed in the first trial." Boyd, J., Dissent, *80-81.

Post-verdict and on appeal, the Defendant argued that the general negligence submission was incorrect and would not support a judgment for Plaintiff. Plaintiff "argues that even if his claim should have been submitted under a premises liability theory of recovery, [Defendant] either waived the argument because it did not object to the jury charge or invited the error by requesting a general-negligence submission in the first trial." *United Scaffolding*,*34. The Court rejected both arguments, based on the concept that a premises liability claim is a theory of recovery distinct from a general negligence claim. The Court said "[c]onsidering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability," as opposed to a claim for negligence. *Id.*, *33. The Dissent vigorously disagreed with this conclusion.

> [The Majority] holds that Rule 279 is irrelevant here because 'the correct theory of recovery was omitted entirely.' . . . I disagree. Although a premises-liability claim is independent from an ordinary-negligence claim, it is still rooted in negligence principles.

Boyd, J., Dissent, 537 S.W.3d at 500.

The Majority "recognize[d]. . . that a defendant must preserve error by objecting when an independent theory of recovery is submitted defectively. See Tex. R. Civ. P. 279." That "includes when an element of that theory of recovery is omitted. *See id.*" But, despite the Dissent's objections, the Majority stuck fast to the negligence/premises distinction, and held that "when, as in this case, the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely,

Implications of Error Preservation Rulings

the defendant has no obligation to object." *United Scaffolding*, at *35. The Dissent also disagreed with that holding:

> We have held, and the Court specifically notes, . . . that a plaintiff may submit a premises-liability claim by submitting a question on control and 'a broad-form negligence question,' as long as 'instructions that incorporate the . . . premises defect elements . . . accompany the questions.' *Olivo*, 952 S.W.2d at 529. The jury charge here included a broad-form negligence question but lacked a question on control and instructions on the premises-liability elements. According to the Court's own rule, this is merely a defective submission, not a complete omission. . . . I agree with Levine that USI waived its complaint by failing to object to the omitted elements. See Tex. R. Civ. P. 279 (explaining [*80] when 'omitted element or elements shall be deemed found by the court in such manner as to support the judgment').

Boyd, J., Dissent, *Id.*

The Majority also held that the defendant did not waive, or invite error, by requesting the general negligence submission in the first trial. "[O]nce the trial court ordered a new trial, [Defendant] could invite error only in the second trial. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)." Id., at *482. The Dissent disagreed with the foregoing, as well:

> I agree with [Plaintiff] that [Defendant] invited the trial court to err by proposing the ordinary-negligence question. Since the record reflects that the court in the second trial simply used the same question [Defendant] had proposed in the first trial, and it does not reflect that [Defendant] ever withdrew the question it had proposed in the very same case, [Defendant] invited the error of which it now complains.

Id., at *501.

Finally, the Court held that the Defendant "preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict." *Id.*, *37 "[Defendant] cited *Olivo* in support of its request for a take-nothing judgment. This gave the trial court notice of USI's complaint that the verdict was based on an immaterial theory of recovery that could not support [Plaintiff's] recovery on a premises liability claim." *Id.*

The foregoing discussions by the *United Scaffolding* Majority and Dissent show how difficult this is. When the Justices disagree about whether a premises liability claim is a subset of negligence or not–and whether that means that a negligence question, without premises instructions, is defective (and thus needing an objection to preserve error) or amounts to an immaterial question not needing a pre-verdict objection–we realize the daunting task we face on the charge. Recall the goals of error preservation: conserving judicial resources, allowing for more accurate judicial decision-making,

and preventing surprise to one's opponent on appeal. *Mansions in the Forest, L.P., v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012). As the Court said in an opinion from 2017, "[u]ndergirding these rules [i.e., Rule 166a(c)'s "state the specific grounds" and TRAP 33.1's "sufficient specificity" tests] is the principle that the trial court should have the chance to rule on issues that become the subject of the appeal." *ETC Mktg. v. Harris Cnty. Appraisal Dist.*, 518 S.W.3d 371, 376 (Tex. 2017). After thinking about those goals, ask yourself whether those goals are promoted by a party which does not object to the trial court's submission of a jury question which that party submitted in a prior trial, but as to which it is allowed to preserve error by a post-verdict motion which "cites *Olivo* in support of [a post-verdict] request for a take-nothing judgment." *United Scaffolding*, at *37. Six Justices noted that to hold otherwise "would effectively force the defendant to forfeit a winning hand." *United Scaffolding*, at *35-36. Which means that, if you represent the party with the burden on a claim or an affirmative defense, make very, very sure you know exactly what kind of claim or defense you have, and request the charge accordingly.

If you have to argue that a post-verdict motion preserved charge error–and perhaps other error which is "a purely legal issue" (lack of an unpled presentment supporting a Chapter 38 claim for attorney's fees?), you should mine *United Scaffolding*, and *Red Deer* and *Menchaca* for the help they provide. And you might keep in mind that we don't know, for now, whether a defendant "invite[s] any charge error [that a case should have been submitted as a premises liability claim, instead of a negligence claim] by opposing a premises liability submission requested by a different defendant." *HNMC, Inc. v. Chan*, 683 S.W.3d 373, 386 (Tex. 2024) (Supreme Court did not reach the question since the defendant did not appeal the court of appeals holding, over the dissent of Chief Justice Christopher, that the defendant did invite the error).

B. Exemplary Damages

There were only two cases, and three rulings, in which the Court dealt with an error preservation issue involving exemplary damages. In both cases, the defendant claimed that it preserved error. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017); *Zorrilla v. Aypco Constr. II*, 469 S.W.3d 143 (Tex. 2015). In one case, the Court held that the defendant "did not challenge the exemplary damages award on constitutional grounds in the trial court," and therefore did not preserve that complaint. Having said that, the defendant won on the merits, with the Court holding that the defendant preserved a separate complaint about exemplary damages. *Zorrilla*, 469 S.W.3d at 155 n.10, 157.

Two important take-aways from the exemplary damage preservation rulings:

- a motion for new trial will timely preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in " the absence of a plea and proof of cap-busting conduct." *Zorrilla*, 469 S.W.3d at 157.

Implications of Error Preservation Rulings

- responding to an amended motion for entry of judgment, and specifically adopting the response of other defendants that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties, will preserve that complaint by the adopting defendant. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).

C. Jurisdiction

Subject matter jurisdiction can be first raised on appeal. Nothing new there. In the examples the Supreme Court addressed in the last few years, it held:

- "[A] jurisdictional holding can never be dicta because subject-matter jurisdiction must exist before we can consider the merits, a challenge to it cannot be waived." *Tex. Propane Gas Ass'n v. City of Hous.*, 622 S.W.3d 791, 797-98 (Tex. 2021).
- "jurisdictional arguments concerning immunity waiver cannot be waived." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015) (held, argument that "there is no evidence that [plaintiff] had a good-faith, reasonable belief that she engaged in a protected activity under the TCHRA" "implicates [a defendant's] immunity from suit" under the TCHRA because "'the Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA.'"); and
- "[E]xhaustion of administrative remedies is an issue of subject-matter jurisdiction." *Clint Indep. Sch. Dist. v. Sonia Herrera Marquez ex rel. Their Minor Children*, 487 S.W.3d 538, 558 (Tex. 2016) (held, parents must first exhaust their administrative remedies under the Education Code as to their constitutional claims against a school district before bringing those claims in the district courts).

But the Court did have the opportunity to point out that "the UDJA does not confer jurisdiction, but 'is merely a procedural device for deciding cases already within a court's jurisdiction.' *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994) (citation omitted)." *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015). The Court pointed out that the "pleadings sufficiently characterize the parties' claims as being within the purview of the UDJA." *Id.* The plaintiff argued on appeal that the defendant could not recover fees under the UDJA because "neither party pleaded a cognizable claim for declaratory relief." *Id.* Because the plaintiffs "did not preserve their re-characterization argument regarding their own claim in the trial court, . . . it was error for the court of appeals to address it sua sponte." *Id.* So the lesson here is–if the trial court awards the other party attorney's fees under the UDJA, and you don't think either party has made a UDJA claim, say so in the trial court.

D. Summary Judgment: your motion and response must be specific–context matters--and it's not necessarily too late to get your summary judgment

Implications of Error Preservation Rulings

evidence before the trial court so long as a final judgment has not been signed.

1. Make sure your motion or response specifically mention the grounds on which you rely. Context matters.

In at least three opinions, the Supreme Court affirmed the mandate of Rule 166a(c) that "'[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'" *ETC Mktg. v. Harris Cnty. Appraisal Dist.*, 518 S.W.3d 371, 377 (Tex. 2017); *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 545-546 (Tex. 2017); *see also McAllen Hosps., L.P. v. State Farm County Mut. Ins. Co.*, 433 S.W.3d 535, 541-542 (Tex. 2014) (held, Court would not "read into" a hospital lien statute a cause of action for enforcement of a lien because that issue "was not raised in the trial court as a ground for summary judgment and was not briefed in the court of appeals or in this Court, and therefore has not been preserved for our review.")

Lazy R and *ETC* go further, though. Both point out that a motion for summary judgment must "'state the specific grounds'" entitling the movant to judgment. *Lazy R*, 545-546; *ETC*, at 376, citing Rule 166a(c). *ETC* also recited the "sufficient specificity" test of Rule 33.1; *Lazy R* did not mention Rule 33.1. Having mentioned both Rule 166a(c) and Rule 33.1, *ETC* pointed out that "[u]ndergirding these rules is the principle that the trial court should have the chance to rule on issues that become the subject of the appeal." *Id.* Here are the reasons the Court held the summary judgment motions in those two cases did not "state the specific grounds" for judgment:

Case	Holding
Lazy R	while the "motion for summary judgment . . . mention[ed] that the Ranch should not be entitled to its requested relief," it did not specifically mention that the nonmovant should not be entitled to receive the injunctive relief it admittedly "was then requesting." *Id.*
ETC	"The body of the motion, the prayer for relief, and the accompanying affidavits were devoted entirely to discussion of the Commerce Clause.. . . ETC cannot devote an entire motion to one federal argument and seek to argue a distinct state-law position on appeal by relying on [one sentence in the motion] . . . that is ambiguous in isolation. Context matters. And in the context of this motion there is no question that ETC failed to present the temporary-period ground at all, let alone specifically. Accordingly, ETC waived any complaint on appeal involving Sections 11.01© and 22.01(a) of the Tax Code." *ETC*, at 376.

You might contrast the foregoing holdings with that in *Rincones*, in which the Court held that a plaintiff preserved the argument that the defendant "can be liable for tortious interference through its agency relationship" with others. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). The Court held that plaintiff had preserved this argument, despite the fact that the plaintiff's

"discussion of this argument in his response to summary judgment is brief and not specific." *Id.*. The plaintiff had merely "alleged that 'Exxon and WHM empowered DISA . . . as agents to implement its [sic] drug[-]testing policy.'" *Id.*

In *Lazy R*, it did not matter that "the availability of injunctive relief was discussed at the hearing on the motion"–in fact, apparently both parties discussed it at the summary judgment hearing–because "the motion itself did not 'present' the issue" of the nonmovant's entitlement to injunctive relief, depriving the Court of the ability to address that issue. *Lazy R*, at 546. And in *ETC*, where the trial court had denied the petitioner's motion for summary judgment in a battle of competing motions, the Court pointed out that Rule 166a(c) prohibited the Court from considering, as a ground for reversal, an issue not expressly presented to the trial court by written motion, answer, or other response. *ETC*, *377.

2. If there is no final judgment, and the claim not fully adjudicated, it may not be too late to submit summary judgment proof by way of a motion for reconsideration–if the motion is ruled on.

The Court also held that a "ratification defense was timely presented and ruled on by the trial court," in the summary judgment context, where the defendant (which had raised ratification in its answer and, without summary judgment proof, in response to the other side's motion for summary judgment) "present[ed] its summary-judgment proof . . . in connection with a motion for reconsideration, before the unpooling claim had been fully adjudicated and prior to final judgment," and the trial court had denied both motions. *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 783 (Tex. 2017). The Court pointed out that "the record reflects the trial court considered Samson's motion, as it had discretion to do, . . . and specifically ruled on it. This is sufficient to meet the preservation requirements of Rule 33.1. Accordingly, Samson's ratification defense was timely presented and ruled on by the trial court." *Id.*, at 784.

3. No matter what TRAP 33.1 says about implied rulings, get a signed order on your objections to summary judgment evidence.

For almost twenty years, the courts of appeals have disagreed as to whether an order granting a motion for summary judgment can serve as an implicit ruling on objections to summary judgment evidence. *See* Section 5.Q, *supra*; Patton, *Summary Judgments in Texas*, §6.10[4][e]. In 2017, the Supreme Court held that when "[t]he record contains no order sustaining the objection," an objection to "late-filed summary-judgment evidence. . . . has been waived," because "[e]ven objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.' *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin [*sic*-Dallas] 2003, no pet.)." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). The Court issued this holding without discussing the disagreement among the various

Implications of Error Preservation Rulings

courts of appeals on this issue, and without mentioning Rule 33.1, much less its provision that allows an implicit ruling on complaints,

In June 2018, without mentioning *Rincones*, the Supreme Court potentially injected uncertainty into this area in its Per Curiam opinion in *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 162 (Tex. 2018). *Seim v. Allstate Tex. Lloyds* dealt with an objection to the form of an affidavit (apparently the failure of a notary to sign a jurat). In *Seim*, the Supreme Court first seemed to endorse the holding in *Rincones* by saying that "[w]e hold the Fourth and Fourteenth courts have it right," expressly endorsing the following holdings from those courts:

- "it is incumbent upon the party asserting objections [as to an affidavit's form] to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver." *Seim*, at 165, quoting *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.-Houston [14th Dist.] 2000, pet. denied);
- "a trial court's ruling on an objection to summary[-]judgment evidence is not implicit in its ruling on the motion for summary judgment." *Seim*, at *165-166, citing *Well Sols., Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.-San Antonio 2000, no pet.).

But instead of invoking *Rincones*, and expressly requiring an "order sustaining the objection . . . reduced to writing, signed and entered of record," the *Seim* Court focused on whether the trial court had impliedly ruled on the objection to the summary judgment evidence. For example, *Seim* said that "nothing in this record serves as a clearly implied ruling by the trial court on Allstate's objections" to the summary judgment affidavit. In support of that assertion, the Supreme Court pointed out that "even without the objections, the trial court could have granted summary judgment against the [Plaintiffs] if it found that their evidence did not generate a genuine issue of material fact," a fact which Defendant "has argued . . . in its briefing to this Court." *Seim*, at *166. The Court then held that the objection as to form was waived because Defendant "failed to obtain a ruling from the trial court on its objections to the affidavit's form." *Seim*, at 166. This leaves us to wonder if that ruling must be in writing, or if an implied ruling is good enough, or whether a ruling on a motion for summary judgment may be an acceptable implied ruling in those situations where the trial court could not have granted summary judgment if the objected to evidence created a fact issue. In any event, the Supreme Court reversed and remanded the case to the court of appeals, for it to consider whether the Defendant was "still entitled to summary judgment on other grounds." *Seim*, at 166.

Where does that leave us? I still think a written ruling of some kind is probably required, but in any event everyone should keep following the best practice of getting a written order as to your objections, to avoid an expensive, tedious, confusing error preservation fight that does not get you any closer to the resolution of your case–or worse. *Ahmad v. State*, 615 S.W.3d 496, 502 (Tex. App.—Houston [1st Dist.] 2020), no pet.). And whatever you do, don't allow the trial judge to sign an order granting a summary judgment motion which reflects that "it considered the 'evidence and arguments of counsel,' without any limitation," because that is an "'affirmative indication' that the trial court considered [your opponent's] response and the evidence attached to it." *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259-62 (Tex. 2020).

Implications of Error Preservation Rulings

4. As to a traditional summary judgment motion, the non-movant can challenge the legal sufficiency of the summary judgment grounds for the first time on appeal.

While not earth-shattering, the Court did reaffirm that "the party moving for traditional summary judgment . . . ha[s] the burden to submit sufficient evidence that established on its face that 'there is no genuine issue as to any material fact" and that it is 'entitled to judgment as a matter of law.' Tex. R. Civ. P. 166a(c)." *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511(Tex. 2014). Even if the "non-movant . . . fails to raise any issues in response to a summary judgment motion," it "may still challenge, on appeal, 'the legal sufficiency of the grounds presented by the movant.'" *Id*.

2. Different preservation mechanisms

Here are a few examples of error preservation vehicles which the Court approved during the 2014-2017 time frame.

A. A motion for reconsideration of an interlocutory summary judgment order, and your own post-order motion for summary judgment, may serve as vehicles to get summary judgment evidence before the trial court–if it has not signed or rendered a final judgment.

That was the holding in *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 783 (Tex. 2017). Having said that, do not consider this holding as the best way to do things–only consider it as a possible tool to salvage a disaster.

B. A response to a motion for entry of judgment will preserve a complaint about joint and several liability.

A response to a motion for entry of judgment will preserve a complaint that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).

C. Motions for New Trial

A timely motion for new trial will preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in "the absence of a plea and proof of cap-busting conduct." *Zorrilla*, 469 S.W.3d at 157.

That concludes our four year tour of the Supreme Court. I hope you have enjoyed the narration, and that it helps.

Implications of Error Preservation Rulings

10. Don't forget–new arguments in support of properly raised issues are always O.K.

Thankfully, we won't explore how to distinguish between "complaints," which TRAP 33.1 requires we present in the trial court (sometimes referred to as "issues"), and "arguments" which support such "complaints" or "issues." But we should always keep in mind that, while the Supreme Court assures us that "we do not consider unraised issues," it also points out that "'parties are free to construct new arguments in support of issues properly before the Court.'" N. E. Indep. Sch. Dist. v. Riou, 598 S.W.3d 243, 252 n.36 (Tex. 2020), *quoting Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764, n. 4 (Tex. 2014). Perhaps you can avoid your opponent's complaint about waiver by casting your new spin as an argument in support of a clearly preserved issue.

11. Conclusion.

I hope that this paper will have given you some examples of things that will help you hone your error preservation skills, and evaluate whether to pursue appellate issues with preservation problems. More than that, I hope that it has helped you think about using error preservation not just as a way to keep your case alive on appeal, but also as a means to sell your case effectively at the trial court level. Good luck to you all!

Implications of Error Preservation Rulings

APPENDIX

1. Preservation Rates for the Most Common Error Preservation Problems (2014 through 2016).

2. Comparing Individual Courts of Appeals to the Average (FYE 2014).

3. Comparing Individual Courts of Appeals to the Average (2014 through 2016).

3.A. Rates of Error Preservation, and Reasons Error Was Not Preserved, Correlated by Citing of TRAP 33.1, for Fiscal Years 2014 through 2016.

3.B. The Correlation Between the Result on an Error Preservation Decision and the Result on the Merits (September 1, 2015 through May 18, 2016).

3.C. Correlating the Tendencies of Transferor Courts, Transferee Courts, and All Courts (2014 through 2016).

3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Act, Parent Child Relationship).

3.E. How parties fare in the courts of appeals on error preservation (FYE 2015-2016)

4.1. Texas Supreme Court: How Often Error Was Preserved or Can First Be Raised on Appeal (Fiscal Years Ending August 31, 2014-2017)

4.2. Texas Supreme Court: How Parties Claiming Error Was Not Waived Fared on the Merits

5. Checklist for Litigators Trying to Anticipate and Avoid Ambushes

	AF	AG	AH	AI	AJ	AK	AL	AM	AN	AO	AP	AQ	AR	AS	AT	AU	AV
177	**Appendix 1. Preservation Rates for the Most Common Error Preservation Issues in FYE 2014-2016 (unless otherwise stated)**													**FYE 2016: Success on the Merits**			
178	Preservation Rate Range (in %): FYE 2014 {2015} 2016	Rank	**FYE 2014-2016 Category**	**Number of Decisions**	**Preserved**	**Not Preserved**	**Specific Enough**	**Not Specific Enough**	**Not Raised at All**	**Not timely, d/n comply with other rules***	**No ruling, no record***	**Issue Different Than at Trial**	**D/n have to raise at trial**	**2016: Party Claiming Error Preserved Won on the Merits**	**2016: Party Claiming Error Preserved Lost on the Merits**	**2016: Party Claiming Error Preserved Won in Significant Part on the Merits**	**2016: Win + Win in Significant Part on the Merits**
179	13.3 {10.4} 12%	0	AA-The Unpreserved Avg.	1584	12.0%	81.0%	12.1%	3.8%	53.0%	13.0%	8.1%	5.6%	7.0%	12.9%	69.8%	14.3%	27.2%
180	12.8{12.9}12.3	1	***Evidence***	***190***	***12.6%***	***84.2%***	***12.6%***	***8.4%***	***37.9%***	***22.6%***	***9.1%***	***8.4%***	***3.2%***	***12.5%***	***76.1%***	***10.2%***	***22.7%***
181	22.2{19.0}24.3	2	***Jury Charge***	***106***	***21.7%***	***77.4%***	***21.7%***	***8.5%***	***40.6%***	***8.5%***	***2.5%***	***17.0%***	***0.9%***	***7.9%***	***60.5%***	***31.6%***	***39.5%***
182	7.9{10.7}11.1	3	Summary Judgment	84	9.5%	79.8%	9.5%	2.4%	48.8%	21.4%	13.0%	0.0%	10.7%	5.6%	61.1%	27.8%	33.3%
183	7.1{0.0}7.4	4	Attorney's Fees	71	4.2%	90.1%	4.2%	5.6%	70.4%	7.0%	7.0%	1.4%	5.6%	0.0%	53.6%	35.7%	35.7%
184	40.0{0.0}21.4	5	***Legal Sufficiency***	***56***	***16.1%***	***39.3%***	***16.1%***	***0.0%***	***35.7%***	***1.8%***	***2.4%***	***0.0%***	***44.6%***	***28.6%***	***50.0%***	***14.3%***	***42.9%***
185	6.7{10}0.0	6	Affidavits	49	6.1%	77.6%	6.1%	6.1%	28.6%	10.2%	41.2%	4.1%	16.3%	12.5%	68.8%	12.5%	25.0%
186	11.1{17.6}10.0	7	***Witness***	***45***	***13.3%***	***77.8%***	***13.3%***	***4.4%***	***53.3%***	***13.3%***	***0.0%***	***6.7%***	***8.9%***	***10.0%***	***80.0%***	***0.0%***	***10.0%***
187	0.0{9.1}4.2	8	Constitutionalit	57	3.5%	96.5%	3.5%	1.8%	91.2%	3.5%	0.0%	0.0%	0.0%	0.0%	95.8%	0.0%	0.0%
188	25.0{9.1}0.0	9	***Continuances***	***32***	***15.6%***	***84.4%***	***15.6%***	***0.0%***	***31.3%***	***28.1%***	***21.1%***	***12.5%***	***0.0%***	***0.0%***	***80.0%***	***10.0%***	***10.0%***
189	10.0{8.7}13.3	10	Discovery	30	10.0%	86.7%	10.0%	0.0%	53.3%	16.7%	29.4%	0.0%	3.3%	0.0%	100.0%	0.0%	0.0%
190	12.5{14.3}25.0	11	***Pleading***	***30***	***16.7%***	***83.3%***	***16.7%***	***3.3%***	***66.7%***	***6.7%***	***4.5%***	***3.3%***	***0.0%***	***22.2%***	***66.7%***	***11.1%***	***33.3%***
191	0.0{13.3}0.0	12	Notice	28	7.1%	85.7%	7.1%	0.0%	64.3%	14.3%	0.0%	7.1%	7.1%	10.0%	90.0%	0.0%	10.0%
192	0.0{0.0}12.5	13	Due Process	24	4.2%	95.8%	4.2%	4.2%	91.7%	0.0%	0.0%	0.0%	0.0%	12.5%	87.5%	0.0%	12.5%
193	14.3{0.0}12.5	14	Factual Sufficiency	24	8.3%	87.5%	8.3%	0.0%	66.7%	16.7%	0.0%	4.2%	4.2%	12.5%	87.5%	0.0%	12.5%
194	42.9{16.7}0.0	15	***Argument***	***16***	***25.0%***	***68.8%***	***25.0%***	***0.0%***	***43.8%***	***12.5%***	***6.3%***	***6.3%***	***6.3%***	***0.0%***	***66.7%***	***33.3%***	***33.3%***
195	14.3{0.0}13.6	16	***Judgment***	***22***	***18.2%***	***81.8%***	***18.2%***	***4.5%***	***68.2%***	***4.5%***	***0.0%***	***4.5%***	***0.0%***	***16.7%***	***41.7%***	***25.0%***	***41.7%***
196																	
197			***bold, italics indicates a preservation rate higher than the average***														
198			* these categories were not split out for 2014, so the numbers here are for FYE 2015 and 2016.														

	A	B	C	D	E	F	G	H	I	J	K	L	M
41	**Appendix 2. Error Preservation Tendencies (FYE 2014)**				**As a % of Error Preservation Decisions**								
42	Court Number	Court Name	% of Total Cases Which Are Error Preservation Cases	Error Preservation Rulings as a % of total issues*	Which Are Based on Rule 33.1**	In Which Error is Preserved	In Which Error is Not Preserved	In Which Objection is Specific Enough	In Which Objection is Not Specific Enough	In Which Complaint Was Not Raised at All	Others (no ruling, no record, not timely, d/n comply with other rules,etc.)	Issue raised at trial different than asserted on appeal	D/n have to raise
43	1	Houston 1st	15.0%	4.3%	73.6%	17.0%	79.2%	17.0%	3.8%	49.1%	22.6%	3.8%	3.8%
44	2	Fort Worth	17.4%	5.5%	78.6%	21.4%	73.8%	21.4%	0.0%	40.5%	23.8%	9.5%	4.8%
45	3	Austin	13.8%	3.8%	81.8%	21.2%	72.7%	21.2%	9.1%	54.5%	3.0%	6.1%	6.1%
46	4	San Antonio	8.0%	2.2%	79.2%	20.8%	79.2%	20.8%	0.0%	58.3%	16.7%	4.2%	0.0%
47	5	Dallas	16.7%	5.0%	78.8%	6.1%	84.8%	6.1%	3.0%	53.0%	24.2%	4.5%	9.1%
48	6	Texarkana	13.3%	3.8%	77.8%	11.1%	88.9%	11.1%	0.0%	88.9%	0.0%	0.0%	0.0%
49	7	Amarillo	16.8%	5.0%	85.0%	15.0%	75.0%	15.0%	10.0%	40.0%	25.0%	0.0%	10.0%
50	8	El Paso	17.4%	4.7%	68.8%	6.3%	81.3%	6.3%	6.3%	68.8%	6.3%	0.0%	12.5%
51	9	Beaumont	36.2%	11.0%	90.2%	9.8%	88.2%	9.8%	9.8%	56.9%	19.6%	2.0%	2.0%
52	10	Waco	13.3%	4.6%	81.8%	0.0%	100.0%	0.0%	9.1%	81.8%	9.1%	0.0%	0.0%
53	11	Eastland	14.1%	3.5%	84.6%	7.7%	84.6%	7.7%	0.0%	76.9%	7.7%	0.0%	7.7%
54	12	Tyler	9.5%	2.7%	75.0%	12.5%	87.5%	12.5%	12.5%	50.0%	25.0%	0.0%	0.0%
55	13	Corpus	18.9%	6.0%	89.5%	18.4%	73.7%	18.4%	7.9%	39.5%	21.1%	5.3%	7.9%
56	14	Houston 14th	27.4%	7.9%	53.0%	12.0%	83.1%	12.0%	8.4%	44.6%	20.5%	9.6%	4.8%
57		The Unpreserved Average	17.1%	5.0%	76.0%	13.5%	81.2%	13.5%	5.8%	51.6%	18.8%	4.9%	5.4%
58													
59	Greater Than the Overall %	Smaller Than the Overall %	None										

Appendix 3. Comparing Individual Courts of Appeals to Unpreserved Average: How and Why the Courts Ruled (FYE 2014-2016)

					% of Error Preservation Rulings In Which:									
Ct. No.	Court Name	Total Cases	% of Total Cases Which Are Error Preservation Cases	% of Total Rulings Which Are Error Preservation Rulings*	TRAP 33.1 Was Invoked	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific Enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (not timely, d/n comply with other rules,etc., [2014-2016]; no ruling, no record [2014])**	No record, no ruling (for 2015 and 2016)	Issue raised at trial different than asserted on appeal	D/n have to raise complaint at trial
7	Amarillo	348	12.9%	3.6%	66.0%	12.0%	78.0%	12.0%	10.0%	50.0%	12.0%	6.7%	2.0%	10.0%
3	Austin	700	17.3%	4.8%	70.7%	10.5%	85.0%	10.5%	6.0%	59.4%	9.8%	9.0%	3.0%	4.5%
9	Beaumont	366	29.2%	9.0%	77.3%	10.6%	81.8%	10.6%	5.3%	50.8%	14.4%	7.4%	6.8%	7.6%
9	Beaumont, Non-SVP^	366	9.3%	2.9%	66.7%	11.9%	69.0%	11.9%	4.8%	45.2%	7.1%	9.5%	2.4%	19.0%
13	Corpus Christi (incl. CC/Edinburg)	472	14.6%	4.3%	74.1%	19.8%	74.1%	19.8%	7.4%	39.5%	19.8%	4.7%	4.9%	6.2%
5	Dallas	986	22.0%	6.3%	66.1%	9.3%	81.5%	9.7%	1.2%	50.8%	15.7%	10.4%	6.0%	9.3%
11	Eastland	259	13.5%	3.9%	72.5%	7.5%	90.0%	7.5%	5.0%	67.5%	12.5%	3.7%	2.5%	2.5%
8	El Paso	264	19.7%	6.3%	68.2%	15.2%	78.8%	15.2%	6.1%	53.0%	9.1%	8.0%	4.5%	6.1%
2	Fort Worth	555	21.6%	6.8%	71.7%	15.8%	78.3%	15.8%	1.3%	50.0%	11.8%	8.2%	9.2%	5.9%
1	Houston 1st	897	19.4%	5.7%	64.2%	14.7%	77.9%	14.7%	2.0%	52.0%	13.2%	10.6%	2.9%	7.4%
14	Houston 14th	767	29.5%	8.6%	55.5%	11.8%	81.4%	11.8%	4.2%	52.9%	11.8%	7.8%	7.2%	6.8%
4	San Antonio	737	11.0%	3.0%	57.5%	13.8%	77.0%	13.8%	4.6%	51.7%	12.6%	4.8%	4.6%	9.2%
6	Texarkana	212	17.9%	5.1%	72.1%	7.0%	86.0%	7.0%	4.7%	62.8%	9.3%	0.0%	9.3%	7.0%
12	Tyler	182	20.3%	6.5%	72.3%	8.5%	85.1%	8.5%	2.1%	59.6%	8.5%	12.8%	4.3%	6.4%
10	Waco	174	16.7%	5.3%	83.8%	2.7%	94.6%	2.7%	2.7%	70.3%	16.2%	0.0%	5.4%	2.7%
	Avg.	6919	19.5%	5.7%	66.9%	12.1%	80.9%	12.1%	3.8%	52.9%	13.0%	8.1%	5.6%	7.0%

	* Assumes 4 issues per case	of Unpreserved	< 95% of Unpreserved Avg.	None	Within 5% of Average	^ Decisions involving Sexually Violent Predators are eliminated from the figures on this row, which reflects decisions	**For 2014, includes no record, no ruling; for remaining years, includes only other listed criteria.

Appendix 3.A. Rates of Error Preservation in Courts of Appeals, Correlated by Citing of Rule 33.1

Fiscal Years 2014-2016

2014-2016, for Courts of Appeals	Total Error Preservation Decisions	Error Preserved	Error Not Preserved	Complaint Specific Enough	Complaint Not Specific Enough	Complaint Not Raised At All/ withdrawn	Others (no ruling, no record, not timely, d/n comply with other rules,etc.)*	No record, no ruling (solely 2015 and 2016)	Issue raised at trial different than asserted on appeal	D/n have to raise to preserve
All Decisions, Cts. App.										
2014	466	62	379	62	27	241	88		23	25
2015	557	58	456	59	19	299	47	49	42	43
2016	561	70	448	70	14	299	71	41	23	43
Totals	1584	190	1283	191	60	839	206	90	88	111
		12.0%	81.0%	12.1%	3.8%	53.0%	13.0%	5.7%	5.6%	7.0%
33.1 Decisions, Cts. App.										
2014	355	33	308	33	25	206	57		20	14
2015	376	30	324	31	10	212	26	40	36	22
2016	342	33	292	33	9	217	26	25	15	17
Totals	1073	96	924	97	44	635	109	65	71	53
		8.9%	86.1%	9.0%	4.1%	59.2%	10.2%	6.1%	6.6%	4.9%
Non-33.1 Decisions, Cts. App.										
2014	111	29	71	29	2	35	31		3	11
2015	181	28	132	28	9	87	21	9	6	21
2016	219	37	156	37	5	82	45	16	8	26
Totals	511	94	359	94	16	204	97	25	17	58
		18.4%	70.3%	18.4%	3.1%	39.9%	19.0%	4.9%	3.3%	11.4%

***For 2014, includes no record, no ruling; for remaining years, includes only other listed criteria.**

Appendix 3.B: Correlating the Result on Error Preservation with the Result on the Merits of the Appeal (FYE 2016)

		Total	Party Claiming Error Preserved Won on the Merits	Party Claiming Error Preserved Lost on the Merits	Party Claiming Error Preserved Won Part, Lost Part on the Merits	Party Claiming Error Preserved Won in Significant Part of the Merits	Party Claiming Error Preserved Won+Won in Significant Part on Merits
For All Error Preservation Decisions		567	12.9%	69.8%	17.3%	14.3%	27.2%
For All Error Preservation Decisions in Which Error Was Not Preserved		450	4.4%	78.7%	16.9%	13.3%	17.8%
For All Error Preservation Decisions in Which Error Was Preserved		73	43.8%	39.7%	16.4%	16.4%	60.3%
For All Error Preservation Decisions in Which Error Did Not Have to be Raised in the Trial Court		44	47.7%	29.5%	22.7%	20.5%	68.2%

Appendix 3.C. Correlating The Tendencies of Transferor and Transferee Courts With the Tendencies of All Courts.

Type of Court	% of Total Cases Which Are Error Preserva-tion Cases	% of Total Rulings Which Are Error Preserva-tion Rulings*	TRAP 33.1 used	Error Was Pre-served	Error Was Not Pre-served	Com-plaint Was Specific enough	Com-plaint Was Not Specific Enough	Com-plaint Was Not Raised at All/Was With-drawn	Others (no ruling, no record for 2014, not timely, d/n comply with other rules, etc., for 2014/ 2015)	No record, no ruling (only for 2015)	Issue raised at trial differ from issues on appeal	D/n have to raise com-plaint at trial
% of All Cts. Below Avg.	71.4%	71.4%	28.6%	64.3%	42.9%	64.3%	50.0%	50.0%	51.1%	64.3%	57.1%	57.1%
% of Transferor Courts Below Avg.	60.0%	60.0%	20.0%	60.0%	40.0%	60.0%	60.0%	60.0%	40.0%	60.0%	60.0%	40.0%
% of Transferee Courts Below Avg.	71.4%	71.4%	28.7%	71.4%	42.9%	71.4%	28.7%	42.9%	57.1%	71.4%	71.4%	57.1%
% of Mixed Courts Below Avg.	100.0%	100.0%	50.0%	50.0%	50.0%	50.0%	100.0%	50.0%	100.0%	50.0%	0.0%	50.0%
% of Courts Below Avg. Which Are Transferor Courts	30.0%	30.0%	25.0%	33.3%	33.3%	33.3%	42.9%	42.9%	25.0%	33.3%	37.5%	28.6%
% of Courts Below Avg. Which Are Transferee Courts	50.0%	50.0%	50.0%	55.6%	50.0%	55.6%	28.7%	42.9%	50.0%	55.6%	63.5%	57.1%
% of Courts Below Avg. Which Are Mixed Courts	20.0%	20.0%	25.0%	11.1%	16.7%	11.1%	28.7%	14.2%	25.0%	11.1%	0.0%	14.3%

According to the Miscellaneous Orders of the Supreme Court affecting 2014-2015 which effected Docket Equalization Transfers: 36% of Courts are Transferor Courts (Austin, Beaumont, Dallas, Fort Worth, Waco); 50% of Courts are Transferee Courts (Amarillo, Corpus Christi/Edinburg, Eastland, El Paso, Houston 1st, Houston 14th, Texarkana); 14% of Courts are both Transferor and Transferee Courts (San Antonio, Tyler)

Appendix 3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Action, Parent Child Relationship)

	Number of Cases	Rule 33.1 invoked, % of Preservation Decisions	Error Preser-vation Decisions	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (not timely, d/n comply with other rules,etc.)	Others (no record, no ruling)	Issue raised at trial different than asserted on appeal	D/n have to raise complaint at trial
Non-transfer Cases 2015	75	46	87	5	74	4	0	49	13	5	8	8
Non-transfer Cases 2016	67	42	80	11	65	11	2	46	10	3	4	4
Totals	142	88	167	16	139	15	2	95	23	8	12	12
		52.7%	100.0%	9.6%	83.2%	9.0%	1.2%	56.9%	13.8%	4.8%	7.2%	7.2%
All 2015 Cases	456	376	557	58	456	59	19	299	47	49	42	43
All 2016 Cases	494	342	561	70	448	70	14	299	71	41	23	43
Totals	950	718	1118	128	904	129	33	598	118	90	65	86
		64.2%	100.0%	11.4%	80.9%	11.5%	3.0%	53.5%	10.6%	8.1%	5.8%	7.7%
2015 Non-transfer type Cases	75	46	87	5	74	4	0	49	13	5	8	8
		52.9%		5.7%	85.1%	4.6%	0.0%	56.3%	14.9%	5.7%	9.2%	9.2%
All 2015 Cases	456	376	557	58	456	59	19	299	47	49	42	43
		67.5%		10.4%	81.9%	10.6%	3.4%	53.7%	8.4%	8.8%	7.5%	7.7%

Appendix 3.E: How parties fare in the courts of appeals on error preservation decisions (FYE 2015-2016)							
Party	Cases/ Issues	Preserved	Not	D/n/have to	Cases Won	Cases Lost	Cases Won in Significant Part
Plaintiff	332/376	12.8%	80.1%	6.6%	12.8%	72.3%	12.8%*
Defendant	618/744	11.2%	80.2%	8.6%	13.3%	68.5%	16.7%

* Won part, lost part for 2015 (did not record whether won in significant part)

Appendix 4.1: How Often Error Was Preserved or Can First Be Raised on Appeal (Fiscal Years Ending August 31, 2014-2017)	
Cases	**Held, Error Was Preserved, Or Can First Be Raised on Appeal**
All Cases	66.7%
Petitioner Claimed Error Preserved	75.0%
Respondent Claimed Error Preserved	50.0%
Plaintiff Claimed Error Preserved	64.3%
Defendant Claimed Error Preserved	67.9%

Appendix 4.2: How Parties Claiming Error Was Not Waived Fared on the Merits						
All Cases FYE 2015-2017	**Party Claiming Error Preserved Won**	**Party Claiming Error Preserved Lost**	**Party Claiming Error Preserved Won Part, Lost Part**	**Party Claiming Error Preserved Won or Won in Significant Part**	**Petitioner Claimed Error Preserved**	**Respondent Claimed Error Preserved**
All Cases	46.2%	38.5%	15.4%	61.5%	64.1%	35.9%
Petitioner Claimed Error Preserved	53.3%	40.0%	6.7%	60.0%	100.0%	0.0%
Respondent Claimed Error Preserved	36.4%	36.4%	27.3%	63.6%	0.0%	100.0%
Plaintiff Claimed Error Preserved	30.0%	60.0%	10.0%	40.0%	76.9%	23.1%
Defendant Claimed Error Preserved	56.3%	25.0%	18.8%	75.0%	57.7%	42.3%

APPENDIX 5: CHECKLISTS FOR COMPLAINTS WHICH CAN FIRST BE RAISED ON APPEAL, OR AFTER THE TRIAL

A. Complaints that can first be raised on appeal:

1. Fundamental error.
   a. Lack of subject matter jurisdiction.
      i. The many guises of lack of subject matter jurisdiction
      ☐ An order signed after the expiration of plenary power
      ☐ Preemption
      ☐ Statutory prerequisites to suit–maybe
      ☐ The damages in a claim exceed the trial court's jurisdiction
      ☐ A state agency has exclusive original jurisdiction
      ☐ A case involving the political question doctrine
      ☐ Sovereign immunity (and governmental immunity?)
      ☐ Trial court action on remand inconsistent with/beyond the appellate court's judgment and mandate
      ☐ The failure to join an indispensable party
      ☐ Internal management of a voluntary association
      ☐ Ecclesiastical abstention doctrine
      ii. Other components of subject matter jurisdiction
      ☐ Standing
      ☐ Ripeness
      ☐ Mootness
      ☐ Defective service
      iii. ☐ A temporary injunction order which does not comply with Rule 683. **CONFLICT**
   b. ☐ An important public interest or public policy
   c. ☐ Certain issues in juvenile cases
   d. ☐ Certain issues in parental-right termination cases
2. Other stuff
   a. ☐ Ambiguity of contracts
   b. Complaints about judges
      i. ☐ The art. V, §11 constitutional disqualification (judge's interest, connection with the parties, or as prior counsel in the case).
      ii. ☐ Actions beyond the scope of the judge's assignment
      iii. ☐ Challenge to a trial judge's qualifications
      iv. ☐ A trial judge may not testify as a witness at trial
      v. ☐ A trial judge's bias or prejudice shown on the face of the record
   c. ☐ Inadequate notice of a hearing (so long as you don't show up for the hearing in question). **CONFLICT**
   d. ☐ Change in applicable law. **CONFLICT**
   e. ☐ Complaints about legal and factual sufficiency in a bench trial
   f. That the Vexatious Litigant statute bars a lawsuit and an appeal
   g. ☐ Certain complaints about affidavits in, and other aspects of, summary judgment practice

i. the following substantive defects in affidavits
☐ a conclusory statement. **CONFLICT**
☐ a subjective belief
☐ an unsubstantiated opinion
☐ a lack of relevance
☐ the parol evidence rule
☐ that a party's own interrogatory responses may not be used in its favor in a no evidence challenge,
☐ an unsigned affidavit

ii. ☐ A complaint that an affidavit shows it is not based on personal knowledge (**CONFLICT** about affidavit's mere failure to show personal knowledge).

iii. ☐ A failure to attach sworn or certified copies of documents referenced in a summary judgment affidavit. **CONFLICT**

iv. ☐ The failure to authenticate a document in motion practice.

h. ☐ That the no-evidence motion for summary judgment is not sufficiently specific. **CONFLICT**

i. ☐ That the traditional summary judgment motion fails to prove the entitlement of the movant to judgment as a matter of law

B. Complaints which can be raised when it's too late to fix them.

1. ☐ Legal and factual sufficiency complaints can first be raised on appeal in a civil non-jury trial, and in post-trial motions in jury trials. For example:
☐ A complaint that expert testimony is speculative or conclusory on its face can first be raised after the evidence is offered–but you should preserve that complaint as you would a complaint about legal sufficiency. **CONFLICT**

☐ One court of appeals, and a concurrence in another court, say that complaining about a party's failure to segregate its attorney's fees in a bench trial is a legal/factual sufficiency complaint–but most courts don't, and the disagree about the deadline for such a complaint. **CONFLICT**
☐ At least one court of appeals has held that a legal insufficiency complaint as to damages can be made in a post-trial motion.
☐ Other complaints characterized as legal insufficiency complaints.

2. Immaterial jury findings can first be challenge in post-verdict motions. For example:
☐ the question asks the jury about damages on an irrelevant date
☐ the question asks the jury to find whether there was negligence in a case pled as a premises liability claim
☐ a jury finding on a defamation claim was immaterial, because the cause of action actually sounded in business disparagement
☐ the question asks the jury to find reasonable attorney's fees when recovery of fees is sought under Chapter 38 against an LLC
☐ A case study in the difficulties and disagreements regarding immateriality and preserving charge error–United Scaffolding.

3. Jury findings regarding a "purely legal issue" can first be challenged in post-verdict motions. For example:
   ☐ that Chapter 95 applies
   ☐ exemplary damages are capped
   ☐a party is not jointly and severably responsible for exemplary damages

   ☐contractual damages are independent of statutory damages
4. ☐ Incurable jury argument. Tex. R. Civ. P. 324(b)(5)
5. ☐ You may be able to complain about irreconcilably conflicting jury answers after the trial court dismisses the jury–but I would not advise counting on it.

The Appellate Advocate
Appellate Section, State Bar of Texas
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Supreme Court of Texas Update
June 2023 through July 2024

Kelly Canavan, Austin
Martha Newton, Austin
Amy Starnes, Austin
Supreme Court of Texas

Table of Contents

I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from June 1, 2023, through July 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 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*, ___ S.W.3d ___, 2024 WL 1819655 (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." AutoZoners 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.

2. Arbitrability

a) *Alliance Auto Auction of Dall., Inc. v. Lone Star Cleburne Autoplex, Inc.*, 674 S.W.3d 929 (Tex. Sept. 1, 2023) (per curiam) [22-0191]

This case concerns the issue of incorporation of American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator when the selection of AAA rules is contingent on another clause in the agreement.

Lone Star sued Alliance, alleging that Alliance conspired with two of Lone Star's employees to embezzle money from Lone Star. Alliance moved to stay the suit and compel arbitration, relying on arbitration clauses contained in authorization agreements between Lone Star and a third party. Alliance argues those agreements designate it as a third-party beneficiary who may invoke the arbitration clause against Lone Star. The arbitration agreement states that if the parties are unable to agree on an alternative dispute resolution firm, the arbitration will be conducted under AAA rules.

The trial court denied Alliance's motion to compel arbitration. The court of appeals affirmed, holding that the question of whether a case should be sent to arbitration is a gateway issue that courts must decide. After Alliance

filed its petition for review in the Supreme Court, it issued its decision in *Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, ___ S.W.3d ___, 2023 WL 2939648 (Tex. April 14, 2023), which held that the general rule is that the incorporation of AAA rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration.

Lone Star argues that this case is distinguishable from *TotalEnergies* because (1) the parties here agreed to arbitrate under the AAA rules only if they are unable to agree on a different ADR firm; and (2) Alliance is not a party to the arbitration agreement but is instead a third-party beneficiary that may, or may not, elect to invoke the arbitration agreement. In a per curiam opinion, the Court remanded to the court of appeals to consider Lone Star's arguments, along with any other issues the parties raised that the court did not reach, in light of the Court's holdings in *TotalEnergies*.

b) *Taylor Morrison of Tex., Inc. v. Kohlmeyer*, 672 S.W.3d 422 (Tex. June 30, 2023) (per curiam) [21-0072]

The issue in this case is whether subsequent purchasers of a home are required to arbitrate their claims against the builder for alleged construction defects.

Shortly after purchasing their home, the Kohlmeyers sued the builder, Taylor Morrison, for negligent construction, violations of the Deceptive Trade Practices-Consumer Protection Act, and breach of the implied warranties of habitability and good workmanship. The Kohlmeyers allege that construction defects caused a serious mold problem in the home. Taylor Morrison filed a motion to compel arbitration of the Kohlmeyers' claims, arguing that the Kohlmeyers are bound by the arbitration clause in the original purchase agreement under the doctrines of implied assumption and direct-benefits estoppel. The trial court denied the motion to compel, and the court of appeals affirmed, holding that direct-benefits estoppel does not require arbitration of the Kohlmeyers' common-law claims because they do not arise solely from the original purchase agreement.

In a per curiam opinion, the Supreme Court explained that the court of appeals' opinion conflicts with the Court's recent opinion in *Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley*. For the reasons explained in that case, direct-benefits estoppel requires arbitration of all of the Kohlmeyers' claims. Accordingly, the Court reversed the court of appeals' judgment, rendered judgment ordering arbitration of the Kohlmeyers' claims, and remanded the case to the trial court for further proceedings.

c) *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. Attorney–Client Privilege

a) *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (Tex. June 30, 2023) [21-0534]

The issue in this case is whether documents underlying an external investigation into allegations of undue influence in a public university's admissions process are protected by the attorney–client privilege and are thus exempt from disclosure under the Texas Public Information Act.

The University of Texas System hired Kroll Associates to investigate allegations of improper admissions practices at UT Austin. After Kroll completed its investigation and released its final report, Franklin Center made a request under the Public Information Act for documents that were either provided to Kroll by the System or created by Kroll during its investigation. The System argued that all the documents sought were protected from disclosure by the attorney–client privilege because Kroll was serving as its "lawyer's representative" under Texas Rule of Evidence 503 in conducting the investigation.

After reviewing the disputed documents *in camera*, the trial court determined that they were privileged. The court of appeals reversed and ordered disclosure of all the documents. The court reasoned that Kroll did not qualify as a "lawyer's representative" because the final report did not contain legal advice, Kroll did not provide legal services to the System, and Kroll's investigation was not performed to advise the System regarding potential legal liabilities.

The Supreme Court reversed, holding that the attorney–client privilege attached to the disputed documents. The Court held that, to qualify as a "lawyer's representative" for purposes of the privilege, assisting in the rendition of professional legal services must be a significant purpose for which the representative was hired. Applying that standard, the Court concluded that Kroll acted as a lawyer's

representative in conducting the investigation and that the disputed documents were intended to be kept confidential. The publication of the final report did not result in a complete waiver of the privilege as to all documents reviewed or prepared by Kroll. However, to the extent the report directly quoted from or otherwise disclosed "any significant part" of the disputed documents, publication of the report waived the System's attorney–client privilege with respect to those specific documents.

Justice Devine, joined by Justice Boyd, dissented. While agreeing with the Court's standard, the dissent would have held that the record did not sufficiently demonstrate that assisting UT's lawyers in the rendition of legal services was a significant purpose of Kroll's audit.

2. Escrow

a) *Boozer v. Fischer*, 674 S.W.3d 314 (Tex. June 30, 2023) [22-0050]

This case involves an escrow agreement among parties that were engaged in active litigation against each other, requiring the Supreme Court to address: (1) whether an attorney for one party may serve as an escrow holder despite the ongoing litigation and (2) which party bears the risk of loss when that attorney misappropriates escrowed funds.

Ray Fischer sold his tax-consulting business to CTMI, a company owned by Mark Boozer and Jerrod Raymond. That transaction generated litigation among the parties. They settled except for one severed claim pertaining to Fischer's entitlement to certain funds. The parties' settlement agreement provided that, pending the resolution of the litigation regarding the severed claim, CTMI would deposit the funds at issue into an "escrow" account owned by CTMI but controlled by Wesley Holmes (Boozer and Raymond's attorney).

After Fischer prevailed on his claim, it came to light that Holmes had drained the account. CTMI sued, seeking a declaration that it had satisfied its obligations to Fischer under the settlement agreement by depositing the funds in the account. The trial court agreed. The court of appeals reversed, holding that there was no escrow and CTMI therefore had not discharged its liability to Fischer.

The Supreme Court affirmed the court of appeals' judgment, but for different reasons. First, the Court held that the parties created an escrow. Second, however, the Court held that the parties' creation of an escrow did not shift the risk of loss in this case. Because the escrow holder was the attorney for CTMI's owners and CTMI agreed to retain title to the escrowed property, CTMI presumptively retained the risk of loss. Nothing in the parties' agreement rebutted that presumption, and CTMI therefore bore the risk of the escrow's failure.

D. CLASS ACTIONS

1. Class Certification

a) *Frisco Med. Ctr., L.L.P. v. Chestnut*, ___ S.W.3d ___, 2024 WL 2226273 (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) *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234 (Tex. Apr. 21, 2023) [19-0612, 21-0159]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Paul Simien sued the owners and managers of his apartment complex, alleging that Mosaic had violated various Public Utility Commission rules that govern how landlords may bill tenants for water and wastewater service and was therefore liable under section 13.505 of the Water Code. The trial court granted partial summary judgment on liability in Simien's favor, rejecting Mosaic's arguments that Simien lacked standing and that subsequent amendments to section 13.505 had deprived the trial court of subject-matter jurisdiction. The trial court also granted Simien's motion to certify a class of current and former Mosaic tenants who were also subject to the challenged billing practices. Mosaic requested and received permission to file an interlocutory appeal of the trial court's order granting partial

summary judgment.

Mosaic filed an application for permission to appeal the partial summary judgment, which the court of appeals denied, as well as an interlocutory appeal of the class certification order. The court of appeals (1) declined to reach the merits of the trial court's rulings on summary judgment as part of its review of the propriety of class certification and (2) rejected Mosaic's challenge to the trial court's compliance with Rule 42(c)(1)(D), concluding that the trial court's rulings on Mosaic's special exceptions and Simien's motion for summary judgment adequately addressed Mosaic's defenses.

Mosaic petitioned the Supreme Court for review in both cases. The Court granted the petitions and consolidated them for argument with *Mosaic Baybrook One, L.P. v. Cessor*, ___ S.W.3d ___, 2022 WL 3027939 (Tex. Apr. 21, 2023) [21-0159]. The Court affirmed the trial court's partial summary judgment and affirmed the court of appeals' judgment affirming the trial court's order certifying a class. After rejecting Mosaic's challenges to standing and subject-matter jurisdiction, the Court held that Mosaic failed to raise an issue of fact regarding whether it had a right to charge Simien the disputed fees because Mosaic conceded that it had bundled a water-related service fee with other fees unrelated to water or wastewater service that were not authorized under his lease. The Court also rejected Mosaic's challenge to the trial court's failure to list the elements of Mosaic's limitations defense in its order certifying a class, holding that the trial court's temporal limitations on the class definition adequately accounted for the defense.

The dissent, authored by Justice Bland, would have reversed. In its view, the Water Code and its implementing rules require metered-water charges to be calculated and presented independently, not other charges. Because Simien's bills complied with this requirement, the dissent concluded that Simien failed to establish his sole claim of a Water Code violation as a matter of law.

c) *Mosaic Baybrook One, L.P. v. Cessor*, 668 S.W.3d 611 (Tex. Apr. 21, 2023) [21-0161]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Tammy Cessor sued the owners and managers of her apartment complex, alleging that Mosaic had assessed fees for late payment of rent in violation of section 92.019 of the Texas Property Code. Cessor also filed a motion to certify a class of current and former Mosaic tenants who were also subject to the challenged late fees. Mosaic initially filed an answer that generally denied Cessor's claims. Mosaic later amended its answer three days prior to the hearing on class certification, raising several affirmative defenses for the first time and months after the deadline for amended pleadings had passed. The trial court granted Simien's motion to certify a class, and Mosaic filed an interlocutory appeal.

On appeal, Mosaic complained that the trial court did not conduct the requisite rigorous analysis under Rule 42, relying on the trial court's failure to

definitively construe section 92.019 of the Property Code or address the affirmative defenses raised in Mosaic's late-filed answer. The court of appeals affirmed without addressing the parties' arguments about statutory construction, reasoning that courts should not decide the merits of a suit as a means of determining its maintainability as a class action. Mosaic petitioned the Supreme Court for review. The Court granted the petition and consolidated it for argument along with *Mosaic Baybrook One, L.P. v. Simien*, ___ S.W.3d ___, 2022 WL 3027992 (Tex. Apr. 21, 2023) [19-0612, 21-0159].

The Court rejected Mosiac's argument that the trial court had misconstrued or failed to construe section 92.019 but agreed with Mosaic that the trial court's failure to list the elements of or otherwise address Mosaic's late-asserted answers constituted reversible error. Because Cessor did not object to the amended pleading, the trial court had no discretion under Texas Rule of Civil Procedure 63 to refuse to consider the defenses. The Court therefore reversed the court of appeals' judgment affirming the trial court's order certifying a class under Rule 42 and remanded the case to the trial court for further proceedings.

d) *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*, ___ S.W.3d ___, 2024 WL 3219030 (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.*, ___ S.W.3d ___, 2024 WL 2869414 (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*, ___ S.W.3d ___, 2024 WL 3210046 (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. Takings

a) *Tex. Dep't of Transp. v. Self*, ___ S.W.3d ___, 2024 WL 2226295 (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.

2. Releases and Reliance Disclaimers

a) *Austin Tr. Co. v. Houren*, 664 S.W.3d 35 (Tex. Mar. 24, 2023) [21-0355]

The issues in this case involve the scope and validity of liability releases in a family settlement agreement related to the administration of Bob Lanier's estate. Some of the parties to that agreement were the remainder beneficiaries of a marital trust, of which Bob had served as trustee and sole beneficiary. The trust was initially valued at $54 million, but at the time of Bob's death, only $5.5 million in assets remained. To facilitate the prompt distribution of the trust and estate assets, Jay Houren—the independent executor of Bob's estate—proposed a family settlement agreement to all interested parties, including the marital trust beneficiaries. Before signing the agreement, the parties obtained independent counsel and received various disclosures, including general accounting ledgers listing $37 million in payments made from the trust to Bob during his life.

After executing the agreement, the trust beneficiaries demanded that Houren repay that $37 million, which they claimed the trust had loaned to Bob. In response, Houren sued for a declaration that the alleged debt did not exist. The trust beneficiaries counterclaimed, alleging that the debt did exist or alternatively that Bob, as trustee, breached his fiduciary duty to the trust's remainder beneficiaries by making unauthorized distributions of principal to himself during his lifetime. According to the beneficiaries, the settlement agreement did not prohibit them from pursuing their claims because (1) the releases did not extend to the debt claim and (2) they were not provided with the "full information" required by statute to release a trustee from liability. Houren filed a motion for summary judgment, arguing that the evidence conclusively negated the existence of a debt and that the agreement's broad release provisions barred both claims.

The trial court rendered summary judgment for Houren. The court

of appeals affirmed, holding that the beneficiaries released all claims against the other parties to the agreement. The court further held that the releases were valid irrespective of any fiduciary duties owed by Houren or Bob.

The Supreme Court affirmed, holding that the trust beneficiaries released their debt and breach of fiduciary duty claims. The Court first concluded that the releases encompassed the debt claim, holding that the parties' release of liability for such debts superseded Houren's general obligation to pay all debts and claims of the estate. The Court also determined that Houren did not owe a fiduciary duty to the trust beneficiaries since they were not devised any probate assets. Although the Court assumed without deciding that the statutory "full information" requirement governing beneficiary releases of trustee liability cannot be waived, the Court held that Houren provided the trust beneficiaries with such information. Specifically, the Court held that the beneficiaries were sufficiently informed to understand the character of the act they were releasing and make an informed decision about whether to agree to the release.

G. CORPORATIONS

1. Stock Redemption

a) *Skeels v. Suder*, 671 S.W.3d 664 (Tex. June 23, 2023) [21-1014]

The central issue in this declaratory-judgment suit is whether a corporate resolution authorized a law firm to redeem a departing shareholder's shares on terms unilaterally set by the firm's founders.

As a shareholder in a law firm, David Skeels signed a corporate resolution generally authorizing the firm's founders "to take affirmative action on behalf of the Firm." After his relationship with the firm soured, the firm terminated his employment and proposed separation terms, including that Skeels relinquish his rights to his shares. When Skeels did not agree, the founders purported to redeem his shares at no cost. Skeels then sued the firm and two of its founders, and the firm counterclaimed. Both sides raised competing declaratory-judgment claims on whether the resolution authorized the founders' redemption actions. In a pretrial ruling, the trial court declared that it did, and the court of appeals affirmed.

The Supreme Court reversed. The Court held that the resolution, by modifying "affirmative action" with "on behalf of the Firm," authorized the founders to take action the firm could take, but it neither expanded the scope of the firm's authorized actions nor constituted an agreement that the founders may set redemption terms on Skeels's behalf. And because the firm was not authorized to set the redemption terms without Skeels's agreement, the Court held that the resolution did not independently authorize the founders to unilaterally set those terms. Chief Justice Hecht dissented, concluding that Skeels agreed in the resolution that the firm could redeem his shares on his departure without payment.

H. 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.

2. Wrongful Death

a) *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. June 16, 2023) [21-0017]

In this wrongful death case, the main issue is whether a noneconomic damages award of just over $15 million is supported by sufficient evidence.

Sarah Gregory—a truck driver for New Prime, Inc.—jackknifed her eighteen-wheeler, causing a multiple-fatality, multi-vehicle pileup. Among the deceased was Bhupinder Deol, whose estate and family brought suit. The case, which involved Deol and other decedents, was tried to a jury, which returned a nearly $39 million verdict. Deol's family's share was nearly $16.5 million, and the family's noneconomic damages accounted for just over $15 million. Concluding that the award neither shocked the conscience nor manifested passion or prejudice, the court of appeals affirmed.

In divided opinions, the Supreme Court of Texas reversed. Writing for a plurality, Justice Blacklock concluded that parties must provide both evidence of the existence of mental anguish and evidence to justify the amount awarded. The plurality would require parties defending a noneconomic damages award to demonstrate a rational connection between the evidence and the amount awarded. The "shock the conscience" standard of review is insufficient, and parties should not rely on unsubstantiated anchors or ratios between economic and noneconomic damages.

Justice Devine, joined by Justice Boyd, concurred in the judgment. His concurrence expressed concern that the plurality's "rational connection" requirement is an impossible standard to meet that infringes upon the jury's traditional role.

Justice Bland concurred in part. She agreed that improper argument affected the jury's verdict but considered that a sufficient basis for reversal in this case.

The case presented a secondary issue about whether ATG Transportation, another trucking company whose truck overturned during the accident, was wrongly excluded as a responsible third party. Both concurrences agreed with the plurality that ATG should have been joined as a responsible third party, and on that basis, the Court remanded for a new trial.

I. ELECTIONS

1. Ballots

a) *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.

J. EMPLOYMENT LAW

1. Disability Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Niehay*, 671 S.W.3d 929 (Tex. June 30, 2023) [22-0179]

The issue in this case is whether morbid obesity qualifies as an "impairment" under the Texas Commission on Human Rights Act without evidence that it is caused by an underlying physiological disorder or condition.

Texas Tech dismissed Dr. Lindsey Niehay from its medical residency program, and Niehay sued for disability discrimination. claiming that Texas Tech dismissed her because it regarded her as being morbidly obese. Texas Tech filed a combined plea to the jurisdiction and motion for summary judgment, asserting that Niehay had not shown a disability as defined by the TCHRA. Specifically, Texas Tech argued that morbid obesity is not a disability without evidence that it is caused by an underlying physiological disorder. The trial court denied the plea and motion, and the court of appeals affirmed.

The Supreme Court reversed. The majority opinion, authored by Chief Justice Hecht, held that the plain language of the TCHRA's definition of disability as "a mental or physical impairment" requires an impairment to have an underlying a physiological disorder or condition. It further held that weight is not a physiological disorder or condition—it is a physical characteristic. Niehay presented no evidence that her morbid obesity is caused by an underlying physiological disorder or that Texas Tech perceived it as such, so the Court ultimately held that Niehay has not shown a disability under the TCHRA.

Justice Blacklock filed a concurring opinion, joined by two other justices. He emphasized that the medical community's current understanding of morbid obesity is not a basis for interpreting fixed statutory language enacted in 1993 and that while Texas courts may look to federal law for assistance, federal authorities are not binding on Texas courts interpreting the TCHRA.

Justice Boyd filed a dissenting opinion, joined by one other justice. He would have held that morbid obesity

qualifies as an impairment without evidence of an underlying physiological condition.

2. 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.

3. Sexual Harassment

a) *Fossil Grp., Inc. v. Harris*, ___ S.W.3d ___, 2024 WL 2982976 (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.

4. Whistleblower Actions

a) *City of Denton v. Grim*, ___ S.W.3d ___, 2024 WL 1945118 (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.

K. EVIDENCE

1. Exclusion for Untimely Disclosure

a) *Jackson v. Takara*, 675 S.W.3d 1 (Tex. Sept. 1, 2023) (per curiam) [22-0288]

The issue in this case is whether the trial court committed reversible error by allowing an untimely identified witness to testify.

Reuben Hitchcock fell while trimming a tree on Andrew Jackson's property and died. Hitchcock's sister, Kristen Takara, sued Jackson on the estate's behalf. Shortly before trial, Jackson identified Valerie McElwrath, a neighbor, as a person with knowledge of relevant facts. Takara moved to exclude McElwrath from testifying because the identification was untimely. Jackson's counsel represented to the trial court, without objection, that the parties had agreed to extend the discovery period and that Takara was not unfairly surprised or unfairly prejudiced because she knew McElwrath and mentioned McElwrath by name multiple times in her deposition. The trial court allowed McElwrath to testify. The jury found neither Jackson nor Hitchcock negligent, and the trial court rendered a take-nothing judgment.

A divided court of appeals reversed and remanded for a new trial. It held the trial court should have prohibited McElwrath from testifying because she was not timely identified, there was no discovery agreement that complied with Rule 11, and there was no evidence in the record that Takara was aware of McElwrath or her potential testimony.

The Supreme Court reversed and rendered judgment for Jackson. The Court held that the trial court did not abuse its discretion by allowing McElwrath to testify because the record included counsel's uncontested statements regarding the state of discovery and Takara's knowledge of McElwrath. The Court also held that the trial court's ruling, even if erroneous, would not constitute reversible error because the jury's failure to find negligence did not turn on McElwrath's testimony.

2. Medical Expense Affidavits

a) *In re Chefs' Produce of Hous., Inc.*, 667 S.W.3d 297 (Tex. Apr. 21, 2023) (per curiam) [22-0286]

The issue in this mandamus proceeding is whether the trial court abused its discretion by striking Chefs' Produce's medical expense counteraffidavit and prohibiting the counteraffiant from testifying at trial.

Antonio Estrada was injured in

a car accident with Mario Rangel, who was driving a box truck for his employer, Chefs' Produce. Estrada sued both Rangel and Chefs' Produce claiming that Rangel's negligence caused the wreck.

Estrada timely filed an affidavit under Section 18.001 of the Civil Practice and Remedies Code averring that he had incurred reasonable and necessary medical expenses because of the accident. Chefs' Produce timely filed a counteraffidavit under Section 18.001(f) challenging Estrada's expenses. Chefs' Produce retained an anesthesiologist and pain management doctor as the counteraffiant.

Estrada moved to strike the counteraffidavit and testimony. The trial court granted the motion to strike and precluded the counteraffiant from testifying at trial. Chefs' Produce moved for reconsideration shortly after the Supreme Court issued its opinion in *In re Allstate Indemnity Insurance Co.*, 622 S.W.3d 870 (Tex. 2021), arguing that that opinion established that the trial court improperly struck the counteraffidavit. The trial court denied the motion for reconsideration. Chefs' Produce sought mandamus relief in the court of appeals, and a divided court denied relief.

The Supreme Court conditionally granted Chefs' Produce's petition for writ of mandamus and ordered the trial court to vacate its order striking the counteraffidavit and testimony. The Court held that the counteraffidavit satisfied all of Section 18.001(f)'s requirements and provided Estrada with reasonable notice of Chefs' Produce's basis for controverting the initial affidavit's claims. The Court further held that the mere inclusion of a causation opinion in an otherwise compliant Section 18.001(f) counteraffidavit is not a proper basis for striking it. Finally, the Court held that Chefs' Produce lacked an adequate appellate remedy because, given the procedural posture of the case, the trial court's improper order effectively foreclosed Chefs' Produce from presenting rebuttal testimony on the reasonableness and necessity of Estrada's medical expenses.

3. 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.

L. 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. Termination of Parental Rights

a) *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.

b) *In re J.N.*, 670 S.W.3d 614 (Tex. June 9, 2023) [22-0419]]

This case concerns a trial court's failure to interview a child under Section 153.009(a) of the Family Code. Under this section, upon application by certain parties, a trial court "shall" interview a child twelve and older to determine the child's wishes as to who will have the exclusive right to determine their primary residence. This statute applies only to nonjury trials or hearings. Therefore, a litigant must forgo her right to a jury trial to benefit from Section 153.009(a)'s interview provision.

In this divorce proceeding, Mother withdrew her jury demand and properly invoked the trial court's statutory obligation to interview her thirteen-year-old daughter regarding which parent she would prefer to have determine her primary residence. The trial court did not conduct the interview and ultimately granted the father the exclusive right to determine the primary residence of the couple's four children.

The court of appeals affirmed in a split decision. The panel agreed that the trial court erred in failing to conduct an in-chambers interview but disagreed about whether the error is subject to a harm analysis.

The Supreme Court held that the trial court erred in failing to conduct the interview because Section 153.009(a)'s interview requirement is mandatory, and such an error is subject to a harm analysis. Here, the trial court's error was harmful. Consequently, the Court reversed the judgment in part and remanded for an interview under Section 153.009(a) and a new judgment regarding the child's primary residence.

c) *In re J.S.*, 670 S.W.3d 591 (Tex. June 16, 2023) [22-0420]

This case concerns the findings a trial court is required to make under Section 263.401(b) of the Family Code to extend the automatic dismissal deadline for a parental-rights-termination suit.

The suit to terminate the rights of J.S.'s parents was initially set for trial by remote appearance on the same day as the deadline for either commencing trial or dismissing the suit under Section 263.401(a). But J.S.'s attorney ad litem failed to appear, and both parents made last-minute requests for a jury trial. The trial court granted DFPS's motion to extend the dismissal deadline and rescheduled the trial to a later date. At DFPS's prompting, the court made an oral finding that the extension was in the best interest of the child. The court did not mention the second finding required by Section 263.401(b), that extraordinary circumstances necessitate the child's remaining in DFPS's conservatorship. Neither parent's counsel objected to the extension. The court later signed a written extension order that included both findings.

The parents' rights were eventually terminated after a jury trial, and Mother appealed. The court of appeals reversed, holding that the trial court's failure to make the extraordinary-circumstances finding when it granted the extension deprived the court of subject-matter jurisdiction. The court of appeals then vacated the trial court's judgment and dismissed the case.

The Supreme Court reversed. The Court held while Section 263.401(b) requires the best-interest and extraordinary-circumstances findings to be made expressly, these findings are mandatory rather than jurisdictional. As a result, a parent whose rights have been terminated generally must object before the initial automatic dismissal deadline passes in order to preserve the complaint for appellate review. Because Mother did not raise her complaint before the initial automatic dismissal deadline and did not oppose the extension, she had not preserved her complaint. Holding otherwise, the Court said, would penalize the trial court for doing its best to honor the parents' last-minute requests for a jury trial.

Justice Boyd concurred in judgment. He would have held that the findings are jurisdictional but can be made impliedly. Because the record in this case supports an implied finding of extraordinary circumstances, he joined the Court's judgment.

d) *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.

e) *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.

M. GOVERNMENTAL IMMUNITY

1. Arm of the State

a) *CPS Energy v. Elec. Reliability Council of Tex.* And *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund LLC*, 671 S.W.3d 605 (Tex. June 23, 2023) [22-0056, 22-0196]

The main issue in these cases is whether ERCOT is entitled to sovereign immunity.

In *CPS*, CPS sued ERCOT for breach of contract and other claims, alleging that ERCOT unlawfully short-paid CPS to offset losses suffered after Winter Storm Uri caused some wholesale market participants defaulted on their payment obligations to ERCOT. ERCOT filed a plea to the jurisdiction, asserting sovereign immunity and, alternatively, that the Public Utility Commission had exclusive jurisdiction. The trial court denied the plea, and the court of appeals reversed and dismissed the claims for lack of jurisdiction.

In *Panda*, Panda sued for fraud and other claims, claiming that ERCOT fraudulently projected a severe electricity shortfall when in fact there would ba an excess of supply and that Panda relied on ERCOT's reports when it decided to construct new power plants. ERCOT filed a plea to the jurisdiction asserting sovereign immunity and that the PUC had exclusive jurisdiction. The trial court granted the plea. Sitting en banc, the court of appeals reversed.

In an opinion by Chief Justice Hecht, the Supreme Court rendered judgment for ERCOT in both cases. After concluding that ERCOT is a "governmental unit" entitled to an interlocutory appeal, the Court held that ERCOT is entitled to sovereign immunity. Specifically, the Court held that ERCOT is an "arm of the State" because, pursuant to the Utility Code, ERCOT operates under the direct control and oversight of the PUC, it performs the governmental function of utilities regulation, and it possesses the power to adopt and enforce rules. The Court further held that recognizing immunity satisfies the policies underlying immunity because it prevents the disruption of key governmental services, protects public funds, and respects separation of powers principles. The Court also held that the PUC has exclusive jurisdiction.

Justice Boyd and Justice Devine filed a jointly authored dissenting opinion, joined by two other justices. They agreed that ERCOT is a governmental unit and that the PUC has exclusive jurisdiction, but they would have held

that ERCOT is not entitled to sovereign immunity.

2. 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 off-site 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) *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494 (Tex. June 9, 2023) [21-0307]

This case involves the governmental/proprietary dichotomy in a breach-of-contract context. League City and Jimmy Changas entered into an agreement under Chapter 380 of the Texas Local Government Code, which permits cities to provide economic-development incentives to stimulate commercial activity. The City agreed to reimburse Jimmy Changas for certain fees and taxes if Jimmy Changas built a restaurant and created jobs in League City. After Jimmy Changas completed the project, League City refused to provide the promised reimbursements, and Jimmy Changas sued. The City filed a plea to the jurisdiction, arguing that contracts made under Chapter 380 were governmental functions and the City was therefore

immune from suit. The trial court denied the City's plea, concluding that the City acted in its proprietary capacity, and the court of appeals affirmed.

The Supreme Court likewise affirmed. First, it held that Chapter 380 contracts are not similar to those expressly identified in the Tort Claims Act as being governmental. The Act includes only community-development activities under Chapter 373 and urban-renewal activities under Chapter 374 and does not suggest that local economic-development activities under Chapter 380 should be impliedly included.

It then held that the *Wasson* factors weigh in favor of determining that the City's acts were proprietary. The City's decision to contract with Jimmy Changas was discretionary, the contract primarily benefited City residents, the City acted on its own behalf (that is, it did not act as an agent of the State), and the City's acts were not sufficiently related to a governmental function so as to make them governmental as well.

Justice Young filed a concurring opinion. Although he agreed with the majority opinion, he suggested that the Court reconsider its reliance on the list of governmental functions in the Torts Claims Act when deciding a contract case, and he questioned the usefulness of the *Wasson* factors in other cases.

Justice Blacklock filed a dissenting opinion, in which Justice Bland joined in part. He agreed with the concurrence that the *Wasson* factors do not aid the Court in answering the ultimate question of whether the City's acts were governmental or proprietary. The dissent would hold that a Chapter 380 tax-incentive grant program for local economic development is a governmental function because such contracts implement a government grant program operated for a diffuse public benefit.

c) *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.

d) *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.

3. 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.

4. 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.

5. Texas Tort Claims Act

a) *City of Austin v. Quinlan*, 669 S.W.3d 813 (Tex. Jun. 2, 2023) [22-0202]

The issue is whether the Texas Tort Claims Act waives the City of Austin's governmental immunity from a claim that it negligently maintained a permitted sidewalk café.

The City granted a restaurant a permit to use a portion of the sidewalk for a sidewalk café. The restaurant agreed to operate and maintain the sidewalk café's premises at its own expense. The City had the right to enter the sidewalk café premises to ensure the restaurant's compliance.

Quinlan was injured after exiting the restaurant when she fell from an elevated edge of the sidewalk to the street below. She sued the City, alleging, among other claims, that it negligently implemented a policy of ensuring that the restaurant complied with the maintenance agreement. The City filed a plea to the jurisdiction. The trial court denied the City's plea. A divided court of appeals affirmed with respect to Quinlan's negligent-implementation claims.

The Supreme Court reversed, holding that Quinlan's claims are subject to the discretionary-function exception to the Texas Tort Claims Act. First, the Court noted that neither Quinlan nor the court of appeals identified any maintenance- or inspection-related act that the City was affirmatively required to perform under the maintenance agreement. Rather, the agreement granted the City permission to conduct inspections and order additional maintenance as it deemed fit. Second, the Court rejected Quinlan's argument that the City had a nondelegable statutory duty to protect the public from sidewalk cafés with dangerous conditions. Because the City had discretion, but not a legal obligation, to intervene, the City's decision not to do so was a discretionary decision for which it remained immune.

b) *City of Houston v. Green*, 672 S.W.3d 27 (Tex. June 30, 2023) (per curiam) [22-0295]

The issue in this case is whether a police officer is entitled to immunity under the Texas Tort Claims Act's emergency exception.

Houston police officer Samuel Omesa was responding to an emergency call when his vehicle collided with one driven by Crystal Green. Omesa testified that he had his emergency lights on and his siren activated intermittently. He claimed that he

stopped and looked both ways at each intersection he crossed but that Green appeared suddenly from behind other vehicles and did not have her headlights on. Green disputed Omesa's testimony that he was driving at a reasonable speed and had his siren on.

Green sued the City of Houston. The City moved for summary judgment, asserting that the TTCA's emergency exception preserved the City's immunity. The trial court denied the motion, and the City appealed. The court of appeals affirmed, holding that Green raised a fact issue as to whether Omesa's conduct was reckless. The City petitioned the Supreme Court for review.

In a per curiam opinion, the Court reversed the court of appeals' judgment and rendered judgment dismissing Green's claims against the City. The Court held that the emergency exception applies—and that immunity is not waived—because Green failed to raise a fact issue as to whether Omesa acted with reckless disregard for the safety of others. Specifically, Green failed to introduce evidence that could support anything more than a momentary judgment lapse or failure to use due care, neither of which suffice to show reckless disregard for the safety of others.

6. Ultra Vires Claims

a) *Image API, LLC v. Young*, ___ S.W.3d ___, 2024 WL 3075693 (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.

N. 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.

O. 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. Incorporation by Reference

a) *ExxonMobil Corp. v. Nat'l Union Fire Ins. Co.*, 672 S.W.3d 415 (Tex. Apr. 14, 2023) [21-0936]

At issue in this case is whether an umbrella insurance policy incorporates the payout limits of an underlying service agreement.

ExxonMobil entered into a service agreement with Savage Refinery Services, under which Savage was required to obtain liability insurance for its employees and to name Exxon as an additional insured. Savage obliged and obtained five different policies. National Union Fire Insurance Company underwrote two of them—a primary policy and an umbrella policy. After two Savage employees were severely injured during a workplace accident, Exxon settled with both for about $24 million, some of which National Union paid under its primary policy. National Union denied Exxon coverage under its umbrella policy, however, so Exxon sued for breach of contract. The trial court granted Exxon summary judgment, but the court of appeals reversed, holding that Exxon was limited to only primary coverage because the umbrella policy incorporated the primary policy's definition of "additional insured," which in turn was "informed by" the coverage limits spelled out in the service agreement.

The Supreme Court reversed. The Court began by noting the longstanding principles that insurance policies can incorporate extrinsic

contracts, but only if they clearly do so, and that such extrinsic contracts will be referred to only to the extent required by the incorporation, but no further. Based on those principles, the Court concluded that National Union's umbrella policy incorporated the primary policy only for the purpose of identifying who was insured. The Court also rejected National Union's argument that Exxon was not entitled to coverage under the umbrella policy because that policy expressly disclaimed "broader coverage" than the primary policy. "Interpreting 'broader coverage' to refer to payout limits," the Court explained, "would give the umbrella policy a self-defeating meaning," and nothing in the policy's text required a "departure from the settled understanding that umbrella policies provide greater limits for *the risks already covered* by primary policies." The Court accordingly reversed and remanded for further proceedings in light of Exxon's status as an insured under National Union's umbrella policy.

3. 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.

4. Rescission of Policy

a) *Am. Nat'l Ins. Co. v. Arce*, 672 S.W.3d 347 (Tex. Apr. 28, 2023) [21-0843]

The principal issue is whether proof of intent to deceive is required to rescind a life insurance policy during the contestability period based on a material misrepresentation in the insurance application.

Sergio Arce applied for life insurance from American National Insurance Company without disclosing certain health conditions. Thirteen days after the policy was issued, Arce died in an automobile accident. American National refused to pay the beneficiary's claim because Arce had misrepresented his medical history.

In the beneficiary's suit for breach of contract and violations of the Texas Insurance Code, the insurer argued that the common-law scienter requirement is repugnant to Section 705.051 of the Insurance Code, which provides that a misrepresentation in a life insurance application "does not defeat recovery . . . unless the misrepresentation: (1) is of a material fact; and (2) affects the risks assumed." According to the insurer, Section 705.051 permits rescission of a policy if the two stated conditions are satisfied and, in doing so, renders the common-law intent-to-deceive requirement a dead letter. The trial court agreed and granted a take-nothing judgment for the insurer, but the court of appeals reversed, holding that the insurer could not rescind the policy without pleading and proving the misrepresentations were intentional.

The Supreme Court affirmed in part and reversed in part. On the main issue, the Court held that Section 705.051 does not abrogate the common law because the statute prescribes necessary, not exclusive or sufficient, conditions for denying recovery under a contestable life insurance policy. As written, Section 705.051 does not guarantee the insurer can "defeat recovery under the policy" if both conditions are satisfied; it only guarantees that recovery *cannot* be defeated if one or the other is not. The Court was not persuaded that this construction would render meaningless the express inclusion of an intent-to-deceive limitation in a different statutory provision applicable to incontestable life insurance policies. Finding no conflict with the statute, the Court also rejected the insurer's entreaty to repudiate the common-law rule as a product of "judicial drift" that adopts a minority view. However, the Court reversed and rendered judgment that the insurer did not forfeit its misrepresentation defense under a statutory notice provision that was inapplicable to Arce's life insurance policy as a matter of law.

In addition to joining the Court's opinion, Justice Young filed a concurring opinion elaborating on why principles of stare decisis require the Court to adhere to the common-law rule, which has coexisted with the statutory scheme for more than a century.

P. 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*, ___ S.W.3d ___, 2024 WL 3210234 (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.

Q. 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.

R. JURISDICTION

1. Appellate

a) *In re A.B.*, 676 S.W.3d 112 (Tex. Sept. 15, 2023) (per curiam) [22-0864]

The issue is whether an appellant can consolidate two separate appeals from a single judgment in one court of appeals by moving to consolidate in one court of appeals and voluntarily dismissing the appeal in another, when both courts of appeals have statutory jurisdiction to hear the case and no party objects.

In Gregg County, the trial court terminated Mother's and Father's parental rights in one trial court proceeding. Both the Sixth and Twelfth Courts of Appeals have jurisdiction to hear appeals from Gregg County. Father noticed his appeal to the Twelfth Court, and Mother to the Sixth Court. Father then amended his notice of appeal to reflect that he was appealing to the Sixth Court under the same case number as Mother. Father also moved to dismiss his appeal in the Twelfth Court, and the Twelfth Court granted his motion. After briefing was complete, the Sixth Court determined that it lacked jurisdiction over Father's appeal because the Twelfth Court had acquired dominant jurisdiction, and Father's amended notice of appeal did not properly invoke the Sixth Court's jurisdiction.

The Supreme Court reversed, holding that Father's amended notice of appeal attempted compliance with the rule of judicial administration requiring consolidation of such cases. The Sixth Court acquired dominant jurisdiction when Father indicated his lack of intent to prosecute the appeal in the Twelfth Court.

b) *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.

c) *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. Mandamus Jurisdiction

a) *In re Renshaw*, 672 S.W.3d 426 (Tex. July 14, 2023) (per curiam) [22-1076]

The central issue in this proceeding is whether a court of appeals must address a petitioner's request for mandamus relief when he expressly requests it as alternative relief.

Timothy Renshaw petitioned the trial court for release from his civil commitment, which the court denied without a hearing. Renshaw petitioned the court of appeals for writ of habeas corpus and, in the alternative, requested that the court "consider this a petition for a writ of mandamus." The court dismissed his habeas petition for want of original jurisdiction but did not address Renshaw's express request for mandamus relief.

Without hearing oral argument, the Supreme Court conditionally granted mandamus relief and directed the court of appeals to withdraw its previous opinion and to reconsider Renshaw's habeas corpus petition as a petition for writ of mandamus, as he requested.

3. 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.

4. Subject Matter Jurisdiction

a) *Hensley v. State Comm'n on Jud. Conduct*, ___ S.W.3d ___, 2024 WL 3210043 (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.

S. JUVENILE JUSTICE

1. Mens Rea

a) *In re T.V.T.*, 675 S.W.3d 303 (Tex. Sept. 8, 2023) (per curiam) [22-0388]

This case concerns whether consent is relevant when a child under the age of fourteen is charged with aggravated sexual assault of another child under fourteen.

The State charged T.V.T. with aggravated sexual assault. At the time of the offense, T.V.T. was thirteen years old and the complainant was twelve. The trial court placed T.V.T. on probation and required that he receive sex-offender treatment. The court of appeals reversed and dismissed the case, holding that T.V.T. could not commit sexual assault because he lacked the legal capacity to consent to sex.

Shortly thereafter, the Supreme Court held in *State v. R.R.S.*, 597 S.W.3d 835 (Tex. 2020), that juveniles under fourteen are capable of committing aggravated sexual assault.

In light of *R.R.S.*, the State moved for rehearing. The court of appeals denied the motion but issued a supplemental opinion, holding that consent, while not a defense, can still inform whether T.V.T. had the intent to commit aggravated sexual assault. The court also noted that when both the accused and complainant are close in age and under fourteen years old, it is difficult to distinguish between the victim and the offender.

The Supreme Court reversed. The Court first concluded that, even though T.V.T.'s probation had ended, the case was not moot because he still faced potential collateral consequences based on his adjudication as a sex offender. The Court then held that evidence of a victim's consent is not relevant to the accused's *mens rea*, reasoning that such a rule would circumvent the Legislature's exclusion of consent as a defense for engaging in the prohibited conduct with children under fourteen. The Court also found immaterial the fact that the T.V.T. and the victim were close in age, noting that the plain text of the statute covers conduct between children who are both under fourteen. The Court remanded the case to the court of appeals for consideration of T.V.T.'s constitutional arguments.

T. MEDICAL MALPRACTICE

1. Expert Reports

a) *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879 (Tex. June 30, 2023) [21-0470]

This case examines what constitutes a "health care liability claim" under the Texas Medical Liability Act.

Christine Faber sued an assisted living facility for premises liability after her mother, a facility resident, died from injuries she sustained while being pushed on a rolling walker by a facility employee along the facility's sidewalk. A walker wheel caught in a crack, and Faber's mother fell. The facility filed a motion to dismiss on the grounds that Faber had not timely served an expert report as required by the TMLA. The trial court granted the motion, but the court of appeals, sitting en banc, reversed.

In an opinion by Justice Busby, the Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing Faber's claim, and remanded the case to the trial court for an award of attorney's fees. The Court explained that the court of appeals did not consider the entire record, which included allegations directed to employee conduct, the condition of the walker, and the decedent's status as a recipient of personal-care services. Applying the factors articulated in *Ross v. St. Luke's Episcopal Hospital*, the Court held that Faber's claim is a health care liability claim under the TMLA and that, therefore, an expert report was required.

Justice Young, joined by Justice Blacklock, concurred, suggesting that the *Ross* factors should be revisited.

Justice Boyd dissented, joined by Justice Lehrmann and Justice Devine. The dissent would have affirmed because the record lacks evidence that the facility provided the decedent with "health care" as defined in the Act.

U. 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. Health Care Liability Claims

a) *Uriegas v. Kenmar Residential HCS Servs., Inc.*, 675 S.W.3d 787 (Tex. Sept. 15, 2023) (per curiam) [22-0317]

The issue in this Chapter 74 case is whether two expert reports provide a fair summary of the experts' opinions regarding the standard of care and breach elements of a negligence claim against a residential care facility.

Brandon Uriegas, a nonverbal adult with intellectual and physical disabilities, resided at a residential care facility operated by Kenmar. Uriegas fell while showering and was treated for scalp lacerations. The next day, Uriegas fell in the bathroom

again, allegedly while unsupervised, and did not receive an immediate medical evaluation. When Uriegas could not stand the following day, Kenmar staff took Uriegas to the hospital where he was diagnosed with a fractured hip and femur. Uriegas's guardian sued Kenmar and provided expert reports. Cumulatively, the reports state that after Uriegas fell the first time, Kenmar should have closely monitored Uriegas, especially while using the bathroom, and that Kenmar should have sought an immediate medical assessment of Uriegas after the second fall because Uriegas could not verbalize any pain or discomfort. The trial court denied Kenmar's motion to dismiss under Chapter 74 on the basis that the reports insufficiently described the applicable standard of care and breach of that standard. Agreeing with Kenmar, the court of appeals reversed.

The Supreme Court reversed the court of appeals, holding that the reports together provide a fair summary of the applicable standard of care and breach, namely, increased monitoring after a fall and medical assessments for nonverbal patients. That Kenmar disagrees about the appropriate standard of care is not a reason to reject the expert report at this stage of the case.

V. 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.

2. State Law Preemption

a) *Hotze v. Turner*, 672 S.W.3d 380 (Tex. Apr. 21, 2023) [21-1037]

The issue in this case is whether one proposed city charter amendment may impose a higher vote threshold for adoption on another proposed city charter amendment when both win a majority of votes at the same election.

A group of citizens submitted a proposed city charter amendment, Proposition 2, that would impose a strict voter-approval requirement before the City of Houston could increase tax revenues. The Houston City Council responded with its own proposed amendment, Proposition 1, that would require a more lenient voter-approval threshold; it also included a primacy clause that would require Proposition 1 to prevail over another majority-winning amendment "relating to limitations on increases in City revenues" if Proposition 1 passed with a higher number of votes. A majority of voters approved both propositions at the same election, but Proposition 1 earned more votes than Proposition 2.

The City declined to comply with Proposition 2, claiming that Proposition 1's primacy clause prevented its enforcement and, moreover, that the City Charter's reconciliation provision required such a result when two adopted amendments conflict. Bruce Hotze sued for enforcement, arguing that the primacy clause and the reconciliation provision violated a state law that provides for the adoption of a proposed charter amendment if it passes by a majority of votes. The trial court ruled that the primacy clause defeated Proposition 2. A divided court of appeals affirmed, holding that the state-law requirement that a majority-approved amendment must be adopted does not also require that the amendment be enforced.

The Supreme Court reversed, holding that the primacy clause improperly imposed a higher vote threshold than state law permits and that the City had no discretion to refuse to enforce a charter amendment after its approval and adoption. The Court observed, however, that state law does not address the unusual situation in which conflicting amendments pass simultaneously, and it remanded the case to the trial court to consider whether the City Charter's reconciliation provision governs the two amendments.

W. NEGLIGENCE

1. Duty

a) *Hous. Area Safety Council v. Mendez*, 671 S.W.3d 580 (Tex. June 23, 2023) [21-0496]

The issue in this case is whether third-party companies that collect and test employment-related drug-testing samples owe a duty of care to the employees being tested.

Mendez was required to submit to a random drug test as part of his employment. Houston Area Safety Council collected Mendez's samples, and Psychemedics tested them. Mendez's urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although two subsequent hair tests came back negative, Mendez's employer refused to assign him to any jobsites.

Mendez sued the Safety Council and Psychemedics, alleging the companies negligently administered and analyzed the first hair sample, resulting in a false positive that cost him his job. Both companies filed motions for summary judgment. The trial court concluded that the companies did not owe Mendez a duty of care and granted summary judgment for the companies. The court of appeals reversed.

The Supreme Court reversed and rendered judgment for the companies. Chief Justice Hecht delivered the opinion of the Court, which held that third-party companies hired by an employer do not owe the employees they test a common-law duty of care. The Court concluded that the risk–utility factors set out in *Greater Houston Transportation Co. v. Phillips* weigh against imposing such a duty and that declining to recognize a duty is consistent with existing tort law.

Justice Young filed a concurring opinion joined by one other justice. They agreed with the majority but wrote separately to emphasize that the result could be reached without reliance on the risk–utility factors.

Justice Boyd filed a dissenting opinion joined by two other justices. They would have held that the risk–utility factors weigh in favor of imposing a duty on the third-party companies.

b) *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*, ___ S.W.3d ___, 2024 WL 3075684 (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. Res Ipsa Loquitur

a) *Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577 (Tex. June 16, 2023) [22-0030]

The main issue in this case is whether the trial court abused its discretion by including in the jury charge an instruction on res ipsa loquitur.

Darren Ceasar alleges he was injured in a hotel elevator that ascended rapidly and then came to an abrupt stop at the wrong floor. He sued the hotel's elevator-maintenance company, Schindler, for personal injuries and presented two theories of negligence to the jury: (1) res ipsa loquitur and (2) the theory that Schindler negligently maintained the elevator's SDI board, which controls the elevator's position and velocity. The trial court submitted a jury instruction on res ipsa over Schindler's objection. The jury found for Ceasar, and the court of appeals affirmed.

The Supreme Court reversed and remanded for a new trial. The first evidentiary requirement for a res ipsa instruction is that the character of the accident is such that it would not ordinarily occur in the absence of negligence. The Court held that Ceasar presented no evidence to support this requirement because the testimony of Ceasar's elevator expert was conclusory and conflicting.

The Court further held that the court's submission of the res ipsa instruction was harmful because both of Ceasar's negligence theories were hotly contested, and the jury returned a 10–2 verdict. Finally, the Court rejected Schindler's challenges to a discovery-sanctions order, the court's exclusion of evidence, and the court's refusal to include a jury instruction on spoliation.

4. 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.

5. 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.

X. 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. Deed Construction

a) *Thomson v. Hoffman*, 674 S.W.3d 927 (Tex. Sept. 1, 2023) (per curiam) [21-0711]

At issue in this case is whether a 1956 deed reserved a fixed or floating royalty interest.

Peter and Marion Hoffman conveyed to Graves Peeler 1,070 acres of land in McMullen County, Texas, but reserved a royalty interest for Peter Hoffman. The deed expressly gave Peter "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth

(1/8th) royalty) in and to all the oil, gas and other minerals." Other parts of the deed then referred to 3/32 without using the double-fraction description. Two interpleader actions were filed and consolidated in the trial court for a determination of the deed's meaning. The trial court concluded that the deed created a fixed 3/32 nonparticipating royalty interest, but the court of appeals reversed, holding that "the usual one-eighth (1/8th) royalty" language indicated an intent to reserve a floating interest.

The Hoffmans petitioned for review. After the parties filed briefs on the merits, the Supreme Court decided *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), in which it held that an antiquated mineral instrument containing "1/8" within a double fraction raised a rebuttable presumption that 1/8 was used as a term of art to refer to the total mineral estate, not simply one-eighth of it. Because the court of appeals did not have the benefit of *Van Dyke* and its rebuttable-presumption framework, the Supreme Court vacated the court of appeals' judgment and remanded for further proceedings in light of changes in the law.

3. Force Majeure

a) *Point Energy Partners Permian LLC v. MRC Permian Co.*, 669 S.W.3d 796 (Tex. Apr. 21, 2023) [21-0461]

In this permissive interlocutory appeal, the central issue is whether a force majeure clause was properly invoked when the operation allegedly delayed by the force majeure had been untimely scheduled to begin after the lease deadline.

To suspend termination of its oil-and-gas lease at the end of the primary term, MRC had to commence drilling a new well by a certain date. But MRC mistakenly scheduled the drilling to begin three weeks after that deadline. MRC discovered its mistake after the deadline passed and invoked its lease's force majeure clause. The clause provided that "[w]hen Lessee's operations are delayed by an event of force majeure," the lease shall remain in force during the delay with ninety days to resume operations. In a notice to the lessors, MRC alleged that a month before the deadline, a wellbore instability on an unrelated lease set back its rig's schedule for drilling on other leases—including the untimely scheduled operation—by thirty hours. Point Energy responded that it had taken the lease from the lessors after the deadline had passed and challenged MRC's continued leasehold interests.

MRC sued Point Energy for tortious interference with its lease and declaratory relief that it properly invoked the force majeure clause. Point Energy counterclaimed for declaratory relief that MRC's lease terminated and that MRC's retained interests in production units for wells it had drilled during the primary term were limited in size to the smaller of two options described by the lease. On cross-motions for partial summary judgment, the trial court ordered that MRC's lease terminated, Point Energy did not establish the production-unit size as a matter of law, and MRC take nothing on its tortious-interference claims. The court of appeals reversed the declaratory

judgment that the lease terminated, concluded that the question of the production-unit size was unripe for decision, reversed the take-nothing summary judgment on the tortious-interference claim, and remanded the case.

The Supreme Court held that, construed in context, "Lessee's operations are delayed by an event of force majeure" does not refer to the delay of a necessary drilling operation that had been scheduled to commence after the deadline for perpetuating the lease. Accordingly, the Court reversed the court of appeals' judgment on the force majeure and tortious-interference issues, rendered judgment that the force majeure clause did not save the lease as a matter of law, rendered a take-nothing judgment in part on MRC's tortious-interference claims to the extent they are predicated on the force majeure clause saving the lease, and remanded the case to the court of appeals to consider two issues preserved but not reached: the size of MRC's retained production units and whether the evidence raised a fact issue on MRC's tortious-interference claims regarding any leasehold interest in the retained production units.

4. Leases

a) *Apache Corp. v. Apollo Expl., LLC*, 670 S.W.3d 319 (Tex. Apr. 28, 2023) [21-0587]

This case primarily concerns whether the oil-and-gas lease at issue departed from the default common-law rule for computing time measured "from" a particular date.

In 2011, Apollo Exploration, Cogent Exploration, and SellmoCo (collectively, Sellers), along with Gunn Oil Company, entered into purchase-and-sale agreements with Apache. In the agreements, each Seller and Gunn conveyed to Apache 75% of their interests in 109 oil-and-gas leases, one of which was the Bivins Ranch lease at issue in this appeal, and entered into joint operating agreements making Apache the operator for these leases. There were two key features of the Bivins Ranch lease: (1) its primary term, which was to last three years "from" the lease's effective date of January 1, 2007, and (2) its continuous-drilling provision, through which the lease could be continued after the primary term expired by splitting the land into three equally sized blocks and drilling a certain amount each year. However, one of these blocks, the North Block, terminated after Apache did not fulfill that year's drilling requirement for that block.

The Sellers later alleged, among other things, that Apache breached the purchase agreements by not offering the North Block and other leases back to the Sellers. Apache argued that the North Block expired January 1, 2016, not (as the Sellers argue) December 31, 2015—a one-day difference with significant consequences for the amount of potential damages. The trial court agreed with Apache, excluded the Sellers' expert witness on damages, and granted Apache's summary-judgment motion challenging the Sellers' claims on the basis that the Sellers have no evidence of damages. The court of appeals, however, reversed on each of these issues.

The Supreme Court reversed. The Court held that the Bivins Ranch lease unambiguously imposed a

January 1, 2010, expiration date for the primary term, which resulted in a January 1, 2016, expiration date for the North Block based on the text of the lease's continuous-drilling provision. The lease's primary term measured time "from" January 1, triggering the longstanding default common-law rule that years measured in this way end on the anniversary of that date (i.e., January 1 rather than December 31). Parties may measure time in any other way; and if they measure time "from" a date, they may freely depart from the default rule, but the text of the lease did not do so. The Court also addressed several other issues, holding that (1) the purchase agreements did not require Apache to offer Gunn's former interest—the remainder of which Apache had later also acquired, along with Gunn's purchase and sale rights—back to the Sellers, (2) the purchase agreements' back-in trigger—the point at which each Seller could "back in" for up to one-third of the interests it sold to Apache—should be calculated based on a 2:1 ratio of specified revenues versus specified expenses, and (3) the trial court correctly excluded the Sellers' expert witness on damages. The Court then remanded the case to the court of appeals to determine whether the Sellers otherwise produced evidence sufficient to demonstrate damages and to address all remaining issues.

5. Pooling

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.*, ___ S.W.3d ___, 2024 WL 3210180 (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.

6. 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.

Y. 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.

Z. 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. 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.

4. Vexatious Litigants

a) *Serafine v. Crump*, ___ S.W.3d ___, 2024 WL 3075697 (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.

AA. PROCEDURE—PRETRIAL

1. Discovery

a) *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.

2. Dismissal

a) *In re First Rsrv. Mgmt., L.P.*, 671 S.W.3d 653 (Tex. June 23, 2023) [22-0227]

The issue in this case is whether the trial court should have dismissed the plaintiffs' negligent-undertaking claim against a group of private-equity investors under Texas Rule of Civil Procedure 91a.

After explosions at a chemical plant caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. When it became clear that the original defendant, plant-owner TPC, was bankrupt, Plaintiffs sued TPC's private-equity investors, First Reserve, for negligent undertaking. Plaintiffs allege that First Reserve undertook to take charge of TPC's operations and was negligent by failing to provide resources for safety measures that could have prevented the explosions. The trial court denied the motion to dismiss, and the court of appeals denied mandamus relief.

The Supreme Court held that the trial court should have dismissed the claim for lacking a basis in law. The only factual allegation in the petition about how First Reserve controlled TPC's operations is that First Reserve, together with another investor group, appointed four members to the five-member board of managers that governed TPC. Plaintiffs failed to plead facts that would take First Reserve's conduct outside the norm of private-

equity-investor behavior.

Despite its holding, the Court declined to grant relief because of procedural irregularities in the case caused by TPC's bankruptcy. Justice Boyd concurred in the Court's disposition but did not file a separate opinion.

b) *McLane Champions, LLC v. Hous. Baseball Partners LLC*, 671 S.W.3d 907 (Tex. June 30, 2023) [21-0641]

The issue in this case is whether the Texas Citizens Participation Act applies to a private business transaction between private parties that later generates public interest.

Houston Baseball Partners purchased the Houston Astros from McLane Champions in 2011. The deal included both the team and its interest in a planned regional sports network, in which Comcast also owned an interest. Partners alleges that the Astros' interest in the proposed network was the primary reason Partners acquired the team. But the network collapsed shortly after the purchase. Partners alleged that Champions and Comcast had materially misrepresented the proposed network's financial prospects, causing Partners to pay substantially more for the Astros than the team was worth. Partners sued, and Champions moved to dismiss Partners' claims under the TCPA. The trial court denied the motion, and the court of appeals affirmed.

The Supreme Court affirmed, holding that the TCPA did not apply to Partners' claims because Partners' lawsuit was not based on or in response to Champions' exercise of either the right of free speech or the right of association. The communications underlying Partners' suit were not "made in connection with a matter of public concern" because they did not hold relevance to a public audience when they were made. Rather, the challenged communications were private business negotiations in an arms-length transaction subject to a nondisclosure agreement relevant only to the private business interests of the parties. And the "common interest" that individuals join together to express, promote, pursue, or defend when exercising that right under the TCPA must relate to a government proceeding or a matter of public concern. Because the interest that Champions joined with Comcast to promote was their mutual private business interests, the Court held that the TCPA did not apply.

Chief Justice Hecht, joined by Justice Blacklock, dissented. He would have held that Partners' suit implicated Champions' right to free speech under the TCPA and that Partners failed to make a prima facie case for its fraud-based claims.

Justice Blacklock dissented separately to further highlight that the basis for Partners' lawsuit is substantially undermined by the Astros' extraordinary competitive and financial success under Partners' ownership.

3. 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.

4. Statute of Limitations

a) *Ferrer v. Almanza*, 667 S.W.3d 735 (Tex. Apr. 28, 2023) [21-0513]

The issue in this case is whether a statute that suspends the running of a statute of limitations during a defendant's "absence from this state" applies when a Texas resident is physically absent from Texas but otherwise subject to personal jurisdiction and amenable to service.

Sibel Ferrer sued Isabella Almanza for personal injuries but did not file her claim until more than two years after the accident. Almanza moved for summary judgment on limitations. Ferrer responded that the running of limitations was suspended while Almanza was attending college outside Texas. Ferrer relied on Section 16.063 of the Civil Practice and Remedies Code, which suspends the running of a statute of limitations during a defendant's "absence from this state." The trial court granted summary judgment for Almanza, and the court of appeals affirmed. Ferrer petitioned for review, arguing that the statute required the limitations period to be suspended while Almanza was physically absent from Texas.

The Supreme Court affirmed. The Court held that a defendant's "absence from this state" under Section 16.063 does not depend on physical location but rather on whether the defendant is subject to personal jurisdiction and service. The Court applied the interpretation of "absence" it adopted in *Ashley v. Hawkins*, 293 S.W.3d 175 (Tex. 2009), in which the Court

concluded that Section 16.063 does not apply to a defendant who permanently leaves Texas but remains subject to personal jurisdiction and is amenable to service under the Texas long-arm statute. The Court held here that Section 16.063 likewise does not apply to a Texas resident who is subject to personal jurisdiction and amenable to service during the limitations period. The Court rejected Ferrer's argument that *Ashley* is distinguishable, concluding that Section 16.063's text does not support applying it only to Texas residents. The Court also noted that its interpretation was bolstered by the Legislature's codification of Section 16.063, which deleted two phrases the Court previously had relied on to hold that the statute applied to physical absences from the state, and the fact that the Legislature had not amended the statute since *Ashley* was decided.

Justice Busby dissented. He would have held that the plain meaning of "absence" as used in Section 16.063 applies to the time a defendant is living out of state, and he argued that the Court's construction renders the statute a nullity.

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. 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.

BB. PROCEDURE—TRIAL AND POST-TRIAL

1. 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.

2. Jury Instructions and Questions

a) *Horton v. Kan. City S. Ry. Co.*, ___ S.W.3d ___, 2024 WL 3210468 (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.

3. New Trial Orders

a) *In re Rudolph Auto., LLC*, 674 S.W.3d 289 (Tex. June 16, 2023) [21-0135]

The issue in this case is whether the trial court abused its discretion in granting a new trial.

This case arose after a tragic accident: after several employees consumed beer on the premises of Rudolph Mazda, one departing employee hit Irma Vanessa Villegas, another employee, with his truck when she was walking in the parking lot. Villegas suffered serious injuries and was left permanently paralyzed on one side before passing away several years later. Villegas's daughter, Andrea Juarez, sued Rudolph and its employees for negligence, failure to train, and premises liability.

A pretrial order in limine prohibited testimony about Villegas's drinking habits aside from the day of the accident. At the end of the three-week jury trial, the final witness—an expert toxicologist—provided testimony that the court found to have violated the order. The judge gave a stern limiting instruction to the jury and the trial proceeded. The jury awarded Villegas and Juarez over $4 million in damages.

Juarez then filed a motion for new trial, which the district court granted. The court listed four reasons in its new-trial order: (1) the apportionment of responsibility to Rudolph was irreconcilable with the jury's failure to find Rudolph negligent; (2) the jury's awards in certain categories of non-economic damages were inadequate given the record's positive depiction of Villegas; (3) on the day of the jury verdict, this Court issued a decision in an unrelated case that might have affected the trial court's earlier rulings; and (4) the expert's improper testimony was incurable and caused the rendition of an improper verdict.

The court of appeals denied mandamus relief. The Supreme Court granted relief based on its precedents requiring clear, specific, and valid reasons to justify a new trial.

The Court reasoned that, individually or collectively, none of the articulated errors warranted a new trial: (1) the verdict could be harmonized as a matter of law, so a new trial was unnecessary; (2) nothing in the new-trial order explained, based on the evidence, why the jury could not have rationally allocated damages as it did; (3) this Court's separate decision in a different case had no plausible effect on this verdict; and (4) the jury system depends on the presumption that jurors can and will follow instructions, as they each said they would do in this case regarding the curative instruction about expert testimony. To rebut this presumption, a new-trial order must show why this jury could not follow the instruction, but no such reason was given here.

Because no new trial was necessary, the Court conditionally granted mandamus relief and ordered the trial court to vacate the new-trial order, harmonize the verdict, and move to any remaining post-trial proceedings.

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.

CC. PRODUCTS LIABILITY

1. Design Defects

a) *Am. Honda Motor Co. v. Milburn*, ___ S.W.3d ___, 2024 WL 3210146 (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.

DD. REAL PROPERTY

1. 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.

2. Implied Reciprocal Negative Easements

a) *River Plantation Cmty. Improvement Ass'n v. River Plantation Props. LLC*, ___ S.W.3d ___, 2024 WL 2983168 (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.

3. 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.

4. Nuisance

a) *Huynh v. Blanchard*, ___ S.W.3d ___, 2024 WL 2869423 (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.

EE. RES JUDICATA

1. Judicial Estoppel

a) *Fleming v. Wilson*, ___ S.W.3d ___, 2024 WL 2226290 (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.

FF. 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.

b) *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 670 S.W.3d 622 (Tex. June 16, 2023) [21-0797]

The primary issue in this case is whether the running of limitations was equitably tolled during the appeal of the plaintiff's earlier, identical suit, which was ultimately dismissed after limitations expired.

In 2010, El Pistolón sued Levinson for professional negligence and breach of contract arising from Levinson's performance of architectural services. El Pistolón's petition included a certificate of merit as required by statute. Levinson moved to dismiss, challenging the certificate of merit. The trial court denied the motion, but the court of appeals and the Supreme Court held that the certificate failed to satisfy statutory requirements. The trial court dismissed El Pistolón's suit without prejudice in 2018.

El Pistolón immediately refiled with a new certificate of merit and pleaded that equitable tolling paused the running of limitations. Levinson moved for summary judgment on limitations. The trial court granted Levinson's motion, but the court of appeals reversed, holding that the running of limitations was equitably tolled while the 2010 suit was on appeal. Levinson petitioned for review.

The Supreme Court reversed and reinstated the trial court's judgment. The Court noted that equitable tolling is sparingly applied and limited in scope. It concluded that the court of appeals improperly relied on a broad "legal impediment rule" to support equitable tolling because the Court's precedents have limited such a rule's application to (1) cases where an injunction prevents a claimant from bringing suit and (2) legal-malpractice claims. The Court also held that the dismissal of El Pistolón's 2010 suit was not based on a procedural defect that would support equitable tolling. The Court rejected El Pistolón's alternative arguments that summary judgment was improper because Levinson's

motion inartfully recited the summary-judgment burden and failed to establish the precise accrual date.

GG. 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.

HH. TAXES

1. Property Tax

a) *Bexar Appraisal Dist. v. Johnson*, ___ S.W.3d ___, 2024 WL 2869321 (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.

b) *Duncan House Charitable Corp. v. Harris Cnty. Appraisal Dist.*, 676 S.W.3d 653 (Tex. Sept. 1, 2023) (per curiam) [21-1117]

This case concerns the applicability of a charitable tax exemption.

Duncan House applied for a charitable tax exemption for the 2017 tax year covering its interest in an historic home, but its application was denied. Duncan House filed suit for judicial review. When its protest for a 2018 exemption was also denied, it amended its petition to also challenge the denial of the 2018 exemption. The trial court dismissed the 2018 claim for want of jurisdiction because Duncan House never applied for the 2018 exemption. The court of appeals affirmed, holding that a timely filing of an application for the exemption is a statutory prerequisite to receive the exemption.

The Supreme Court reversed, holding that Duncan House did not need to apply for 2018 if it was entitled to the 2017 exemption. That issue

remains pending in the trial court. If the courts ultimately conclude that Duncan House did not qualify for the exemption in 2017, Duncan House's failure to timely apply for the 2018 exemption will preclude it from receiving the exemption for 2018. But if the courts ultimately allow the exemption for 2017, Duncan House will then be entitled to the exemption for all subsequent years, including 2018. The Court remanded to the trial court for further proceedings.

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.*, ___ S.W.3d ___, 2024 WL 3075706 (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 non-jurisdictional 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.*, ___ S.W.3d ___, 2024 WL 3076317 (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.

II. TEXAS DISASTER ACT

1. Executive Power

a) *Abbott v. Harris County*, 672 S.W.3d 1 (Tex. June 30, 2023) [22-0124]

The question presented in this case is whether the Governor has authority to issue executive orders that prohibit local governments from imposing mask-wearing requirements in response to the coronavirus pandemic.

In 2020 and 2021, Harris County officials issued a series of executive orders requiring masks in certain public settings. The Governor then issued executive order GA-38, which stated that no local government or official "may require any person to wear a face covering." Citing independent authority under the Disaster Act and the Health and Safety Code, Harris County obtained a temporary injunction against the enforcement of GA-38 and future orders. The court of appeals affirmed.

The Supreme Court reversed and dissolved the temporary injunction. It concluded that the County had standing to sue the Attorney General but no probable right to relief. The Court concluded that county judges, who are the Governor's designated agents, have no authority to issue contrary orders. And while the Court noted that the Governor's view of the Act created constitutional questions, it concluded that GA-38 fell within the Governor's authority to control the movement of persons and the occupancy of premises in a disaster area. In light of statutory provisions vesting the State

with final authority over contagious disease response, the Court concluded that the Disaster Act at least authorizes the Governor to control local governments' disease control measures, whether or not it also allows him to impose mask-wearing requirements of his own. In light of its decision, the Court vacated and remanded similar cases that were consolidated for oral argument.

Justice Lehrmann concurred, noting her view that the Governor's authority to balance competing concerns when responding to a disaster comes from the Disaster Act itself.

JJ. TEXAS MEDICAID FRAUD PREVENTION ACT

1. Unlawful Acts

a) *Malouf v. State*, ___ S.W.3d ___, 2024 WL 3075672 (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. 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.

2. 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.

3. Public Information Act

a) *Univ. of Tex. at Austin v. Gatehouse Media Tex. Holdings, II, Inc.*, 656 S.W.3d 791 (Tex. App.—El Paso 2022), *pet. granted* (May 31, 2024) [23-0023]

The issue in this case is whether the Texas Public Information Act gives the University of Texas discretion to withhold information concerning the results of disciplinary proceedings.

Gatehouse Media sent a Public Information Act request to the University, seeking the results of disciplinary proceedings in which the University determined that a student had been an "alleged perpetrator" of a violent crime or sexual offense and committed a violation of the University's rules or policies. The University declined to provide the information, asserting that the Federal Education Rights and Privacy Act of 1974 does not require this information's disclosure.

Gatehouse filed a petition for mandamus in the trial court, seeking to compel the disclosure. Gatehouse then moved for summary judgment, claiming that while FERPA makes the University's disclosure of disciplinary information discretionary, the mandatory-disclosure requirements of the PIA revoked the University's discretion, requiring disclosure here. The trial court granted Gatehouse's motion, finding that the information was presumed subject to disclosure because the University failed to seek an opinion

from the Office of the Attorney General, as the PIA requires. The court of appeals affirmed.

The University filed a petition for review, arguing that disclosure of the requested information is discretionary under both state and federal law. Additionally, the University contends that past opinions from the Attorney General and this Court render such an opinion unnecessary in this case. The Supreme 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. Legal Malpractice

a) *Newsom, Terry & Newsom, LLP v. Henry S. Miller Com. Co.*, 684 S.W.3d 502 (Tex. App.—Dallas 2022), *pet. granted* (Mar. 15, 2024) [22-1143]

In this case, the issues are the propriety of an assignment of a legal-malpractice claim and whether a jury instruction impermissibly commented on the weight of the evidence.

HSM is a real estate broker. Its former employee negotiated the purchase of nine commercial properties on behalf of a client. During the negotiations, the employee represented to the seller that the buyer was the beneficiary of a multimillion-dollar trust, that he had verified the buyer's financial means, and that the transactions would close imminently. But after the closing date was rescheduled multiple times, the buyer disappeared. The properties were either deeded to banks

in lieu of foreclosure or sold at a loss.

Lawyer Steven Terry represented HSM and its employee in the seller's subsequent lawsuit. Despite knowing that the buyer could be held at least partly responsible for the seller's damages, Terry initially did not try to find him or designate him as a responsible third party. Terry later moved to designate the buyer as an RTP shortly before trial. The seller objected to the motion's untimeliness. The trial court denied the motion and ultimately rendered judgment on the jury's verdict for the seller.

In the aftermath, HSM sued Terry for legal malpractice, alleging that he was negligent in failing to timely designate the buyer as an RTP and in stipulating that HSM was responsible for the employee's conduct. Around the same time, the seller filed an involuntary bankruptcy petition against HSM. The reorganization plan approved by the bankruptcy court assigned part of HSM's malpractice claim to the seller and also gave the seller the right to veto any settlement between HSM and Terry.

This appeal arises from the second trial of the legal-malpractice suit. The trial court rendered judgment on the jury's verdict for HSM, awarding it $15 million in actual and exemplary damages. A split panel of the court of appeals reversed and remanded for a third trial. The majority held that language in a jury instruction on designating RTPs constituted an impermissible comment on the weight of the evidence about the buyer's responsibility. Terry also reurged his challenge, rejected by the court in the first appeal, that HSM's recovery is barred because the assignment of its malpractice claim and settlement-veto power to the seller is impermissible under Supreme Court caselaw. The court declined to reconsider that holding.

HSM and Terry filed cross-petitions for review, which the Supreme Court granted.

C. CONSTITUTIONAL LAW

1. Separation of Powers

a) *Comm'n for Law. Discipline v. Webster*, 676 S.W.3d 687 (Tex. App.—El Paso 2023), *pet. granted* (June 14, 2024) [23-0694]

The issue in this case is whether sovereign immunity or the separation of powers doctrine protects government lawyers from professional discipline procedures arising from alleged misrepresentations made to a court.

First Assistant Attorney General Webster signed the State's briefs in *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020), in which Texas challenged the election procedures of other states in the 2020 election. The Supreme Court of the United States held that Texas failed to raise a cognizable interest in other states' election procedures and dismissed the case. These proceedings arise from a disciplinary complaint against Webster that alleges he was dishonest in making assertions in the *Pennsylvania* briefs.

The trial court granted Webster's plea to the jurisdiction and dismissed the disciplinary action on grounds of separation of powers. The court concluded that the action impermissibly sought to limit the Attorney General's broad power to file lawsuits on behalf of the State. The court of

appeals reversed, holding that neither separation of powers nor sovereign immunity deprived the trial court of jurisdiction. The court reasoned that sovereign immunity does not protect Webster's personal license to practice law and that the Attorney General, like all attorneys, must follow the ethical rules of professional conduct.

Webster filed a petition for review, invoking sovereign immunity and contending that the disciplinary action improperly influences the Attorney General's broad discretion in filing suits and weighing evidence when deciding to file suits. The Supreme Court granted review.

D. EMPLOYMENT LAW

1. Age Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.-El Paso v. Flores*, 657 S.W.3d 502 (Tex. App.—El Paso 2022), *pet. granted* (Mar. 15, 2024) [22-0940]

The issue in this case is whether the trial court should have granted Tech's plea to the jurisdiction on the plaintiff's age-discrimination claim.

Loretta Flores, age 59, applied to work as Chief of Staff for university president, Dr. Richard Lange. Lange, however, had personally encouraged Amy Sanchez, a 37-year-old Tech employee, to apply for the Chief of Staff position. Both candidates met the education and experience requirements and submitted all required application materials. Flores submitted an additional five letters of recommendation from her previous roles at Tech. Lange mentioned Flores's age during her interview, although the parties dispute what was said. Lange ultimately hired Sanchez for the position.

Flores sued for age discrimination and retaliation. Tech filed a plea to the jurisdiction, which the trial court denied. The court of appeals reversed as to the retaliation claim but affirmed as to age discrimination, holding that a reasonable fact finder could conclude that Lange's proffered reasons for not hiring Flores were pretextual and that age was at least a motivating factor in Tech's decision not to select Flores for the Chief of Staff position.

Tech petitioned the Supreme Court for review, arguing that Flores did not meet the required showing that Tech's proffered reason for denying Flores the position was both false and a pretext for discrimination. The Court granted Tech's petition for review.

E. FAMILY LAW

1. Division of Marital Estate

a) *In re J.Y.O.*, 684 S.W.3d 796 (Tex. App.—Dallas 2022), *pet. granted* (Mar. 15, 2024) [22-0787]

At issue in this case is the trial court's characterization and division of a discretionary bonus, retirement account, and marital residence.

Lauren and Hakan Oksuzler divorced in December 2019. The next February, Hakan was scheduled to receive a $140,000 bonus from his employer, Bank of America. The bonus was at the sole discretion of Bank of America and contingent on Hakan's continued employment; however, the bonus was based on work he performed while the parties were still married. In addition to the bonus, Hakan contributed to a retirement account through Bank of America before and during the

marriage. Hakan also owned the marital residence as his separate property before the marriage, but the parties executed a deed while they were married that listed both Hakan and Lauren as the grantor and grantee.

In August 2020, the trial court signed a final divorce decree that awarded Hakan as his separate property the $140,000 bonus, a portion of his retirement account, and the marital residence. The court of appeals (1) affirmed the judgment awarding Hakan the bonus because his right to it vested when the parties were no longer married; (2) reversed the judgment awarding Hakan a portion of his retirement account because he presented no evidence that the funds in the account were separate property; and (3) reversed the judgment awarding Hakan the marital residence because he presented no evidence rebutting the presumption that he gifted one half of the residence to Lauren.

Hakan petitioned the Supreme Court for review, arguing that the marital residence and a portion of his retirement account are his separate property. Lauren cross-petitioned the Court for review, arguing that the bonus should not be awarded entirely to Hakan as his separate property because it compensated him for work performed during the marriage.

The Court granted both petitions for review.

2. Divorce Decrees

a) *In re Marriage of Benavides*, ___ S.W.3d ___, 2023 WL 1806844 (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.

F. GOVERNMENTAL IMMUNITY

1. Official Immunity

a) *City of Houston v. Rodriguez*, 658 S.W.3d 633 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Jan. 26, 2024) [23-0094]

At issue in this case is whether a police officer acted with reckless disregard such that the Texas Tort Claims Act's emergency exception does not apply, and whether the officer acted in good faith such that he is entitled to official immunity.

Officer Corral was engaged in a high-speed chase with a suspect who drove erratically and at one point against traffic. Corral tried to make a sudden right turn but was unable to complete it because of his speed. He swerved into the curb to avoid hitting a truck waiting at the stop sign but lost control and struck the truck. Corral's affidavit asserted that he only hit the curb because his brakes were not working.

The City filed a motion for summary judgment asserting official immunity and immunity under the Texas Tort Claims Act's emergency exception. The trial court denied the motion, and the court of appeals affirmed. The court held that the City did not meet its initial burden to demonstrate good faith because Corral's affidavit did not assess the risk of harm in light of the condition of his vehicle's brakes and that Corral's alleged brake failure raises a fact issue as to whether he acted recklessly.

The City filed a petition for review, arguing that Corral engaged in risk assessment measures that precluded a fact issue for recklessness and that the unrefuted evidence offered by both parties establishes Corral's good faith. The City also argues that nothing in the record provides a reasonable inference that Corral's brakes were malfunctioning or that he was aware his brakes were malfunctioning before the incident. The Supreme Court granted the petition.

2. Texas Tort Claims Act

a) *Cai v. Chen*, 683 S.W.3d 99 (Tex. App.—Houston [14th Dist.] June 30, 2022), *pet. granted* (Sept. 1, 2023) [22-0667]

The issue is whether an employee's report of sexual harassment by a coworker and comments about the matter to another coworker fall within the employee's scope of employment for purposes of the Texas Tort Claims Act.

Chen and Cai both worked at the M.D. Anderson Research Center in Houston and were subject to the Center's policies and procedures for the filing and investigating of sexual-harassment claims. In October 2018, Cai reported to a supervisor, as well as the Center's Title IX coordinator, that Chen was sexually harassing and stalking her, which ultimately led to Chen's placement on investigative leave and the commencement of criminal charges against him. Cai also discussed the matter with another coworker, repeating her allegations of stalking and harassment by Chen.

In November 2019, Chen sued Cai, alleging claims of slander, defamation, libel, malicious, criminal prosecution, and tortious interference with contract, among others. Chen moved to

dismiss under Section 101.106(f) of the Tort Claims Act, which requires a court to dismiss a suit against a government employee based on conduct within the general scope of that employee's employment. Chen refused to amend his pleadings to substitute the governmental unit as the defendant, arguing that reporting or discussing sexual harassment was not within the general scope of Cai's employment. The trial court denied Cai's motion to dismiss.

The Court of Appeals affirmed in part and reversed and rendered judgment in part, dismissing Chen's malicious prosecution claim in its entirety and dismissing his remaining claims to the extent they are based on Cai's reports of sexual harassment or conduct relating to the subsequent investigation. One justice, dissenting in part, also would have dismissed any claims based on Cai's statements to the coworker.

Chen and Cai filed cross-petitions for review. The Supreme Court granted both petitions.

b) *City of Austin v. Powell*, 684 S.W.3d 455 (Tex. App.—Austin 2022), *pet. granted* (Jan. 26, 2024) [22-0662]

At issue in this case is whether a police officer in a high-speed chase acted with reckless disregard such that the emergency exception under the Texas Tort Claims Act does not apply and immunity is waived.

Officer Bullock was assigned as backup to pursue a suspect in a vehicle chase. He was following Officer Bender who slowed down suddenly to make a right turn based on the radio report of the suspect's location. Bullock rammed into the back of Bender's vehicle, causing the two police cruisers to crash into Powell's van sitting at the stop sign.

After Powell sued the City, the trial court denied the City's plea to the jurisdiction based on the Texas Tort Claims Act's emergency exception. The court of appeals affirmed, concluding that Bullock's failure to maintain a safe following distance, combined with his inattention and failure to control his speed, create a fact issue on recklessness. The City filed a petition for review in the Supreme Court, challenging the court of appeals' analysis. The Court granted the petition.

G. INSURANCE

1. Insurance Code Liability

a) *In re State Farm Mut. Auto. Ins. Co.*, ___ S.W.3d ___, 2023 WL 5604145 (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.

2. Policies/Coverage

a) *Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc.*, 656 S.W.3d 729 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (June 21, 2024) [23-0006]

This case concerns the interpretation of an excess insurance policy that follows an underlying policy, except where the terms, conditions, definitions, and exclusions of the policies conflict.

The Patterson entities hired Marsh USA, an insurance broker, to obtain multiple layers of general liability insurance coverage. Through Marsh, Patterson obtained an underlying policy that provides coverage for defense costs, including attorney's fees. Patterson also obtained multiple policies providing excess layers of coverage, including a policy issued by Ohio Casualty. The Ohio Casualty policy contract states that except for the "terms, conditions, definitions and exclusions" set out in the Ohio Casualty policy, its coverage follows the underlying policy. Patterson was sued for personal injuries following an industrial accident and settled with the plaintiffs. Patterson then sought coverage from its insurers. Ohio Casualty promptly provided its share of the settlement amount, but it refused coverage for Patterson's defense costs.

Patterson sued both Ohio Casualty and Marsh, asserting that either Ohio Casualty breached the insurance contract by failing to provide coverage for defense costs or else Marsh falsely represented to Patterson that the Ohio Casualty policy covered defense costs. The parties filed competing motions for

summary judgment on the issue of coverage. The trial court concluded that the Ohio Casualty policy does cover defense costs and granted summary judgment for Patterson. The court of appeals affirmed, reasoning that the Ohio Casualty policy does not specifically disclaim the underlying policy's coverage of defense costs.

Ohio Casualty filed a petition for review, arguing that its policy only provides coverage for certain types of loss that does not include defense costs. Ohio Casualty contends that because it set out definitions related to covered loss in its policy, those definitions control over the definitions related to covered loss in the underlying policy. The Court granted the petition for review.

H. 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.

I. JURISDICTION

1. Personal Jurisdiction

a) *BRP-Rotax GmbH & Co. KG v. Shaik*, ___ S.W.3d ___, 2023 WL 4992606 (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.

J. MEDICAL LIABILITY

1. Expert Reports

a) *Columbia Med. Ctr. of Arlington Subsidiary, L.P. v. Bush*, ___ S.W.3d ___, 2023 WL 3017657 (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.

K. NEGLIGENCE

1. 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.

L. OIL AND GAS

1. Leases

a) *Hahn v. ConocoPhillips Co.*, ___ S.W.3d ___, 2022 WL 17351596 (Tex. App.—Corpus Christi–Edinburg 2022), *pet. granted* (June 21, 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, Texas.

In 2002, Hahn conveyed the tract to William and Lucille Gips but reserved a 1/8 non-participating royalty interest. Eight years later, the Gipses leased the tract to a subsidiary of ConocoPhillips. The lease entitled the Gipses to a 1/4 royalty and gave Conoco the right to pool the acreage covered by the lease. After Hahn ratified the lease, Conoco pooled the tract into a larger unit. Hahn and the Gipses then signed a stipulation of interest, agreeing that Hahn reserved a 1/8 "of royalty" when he conveyed the tract to the Gipses.

In 2015, Hahn sued Conoco and the Gipses, alleging that he reserved a fixed 1/8 royalty in the tract, rather than a floating royalty. The trial court disagreed and granted summary judgment for the Gipses. But the court of appeals reversed, holding that Hahn reserved a fixed royalty and that the trial court erred by considering the stipulation of interest.

On remand, Conoco argued that because Hahn ratified the Gipses' lease, his royalty should be diminished by their 1/4 royalty. The trial court granted summary judgment for Conoco, but the court of appeals reversed, holding that Hahn was only bound to the lease's pooling provision. The court of appeals also disagreed with Conoco that the intervening decision in *Concho Resources, Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021), required it to consider the stipulation of interest.

Conoco petitioned the Supreme Court for review, arguing that the court of appeals erred by (1) concluding that Hahn ratified only the lease's pooling provision, and (2) disregarding the stipulation of interest.

The Court granted Conoco's petition for review.

2. Pooling

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.*, 672 S.W.3d 33 (Tex. App.—San Antonio 2021), *pet. granted* (June 2, 2023) [21-1035]

At issue in this case is whether one oil-and-gas company's forced-pooling offer to another, which included a 10% risk penalty, was unreasonably low under the Texas Mineral Interest Pooling Act.

EOG Resources drilled sixteen wells on a riverbed tract based on drilling permits it received from the Railroad Commission. EOG's wells surrounded a seven-mile portion of the riverbed leased by petitioner Ammonite Oil & Gas Corp. Concerned that its mineral interested would be essentially stranded, Ammonite sent a series of letters to EOG proposing the formation of sixteen voluntarily pooled units, including a 10% risk charge to cover the economic risks assumed in drilling the wells. EOG rejected the offer. Ammonite then sought to force-pool its riverbed tracts with EOG's wells.

The Railroad Commission rejected Ammonite's applications, finding that Ammonite's offers to EOG were not "fair or reasonable" as required by the Mineral Interest Pooling Act. Ammonite petitioned for judicial review in the trial court, which affirmed the Commission's order. The court of appeals did the same. Ammonite petitioned for review to the Supreme Court, arguing that nothing in the plain text of MIPA even requires that a risk penalty be included in a voluntary-pooling offer, so a low-risk penalty (or even the absence of one) cannot render an offer statutorily unreasonable. The Court granted the petition for review.

M. 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.

N. PROCEDURE—PRETRIAL

1. Discovery

a) *In re Metro. Water Co.*, ___ S.W.3d ___, 2022 WL 3093200 (Tex. App.—Houston [14th Dist.] 2022), *argument granted on pet. for writ of mandamus* (March 10, 2023) [22-0656]

The issue in this case is whether the trial court abused its discretion when it ordered a sweeping forensic examination of electronic storage devices as a discovery sanction.

Metropolitan Water and Blue Water were involved in litigation over a series of contracts governing rights to develop, market, and sell groundwater. Discovery was sought and ordered during the pendency of this litigation. The trial court ordered Metropolitan Water to turn over certain electronic files to Blue Water. Metropolitan Water did not comply.

The trial court entered an order for forensic inspection of Metropolitan Water's electronic devices as a sanction for its discovery abuse. The order included an inspection of the personal cell phone of Mr. Carlson, the head of Metropolitan Water. Blue Water's own expert was ordered to perform the forensic inspection. The sanction order provided no up-front limitation such as search terms or a time frame to limit the expert's search to relevant information. There was also no opportunity for Metropolitan Water or Mr. Carlson to object that data from their personal

devices was private and irrelevant before it was turned over to Blue Water. The court of appeals denied Metropolitan Water's mandamus petition.

The Supreme Court granted oral argument on Metropolitan Water's mandamus petition.

b) *In re Rashid*, ___ S.W.3d ___, 2023 WL 3730320 (Tex. App.—San Antonio 2023), *argument granted on pet. for writ of mandamus* (Jan. 26, 2024) [23-0414]

The issue in this case is whether a defendant timely designated two experts who were initially designated by co-defendants that later settled.

A man passed away while receiving long-term acute care at Lifecare Hospital. His wife, Anna Marie Moreno, sued several healthcare providers for negligence, including Dr. Rashid.

The trial court issued a docket control order setting a trial date and discovery deadlines, including a deadline for designating expert witnesses. Rashid timely designated one expert, while reserving the right to call any other party's designated expert. Two of Rashid's co-defendants timely designated Dr. Garrett, a neurosurgeon, and Dr. Trevino, an economist. Moreno later settled her claims against those co-defendants.

Days before trial was set to begin, the parties received notice that the trial would be continued due to a scheduling error. The parties filed a Rule 11 Agreement extending the docket control order's deadlines relating to exchanging objections to deposition testimony, exhibit lists, motions in limine, and jury charges.

Months after the docket control order's deadline for defendants to designate testifying experts, Rashid supplemented his discovery responses to designate Dr. Trevino and Dr. Garrett. The trial court struck Rashid's supplemental designation on Moreno's motion and later denied his motion for rehearing. The court of appeals denied Rashid's mandamus petition.

Rashid sought mandamus relief in the Supreme Court. He argues that he properly designated Dr. Garrett and Dr. Trevino before the docket control order's deadline or that his supplementation was proper under the Texas Rules of Civil Procedure.

2. Forum Non Conveniens

a) *In re Pinnergy Ltd.*, ___ S.W.3d ___, 2023 WL 5021214 (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.

3. Multidistrict Litigation

a) *In re Jane Doe Cases*, *argument granted on pet. for writ of mandamus* (Mar. 15, 2024) [23-0202]

This mandamus arises out of the "tag-along" transfer of the underlying lawsuit to an MDL involving other sex-trafficking cases. The issue in this case is whether the MDL panel erred by refusing to remand the case, thereby allowing it to remain in the MDL.

In the underlying case, Jane Doe alleges that she was a victim of sex trafficking. She contends that another user befriended her on Facebook and sent her messages convincing her to meet in person, after which she was forced into sex with several others at a hotel owned by Texas Pearl. In 2018, Doe sued Facebook and Texas Pearl, alleging they both had roles in facilitating her trafficking. In 2019, the MDL panel transferred seven other cases involving sex trafficking allegations to an MDL pretrial court. In 2022, Texas Pearl transferred the underlying case into the MDL as a tag-along case, asserting that Doe's claims are closely related to the MDL cases because those cases also involve sex-trafficking allegations against hotels. Facebook moved to remand, arguing that the case is not sufficiently related to the MDL cases to be transfered.

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.

The Supreme Court granted review of Facebook's mandamus petition.

4. Responsible Third-Party Designation

a) *In re Intex Recreation Corp.*, ___ S.W.3d ___, 2023 WL 2258461 (Tex. App.—Corpus Christi 2023), *argument granted on pet. for writ of mandamus* (Sept. 29, 2023) [23-0210]

The issues in this case are whether the trial court erred by granting the plaintiffs' motion for partial summary judgment on the defendant's contributory-negligence defense and, if it did, whether mandamus is available to correct that error.

Intex manufactures ladders for above-ground swimming pools. The parents of a two-year-old child filed a products-liability suit against Intex after their child snuck out of their house in the middle of the night, climbed the

ladder to their pool, fell in, and drowned. Intex's answer included an affirmative defense designating the parents as responsible third parties because the parents had failed to remove the ladder from the pool and to lock the back door leading to the pool. The parents moved for partial summary judgment, arguing that the common-law doctrine of parental immunity precludes Intex's comparative-responsibility defense. The trial court granted the parents' motion. The court of appeals denied Intex's subsequent mandamus petition.

Intex then sought mandamus relief in the Supreme Court. Intex argues that the doctrine of parental immunity does not foreclose its affirmative defense of contributory negligence and that Supreme Court precedent authorizes mandamus review of a trial court ruling denying the designation of a responsible third party. The Court set Intex's petition for oral argument.

O. 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.

P. REAL PROPERTY

1. Bona Fide Purchaser

a) *CRVI Riverwalk Hosp., LLC v. 425 Soledad, Ltd.*, 691 S.W.3d 644 (Tex. App.—San Antonio 2022), *pet. granted* (May 31, 2024) [23-0344]

A main issue is whether a creditor's bona fide protections pass to a subsequent purchaser if the property is purchased through a receivership sale rather than through foreclosure.

A parking garage, hotel, and office building initially were under common ownership. The owner retained the garage and hotel but sold the office building, which was eventually acquired by 425 Soledad. The original owner and purchaser executed an agreement making a certain number of parking spots in the garage available to the office building and its tenants. The agreement stated that it would run with the land and be binding on the parties' successors and assigns, but it was never recorded.

The garage and hotel were later sold to a purchaser who financed the transaction with two promissory notes. CRVI Crowne acquired the B note. When the new owner of the garage and hotel defaulted, Crowne chose to place the properties into receivership rather than foreclose on them. A related entity, CRVI Riverwalk, purchased the garage and hotel through the receiver. After Riverwalk became the owner of the garage and hotel, 425 Soledad requested parking spaces pursuant to the agreement made by the garage and hotel's original owner. Riverwalk refused to provide the spaces, and 425 Soledad sued.

Riverwalk argues that the parking agreement is unenforceable because Crowne was a bona fide creditor when it purchased the note without notice of the unrecorded agreement; then, when Riverwalk purchased the garage and hotel from the receiver, Crowne's bona fide protections passed through to it. The trial court rejected these arguments and entered judgment for 425 Soledad after a bench trial.

The court of appeals reversed. The court agreed with the trial court that the parking agreement is an easement, but it concluded that Crowne was a bona fide creditor and that Crowne's status "sheltered" and passed through to Riverwalk when Riverwalk purchased the garage and hotel through the receivership sale.

425 Soledad petitioned the Supreme Court for review. It argues that because Riverwalk purchased the properties from the debtor's receiver, and not from creditor Crowne in a foreclosure sale, that Crowne's bona fide protections, if any, cannot shelter or pass through to Riverwalk. The Court granted the petition.

2. 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.

Index

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Appellate Section, State Bar of Texas
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FIFTH CIRCUIT UPDATE

HON. JENNIFER W. ELROD, *Houston*
U.S. Court of Appeals, Fifth Circuit

RAFFI MELKONIAN, *Houston*
Wright Close & Barger

Elrod, Jennifer Walker

Born 1966 in Port Arthur, TX

Federal Judicial Service:
Judge, U.S. Court of Appeals for the Fifth Circuit
Nominated by George W. Bush on March 29, 2007, to a seat vacated by Patrick E. Higginbotham.
Confirmed by the Senate on October 4, 2007, and received commission on October 19, 2007.

Education:
Baylor University, B.A., 1988
Harvard Law School, J.D., 1992

Professional Career:
Law clerk, Hon. Sim Lake, U.S. District Court, Southern District of Texas, 1992-1994
Private practice, Houston, Texas, 1994-2002
Adjunct faculty, University of Houston Law Center, 1995
Judge, Harris County [Texas] One Hundred and Ninetieth District Court, 2002-2007

About the Author

Raffi Melkonian is a partner at the Houston law firm of Wright, Close & Barger LLP. He practices in state and federal courts around the country, and in particular in Texas and in the United States Court of Appeals for the Fifth Circuit. He is a graduate of the University of St. Andrews, the University of Cambridge, and Harvard Law School, and was a law clerk for Judge Jennifer Walker Elrod of the Fifth Circuit.

TABLE OF CONTENTS

Introduction

Lawyers who practiced in New York City in the early 2000s will remember being handed a Zagat Guide to New York City restaurants. The ubiquitous burgundy-covered book offered pithy snippets about each significant restaurant in the City, along with a score and and some symbols telling you whether it might be good to take a date or whether it was better suited to a raucous night out with the lads.

I remember reading my Zagat's late at night in my office as I worked in my ill-fated role as a Mergers and Acquisitions lawyer at a well-known law firm. I'd flip through the snappy descriptions while I looked out my window at all the people enjoying their free time on the weekends and evenings. Did I know what eating at the great Le Bernardin was like? No, but Zagat's description of the magisterial "seafood shrine" kept me going through many a night.

This year, I thought it would be fun to produce a Zagat-like guide to the cases of the Fifth Circuit. Below, you will find witty (and less witty) descriptions of each *published* civil case issued by the Fifth Circuit in 2023 (excluding petitions for writs of habeas corpus). Like Zagat's, I'm not trying to describe the whole case in these snippets. It's a morsel that hopefully tells you whether you should read the rest.

The descriptions are followed by tags to tell you what kind of case it is or some other salient fact: whether it involves ***Civil Rights*** or is a case that implicates *Textualism* or cites the crucial Scalia and Garner Hornbook, *Reading Law*. I have also indicated with three *** the cases of the greatest interest or significance of the year. All of these categories, of course, are mine, and you are welcome to disagree with my coding of the cases. Obviously, the trends illuminated by this work may be misleading: the published work of the Fifth Circuit may differ substantially from the unpublished docket. Nonetheless, I am still hopeful that something can be gleaned from this work.

At least for me, as the author, what the work below illustrates is the breadth of the Fifth Circuit's caseload. For example, out of the roughly 200 cases covered in this compendium, more than 30 involve invocations of qualified immunity, many in police cases. There are numerous challenges to administrative actions (more than I would have guessed), many of them raising broad challenges to agency power. This almanac also shows that if you want to litigate breaches of contract, insurance coverage is where it's at. And as one might guess, between various civil rights claims and labor and employment cases, allegations of discrimination and failure to accommodate occupy much of the Court's time during the year.

I hope this is a useful tool for readers. I intend to update it further with additional indexes and other changes as I discover errors or omissions. But as it stands, I think it accomplishes the goal of aping the Zagat: to give the reader a small taste of each significant case issued by the United States Court of Appeals for the Fifth Circuit for 2023. Happy reading!

VARIOUS INDEXES

Three Star Cases

***Abbott v. Biden*, Case No. 22-40399 (June 12, 2023). Interpreting the Constitution's militia clause, the Court holds that the President of the United States lacks authority to punish non-federalized National Guard members who refused to take the COVID-19 vaccine.

*** *Boudreaux v. LA State Bar Assoc.*, Case No. 22-30564 (November 13, 2023). The Fifth Circuit holds that some of the Louisiana Bar's commentary is not "germane" to its role in regulating the legal profession.

*** *Chamber of Commerce v. SEC*, Case No. 23-60255 (December 19, 2023). The Fifth Circuit set aside the SEC's rule requiring issuers to report day-to-day share repurchase data once a quarter and to disclose the reason why the issuer repurchased shares of its own stock. In the Court's view, the SEC failed to adequately respond to the petitioner's comments about the rule's economic implications. Even worse for the SEC, it wasn't able to fix the problems with the rule during the Court's 30-day grace period.

*** *Crane v. City of Arlington*, Case No. 21-10644 (February 24, 2023). In dissents from denial of rehearing en banc, Judges Ho and Oldham decry the Fifth Circuit's "refusal" to take denials of qualified immunity en banc. In Judge Oldham's words, these denials "sow the seeds of uncertainty." But maybe they just provide certainty in the opposite direction?

*** *Feds for Medical Freedom v. Biden*, Case No. 22-40043 (March 23, 2023) The Court bars the President from imposing a vaccine mandate for federal workers.

*** *Ganpatt v. Eastern Pacific Shipping Co.*, Case No. 22-30168 (April 28, 2023). The Court affirms an anti-suit injunction against litigation in India that had resulted in the jailing of a US litigant.

***Hamilton v. Dallas County*, Case No. 21-10133 (February 22, 2023). The Fifth Circuit holds, en banc, that recovery under Title VII does not require proving an "ultimate employment decision."

***Hudson v. Lincare, Inc.*, Case No. 22-50149 (January 18, 2023). An employer is not liable under Title VII for a racially hostile work environment because its response was "prompt, reasonable, and effective." The company engaged in a prompt investigation and issued remedial and disciplinary measures against the co-workers who used racial slurs.

***IFG Port Hold v. Lake Charles Harbor*, Case No. 22-30398 (September 21, 2023). Trial before a Magistrate Judge is based on consent. But what happens if a party consents, unaware that the Judge has a relationship with one of the parties? The Court's remand requires further factual development about whether the relationship required vacatur of the referral to the magistrate judge.

***Illumina v. FTC*, Case No. 23-60167 (December 15, 2023). In a case that attracted nationwide interest, the Court mostly affirmed an FTC order barring a merger of two innovative medical technology companies. Days later, Illumina announced that it would divest Grail rather than continue to litigate.

*** *Netflix, Inc. v. Babin*, Case No. 22-40786 (December 18, 2023). The Court affirms a district court's injunction against a prosecutor's bad faith and illegal actions against Netflix for promoting a controversial film.

*** *Rogers v. Jarrett*, Case No. 21-20200 (March 30, 2023). An inmate was working in the prison's hog barn when he was struck in the head by the ceiling. The prison staff denied him immediate medical treatment, and he ended up with a traumatic brain injury. Qualified Immunity granted because the prison's staff evaluation of the situation did not meet the extremely high standard of "deliberate indifference." But "Wait What?" Judge Willett concurs to highlight "highly newly published scholarship" that shows the "qualified-immunity doctrine" was flawed "foundationally" from "its inception."

En Bancs Granted

****Alliance for Fair Board Recruitment et. al. v. SEC*, No. 21-60626 (October 18, 2023)**. A Fifth Circuit panel rejects an APA challenge to the SEC order approving NASDAQ's board diversity rules.

B.W. v. Austin ISD, Case No. 22-50158 (January 9, 2023). A white student suffers from being made fun of and mocked because of his pro-Trump views. But some students or staff also allegedly make comments about him being white. The Court dismisses his Title VI claim

Chisom v. State of Louisiana, Case No. 22-30320 (October 25, 2023). The Court continues engaging with a long-running consent decree that pertains to the method of selecting justices for the Louisiana Supreme Court.

Consumers Research v. FCC, Case No. 22-60008 (March 24, 2023). A Fifth Circuit panel rejects nondelegation challenges to the FCC's "Universal Service Fund" but the case was swiftly taken before the whole Court.

Hopkins v. Hosemann, Case No. 19-60662 (August 4, 2023). A Fifth Circuit panel holds that Mississippi's felon disenfranchisement law violates the Eighth Amendment's bar on cruel and unusual punishment, but the decision is swiftly taken en banc.

Jackson Municipal Airport Authority v. Harkins, Case No. 21-60312 (August 29, 2023). The Fifth Circuit granted en banc review of a panel opinion finding that local commissioners had standing to block Mississippi from taking over the Jackson airport authority.

Tesla v. NLRB, Case No. 21-60285 (March 31, 2023). A panel of the Fifth Circuit holds that Tesla boss Elon Musk's tweets constituted an unlawful threat under the National Labor Relations Act. But the Court then granted reconsideration of the case.

Wilson v. Midland County, Texas, Case No. 22-50998 (December 14, 2023). While calling for reconsideration en banc, the Court affirms the dismissal of claims by a defendant victimized by a lawyer who worked both as the prosecutor and as the law clerk for the judge assigned the case

Cases about the Major Questions Doctrine

Feds for Medical Freedom v. Biden, Case No. 22-40043 (March 23, 2023) The Court bars the President from imposing a vaccine mandate for federal workers.

State of Texas v. Nuclear Regulatory Commission, Case No. 21-60743 (August 25, 2023). The Fifth Circuit holds that the Atomic Energy Act does not give the NRC the power to license a private storage facility for nuclear waste, relying in part on the Major Questions Doctrine.

Bankruptcy Cases

Amberson v. McAllen, Case No. 21-50960 (January 3, 2023) (*In the Matter of Jon Amberson*) The Court denies rehearing (which it normally does in a single sentence) but writes to fully explain its view that an arbitrator's later fact-findings can be used in deciding whether a trial court's decision compelling arbitration was valid.

AKD Investments v. Magazine Investments I, L.L.C., Case No. 22-30602 (August 18, 2023) (*In the Matter of AKD Investments, L.L.C.*) The Fifth Circuit affirms a bankruptcy court's "reasonable interpretation" of an ambiguity in its own order.

Anytime Fitness v. Thornhill Brothers, Case No. 22-30757 (October 27, 2023) (*In the Matter of Thornhill Brothers Fitness).* Can a bankruptcy court approve a debtor's partial assignment of an executory contract (rather than a full assignment?) Nope.

Carmichael v. Balke, Case No. 22-20430 (October 6, 2023) (*In the Matter of Imperial Petroleum Recovery Corporation*). The Court mostly affirms the judgment in an adversary proceeding from bankruptcy where the trial judge changed course on reconsideration after having a supplementary evidentiary hearing.

Credos Industrial v. Targa Pipeline, Case No. 22-20480 (March 24, 2023) (*In the Matter of KP Engineering L.P.).* In an adversary proceeding, the Court rules that the existence of a valid contract bars a claim for quantum meruit, says the Court, so the plaintiff's claims were properly dismissed.

ERCOT v. Just Energy Texas, L.P., (In the Matter of Just Energy Group, Inc.), Case No. 22-20424 (January 5, 2023). The bankruptcy court should have exercised *Burford* abstention when faced with a case about the legality of ERCOT's electricity pricing during Winter Storm Uri.

Highland Capital Management Fund Advisors L.P. v. Highland Capital Management L.P., Case No. 22-10189 (January 11, 2023) (*In the Matter of Highland Capital Management*). The Court continues to clean up the messy Highland Capital bankruptcy by holding that certain post-Plan actions were not modifications that required claimholder approval.

Official Committee of Unsecured Creditors v. Bouchard Transportation Co., Inc., Case No. 22-20321 (July 25, 2023) (*In the Matter of Bouchard Transportation Company, Inc).* Is paying a stalking horse bidder a break-up fee in bankruptcy a permissible use of estate funds? Yes.

Inmarsat Global v. Speedcast, Case No. 22-20274 (August 3, 2023) (*In the Matter of Speedcast International Limited*). The Court analyzes whether a particular claim was a contractually defined "Permitted Claim." It's as exciting a case as that sounds.

Nexpoint Advisors v. Pachulski, Case No. 22-10575 (July 19, 2023) (*In the Matter of Highland Capital Management, L.P.,*). A creditor lacked standing to object to professional fees in a bankruptcy because it would not be "directly" impacted by the fee orders.

SR Construction v. Hall Palm Springs, Case No. 21-11244 (April 17, 2023) (*In the Matter of Palm Springs II, L.L.C.*). The Court blesses the sale of an unfinished hotel to an affiliate (which wiped out a subcontractor's liens on the property) because the sale was a reasonable one in the context of the ongoing COVID-19 lockdown

Texxon v. Getty Leasing, Case No. 22-40537 (May 3, 2023) (*In the Matter of Texxon Petrochemicals, Inc.*). A "brief email exchange" was not a contract that could be assumed in bankruptcy.

Insurance Coverage

Colony Insurance Co. v. First Mercury Insurance Co., Case No. 22-51114 (December 18, 2023). Insurer failed to present evidence showing that it was entitled to contribution or or subrogation from a co-insurer.

Discover Property Casualty Insurance Co. v. Blue Bell Creameries, USA, Case No. 22-50842 (July 11, 2023). Texas Ice Cream giant Blue Bell seeks insurance coverage for a shareholder derivative suit arising out of its infamous 2015 listeria outbreak. No hot fudge for you! The derivative suit's allegations arose out of intentional acts, not an accident.

Buchholz v. Crestbrook Insurance Co., 22-50265 (April 18, 2023). The Fifth Circuit affirms summary judgment against owners of a mansion who discovered mold in their home because their insurance policy did not cover generalized mold loss.

Gold Coast v. Crum & Forster Specialty, Case No. 22-60247 (May 22, 2023). Dumping "hot, greasy wastewater" into a city's sewers is an intentional act, not an accident, for purposes of an insurance policy.

Great Lakes Ins. v. Gray Group Invst., Case No. 22-30041 (August 1, 2023). The "Hello Dolly" sank in Hurricane Sally. Because the owner didn't leave the Hello Dolly "where she belonged" (the Orleans Marino) the owner is out of luck on his insurance claim.

Noble House v. Certain Underwriters, Case No. 22-20281 (May 1, 2023). The Court affirms a dismissal for forum non-conveniens in an insurance coverage case involving a forum selection clause picking the courts of England and Wales.

Liberty Mutual Fire Ins. v. Copart of CT, Case No. 21-10938 (July 31, 2023). The Fifth Circuit holds, construing an insurance policy, that there *can* be a duty to indemnify even if there is no duty to defend. Yes, I said indemnify but not defend, not the other way around.

Princeton Excess v. AHD Houston, Case No. 22-20473 (October 6, 2023). It's an insurance coverage dispute arising from claims by professional models that their pictures were misappropriated to imply they worked at strip clubs. The Fifth Circuit holds, for the most part, that the insurance policies do not offer coverage to the clubs.

PHI Group, Inc. v. Zurich American Insurance Co., Case No. 22-30142 (January 30, 2023). The presence of physical coronavirus particles does not create "direct physical loss or damage" for the purposes of an insurance loss.

Southern Orthopaedic Specialists, L.L.C. v. State Farm Fire & Casualty Co., Case No. 22-30340 (April 3, 2023). Business interruption insurance doesn't cover Covid-related shutdowns.

Weyerhaeuser v. Burlington Insurance, Case No. 22-30164 (July 14, 2023). A company and its subsidiaries were supposed to be named as "additional insureds" to a commercial general liability insurance policy, but weren't.

Windermere Oaks v. Allied World, Case No. 22-50218 (May 9, 2023). A breach of fiduciary duty claim is not a claim for breach of contract, and therefore is not covered by an exclusion for contractual liability in an insurance contract

Labor & Employment

Amin v. UPS, No. 22-10295 (April 27, 2023). A UPS worker was denied a bathroom break "until he was forced to defecate on himself at his workstation." He sued for negligent supervision and invasion of privacy, among other things. His claims survive.

Arredondo v. Elwood Staffing Services, Case No. 22-50502 (August 25, 2023). Two women sued their employer and a staffing company for placing them in a situation where they were sexually harassed by another woman. The Fifth Circuit affirms summary judgment in favor of the staffing company, because it only found out about the harassment after the women had left their employer, and thus "there were no additional actions it could take within its control."

Bernstein v. Maximus Federal Services, Inc., Case No. 22-10254 (March 30, 2023). The Court holds that the district court erred by refusing to consider equitable tolling as an excuse for filing a late federal complaint after his EEOC right-to-sue notice was received. Berstein apparently did not receive the first notice, and the second notice directly said that the 90-day filing window ran from *that* date. He was entitled to rely on that definitive statement from the agency.

Braidwood v. EEOC, Case No. 22-10145 (June 20, 2023). The Court tackles religious exemptions from Title VII in the wake of *Bostock*.

Cunningham v. Circle 8 Crane Services, Case No. 22-60008 (March 24, 2023). An employee is a "mechanic" for the purposes of an exception to the Fair Labor Standards Act

Flores v. FS Blinds, Case No. 22-20095 (July 12, 2023). The Court reverses summary judgment granted in favor of an employer in an FLSA case, citing the "lenient" standard to state how much overtime they might have worked. "[U]nder our precedent, [this] is not a tall slope. Plaintiffs have summited it."

*********Hamilton v. Dallas County*, Case No. 21-10133 (February 22, 2023). The Fifth Circuit holds, en banc, that recovery under Title VII does not require proving an "ultimate employment decision."

Harrison v. Brookhaven School District, Case No. 21-60771 (September 21, 2023). The Court applies its new precedent in *Hamilton* (#85, above) and says that any non-de-minimis injury will do. Here, the plaintiff alleged she was excluded from a training course costing $2,000. That's enough!

Klick v. Cenikor Foundation, Case No. 22-20434 (August 16, 2023). At first, the Fifth Circuit affirmed a district court's certification of a collective action under the FLSA for patients put to work by a drug rehabilitation program. After a lengthy en banc process, however, the panel itself reversed the decision and remanded for the consideration of an additional defense to certification.

January v. City of Huntsville, Case No. 22-20380 (July 24, 2023). A firefighter went to his office to copy files to make an EEOC complaint against his employer. He was fired shortly thereafter. But the Court affirmed the summary judgment against him, because his employer had provided sufficient evidence of a

legitimate non-discriminatory reason for his firing (he seemed intoxicated).

Loy v. Rehab Synergies, Case No. 22-40411 (June 21, 2023). The district court properly certified an FLSA collective action for a group of speech, physical, and occupational therapists.

Rahman v. Exxon Mobil Corporation, Case No. 21-30669 (January 10, 2023). The Fifth Circuit recognizes offering "inadequate training" on the basis of race as a cognizable claim under Title VII, but affirmed dismissal of claim on summary judgment where the plaintiff received all the same training as his white colleague.

Wallace v. Performance Contractors, Inc., Case No. 21-30482 (January 3, 2023). A woman's claim that she was not allowed to work "at elevation" at a contractor because her supervisor had discriminatory views about women's bodies survived summary judgment under Title VII.

Appeals that challenge a jury's verdict.

Marquette Transportation Co. Gulf-Inland, L.L.C. v. Johnson, Case No. 22-30261 (December 4, 2023). The Court sorts out a complicated maritime crash by affirming a jury verdict.. Oh, the so negligent river pilot of the STRANDJA!

Kim v. American Honda Motor, Case No. 22-40790 (November 7, 2023). The Court affirms a $5 million product defect jury verdict and judgment against Honda arising out of a side-impact car accident.

Aldrige v. Corporate Management, et. al., No. 21-60568 (August 21, 2023). This is a qui tam case involving an appeal of a nine-week jury trial which resulted in a large verdict for the Government. Perhaps the most important issue is the Fifth Circuit's commentary on the United States' "gamesmanship" and "incessant delays" in intervening in the qui tam. *Id.* at 27. But the Court ultimately holds that the eighteen delay requests do not require dismissal, but do cause statute of limitations problems that cause a reduction of over "half of the judgment entered against Appellants."

Heckman v. Raynolds Gonzalez-Caballero, Case No. 22-10415 (April 13, 2023). References to a "hammer" and "hammering the defense" in a closing statement were not so prejudicial as to require reversal, even though there had been an extended discussion of Jim Adler, "the Texas Hammer" (a prominent plaintiff's personal injury lawyer) during voir dire.

National Oilwell Varco, L.P. v. Auto-Dril Inc., Case No. 21-40648 (May 12, 2023). A complex post-trial appeal arising out of a 2011 agreement settling a 2009 patent infringement suit. Among other things, the Fifth Circuit finds the district court abused its discretion in allowing a lay witness to testify as an expert and orders the trial court to consider whether that error "infected" the jury's verdict.

Cases either citing Reading Law or involving Textualism

Barosse v. Huntington Ingalls, Inc., Case No. 21-30761 (June 12, 2023). A shipyard electrician's state law tort claims are not preempted by the federal Longshore and Harbor Workers Act, because the plaintiff's claims lay in the so-called "twilight zone" of concurrent state and federal jurisdiction.

Princeton Excess v. AHD Houston, Case No. 22-20473 (October 6, 2023). It's an insurance coverage dispute arising from claims by professional models that their pictures were misappropriated to imply they worked at strip clubs. The Fifth Circuit holds, for the most part, that the insurance policies do not offer coverage to the clubs.

Cactus Canyon Quarries v. MSHR, Case No. 22-60322 (April 4, 2023). Does a regulation covering "braking systems" in the mining industry allow the regulators to issue a citation for a malfunctioning low brake pressure alarm? The Fifth Circuit affirms the ALJ's "yes" answer.

Calumet Shreveport Refining, L.L.C. v. EPA, Case No. 22-60266 (November 22, 2023). The Court vacates adjudications denying exemptions from Clean Air Act regulations for six small refineries, holding that the adjudications were impermissibly retroactive. But Judge Higginbotham would have held that venue was only permissible in the D.C. Circuit.

Discover Property Casualty Insurance Co. v. Blue Bell Creameries, USA, Case No. 22-50842 (July 11, 2023). Texas Ice Cream giant Blue Bell seeks insurance coverage for a shareholder derivative suit arising out of its infamous 2015 listeria outbreak. No hot fudge for you! The derivative suit's allegations arose out of intentional acts, not an accident.

Fleming v. Bayou Steel, Case No. 22-30260 (September 27, 2023) The Court finds a disputed issue of fact on whether a parent company exercised "de facto control" over a bankrupt operating company under the WARN act.

Great Lakes Ins. v. Gray Group Invst., Case No. 22-30041 (August 1, 2023). The "Hello Dolly" sank in Hurricane Sally. Because the owner didn't leave the Hello Dolly "where she belonged" (the Orleans Marino) the owner is out of luck on his insurance claim.

*********Hamilton v. Dallas County*, Case No. 21-10133 (February 22, 2023). The Fifth Circuit holds, en banc, that recovery under Title VII does not require proving an "ultimate employment decision."

Huntington Ingalls Inc. v. Office of Workers' Compensation Programs, Case No. 21-60752 (June 6, 2023). Dealing with the Section 907(n) of the Longshore and Harbor Workers' Compensation Act, the Court finds as a matter of first impression that audiologists are physicians.

Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce, Case No. 22-30105 (February 23, 2023). The Fifth Circuit sets aside a regulation that requires charter-boat owners to install a vessel monitoring system that transmits the boat's GPS location to the Government, in part because the Magnuson-Stevens Act does not authorize the GPS-tracking requirement. *Concurrence*. (rejecting Chevron).

Ramey & Schwaller v. Zions Bancorp, Case No. 22-20107 (June 16, 2023). A bank properly withdrew PPP loan funds for an alleged misstatement in a loan application.

Spivey v. ChitimachaTribe, Case No. 22-30436 (August 16, 2023). A district court must remand a case for which it lacks subject matter jurisdiction "even when the district court thinks [the remand is] futile" (i.e., the claim was barred in the state courts by sovereign immunity).

State of Louisiana v. i3 Verticals, Case No. 22-30553 (September 1, 2023). The Fifth Circuit holds that under the Class Action Fairness Act, a dispute between Louisiana law enforcement agencies and software companies presents a local controversy that must be adjudicated in state court. But the majority and dissent face off about the definition of the word "seek" using Bible verses as ammunition.

Texas Aromatics v. Intercontinental Terminals, Case No. 22-20456 (October 27, 2023). If you're dealing with a spill that combines oil and hazardous substances, can you recover under CERCLA or the Oil Pollution Act (OPA, as it is Greekily called). The answer: CERCLA.

Women's Elevated v. City of Plano, Case No. 22-40637 (November 20, 2023). The Fifth Circuit rejects a claim that denying zoning for a group home to recover from alcoholism violates the Fair Housing Act's requirement that denying a "necessary" accommodation is housing discrimination: in the Court's view, the standard of "therapeutic necessity" is a high one.

The Cases

1. *Abdullah v. Paxton*, Case No. 22-50315 (April 11, 2023). The Court dismisses a challenge to the constitutionality of Texas Government Code Section 808 (a prohibition on state investment in companies that participate in a BDS policy) for lack of standing. ***Civil Rights.***

2. *Abdallah v. Mesa Air Group*, Case No. 22-10686 (October 13, 2023). The Court revives Section 1981 claims against an airline where a pilot refused to fly a presumably Arab passenger because "she is not flying this plane with a brother name[d] Issam on it." ***Civil Rights.***

3. ****Abbott v. Biden*, Case No. 22-40399 (June 12, 2023). Interpreting the Constitution's militia clause, the Court holds that the President of the United States lacks authority to punish non-federalized National Guard members who refused to take the COVID-19 vaccine. ***Concurrences*** ***Textualism***

4. *ACS Primary Care Physicians Southwest, P.A. v. United Healthcare Insurance Company, et. al.*, No. 21-20168 (February 16, 2023): Court implements SCOTX's decision that there is no private right of action under the Texas Emergency Care Act for doctors seeking medical fees for out-of-network emergency care. ***Commercial***

5. *AKD Investments v. Magazine Investments I, L.L.C.*, Case No. 22-30602 (August 18, 2023) (*In the Matter of AKD Investments, L.L.C.*) The Fifth Circuit affirms a bankruptcy court's "reasonable interpretation" of an ambiguity in its own order. ***Bankruptcy.***

6. *Aldrige v. Corporate Management, et. al.*, No. 21-60568 (August 21, 2023). This is a qui tam case involving an appeal of a nine-week jury trial which resulted in a large verdict for the Government. Perhaps the most important issue is the Fifth Circuit's commentary on the United States' "gamesmanship" and "incessant delays" in intervening in the qui tam. *Id.* at 27. But the Court ultimately holds the eighteen delay requests do not require dismissal, but do cause statute of limitations problems that cause a reduction of over "half of the judgment entered against Appellants." ***Commercial*** ***Dissent***

7. *Allen et. al. v. Justin Hays, City of Houston, et. al.*, No. 21-20337 (April 14, 2023) (substituting for opinion of March 21, 2023). A "routine" traffic stop turned tragic when a Houston Police Officer fired "six shots" at a man at "point blank" range. The district court dismissed all the victim's claims. The Fifth Circuit disagreed. ***Qualified Immunity***

8. ****Alliance for Fair Board Recruitment et. al. v. SEC*, No. 21-60626 (October 18, 2023)**.** A Fifth Circuit panel rejects an APA challenge to the SEC order approving NASDAQ's board diversity rules. ***En Banc Pending*** ***Major Questions*** ***Dissent***

9. *Alliance for Hippocratic Medicine v. FDA*, Case No. 23-10362 (August 16, 2023). The Court finds that an alleged medical organization has standing to challenge (and has raised meritorious

challenges to) regulations approving the use of mifeprestone. ***Reading Law*** ***Cert Granted and Stayed.***

10. *Allstate Fire and Casualty v. Alison Love*, Case No. 22-20405 (June 22, 2023). When trying to figure out the amount in controversy for an insurance case in federal court under diversity, you use the amount of the underlying claim and not the amount of the insurance policy. ***Commercial***

11. *Amin v. UPS*, No. 22-10295 (April 27, 2023). A UPS worker was denied a bathroom break "until he was forced to defecate on himself at his workstation." He sued for negligent supervision and invasion of privacy, among other things. His claims survive. ***Labor & Employment***

12. *Armstrong v. Ashley*, Case No. 21-30210 (February 15, 2023). The Court affirms dismissal of a Louisiana prisoner's malicious prosecution claims, even though he was falsely prosecuted for capital murder. The Fifth Circuit explains that the plaintiff failed to sufficiently allege the "malice of any defendant."

13. *Anytime Fitness v. Thornhill Brothers*, Case No. 22-30757 (October 27, 2023) (*In the Matter of Thornhill Brothers Fitness).* Can a bankruptcy court approve a debtor's partial assignment of an executory contract (rather than a full assignment?) Nope. ***Bankruptcy***

14. *Antero Resources v. Kawcak*, Case No. 22-10918 (October 31, 2023). The Court holds that a losing defendant often has a right to seek post-judgment discovery of a settlement that might reduce his liability. ***Commercial***

15. *Argueta v. Jaradi*, Case No. 22-40781 (November 17, 2023). The Fifth Circuit reverses and renders judgment in favor of a police officer who shot a fleeing suspect who had a gun and was "clutching" the side of his body where the gun was while running. ***Qualified Immunity*** ***Dissent***

16. *Angell v. GEICO Advantage Ins.*, Case No. 22-20093 (May 12, 2023). The Court affirms the certification of a class of insureds claiming that GEICO failed to fully compensate them for their total loss. But the court declines to state a standard for class representative standing. ***Commercial***

17. *Apter v. HHS*, Case No. 22-40802 (September 1, 2023). "You are not a horse." The Court finds doctors have standing to challenge FDA's advertisements encouraging people not to take ivermectin as a treatment for COVID.

18. *Armadillo Hotel v. Harris*, Case No. 22-50945 (October 20, 2023). The district court dismissed claims because the plaintiff engaged in impermissible claim splitting in his trade secrets case. The Fifth Circuit holds that the standard of review is abuse of discretion, but reverses because the district court did not properly analyze the question whether the parties in the state and federal cases were in privity with each other. ***Commercial***

19. *Arredondo v. Elwood Staffing Services*, Case No. 22-50502 (August 25, 2023). Two women sued their employer and a staffing company for placing them in a situation where they were sexually

harassed by another woman. The Fifth Circuit affirms summary judgment in favor of the staffing company, because it only found out about the harassment after the women had left their employer, and thus "there were no additional actions it could take within its control." ***Labor & Employment***

20. *Association of Club Executives of Dallas, Inc. v. City of Dallas, Texas*, Case No. 22-10556 (October 12, 2023). Relying on the "sordid" externalities of the sex industry, the Court reverses an injunction stopping Dallas's Ordinance No. 32125, which requires adult cabarets, escort agencies, and adult video stores to close between 2:00 am and 6:00 am.

21. *Austin v. City of Pasadena*, Case No. 22-20341 (July 18, 2023). Prison guards responded to a detainee's epileptic seizure by tasing him. The Court denies qualified immunity on the inmate's excessive force claims because no reasonable officer would have believed a person in the middle of a seizure "needed to be restrained as if she were actively resisting." ***Qualified Immunity***

22. *Babinksi v. Sosnowsky*, Case No. 22-30588 (August 21, 2023). Professors who allegedly conspired to prevent a man's enrollment in LSU's theater program are entitled to qualified immunity. ***Qualified Immunity***

23. *Baker et. al. v. Coburn*, No. 21-10303 (May 17, 2023). Darion Baker was shot and killed by police officers while fleeing in a stolen car. The Fifth Circuit partially reverses, noting a disputed issue of material fact about whether the plaintiff was shot "*after* the car safely passed the officers." ***Qualified Immunity***

24. *Barosse v. Huntington Ingalls, Inc.*, Case No. 21-30761 (June 12, 2023). A shipyard electrician's state law tort claims are not preempted by the federal Longshore and Harbor Workers Act, because the plaintiff's claims lay in the so-called "twilight zone" of concurrent state and federal jurisdiction. ***Reading Law*** ***Personal Injury***

25. *Bernstein v. Maximus Federal Services, Inc.*, Case No. 22-10254 (March 30, 2023). The Court holds that the district court erred by refusing to consider equitable tolling as an excuse for filing a late federal complaint after his EEOC right-to-sue notice was received. Berstein apparently did not receive the first notice, and the second notice directly said that the 90-day filing window ran from *that* date. He was entitled to rely on that definitive statement from the agency. ***Labor & Employment***

26. *BNSF Co. v. Federal Railroad Administration*, Case No. 22-60217 (March 15, 2023). The Government's refusal to waive track-inspection regulations so that BNSF could test a new technology was arbitrary and capricious. The agency's "paucity of reasoning" could not hold up to scrutiny. ***Administrative Law***

27. *Bonin v. Sabine River Authority*, Case. No. 20-40138 (April 14, 2023). The Court holds that the Sabine River Authority is not an "arm of the state" and therefore has no right to state sovereign immunity. ***Dissent***

28. *Bourque v. State Farm Mutual Automobile Insurance Co.*, Case No. 22-30126 (December 22, 2023). A class action against an automobile insurer is decertified by the Court of Appeals for not alleging a valid liability claim. ***Commercial***

29. *** *Boudreaux v. LA State Bar Assoc.*, Case No. 22-30564 (November 13, 2023). The Fifth Circuit holds that some of the Louisiana Bar's commentary is not "germane" to its role in regulating the legal profession.

30. *Boyd v. McNamara*, Case No. 20-50945 (July 24, 2023). This is a qualified immunity case reversing grant of summary judgment where the plaintiff was tased when he was a pretrial detainee in county jail. A video reviewed by the Court established a clear dispute of material fact about whether there was any threat to the officer at all. But Judge Oldham dissents, ringing the alarm bell about the use of videos in qualified immunity cases. ***Qualified Immunity*** ***Dissent***

31. *Bradley v. Viking Insurance Co. of Wisconsin*, Case No. 21-60907 (January 6, 2023). The Court answers two questions of Mississippi law about uninsured motorist coverage. ***Dissent***

32. *Braidwood v. EEOC*, Case No. 22-10145 (June 20, 2023). The Court tackles religious exemptions from Title VII in the wake of *Bostock*. ***Labor & Employment***

33. *Brown v. City of Houston, Case No. 21-20302 (April 19, 2023)*. A post-certification opinion implements SCOTX holding that the Tim Cole Act (compensation for wrongful imprisonment) bars a federal lawsuit on the same subject matter.

34. *Bruno v. Biomet*, Case No. 22-30405 (July 21, 2023). The date that prescription started running in a Louisiana Product Liability Act case should have been decided by a jury rather than by the Court.

35. *Buchholz v. Crestbrook Insurance Co.*, 22-50265 (April 18, 2023). The Fifth Circuit affirms summary judgment against owners of a mansion who discovered mold in their home because their insurance policy did not cover generalized mold loss. ***Insurance Coverage***.

36. *B.W. v. Austin ISD*, Case No. 22-50158 (January 9, 2023). A white student suffers from being made fun of and mocked because of his pro-Trump views. But some students or staff also allegedly make comments about him being white. The Court dismisses his Title VI claim. ***En Banc Pending***

37. *Cactus Canyon Quarries v. MSHR*, Case No. 22-60322 (April 4, 2023). Does a regulation covering "braking systems" in the mining industry allow the regulators to issue a citation for a malfunctioning low brake pressure alarm? The Fifth Circuit affirms the ALJ's "yes" answer. ***Textualism***

38. *Calsep v. Dabral*, Case No. 22-20440 (October 11, 2023). The Fifth Circuit affirms a spoliation default judgment in a trade secret misappropriation case. ***Commercial***

39. *Calumet Shreveport Refining, L.L.C. v. EPA*, Case No. 22-60266 (November 22, 2023). The Court vacates adjudications denying exemptions from Clean Air Act regulations for six small refineries, holding that the adjudications were impermissibly retroactive. But Judge Higginbotham would have held that venue was only permissible in the D.C. Circuit. ***Reading Law*** ***Administrative Law*** ***Dissent***

40. *Carbon Six Barrels v. Proof Research*, Case No. 22-30772 (September 29, 2023). In a case between two manufacturers of carbon-fiber gun barrels, the Court holds that various claims (including defamation) between them were prescribed under Louisiana law. ***Commercial***

41. *Carmouche v. Hooper*, Case No. 21-30082 (August 10, 2023). A Louisiana prisoner sued under Section 1983 for being put in solitary for nearly a year. The Court of Appeals reverses: in part because the district court filed the prisoner's letter to the Court enclosing a check as his complaint, when the letter merely was a head's up that a complaint was coming!

42. *Carmichael v. Balke*, Case No. 22-20430 (October 6, 2023) (*In the Matter of Imperial Petroleum Recovery Corporation*). The Court mostly affirms the judgment in an adversary proceeding from bankruptcy where the trial judge changed course on reconsideration after having a supplementary evidentiary hearing. ***Bankruptcy***

43. *CEATS Inc. v. TicketNetwork, Inc.*, Case No. 21-40705 (June 19, 2023). A remarkable case broadly reversing a boat-load of unusual sanctions orders. We learn that awarding one side's lawyers more per hour than the other's doesn't always mean reversal, but it raises the Court's antennas. ***Commercial***

44. *Chambers v. Kijakazi*, Case No. 20-10918 (November 20, 2023). A social security recipient's pro se claims against the Government are dismissed for failure to exhaust. A trenchant reminder that while exhaustion may not be jurisdictional, it is often fatal.

45. *** *Chamber of Commerce v. SEC*, Case No. 23-60255 (December 19, 2023). The Fifth Circuit set aside the SEC's rule requiring issuers to report day-to-day share repurchase data once a quarter and to disclose the reason why the issuer repurchased shares of its own stock. In the Court's view, the SEC failed to adequately respond to the petitioner's comments about the rule's economic implications. Even worse for the SEC, it wasn't able to fix the problems with the rule during the Court's 30-day grace period. ***Administrative Law***

46. *Chavez v. Plan Benefit Services, Inc.*, Case No. 22-50368 (August 11, 2023). The Court affirms the certification of a Rule 23(b)(3) class action about a company's collection of excessive fees from employee benefit plans under ERISA. The Court also holds that the Plaintiffs have constitutional standing even though some members of the class participated in benefit plans they were not part of. ***Commercial***

47. *Chisom v. State of Louisiana*, Case No. 22-30320 (October 25, 2023). The Court continues engaging with a long-running consent decree that pertains to the method of selecting justices for the Louisiana Supreme Court. ***En Banc pending***

48. *Civelli v. J.P. Morgan Securities, L.L.C.*, Case No. 21-20618 (January 11, 2023). The Fifth Circuit guesses, *Erie'ily,* that a party that defeats a *conspiracy* claim arising from the Texas Theft Liability Act has won a suit under the TTLA for shifting attorney's fees. ***Commercial***

49. *Clark v. State of Louisiana, Department of Public Safety*, Case No. 21-30709 (March 28, 2023). Do you have an ADA claim if you're asked to fill out a short medical form about a possibly dangerous disability before being given a driver's license? No. ***Civil Rights***

50. *Clarke v. Commodity Futures Trading Commission*, Case No. 22-51124 (July 21, 2023). The Court saves PredictIt, a website that lets people trade shares betting on future political events. The Court set aside the revocation of the no-action letter on which the whole website is based because "the agency gave no reasons for it." ***Administrative Law*** ***Dissent***

51. *Cloud v. NFL Player Retirement Plan*, Case No. 22-10710 (October 6, 2023). The Fifth Circuit reverses a trial judgment increasing an NFL player's annual disability payments, because - even though the Court recognized that the disability system is "lopsided .. against disabled players" - the player failed to show changed circumstances that could support reclassification.

52. *Colony Insurance Co. v. First Mercury Insurance Co.*, Case No. 22-51114 (December 18, 2023). Insurer failed to present evidence showing that it was entitled to contribution or or subrogation from a co-insurer. ***Insurance Coverage***

53. *Collins v. Dallas Leadership Foundation*, Case No. 22-10094 (August 9, 2023). A prisoner completed his faith based training before a parole hearing, but alleged that the training program's leadership lied about his progress as retaliation for the prisoner's decision to report sexual harassment at the training program. But his claims fail: the *Heck* bar remains unbreachable.

54. *Crandel v. Hall*, Case No. 22-10360 (August 1, 2023). Section 1983 and *Monnell* claims arising out of a suicide in pre-trial detention fail because officers did not have sufficient knowledge of the risk of self-harm. ***Qualified Immunity***

55. *** *Crane v. City of Arlington*, Case No. 21-10644 (February 24, 2023). In dissents from denial of rehearing en banc, Judges Ho and Oldham decry the Fifth Circuit's "refusal" to take denials of qualified immunity en banc. In Judge Oldham's words, these denials "sow the seeds of uncertainty." But maybe they just provide certainty in the opposite direction? ***Commercial***

56. *Crown Castle Fiber v. City of Pasadena*, Case No. 22-20454 (August 4, 2023). The Fifth Circuit holds that the Federal Telecommunications Act preempts local aesthetic requirements that frustrated the creation of 5G networks. Surprisingly, the opinion includes a holding that the

defendant city forfeited all its affirmative defenses by failing to raise them in their answer. ***Commercial***

57. *Cunningham v. Circle 8 Crane Services*, Case No. 22-60008 (March 24, 2023). An employee is a "mechanic" for the purposes of an exception to the Fair Labor Standards Act. ***Labor & Employment***

58. *Consumers Research v. FCC*, Case No. 22-60008 (March 24, 2023). A Fifth Circuit panel rejects nondelegation challenges to the FCC's "Universal Service Fund" but the case was swiftly taken before the whole Court. ***Administrative Law*** ***En Banc pending***

59. *Credos Industrial v. Targa Pipeline*, Case No. 22-20480 (March 24, 2023) (*In the Matter of KP Engineering L.P.).* In an adversary proceeding, the Court rules that the existence of a valid contract bars a claim for quantum meruit, says the Court, so the plaintiff's claims were properly dismissed.. ***Bankruptcy***

60. *Corporativo Grupo v. Marfield Ltd.*, Case No. 22-20345 (March 24, 2023). An appeal of Findings of Fact and Conclusions of Law after a bench trial, inexplicably focused on "vessel mortgage recordation requirements under Panamanian law." The district court's careful work is affirmed. ***Commercial***

61. *Daves v. Dallas County*, Case No. 18-11368 (March 31, 2023) (En Banc). The Fifth Circuit says that challenges to county and city bail systems fail under *Younger* abstention.

62. *Darling Ingredients v. OSHC*, Case No. 22-60466 (October 6, 2023). An ALJ's decision to issue citations against a chicken-rendering plant for insufficient "lockout/tagout" procedures is affirmed. ***Administrative Law***

63. *Devillier v. Texas* Case No. 21-40750 (January 10, 2023). No federal takings clause claims against States. Ever. ***Certiorari Granted***

64. *Direct Biologics v. McQueen*, Case No. 22-50442 (April 3, 2023). Denial of an injunction in a non-compete case because the district court gave "short shrift" to many factors suggesting irreparable harm. ***Commercial***

65. *Dining Alliance v. Foodbuy L.L.C.*, Case No. 22-10340 (September 12, 2023). The Fifth Circuit affirms a case-ending sanction against a party that effectively hid the true citizenship of LLC members, and thus frustrated the court's jurisdictional analysis. ***Commercial*** ***Dissent***

66. *Delta Charter v. School Board Concordia Parish*, Case No. 23-30063 (December 13, 2023). A charter school waived its argument through a "stark lack of briefing" (and stuffing arguments in footnotes, which is forfeiture too) that the district court abused its discretion in refusing to amend a desegregation plan entered in the 1960s.

67. *D.L. Markham DDS v. Variable Annuity Life Insurance Co.*, Case No. 22-20540 (December 14, 2023). The Court affirms dismissal of an ERISA claim because the defendant was not a fiduciary just because it "collect[ed] the previously bargained-for compensation."

68. *Doe v. Rice University* Case No. 21-20555 (May 11, 2023) A student who lost his football scholarship after allegations of sexual misconduct revived his suit against the university. But in dissent, Judge Graves would have held there was no evidence that Doe had been discriminated against because he's a man: to the contrary, Graves says, the college was permitted to impose discipline for his failure to disclose the full scope of his sexually transmitted disease history to his partner. ***Civil Rights*** ***Dissent***

69. *Doe AW v. Burleson County, Texas*, Case No. 22-50918 (November 9, 2023). A county official, who allegedly assaulted an employee, lacks "final policymaking authority" under *Monnell* sufficient to hold the county liable for his own assault. "[T]he broad ability to make decisions … for the county's business generally is distinguishable from Sutherland's personal responsibility for his alleged sexual misconduct….").

70. *Discover Property Casualty Insurance Co. v. Blue Bell Creameries, USA*, Case No. 22-50842 (July 11, 2023). Texas Ice Cream giant Blue Bell seeks insurance coverage for a shareholder derivative suit arising out of its infamous 2015 listeria outbreak. No hot fudge for you! The derivative suit's allegations arose out of intentional acts, not an accident. ***Reading Law*** ***Insurance Coverage***

71. *Ducksworth v. Landrum*, Case No. 21-60830 (March 10, 2023). A man went to wash his car with his kids. Inexplicably, a group of police officers tased him repeatedly, leaving him in agony. The Court lacked appellate jurisdiction over most of the officers' appeals from denials of qualified immunity. ***Qualified Immunity*** ***Dissent***

72. *Edwards v. City of Balch Springs*, Case No.22-10269 (June 9, 2023). A police officer murdered a teenager, for which he was convicted. Was the city liable under *Monnell* for the content of its use of force policy? No,, because the policy sufficiently explained that the officer needed to face an immediate threat to safety before using deadly force. ***Qualified Immunity***

73. *EEOC v. Methodist Hospitals*, Case No. 17-10539 (March 17, 2023). The Court holds that a blanket "most qualified applicant" rule does not immunize an employer from having to consider reassigning an employee covered by the ADA, but also that mandatory reassignment is not always required. ***Civil Rights***

74. *Elmen Holdings v. Martin Marietta Materials, Inc.*, Case No. 23-20023 (November 15, 2023). A leaseholder for a gravel pit (yes, gravel!) was informed that it had missed a royalty payment and failed to cure. Its lease terminated. ***Commercial***

75. *El Paso Electric v. FERC*, Case No. 18-60575 (August 2, 2023). FERC orders allocating the costs of electrical grid improvements in the American West, and which allegedly allowed some public

utilities outside FERC's purview to free-ride, are vacated both for being illegal on their face and for being arbitrary and capricious. ***Administrative Law*** ***Dissent***

76. *Elson v. Black*, Case No. 21-20349 (January 5, 2023). The Court affirms the district court's decision to strike class allegations about the "FasciaBlaster," a cosmetic tool, for inadequate pleading. ***Commercial***

77. *ERCOT v. Just Energy Texas, L.P., (In the Matter of Just Energy Group, Inc.)*, Case No. 22-20424 (January 5, 2023). The bankruptcy court should have exercised *Burford* abstention when faced with a case about the legality of ERCOT's electricity pricing during Winter Storm Uri. ***Bankruptcy***

78. *** *Feds for Medical Freedom v. Biden*, Case No. 22-40043 (March 23, 2023) The Court bars the President from imposing a vaccine mandate for federal workers. ***Major Questions*** ***En Banc***

79. *In re Finn*, Case No. 22-11092 (August 14, 2023). The Fifth Circuit affirms a 12 month suspension from practice in district court for failures caused by substance abuse.

80. *Fisher v. Moore*, Case No. 21-20553 (March 16, 2023). In a horrifying case involving a sexual assault against a student, the Court rejects the "state-created danger" exception to qualified immunity. But Judge Wiener would have "dragged" CA5 into the 21st century by accepting the doctrine. ***Qualified Immunity*** ***Concurrence***

81. *Fleming v. Bayou Steel*, Case No. 22-30260 (September 27, 2023) The Court finds a disputed issue of fact on whether a parent company exercised "de facto control" over a bankrupt operating company under the WARN act. ***Reading Law*** ***Commercial***

82. *Flight Training International, Inc. v. Federal Aviation Authority*, Case No. 20-60676 (January 24, 2023).The Court holds that a new FAA rule that requires any "airline transport pilot" certificate to include a "type rating" for a specific aircraft needed to be promulgated on the basis of notice and comment. The rule is set aside. ***Concurrence*** ***Administrative Law***

83. *Freedom from Religion Foundation, Inc. v. Abbott*, Case No. 21-50469 (January 27, 2023). Governor Abbot's order removing a "Bill of Rights Nativity Scene"' from the Texas Capitol violated the First Amendment. Also, a fun discussion of the voluntary cessation doctrine! ***Civil Rights***

84. *Flores v. FS Blinds*, Case No. 22-20095 (July 12, 2023). The Court reverses summary judgment granted in favor of an employer in an FLSA case, citing the "lenient" standard to state how much overtime they might have worked. "[U]nder our precedent, [this] is not a tall slope. Plaintiffs have summited it." ***Labor & Employment***

85. *Flowers v. Walmart*, Case No. 22-30309 (August 16, 2023). Enough facts for trial in Louisiana for a plaintiff who slipped and fell on a puddle of water in Walmart. ***Personal Injury***

86. *Fort Bend County v. US Army Corps of Engineers*, Case No. 21-20174 (February 2, 2023). The Fifth Circuit holds that a claim against the Corps of Engineers for making flooding worse in and around Houston belonged in federal district court, not the court of claims. ***Administrative Law***

87. *** *Ganpatt v. Eastern Pacific Shipping Co.*, Case No. 22-30168 (April 28, 2023). The Court affirms an anti-suit injunction against litigation in India that had resulted in the jailing of a US litigant. ***Commercial*** ***Dissent***

88. *GMAG L.L.C. v. Janvey*, Case No. 22-20135 (May 5, 2023). In the ongoing Stanford Ponzi scheme receivership, a party forfeited its potential setoff rights against a $79 million judgment by waiting until after final judgment to raise its claims. ***Commercial***

89. *Gonzalez v. Blue Cross/Blue Shield*, Case No. 22-10062 (March 13, 2023). A former federal employee needed proton therapy for her cancer, but her insurer gave her only less-expensive radiation treatment. Unfortunately, her claims against her insurer were preempted by the Federal Employees Health Benefits Act.

90. *Gold Coast v. Crum & Forster Specialty*, Case No. 22-60247 (May 22, 2023). Dumping "hot, greasy wastewater" into a city's sewers is an intentional act, not an accident, for purposes of an insurance policy. ***Insurance Coverage***.

91. *Great Lakes Ins. v. Gray Group Invst.*, Case No. 22-30041 (August 1, 2023). The "Hello Dolly" sank in Hurricane Sally. Because the owner didn't leave the Hello Dolly "where she belonged" (the Orleans Marino) the owner is out of luck on his insurance claim. ***Reading Law*** ***Insurance Coverage***.

92. *Guerra v. Castillo*, Case No. 22-40196 (September 7, 2023). A police officer was the victim of a "deliberate, long-term conspiracy to create and file affidavits" known to be false "with the purpose of exploiting the criminal justice system to arrest, detain and torment" the officer for crimes he did not commit. His Fourth Amendment claims were revived. ***Qualified Immunity***

93. ***_Hamilton v. Dallas County_, Case No. 21-10133 (February 22, 2023). The Fifth Circuit holds, en banc, that recovery under Title VII does not require proving an "ultimate employment decision." ***En Banc*** ***Concurrences*** ***Textualism*** ***Reading Law*** ***Labor & Employment***

94. *Hanover Ins. Co. v. Binnacle Development*, Case No. 21-40662 (January 12, 2023). The Fifth Circuit interprets a liquidated damages provision in a few paving and infrastructure contracts. Memorably, the Court notes these were "MUD contracts created by MUD attorneys." The reader is left to imagine what that is. ***Commercial***

95. *Harrison County MS v. US Army Corps of Engineers*, Case No. 21-60897 (March 27, 2023). Was the Army Corps required to prepare a new environmental analysis of a Louisiana spillway under the National Environmental Policy Act because it was used more often? No. ***Administrative Law***

96. *Harrison v. Brookhaven School District*, Case No. 21-60771 (September 21, 2023). The Court applies its new precedent in *Hamilton* (#85, above) and says that any non-de-minimis injury will do. Here, the plaintiff alleged she was excluded from a training course costing $2,000. That's enough! ***Labor & Employment***

97. *Harward v. City of Austin*, Case No. 22-50924 (October 11, 2023). The Fifth Circuit interprets the little known (to me and probably you) Tax Injunction Act, 28 U.S.C. Section 1341, which prevents district courts from enjoining, suspending, or restraining the assessment of state taxes.

98. *Healthy Gulf v. US Army Corps*, Case No. 22-60397 (September 6, 2023).The Court rejects a bevy of "strange" challenges to the Army Corp of Engineers' permitting of a liquefied natural gas production and export terminal. ***Administrative Law***

99. *Heckman v. Raynolds Gonzalez-Caballero*, Case No. 22-10415 (April 13, 2023). References to a "hammer" and "hammering the defense" in a closing statement were not so prejudicial as to require reversal, even though there had been an extended discussion of Jim Adler, "the Texas Hammer" (a prominent plaintiff's personal injury lawyer) during voir dire. ***Personal Injury***

100. *Heston v. Austin ISD*, Case No. 22-50295 (June 22, 2023). Issue preclusion does not apply in an IDEA case where the Supreme Court changed the law between the first and second suit. That's because issue preclusion requires that the "applicable legal rules remain unchanged." ***Civil Rights***

101. ****Hicks v. LeBlanc*, Case No. 22-30184 (September 5, 2023). This is another in the Fifth Circuit's line of overdetention cases, the "euphemism" for keeping people in prison past the end of their term. The Court holds that qualified immunity was properly denied against high-ranking Louisiana officials because of the pervasiveness of the overdetention problem. Inmates released "will have been locked up past their release dates - for a collective total of 3,000 plus years." ***Qualified Immunity***

102. *Highland Capital Management Fund Advisors L.P. v. Highland Capital Management L.P.*, Case No. 22-10189 (January 11, 2023) (*In the Matter of Highland Capital Management*). The Court continues to clean up the messy Highland Capital bankruptcy by holding that certain post-Plan actions were not modifications that required claimholder approval. ***Bankruptcy.***

103. *Kena Ironclad Corp v. CP Marine Services LLC*, Case No. 22-30311 (October 17, 2023). In a case involving wrongful seizure of a vessel, the Fifth Circuit reverses because the district court did not specify whether the "punitive" damages it issued were intended as compensatory damages. ***Commercial***

104. *Kim v. American Honda Motor*, Case No. 22-40790 (November 7, 2023). The Court affirms a $5 million product defect claim after a jury verdict against Honda arising out of a side-impact car accident. ***Personal Injury***

105. *Klick v. Cenikor Foundation*, Case No. 22-20434 (August 16, 2023). At first, the Fifth Circuit affirmed a district court's certification of a collective action under the FLSA for patients put to work by a drug rehabilitation program. After a lengthy en banc process, however, the panel itself reversed the decision and remanded for the consideration of an additional defense to certification. ***Labor & Employment***

106. *Hernandez v. West Texas Treasures*, Case No. 22-50048 (August 17, 2023). The Court revives, to give the plaintiff a chance to amend, a pro se ADA claim arising out of a dispute about COVID-19 masks at an estate sale. ***Civil Rights***

107. *Hogan v. SMU*, Case No. 22-10433 (July 20, 2023).The Fifth Circuit certifies to SCOTX whether Texas's Pandemic Liability Protection Act retroactively bars a student's claim for money damages when SMU switched to remote instruction during the COVID-19 pandemic.

108. *Hopkins v. Hosemann*, Case No. 19-60662 (August 4, 2023). A Fifth Circuit panel holds that Mississippi's felon disenfranchisement law violates the Eighth Amendment's bar on cruel and unusual punishment, but the decision is swiftly taken en banc. ***En Banc Pending***

109. *Huntington Ingalls Inc. v. Office of Workers' Compensation Programs*, Case No. 21-60752 (June 6, 2023). Dealing with the Section 907(n) of the Longshore and Harbor Workers' Compensation Act, the Court finds as a matter of first impression that audiologists are physicians. ***Textualism*** ***Reading Law***

110. ****Hudson v. Lincare, Inc.*, Case No. 22-50149 (January 18, 2023). An employer is not liable under Title VII for a racially hostile work environment because its response was "prompt, reasonable, and effective." The company engaged in a prompt investigation and issued remedial and disciplinary measures against the co-workers who used racial slurs. ***Labor & Employment***

111. ****IFG Port Hold v. Lake Charles Harbor*, Case No. 22-30398 (September 21, 2023). Trial before a Magistrate Judge is based on consent. But what happens if a party consents, unaware that the Judge has a relationship with one of the parties? The Court's remand requires further factual development about whether the relationship required vacatur of the referral to the magistrate judge. ***Commercial***

112. ****Illumina v. FTC*, Case No. 23-60167 (December 15, 2023). In a case that attracted nationwide interest, the Court mostly affirmed an FTC order barring a merger of two innovative medical technology companies. Days later, Illumina announced that it would divest Grail rather than continue to litigate. ***Commercial***

113. *Amberson v. McAllen*, Case No. 21-50960 (January 3, 2023) (*In the Matter of Jon Amberson*) The Court denies rehearing (which it normally does in a single sentence) but writes to fully explain its view that an arbitrator's later fact-findings can be used in deciding whether a trial court's decision compelling arbitration was valid.

114. *Official Committee of Unsecured Creditors v. Bouchard Transportation Co., Inc.*, Case No. 22-20321 (July 25, 2023) (*In the Matter of Bouchard Transportation Company, Inc).* Is paying a stalking horse bidder a break-up fee in bankruptcy a permissible use of estate funds? Yes. ***Bankruptcy.***

115. *Inmarsat Global v. Speedcast*, Case No. 22-20274 (August 3, 2023) (*In the Matter of Speedcast International Limited*). The Court analyzes whether a particular claim was a contractually defined "Permitted Claim." It's as exciting a case as that sounds. ***Bankruptcy***

116. *Jack v. Evonik Corp.*, Case No. 22-30526 (August 22, 2023). The Court revives claims about damages caused to Louisiana residents from the "colorless and odorless" gas, Ethylene Oxide. In part, the Court observes that the district court was required to consider how regular people (without any "upper-level education in chemistry") could have known EtO could cause breast cancer. ***Personal Injury***

117. *Jackson Municipal Airport Authority v. Harkins*, Case No. 21-60312 (August 29, 2023). The Fifth Circuit granted en banc review of a panel opinion finding that local commissioners had standing to block Mississippi from taking over the Jackson airport authority. ***En Banc Pending***

118. *James v. Hegar,* Case No. 22-50828 (November 16, 2023) This is a case challenging Texas's escheat laws for unclaimed property. The Court holds that the plaintiffs lack standing because they were unable to show they feared an ongoing, rather than a past, violation of their rights under the Takings Clause.

119. *Jeanty v. Big Bubba's Bail Bonds*, Case No. 22-40241 (June 29, 2023). The Court of Appeals holds that a defendant may sue a bail bondsman to challenge the bondsman's claim that the defendant has violated the contractual terms of release (and is not limited to a narrow statutory remedy under Texas law).

120. *GMAG, LLC v. Janvey*, Case No. 22-10235 (May 30, 2023). No year is complete without another episode involving the Stanford International Bank collapse of the noughts. The Court holds that a defendant in one of the many recoupment actions had waived their right to assert a set off by waiting until after final judgment to assert that claim. ***Commercial***

121. *January v. City of Huntsville*, Case No. 22-20380 (July 24, 2023). A firefighter went to his office to copy files to make an EEOC complaint against his employer. He was fired shortly thereafter. But the Court affirmed the summary judgment against him, because his employer had provided sufficient evidence of a legitimate non-discriminatory reason for his firing (he seemed intoxicated). ***Labor & Employment***

122. *Kling v. Hebert*, Case No. 21-30658 (February 17, 2023). The Fifth CIrcuit certifies to Louisiana Supremes whether a state court lawsuit interrupted prescription for his Section 1983 federal claim under Louisiana law.

123. *Landor v. Louisiana Department of Corrections*, Case No. 22-30686 (September 14, 2023). A genuinely astonishing case where a rastafarian took a Fifth Circuit opinion saying he was allowed to wear his hair long in prison with him when he was transferred to a new facility, only to have the case thrown in the garbage and his hair shaved. But his claims were barred by a prior precedent, and the Court denied rehearing en banc because it believed SCOTUS needed to act instead. ***Civil Rights***

124. *Lartigue v. Northside Independent School District*, Case No. 22-50854 (November 16, 2023). The Court applies SCOTUS's ruling in *Fry*, holding that a plaintiff bringing an ADA claim for failure to accommodate her hearing disability has a standalone claim that is not dependent on IDEA exhaustion. ***Civil Rights*** ***Dissent***

125. *LaVergne v. Stutes*, Case No. 22-30476 (September 25, 2023). The Court rejects a pro se prisoner's claims of constitutional violations relating to solitary confinement, noting that he was allowed to make phone calls, cook food, and exercise, and was not deprived of conversation with other inmates.

126. *Louisiana Fair Housing Action v. Azalea Garden*, Case No. 22-30609 (September 14, 2023). The Court holds that a nonprofit entity with a mission to eradicate housing discrimination lacks organizational standing to bring a Fair Housing Act claim because although it did divert its resources to addressing the discrimination, its ability to carry out its purpose was not "concretely and perceptibly impair[ed]" by that diversion. ***Civil Rights*** ***Dissent***

127. *Lewis v. USA*, Case No. 21-30163 (December 18, 2023). The Court holds, following the Supreme Court's decision in *Sackett v. EPA*, that certain tracts in Louisiana are not wetlands subject to the Clean Water Act. In a final footnote, the Court warns the Army Corps of Engineers that it might be subject to sanctions if it persists in its views. ***Administrative Law*** ***Dissent***

128. *Lewis v. Danos*, Case No. 22-30670 (October 12, 2023). A woman's RICO claims based on her whistleblowing against Les Miles, LSU football coach, failed as both time barred and inadequately pleaded on causation.

129. *Liberty Mutual Fire Ins. v. Copart of CT*, Case No. 21-10938 (July 31, 2023). The Fifth Circuit holds, construing an insurance policy, that there *can* be a duty to indemnify even if there is no duty to defend. Yes, I said indemnify but not defend, not the other way around. ***Insurance Coverage***.

130. *Little v. Doguet*, Case No. 20-30159 (June 21, 2023). *Younger* abstention required in suits challenging a local jurisdiction's bail practices when there is an opportunity in state court to present constitutional challenges to bail.

131. *Lousteau v. Holy Cross College Inc.*, Case No. 22-30407 (August 28, 2023). Louisiana's "Revival Provision" reviving prescribed claims of sexual assault against clergy (and other adults) does not apply to crimes committed before 1993.

132. *Loy v. Rehab Synergies*, Case No. 22-40411 (June 21, 2023). The district court properly certified an FLSA collective action for a group of speech, physical, and occupational therapists. ***Labor & Employment***

133. *Luna v. Davis*, Case No. 21-50578 (February 6, 2023). Prisoner's claim that he was transferred as retaliation back to "boot camp" housing where he was likely to be assaulted survived scrutiny under the Eighth Amendment. ***Qualified Immunity***

134. *Martinelli v. Hearst Newspapers*, Case No. 22-20333 (April 13 2023). The Court rejects the argument that the limitations period under the Copyright Act is no longer extended by the discovery rule, despite SCOTUS decisions assuming that the limitations period begins at the time of infringement. ***Commercial***

135. *Marfil v. New Braunfels*, Case No. 22-50908 (June 16, 2023). Plaintiffs are entitled to discovery before their claims that a city's zoning regulation banning short-term rentals of residential properties is unconstitutional. ***Civil Rights*** ***Dissent***

136. *Marquette Transportation Co. Gulf-Inland, L.L.C. v. Johnson*, Case No. 22-30261 (December 4, 2023). The Court sorts out a complicated maritime crash after a jury verdict. Oh, the so negligent river pilot of the STRANDJA! ***Commercial***

137. *Mayfield v. Butler Snow*, Case No. 21-60733 (June 27, 2023). A man's family brought First Amendment retaliation claims after he was apparently driven to suicide by the police investigation into his role in a scheme to embarass a United States Senator by taking pictures of his elderly wife. The Court affirmed dismissal of all those claims. Judge Ho dissented from denial of rehearing, writing "Did he deserve to be humiliated … and his family destroyed" because he disagreed with those in power? ***Qualified Immunity*** ***Dissent***

138. *Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce*, Case No. 22-30105 (February 23, 2023). The Fifth Circuit sets aside a regulation that requires charter-boat owners to install a vessel monitoring system that transmits the boat's GPS location to the Government, in part because the Magnuson-Stevens Act does not authorize the GPS-tracking requirement. *Concurrence*. (rejecting Chevron). ***Reading Law***

139. *Mclin v. Twenty-First Judicial District*, Case No. 22-30490 (August 16, 2023). An employee was fired from her job for a court after allegedly making inappropriate comments on social media about peaceful protestors. The Fifth Circuit dismisses her Title VII claims because her dismissal was based on these comments and not because of her race. ***Labor & Employment***

140. *McClelland v. Katy ISD*, Case No. 21-20625 (March 31, 2023). A high school football star's constitutional claims for being suspended from his team for a racially charged snapchat can't surmount qualified immunity. ***Qualified Immunity*** ***Civil Rights***

141. *National Oilwell Varco, L.P. v. Auto-Dril Inc.*, Case No. 21-40648 (May 12, 2023). A complex post-trial appeal arising out of a 2011 agreement settling a 2009 patent infringement suit. Among other things, the Fifth Circuit finds the district court abused its discretion in allowing a lay witness to testify as an expert and orders the trial court to consider whether that error "infected" the jury's verdict. ***Commercial*** ***Dissent***

142. *** *Netflix, Inc. v. Babin*, Case No. 22-40786 (December 18, 2023). The Court affirms a district court's injunction against a prosecutor's bad faith and illegal actions against Netflix for promoting a controversial film.***Civil Rights***

143. *Newbold v. Kinder Morgan SNG Operator, L.L.C.*, Case No. 22-30416 (March 14, 2023). A man died two years after hitting a submerged sign in his boat. The Court holds that the "allision" occurred on non-navigable waters (the waters were on an area that was dry 67% of the time). Thus, Louisiana law applied, and his claim was barred. ***Personal Injury***

144. *New Orleans Association of Cemetery Tour Guides and Companies v. New Orleans Archidiocesan Cemeteries*, Case No. 22-30091/22-30559 (January 6, 2023). The Fifth Circuit affirms dismissal of antitrust suits about cemeteries tour guides. "A product market limited to cemetery tours alone" does not survive a motion to dismiss, because tour guides can also offer tours of Voodoo sites combined with different cemeteries.

145. *Nexpoint Advisors v. Pachulski*, Case No. 22-10575 (July 19, 2023) (*In the Matter of Highland Capital Management, L.P.,*). A creditor lacked standing to object to professional fees in a bankruptcy because it would not be "directly" impacted by the fee orders. ***Bankruptcy.***

146. *Nix v. MLB*, Case No. 22-20364 (March 16, 2023). A former baseball player claiming that Major League Baseball and various other entities were conspiring against his nutritional supplement "strikes out once again" and is sanctioned for bringing a frivolous appeal.

147. *Noble House v. Lloyd's*, Case No. 22-20281 (May 1, 2023). The Court affirms a dismissal for forum non-conveniens in an insurance coverage case involving a forum selection clause picking the courts of England and Wales. ***Insurance Coverage***

148. *Norsworthy v. HISD*, Case No. 22-20586 (June 13, 2023). Of most interest, the Court applies new FRAP 3(c) for the first time in a published opinion, saving an inexact notice of appeal.

149. *Onpath Federal Credit Union v. Department of Treasury*, Case No. 22-30080 (July 5, 2023). "No harm no foul" doesn't work when you're talking about incorrect representations to a federal agency when trying to get funding.

150. *Oklahoma Firefighters Pension and Retirement System v. Six Flags Entertainment Co.*, Case No. 21-10865 (January 18, 2023). In a federal complaint governed by the PSLRA, must allegations backed by the testimony of an anonymous witness be discounted? Not always, and especially not if the "details substantiate that the source has the necessary knowledge." ***Commercial***

151. *Ostrewich v. Tatum*, Case No. 21-20577 (June 28, 2023). Texas's "electioneering" laws, preventing electioneering activity inside polling places, pass constitutional muster.

152. *Parker v. LecBlanc*, Case No. 21-30446 (July 17, 2023). Fifth Circuit revives yet another claim that, due to a mistake by Louisiana authorities (this time incorrectly describing an inmate as a sex offender), an inmate was kept in prison 337 days past his release date.

153. *Pool v. City of Houston*, Case No. 22-20491 (December 11, 2023). A fight about voter-registration provisions in the Houston City Charter is a "faux dispute" and is thus dismissed.

154. *Paymentech, L.L.C. v. Landry's Inc. v. Visa, Inc. et. al.*, Case No. 21-20447 (February 23, 2023). A complex commercial dispute trying to clean up the consequences of a data breach and crossing indemnification provisions. In the end, the retailer ends up holding much of the bag, as opposed to the payment processor or credit card companies. ***Commercial***

155. *Petersen v. Johnson*, Case No. 21-20565 (January 4, 2023). The family of a man who killed himself after being caught up in an underage sex sting loses their Section 1983 claim: the Court holds that the officer reasonably believed the man was seeking illegal sexual contact, even if he subjectively was not. ***Qualified Immunity***

156. *Petteway v. Galveston County*, Case No. 23-40582 (November 10, 2023). The Fifth Circuit affirms a judgment under the Voting Rights Act, but asks for an immediate en banc on whether "distinct" minority groups like "blacks and Hispanics may be aggregated for purposes of voter dilution claims under Section 2." ***En Banc Granted***

157. *PHH Mortgage v. Old Republic National*, Case No. 22-50930 (August 30, 2023). The district court erred in dismissing a case sua sponte under FRCP Rule 19, because it misunderstood the graveman of the dispute under Texas law, and thus thought a party was required when it wasn't.

158. *PHI Group, Inc. v. Zurich American Insurance Co.*, Case No. 22-30142 (January 30, 2023). The presence of physical coronavirus particles does not creates "direct physical loss or damage" for the purposes of an insurance loss. ***Insurance Coverage***.

159. *Pinkston v. Kuiper*, Case No. 21-60320 (May 4, 2023). A prisoner loses a Section 1983 claim for forcible injection of an antipsychotic medication. The Court says that a "threatening, time-sensitive" prison situation does not require a hearing before subjecting the prison to antipsychotic injections. ***Qualified Immunity***

160. *Pizza Hut v. Pandya*, Case No. 22-40555 (August 22, 2023). In a fight between the 1980s pizza giant and a large franchisee, the Court enforces the latter's contractual waiver of its right to a jury trial (and, crucially, holds that the party resisting the jury waiver has the burden of proof to show the waiver was invalid).

161. *Prescott v. UTMB*, Case No. 21-40856 (July 10, 2023). The Fifth Circuit clarifies that a prisoner receives individual strikes for deciding IFP-status for the decision of a district court dismissing his claim *and* losing an appeal from the same case. Also, importantly, the Court reaffirms that "specific and detailed" allegations of food contamination are enough to demonstrate imminent danger for purposes of the statute.

162. *Princeton Excess v. AHD Houston*, Case No. 22-20473 (October 6, 2023). It's an insurance coverage dispute arising from claims by professional models that their pictures were misappropriated to imply they worked at strip clubs. The Fifth Circuit holds, for the most part, that the insurance policies do not offer coverage to the clubs. ***Insurance Coverage*** ***Reading Law*** ***Dissent***

163. *QBE Syndicate 1036 v. Compass Minerals, Louisiana*, Case No. 23-30076 (October 12, 2023). The Court certifies questions to the Louisiana Supreme Court about whether a Louisiana statute that nullifies indemnity agreements in oil & gas contracts applies to the "drill and blast" method for mining salt. ***Commercial***

164. *Rahman v. Exxon Mobil Corporation*, Case No. 21-30669 (January 10, 2023). The Fifth Circuit recognizes offering "inadequate training" on the basis of race as a cognizable claim under Title VII, but affirmed dismissal of claim on summary judgment where the plaintiff received all the same training as his white colleague. ***Labor & Employment*** ***Dissent***

165. *Ramey & Schwaller v. Zions Bancorp*, Case No. 22-20107 (June 16, 2023). A bank properly withdrew PPP loan funds for an alleged misstatement in a loan application. ***Reading Law***

166. *Raskin v. Dallas ISD*, Case No. 21-11180 (June 2, 2023). The Fifth Circuit holds for the first time that a non-lawyer parent may *sometimes* represent a child pro se, but only when the "child's case is the parent's own." Judge Oldham's dissent says he would have protected that right "absolutely." ***Civil Rights*** ***Dissent***

167. *Reagan National Advertising of Austin v. City of Austin*, Case No. 19-50354 (March 30, 2023). Austin's digital billboard regulation, on remand from SCOTUS, survives intermediate scrutiny.

168. *Reitz v. Woods*, Case No. 21-11100 (November 2, 2023). A man was SWATTED, and when the police arrived to find no threat, he was arrested and later prosecuted for making a false report. The Court holds that one of his Fourth Amendment claims survives. ***Qualified Immunity***

169. *Restaurant Law Center v. LABR*, Case No. 22-50145 (April 28, 2023). The Court says the district court erred in denying a preliminary injunction against the Department of Labor's new tipped employee regulations. ***Administrative Law*** ***Dissent***

170. *Rex Real Est. I v. Rex Real Estate Exchange*, Case No. 22-50405 (September 6, 2023). The Court revives trademark infringement claims brought by Rex Real Estate ("The Real Rex" as he called himself) against a company called the Rex Real Estate Exchange.

171. *R.J. Reynolds Vapor Company v. Food & Drug Administration*, Case No. 23-60037 (March 23, 2023). A stay of enforcement granted because the FDA was not permitted to pull a "surprise switcheroo" on a company which had placed legitimate reliance on the agency's guidance about menthol flavored e-cigarettes. ***Administrative Law***

172. *** *Rogers v. Jarrett*, Case No. 21-20200 (March 30, 2023). An inmate was working in the prison's hog barn when he was struck in the head by the ceiling. The prison staff denied him immediate medical treatment, and he ended up with a traumatic brain injury. Qualified Immunity granted because the prison's staff evaluation of the situation did not meet the extremely high standard of "deliberate indifference." But "Wait What?" Judge Willett concurs to highlight "highly newly published scholarship" that shows the "qualified-immunity doctrine" was flawed "foundationally" from "its inception." ***Qualified Immunity*** ***Concurrence***

173. *Rutila v. DOT*, Case No. 22-10848 (July 10, 2023). The FAA was not required to create a record to respond to a FOIA request by taking a screenshot of a database.

174. *Sauceda v. City of San Benito*, Case No. 19-40904 (August 15, 2023). The police burst into a man's yard based on "rude comments and gestures" and arrest him. His false arrest claim is revived by the Fifth Circuit against the officers' claims of qualified immunity. ***Qualified Immunity***

175. *Sacks v. Texas Southern University*, Case No. 22-20541 (October 3, 2023). A tenured law professor loses her Section 1983 claims are barred by res judicata, and her Title VII and Equal Pay Act claims. ***Civil Rights***

176. *Sampson v. United Services Automobile Association* Case No. 22-30351 (October 6, 2023) The Court holds that USAA insureds were not injured by the company's decision to use one valuation handbook rather than another in deciding how much to pay for a totaled car.

177. *Satanic Temple v. Texas Health and Human Services*, Case No. 22-20459 (August 18, 2023). The Satanic Temple's interlocutory appeal (seeking an injunction against Texas's abortion laws) was dismissed for lack of jurisdiction because in the meantime, the district court had dismissed its claims on the merits. ***Civil Rights***

178. *Self v. BPX Operating Co.*, Case No. 22-30243 (September 8, 2023). The Court certifies to the Louisiana Supreme Court a question about the interplay between the Civil Code doctrine of

negotiorum gestio (a quasi-contractual obligation) and new Louisiana Oil & Gas conservation statutes. ***Dissent***

179. *Scott v. City of Mandeville*, Case No. 20-30507 (May 23, 2023). The police hurt a woman while handcuffing her for driving while intoxicated. It turns out the officers are wrong about intoxication (she hadn't drunk) but right about her impairment (she'd taken oxycodone). They prevail on qualified immunity. ***Qualified Immunity***

180. *Shemwell v. McKinney, Texas*, Case No. 21-40798 (March 28, 2023). An elected official seeking an "prospective" injunction about voting procedures in her recall election loses because the election happened and all her claims are moot. As the Court observes, they really should have taken the district court up on its "sua sponte invitation" to seek injunctive relief while the case was still live. But they didn't, and so their case couldn't proceed. ***Civil Rights***

181. *Shrimpers and Fishermen of the RGV v. US Army Corps of Engineers*, Case No. 21-60889 (January 5, 2023). Shrimpers fail in their effort to prevent the issuance of a permit to build a liquid natural gas facility in Louisiana wetland terrain. ***Administrative Law***

182. *Shenzhen Synergy Digital v. Mingtel*, Case No. 22-40440 (July 18, 2023). An American company was liable to pay for thousands of Chinese tablets that had bombed on the Home Shopping Network. ***Commercial***

183. *Southern Orthopaedic Specialists, L.L.C. v. State Farm Fire & Casualty Co.*, Case No. 22-30340 (April 3, 2023). Business interruption insurance doesn't cover Covid-related shutdowns. ***Insurance Coverage***.

184. *Spano v. Whole Foods, Inc.*, Case No. 22-50593 (April 14, 2023). A child's claims about being injured by muffins containing nuts at Whole Foods were not preempted by the Food, Drug, and Cosmetic Act. ***Personal Injury***

185. *Spivey v. ChitimachaTribe*, Case No. 22-30436 (August 16, 2023). A district court must remand a case for which it lacks subject matter jurisdiction "even when the district court thinks [the remand is] futile" (i.e., the claim was barred in the state courts by sovereign immunity). ***Reading Law***

186. *Springboards to Education Inc. v. McAllen ISD*, Case No. 21-40333 (March 8, 2023). The Fifth Circuit holds that neither a school district nor a network of charter schools is an "arm of the state" for state sovereign immunity, under the Fifth Circuit's *Clark* factors. But Judge Oldham would take the case en banc to discard *Clark* and replace its six factors with just one: "Was the entity asserting state sovereign immunity considered 'the State' in 1789?" But the districts won on the merits anyway. ***Concurrence***

187. *SR Construction v. Hall Palm Springs*, Case No. 21-11244 (April 17, 2023) (*In the Matter of Palm Springs II, L.L.C.*). The Court blesses the sale of an unfinished hotel to an affiliate (which

wiped out a subcontractor's liens on the property) because the sale was a reasonable one in the context of the ongoing COVID-19 lockdown. ***Bankruptcy***

188. *Sligh v. City of Conroe*, Case No. 22-40518 (November 29, 2023). The Court affirms the dismissal of excessive force and other claims when plaintiff was bitten by a police dog after having broken free of police control (but posing no threat), because this right was not clearly established. ***Qualified Immunity***

189. *State of Louisiana v. i3 Verticals*, Case No. 22-30553 (September 1, 2023). The Fifth Circuit holds that under the Class Action Fairness Act, a dispute between Louisiana law enforcement agencies and software companies presents a local controversy that must be adjudicated in state court. But the majority and dissent face off about the definition of the word "seek" using Bible verses as ammunition. ***Dissent*** ***Textualism***

190. *State of Missouri v. Biden*, Case No. 23-30445 (October 3, 2023). The Fifth Circuit partially affirms an injunction against the Government's efforts to combat misinformation about COVID-19 on social media. ***Cert Granted and Stayed***

191. *State of Texas v. Nuclear Regulatory Commission*, Case No. 21-60743 (August 25, 2023). The Fifth Circuit holds that the Atomic Energy Act does not give the NRC the power to license a private storage facility for nuclear waste, relying in part on the Major Questions Doctrine. ***Major Questions*** ***Commercial***

192. *Smith v. John Bel Edwards*, Case No. 23-30634 (December 19, 2023). An injunction preventing housing juveniles at a Louisiana state penitentiary for adults has expired by its terms and the case is therefore moot.

193. *St. Maron Properties, L.L.C. v. City of Houston*, Case No. 22-20019 (August 21, 2023). The Court revives Section 1983 claims by Houston property-owners that the city made their homes more likely to flood and created "mosquito and snake infestations."

194. *SXSW v. Federal Insurance*, Case No. 22-50933 (October 5, 2023). The Fifth Circuit remands sua sponte for factual development on complete diversity: the district court is asked to consider "at least three potential jurisdictional defects…"

195. *Teeuwissen v. Hinds County, MS*, Case No. 22-60457 (August 14, 2023). The Court interprets the unusual Mississippi law that a local government official has unilateral authority to void any contracts that they find in effect upon taking office: the Court here says that one of the exceptions to that rule requires the contract for legal services here to be honored.

196. *Tejas Motel, L.L.C. v. City of Mesquite*, Case No. 22-10321 (March 22, 2023). Can a plaintiff relitigate a federal takings claim in federal court that was previously dismissed in state court? No, because this particular plaintiff sued before the Supreme Court solved the "terrible double-bind" takings plaintiffs faced in *Knick v. Township of Scott*.

197. *Tesla v. NLRB*, Case No. 21-60285 (March 31, 2023). A panel of the Fifth Circuit holds that Tesla boss Elon Musk's tweets constituted an unlawful threat under the National Labor Relations Act. But the Court then granted reconsideration of the case. ***En Banc Pending*** ***Commercial***

198. *Texas Aromatics v. Intercontinental Terminals*, Case No. 22-20456 (October 27, 2023). If you're dealing with a spill that combines oil and hazardous substances, can you recover under CERCLA or the Oil Pollution Act (OPA, as it is Greekily called). The answer: CERCLA. ***Administrative Law*** ***Reading Law***

199. *Texxon v. Getty Leasing*, Case No. 22-40537 (May 3, 2023) (*In the Matter of Texxon Petrochemicals, Inc.*). A "brief email exchange" was not a contract that could be assumed in bankruptcy. ***Bankruptcy***

200. *In re TikTok, Inc.*, Case No. 23-50575 (October 31, 2023). Mandamus was warranted to require transfer of a dispute about TikTok's source code to California.

201. *Thompson v. Texas Department of Criminal Justice*, Case No. 21-20241 (May 5, 2023). The claims of a man who suffered a stroke in prison failed because his claim sounded in medical negligence rather than deliberate indifference.

202. *TNT Crane & Rigging Co. v. OSHC*, Case No. 22-60399 (July 19, 2023). A crane company challenged an adverse decision by OSHA for violations of the "Cranes and Derricks in Construction Standard." Its decision was affirmed as supported by substantial evidence. ***Administrative Law***

203. *In re: TD Bank*, Case No. 22-20648 (February 14, 2023). The Court observes that "[t]he four most powerful words from the lips of a [district judge] are simply 'Call your first witness.'"

204. *Turtle Island Foods v. Strain*, Case No. 22-30236 (April 12, 2023). Although Tofurkey has standing to challenge Louisiana's new "Truth in Labeling" laws (designed to force vegan meats to relabel) it loses its *facial* challenge on the merits.

205. *Tuttle v. Sepolio*, Case No. 22-20279 (May 23, 2023). The Court largely denies qualified immunity in a case where the police executed a no-knock warrant based on allegedly false information, killed the home-owners' do, and also fired on the homeowners. ***Qualified Immunity*** ***Dissent***

206. *Torrey v. Infection Diseases Society*, Case No. 22-40728 (November 16, 2023). Claims by people suffering from chronic Lyme disease against a magazine that said chronic Lyme doesn't exist were dismissed: those are "non-actionable medical opinions not factual assertions…."

207. *Trevino v. Iden*, Case No. 21-51105 (August 21, 2023). Game wardens prevail against a plaintiff's retaliatory prosecution claims arising out of a deal involving $400, a jet ski, and an ill-fated ad on Craigslist. ***Qualified Immunity***

208. *U.S. Navy Seals 1-26 v. Biden*, Case No. 22-10077 (July 6, 2023). Some Navy Seals' challenge to the administration's vaccine mandate is moot because the mandate was rescinded before the case could be decided. ***Dissent***

209. *United Natural Foods v. NLRB*, Case No. 21-60532 (April 24, 2023). The Court confirms that the NLRB was permitted to withdraw a complaint upon a change of policy. In so holding, the Court observes that a "see generally" citation to "five law review articles" is not enough to save an argument from forfeiture. ***Commercial*** ***Administrative Law***

210. *USA v. Financial Times*, Case No. 23-20097 (August 4, 2023). The Court affirms a district court's refusal to unseal documents for the use of intervenor newspapers (and other organizations), despite numerous procedural mistakes, because "there is no reasonable doubt about the propriety of the decision to" seal in this case.

211. *USA v. Team Finance*, Case No. 22-40707 (August 31, 2023). The district court erred in denying a health care economist's motion to intervene in a qui tam to get the records unsealed.

212. *J.W. v. Paley; Katy ISD*, Case No. 21-20671 (August 28, 2023). A school officer tased a special-needs student. While the claims were properly administratively exhausted, the Court affirms the grant of summary judgment to the officer and the school district because there was no evidence of intentional discrimination. ***Dissent***

213. *Wallace v. Performance Contractors, Inc.*, Case No. 21-30482 (January 3, 2023). A woman's claim that she was not allowed to work "at elevation" at a contractor because her supervisor had discriminatory views about women's bodies survived summary judgment under Title VII. ***Labor & Employment***

214. *Welsh v. Lubbock County*, Case No. 22-10382 (June 15, 2023). Court rules against a prisoner's claims of mistreatment while a pre-trial detainee. ***Prison***

215. *Wesdem, L.L.C. v. Illinois Tool Works, Inc.*, Case No. 22-50769 (June 9, 2023). A distributor of a product line called "Auto Magic" claims he was promised he could continue to distribute through websites like Amazon, but the company later changed policy. His fraud and breach of contract claims are dismissed. ***Commercial***

216. *Weyerhaeuser v. Burlington Insurance*, Case No. 22-30164 (July 14, 2023). A company and its subsidiaries were supposed to be named as "additional insureds" to a commercial general liability insurance policy, but weren't. ***Insurance Coverage***

217. *Whirlpool v. Shenzen Sanlida*, Case No. 22-40376 (August 25, 2023). The Fifth Circuit affirms an injunction against the "COOKLEE," a Chinese-made look-alike of the iconic Kitchen-Aid stand mixer. ***Commercial***

218. *Windermere Oaks v. Allied World Specialty Insurance Co.*, Case No. 22-50218 (May 9, 2023). A breach of fiduciary duty claim is not a claim for breach of contract, and therefore is not covered by an exclusion for contractual liability in an insurance contract. ***Insurance Coverage***

219. *Women's Elevated v. City of Plano*, Case No. 22-40637 (November 20, 2023). The Fifth Circuit rejects a claim that denying zoning for a group home to recover from alcoholism violates the Fair Housing Act's requirement that denying a "necessary" accommodation is housing discrimination: in the Court's view, the standard of "therapeutic necessity" is a high one. ***Textualism***

220. *Price v. Valvoline*, Case No. 23-20131 (December 18, 2023). Racial comments, such as stating that Black people "always want something for free" were not sufficiently pervasive to trigger a hostile work environment claim under Title VII.

221. *Van Winkle v. Rogers*, Case No. 22-30638 (September 15, 2023). A district court held that even though crucial evidence (a faulty tire) was intentionally destroyed by defendants, there was no evidence of bad faith for spoliation. The Fifth Circuit says no: "bad faith is a question of fact like any other." ***Personal Injury.***

222. *Vote.Org v. Callanen*, Case No. 22-50536 (December 15, 2023). Texas's "wet signature" rule for voter registration applications is constitutional and does not violate the Voting Rights Act. ***Dissent***

223. *Walton v. City of Verona*, Case No. 22-60231 (September 13, 2023). In a case where the plaintiffs alleged the police released a man who would go on to kill their family members, the Court observes that orders granting qualified immunity are not subject to interlocutory appeal. ***Qualified Immunity***

224. *Wilson v. Midland County, Texas*, Case No. 22-50998 (December 14, 2023). While calling for reconsideration en banc, the Court affirms the dismissal of claims by a defendant victimized by a lawyer who worked both as the prosecutor and as the law clerk for the judge assigned the case. ***En Banc Pending***

225. *Wynnewood Refining Co. v. EPA*, Case No. 22-60357 (November 22, 2023). The DC Circuit was the only proper venue under the channeling provision in the Clean Air Act. ***Administrative Law***

226. *Young Conservatives v. Smatresk*, Case No. 22-40225 (July 10, 2023). The Fifth Circuit rejects the district court's claim that if Texas offers undocumented immigrants in-state tuition, it must also offer citizens of other U.S. states in-state tuition.

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United States Supreme Court Update OT 2023 (thru June, 2024)

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The United States Supreme Court OT 2023

34th Annual Conference on State and Federal Appeals

Presenter: Kathryn Cherry
Former Assistant Solicitor General, Texas Office of the Attorney General

UT CLE June 2024

Overview of the Supreme Court Term:

Administrative Law

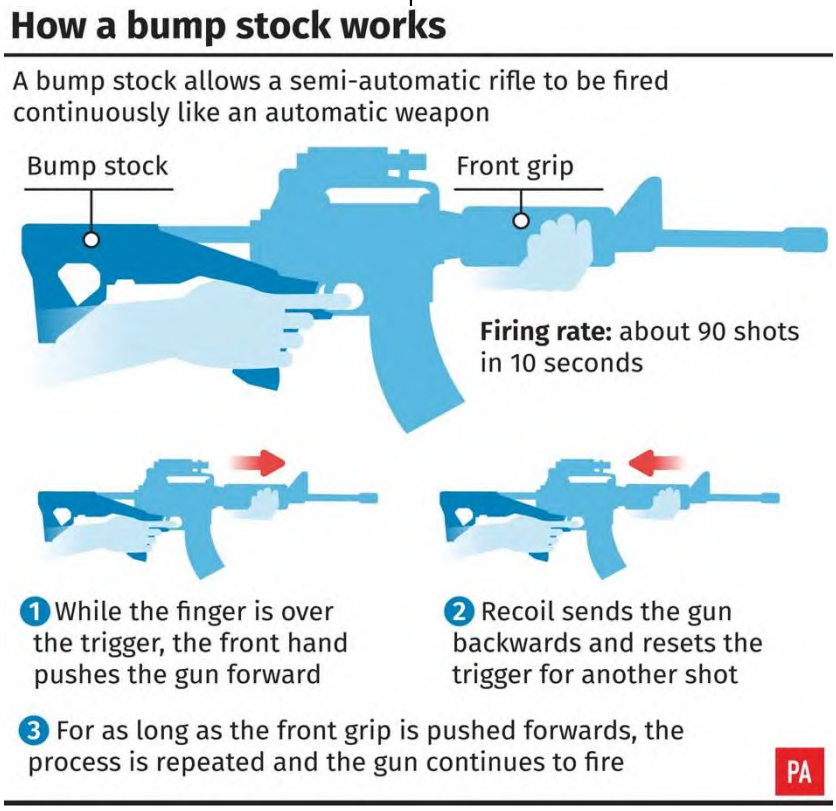
Corner Post, Inc. v. Board of Governors of the Federal Reserve System–Corner Post, a convenience store, and retail groups challenged the Board of the Federal Reserve System's Regulation II, which caps the fees banks can charge for each debit transaction. Petitioners argued that the regulation is arbitrary and capricious in violation of the Administrative Procedure Act (APA), but the district court dismissed the case based on the statute of limitations. The question presented to the Supreme Court is whether, under the APA's "first accrue" rule in 28 U.S.C. § 2401(a), Corner Post's limitations period began in 2011, when the regulation was first promulgated, even though Corner Post had not yet entered the industry, or when the regulation first harmed it. *Decision pending.*

Department of Agriculture Rural Development Rural Housing Services v. Kirtz–Justice Gorsuch delivered the opinion for a unanimous Court. The Court held that the civil liability provisions of the Fair Credit Reporting Act (FCRA) waive the sovereign immunity of the United States. In the Court's view, FCRA Sections 1681n and 1681o use "any person" (who furnished information to consumer reporting agencies)

to refer back to Section 1681a's definition of "person," which explicitly included government agencies. In other words, the FCRA provides that a government agency is also subject to a consumer suit for misreporting information to credit reporting agencies.

Food and Drug Administration v. Alliance for Hippocratic Medicine–(Consolidated with *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*.) In 2016, the Food and Drug Administration (FDA) expanded medical practitioners' access to mifepristone, a drug used in over half of all U.S. abortions. In 2021, because of COVID-19, the FDA permitted pharmacies to distribute the drug through certified mail. After *Dobbs v. Jackson Women's Health Organization* allowed States to prohibit most abortions, the Alliance for Hippocratic Medicine and other anti-abortion groups challenged the FDA's expansion of access to the drug in 2016. The Court is asked to decide whether Respondents have Article III standing to challenge the 2016 and 2021 approvals; whether those approvals were arbitrary and capricious; and whether the district court properly granted respondents' request for an injunction. *Decision pending*.

Garland v. Cargill–After the 2017 Las Vegas nightclub shooting, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) changed its prior position and classified bump-stock guns as machineguns, ownership or use of which could lead to criminal liability. Cargill surrendered his bump stock but challenged ATF's regulations as exceeding its statutory authority. The Court is asked to decide whether, pursuant to the statute permitting ATF to regulate dangerous weapons such as machineguns, 26 U.S.C. § 5845(b), a bump stock device qualifies as a machinegun. *Decision pending*.



Loper Bright Enterprises v. Raimondo–*See Relentless. Decision pending.*

Ohio v. Environmental Protection Agency–Unlike the broader challenges to the existence of agencies, this case is a more typical challenge to federal-agency rulemaking. The Environmental Protection Agency (EPA) required States to submit plans on how they would mitigate emissions that would affect "downwind" States to conform to the Clean Air Act's "good neighbor" provision. 21 States proposed no action, and 2 failed to submit plans. The EPA nevertheless promulgated a Rule mandating that States use existing tools more efficiently and adopt commonly used tools by 2026, among other things. 3 States and several companies and interested parties challenged the rule on the merits, and 12 States challenged the EPA's rejection of their emission plans. The Court is asked to decide whether the EPA's Rule should be stayed and whether the emission controls established by the Rule are reasonable. *Decision pending.*

Relentless, Inc. v. Department of Commerce–The Secretary of Commerce, overseeing the National Marine Fisheries Service (NMFS), reviews "fishery management plans" submitted by "regional councils" required by the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to prevent overfishing and promote conservation of the Atlantic herring. The New England regional council submitted a plan that would require vessel owners to bear some of the cost of implementing at-sea monitoring of herring fishing trips. Fishing vessel owners challenged the plan, arguing that the monitoring requirement disproportionately burdened them because of the length of their fishing trips, among other reasons. Because the MSA was, according to the district court, ambiguous regarding the permissibility of industry-paid monitors, the district court upheld the agency rule under *Chevron* deference and held that it complied with the Act and did not violate the Commerce Clause. The court of appeals affirmed. The Court is asked to decide whether *Chevron v. Natural Resources Defense Council* should be overruled, and whether the Act is actually ambiguous with regard to monitors. *Decision pending.*

Rudisill v. McDonough–Justice Jackson delivered the 7-2 opinion of the Court, in which Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett joined, holding that when servicemembers accrue benefits under two educational benefit programs available for veterans, they may use either one up to the statutory cap. Rudisill's three periods of active duty entitled him to educational benefits under the Montgomery GI Bill of 1984 and the Post-9/11 GI Bill of 2008, one of which he used for his undergraduate degree, and one he sought to use for his graduate degree. Servicemembers are prohibited from using more than 48 months of education benefits or using

Securities and Exchange Commission v. Jarkesy–The Securities and Exchange Commission (SEC) initiated an "in-house" enforcement proceeding against Jarkesy for fraud: The SEC investigated Jarkesy, an SEC Administrative Law Judge (ALJ) held an evidentiary hearing to affirm his culpability, then the SEC Commission oversaw—and denied—his appeal and imposed penalties. In the meantime, Jarkesy sought to enjoin those proceedings in federal district court, but that court found it had no jurisdiction to do so and the court of appeals agreed. The Supreme Court is asked to decide whether the SEC's power to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violates the 7th Amendment; whether the SEC's ability to choose either "in-house" courts or federal court as the forum for enforcing securities laws violates the nondelegation doctrine; and whether the for-cause removal protection for ALJs violates Article II. *Decision pending.*

benefits from both programs concurrently and must "coordinate" their use of their benefit plans under 38 U.S.C. § 3327(d)(2). But those prohibitions do not require him to choose between benefits programs when he is entitled to both and seeks to use them for two separate occasions. Justice Kavanaugh filed a concurring opinion, in which Justice Barrett joined, questioning the place of the "veterans canon" of statutory interpretation, which favors veterans when statutes are ambiguous. Justice Thomas filed a dissenting opinion, in which Justice Alito joined, arguing that the majority misread the plain text of the statute.

Arbitration

Bissonnette v. LePage Bakeries Park St., LLC–Chief Justice Roberts delivered the opinion for a unanimous Court, which held that a transportation worker need not be employed by a company in the transportation industry to be exempt from compelled arbitration pursuant to Section 1 of the Federal Arbitration Act (FAA). Section 1 of the FAA excludes from the requirement to send disputes to arbitration transportation workers, among others. In this case, the workers were employed by distributors of baked goods from local warehouses to stores and restaurants and were not employed by a transportation company. But, the Court held, nothing in Section 1 limits the workers exempt from the Act to those in specific industries—the workers are identified by the work they perform, not the industry of their employer.

Coinbase, Inc. v. Suski–Justice Jackson delivered the opinion for a unanimous Court holding that where parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court, not an arbitrator, must decide which contract governs. Justice Gorsuch filed a concurring opinion, emphasizing that parties can still agree to send arbitrability questions to an arbitrator through a delegation clause.

Smith v. Spizzirri–Justice Sotomayor delivered the opinion for a unanimous Court, holding that when a district court finds that a suit must be sent for arbitration, but a party has requested a stay of the lawsuit pending arbitration, Section 3 of the FAA requires the district court to enter a stay rather than dismiss the suit.

Article III Standing

Acheson Hotels, LLC v. Laufer–The Court was asked to decide whether a wheelchair-bound "tester" who accesses the websites of hotels she has no intention of visiting and checks to see if their websites are Americans with Disabilities Act (ADA)-compliant has Article III standing to sue those hotels under the ADA. Justice Barrett delivered the opinion of the Court, in which Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh joined, holding the case moot. The Court held that it may address jurisdictional issues of mootness

and standing in any order it chooses and determined here to address mootness first. In addition, the Court did not believe that Laufer deliberately abandoned her case to avoid Supreme Court review. The Court therefore vacated and remanded the judgment, per the *Munsingwear* doctrine. Justices Thomas and Jackson filed opinions concurring in the judgment. Justice Thomas argued that he would have found that Laufer had no standing. Justice Jackson argued that there was no equitable basis for vacatur, effectively arguing against the *Munsingwear* doctrine of vacating the court of appeals' opinion if the prevailing party before that court is also the party that unilaterally mooted the case before it was heard by the Supreme Court.

Carnahan v. Maloney–Although the Court was initially asked to determine whether individual members of Congress have Article III standing to sue an executive agency—and specifically to compel it to disclose information that the members have requested under 5 U.S.C. § 2954—the case was determined to be moot because Respondents voluntarily dismissed the suit. The Court vacated and remanded the judgment of the court of appeals (presumably because of the *Munsingswear* doctrine, *see Acheson Hotels*). Justice Jackson dissented from the vacatur, arguing that the decision should instead have been dismissed as improvidently granted.

FBI v. Fikre–Justice Gorsuch delivered the opinion for a unanimous Court, holding that the FBI's declaration that, based on currently available information, Fikre would not be placed on the No Fly List in the future was insufficient to demonstrate that Fikre's suit was moot. Importantly, the declaration did not disclose the conduct that justified Fikre's initial placement on the list, so Fikre could not be assured that he would not be placed back on the list for engaging in the same or similar conduct in the future. Thus, under traditional mootness principles, the government failed to meet its burden of proving Fikre's case was moot. Justice Alito filed a concurring opinion joined by Justice Kavanaugh, indicating that although the FBI did not provide enough explanation in this case, the opinion should not be interpreted as requiring the government to disclose classified information or endanger national security interests.

Harrow v. Department of Defense–Justice Kagan delivered the opinion for a unanimous Court, holding that the petitioner's challenge to a decision of the Merit Systems Protection Board, which must be appealed to the Court of Appeals for the Federal Circuit within 60 days under 5 U.S.C. § 7703(b)(1), could be equitably tolled. In other words, Section 7703(b)(1)'s 60-day filing deadline is not jurisdictional.

Bankruptcy

Harrington v. Purdue Pharma L.P.–This case concerns the Sackler family and their company, Purdue Pharma, which played

an outsized role in the development and marketing of OxyContin. When the drug led to widespread abuse, Purdue Pharma declared bankruptcy, and as part of a plea agreement, Purdue would owe up to $2 billion. Currently, claims against Purdue and the Sacklers, are expected to exceed $40 trillion. A bankruptcy court approved a plan that would, through a "shareholder release," permanently enjoin some third-party claims against the Sacklers. The third parties objected, arguing that the Bankruptcy Code does not allow for the forced release of direct claims against non-debtors. The Court is asked to decide whether the Bankruptcy Code authorizes a court to approve a plan that extinguishes claims held by non-debtors against non-debtor third parties without the claimants' consent. *Decision pending*.

Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC–This case concerns the two bankruptcy systems available for debtors based on their location. In 88 judicial districts, the Department of Justice administers a Trustee Program. In 6 districts, located in Alabama and North Carolina, courts oversee the proceedings and are exempted from the Trustee Program. The courts fund their program using the courts' budget, but the Trustee districts rely on fees charged to debtors. Seventy-six Chapter 11 debtors (John Q. Hammons Hotels & Resorts) filed for bankruptcy in a Trustee district–the District of Kansas, in 2016. A year later, Congress significantly raised fees in Trustee districts, resulting in them paying over $2.5 million more than they would in a court-administered district. The Court will decide whether the fee increase for Trustee districts was (1) unequally applied, and (2) impermissibly retroactive and inconsistent with clear congressional intent, and, if so, (3) whether the U.S. Trustee must refund the fees. *Decision pending.*

Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.–In this case, Truck Insurance Exchange (Truck) had issued liability insurance policies Respondents, which collectively faced over 38,000 asbestos-related lawsuits. Truck objected to Respondents, asbestos plaintiffs, and the bankruptcy court's decision to

transfer plaintiffs' rights in collecting asbestos-suit verdicts into a trust. Truck argued before the district court that the new configuration exposed it to an outsized probability of fraudulent claims, but the district court and court of appeals held that Truck lacked standing to challenge the plan because it was not a "party in interest" under the Bankruptcy Code. The question before the Court is whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a plan of reorganization under Chapter 11 of the Bankruptcy Code. *Decision pending*.

Business Law

Macquarie Infrastructure Corp. v. Moab Partners, L.P.–Justice Sotomayor delivered the opinion for a unanimous Court, holding that pure omissions, when a speaker says nothing, in circumstances that do not make that silence meaningful, are not actionable under Securities and Exchange Commission (SEC) Rule 10b-5. Rule 10b–5(b) makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b–5(b). In addition to prohibiting "any untrue statement of a material fact"—i.e., false statements or lies—the Rule also prohibits omitting a material fact necessary "to make the statements made . . . not misleading." But that prohibition does not extend to pure omissions that are not in themselves significant.

Civil Rights Liability

Gonzalez v. Trevino—In *Nieves v. Bartlett*, the Supreme Court held that a retaliatory arrest claim could not lie if there was probable cause for the arrest. But that rule had an exception: a petitioner would need to show that other individuals who engaged in the same conduct had not been charged. The Court was asked in this case whether the requirement in *Nieves* could also be satisfied by objective evidence other than the fact that law-enforcement officials did not apply the same criminal charges to other individuals engaged in the same conduct, and whether *Nieves* applies only to arrests resulting from split-second decisions rather than premeditated arrests. *Decision pending*.

Muldrow v. City of St. Louis, Missouri–Justice Kagan delivered the opinion of the unanimous Court, in which Chief Justice Roberts and Justices Sotomayor, Gorsuch, Barrett, and Jackson joined, holding that Title VII of the Civil Rights Act of 1964 requires that an employee challenging a job transfer must show that the transfer brought about some harm with respect to a term or condition of employment, but it need not be "significant" harm. Title VII concerns unfavorable employment practices because of a protected trait, but Congress did not limit its scope to significant harms. Justices Thomas, Alito, and Kavanaugh filed opinions concurring in the judgment. Justice Thomas believed the court of appeals

did not require significant harm; Justice Alito argued that the majority opinion was too vague because it failed to clarify the circumstances in which harm became "significant"; and Justice Kavanaugh argued that even requiring "some harm" was too much if the transfer was based on a protected trait.

Copyright

Warner Chappell Music, Inc. v. Nealy–Justice Kagan delivered the 6-3 opinion of the court, in which Chief Justice Roberts and Justices Sotomayor, Kavanaugh, Barrett, and Jackson joined, holding that a cause of action for a copyright owner's claim against an infringer accrues when the infringement claim is timely, not simply when the infringing act occurred (thus allowing room for the discovery rule). Justice Gorsuch filed a dissenting opinion in which Justices Thomas and Alito joined, challenging the existence of a discovery rule for claim accrual.

Corporations

Connelly v. United States–The brothers Connelly were the sole shareholders of a closely held corporation. They each took out life insurance policies on the other so that in the event of one brother's death, the surviving brother could use the proceeds to redeem the deceased brother's shares. But when Michael Connelly died, the IRS's calculation of the value of Michael's stock in the corporation included the life insurance proceeds. The question presented to the Court is whether the proceeds of a life insurance policy taken out by a closely held corporation in this situation should be considered a corporate asset when calculating the value of the shareholder's shares for purposes of the federal estate tax. *Decision pending*.

Criminal Law

Diaz v. United States–Whether, when an element of the offense of drug trafficking is the defendant's knowledge that she was carrying illegal drugs, a government expert witness can testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters under Federal Rule of Evidence 704(b). *Decision pending*.

Erlinger v. United States–Whether, before a court may impose an enhanced sentence under the Armed Career Criminal Act (ACCA), the Constitution requires a jury trial and proof beyond a reasonable doubt of a necessary element: that a defendant's prior convictions were committed on different occasions. *Decision pending.*

McElrath v. Georgia–Justice Jackson delivered the opinion for a unanimous Court that the jury's verdict that McElrath was not guilty of malice murder by reason of insanity constituted an acquittal for double jeopardy purposes notwithstanding any inconsistency with the jury's other verdicts. Justice Alito filed a concurring opinion, noting that the Court had not expressed any view on whether a non-guilty verdict that was rejected by the

trial court is also an acquittal for double-jeopardy purposes.

Pulsifer v. United States—Justice Kagan delivered the 6-3 opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett joined, holding that a criminal defendant is not eligible to receive "safety-valve relief"—if he cannot satisfy all of the statutory requirements in 18 U.S.C. § 3553(f)(1).

Specifically, the fact that a defendant meets some of the conditions does not entitle the defendant to safety-valve relief; the defendant must meet all the conditions. Justice Gorsuch filed a dissenting opinion, joined by Justices Sotomayor and Jackson, arguing that the majority's statutory interpretation was flawed and elevated implicit congressional intent over the plain text of the safety-valve provisions.

Smith v. Arizona—Whether the Confrontation Clause permits the prosecution to present testimony by a substitute expert concerning the testimonial statements of a non-testifying forensic analyst in a criminal trial. *Decision pending*.

Thornell v. Jones—Justice Alito delivered the 6-3 opinion of the Court, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett, holding that the Ninth Circuit misapplied the standard for ineffective assistance of counsel established in *Strickland v. Washington* when it found that the criminal defendant had been denied effective counsel. Justice Sotomayor wrote a dissenting opinion, which Justice Kagan joined, arguing that the

Court should not have determined whether the defendant was prejudiced by the lack of counsel in the first instance. Justice Jackson wrote a dissenting opinion, arguing that the Court misread the court of appeals' decision and that the court of appeals correctly applied *Strickland*.

United States v. Rahimi—This case involves an individual who has a history of violence, including two shootings and a hit-and-run, and who is under a civil protective order for alleged assault against his ex-girlfriend. Rahimi was explicitly prohibited from obtaining guns, but during a search, police found a rifle and pistol in his home. Rahimi sued, arguing that the prohibition violated his Second Amendment right to bear arms. The Court is asked to decide whether 18 U.S.C. § 992(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment. *Decision pending.*

Criminal Statutes

Brown v. United States—(Consolidated with *Jackson v. United States.*) Justice Alito delivered the 6-3 opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Sotomayor, Kavanaugh, and Barrett joined, holding that a state drug conviction counts as a predicate under the Armed Criminal Career Act (ACCA) if it involved a drug on the federal schedules at the time of that conviction. Brown had argued that his prior convictions under state law for possession of marijuana should not count as predicates under the ACCA because those crimes were no longer categorical matches to their federal counterparts. The majority held that the offense still applies so long as it would have counted at the time the offense was committed. Justice Jackson filed a dissenting opinion, joined by Justice Kagan, and by Justice Gorsuch as to Parts I, II, and III, arguing that the majority misinterpreted the text and that courts should instead look to the drug schedules in effect at the time of the federal firearms offense that triggered the ACCA's application.

Fischer v. United States—Three petitioners were indicted for offenses related to the January 6 riot in the Capitol, such as assaulting, resisting, or impeding officers, and disorderly conduct in a Capitol building and on restricted ground, as well as obstruction of congressional pleadings. The question before the Court is whether one of those charges, brought under 18 U.S.C. § 1512(c), which prohibits obstruction of congressional inquiries and investigations, includes acts unrelated to investigations and evidence. *Decision pending.*

Snyder v. United States—Snyder, the former mayor of Portage, Indiana, was convicted of federal funds bribery in violation of 18 U.S.C. § 666(a)(1)(B) for soliciting and accepting $13,000 in connection with the city's contractors. Snyder argued that there was no evidence that there was an

agreement to exchange money for service, and without a quid pro quo agreement, 18 U.S.C. § 666 should not apply to his conduct. The question before the Court is whether Section 666 criminalizes gratuities—i.e., payments in recognition of past or certain future actions taken by a state or local official, when there is no quid pro quo agreement to take those actions. *Decision pending.*

Due Process

Culley v. Marshall–Justice Kavanaugh delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett joined. The Court held that due process requires a timely forfeiture hearing when police seize and seek civil forfeiture of a vehicle used in a crime, but not a preliminary hearing approving police retaining the vehicle until the forfeiture hearing. Justice Gorsuch filed a concurring opinion joined by Justice Thomas, noting that the opinion left for another day whether contemporary civil forfeiture practices conform with due process. Justice Sotomayor filed a dissenting opinion, joined by Justices Kagan and Jackson, arguing that the majority's opinion is too broad and of little help to lower courts.

Eighth Amendment

City of Grants Pass v. Johnson–Grants Pass, Oregon, has a larger homeless population than available shelter beds, resulting in some homeless sleeping on the streets or in parks. But the City's municipal code prohibits them from doing so through "anti-sleeping," "anti-camping," and park-exclusion ordinances. The ordinances impose only civil penalties, but they can lead to criminal penalties. The Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." The Court will review the Ninth Circuit's holding. *Decision pending.*

Employment

Murray v. UBS Securities, LLC–Justice Sotomayor delivered the opinion for a unanimous Court, holding that a whistleblower must prove that his whistleblowing was a "contributing factor" to his employer's unfavorable personnel action, but need not prove that his employer acted with "retaliatory intent." Title 18 U.S.C. § 151A(a) of the Sarbanes-Oxley Act protects whistleblowers in publicly traded companies who report what they reasonably believe to be criminal fraud or securities law violations from unfavorable personnel actions "because of" their protected activity, but the provision says nothing about limiting such activity to that borne from animus. Justice Alito filed a concurring opinion, joined by Justice Barrett, distinguishing between the animus requirement, which the Court rejected, and the Act's intent requirement, which was still required.

Starbucks Corporation v. McKinney–After a Starbucks employee worked with several others to demand the creation of a union for employees, was discovered by Starbucks, and fired, the Union filed suit against Starbucks for unfair labor practices. The question before the Court is how to evaluate whether the National Labor Relations Board (NLRB) showed "reasonable cause" to believe that the employers engaged in unfair labor practices. *Decision pending.*

Federalism

Moore v. United States–The 2017 Tax Cuts and Jobs Act retroactively taxed earnings by U.S. shareholders of companies that operated overseas, or controlled foreign corporations (CFC), since 1986, regardless of whether those earnings were repatriated to the United States. Petitioners, a couple who invested in CFC KisanKraft, argued that the tax was unconstitutional and, because it was retroactive, violated the Due Process Clause of the Fifth Amendment. The question before the Court is whether the 16th Amendment, which empowers Congress to "lay and collect taxes on incomes, from whatever source derived," authorizes Congress to tax these "unrealized" sums. *Decision pending.*

Trump v. Anderson–In a per curiam opinion, the Court held that while States may disqualify state officials under Section 3 of the 14th Amendment for participating in a riot, it could not do so against federal officeholders and candidates. In the Court's view, the 14th Amendment speaks only to Congress's power, not the States'. Justice Barrett concurred in part and concurred in the judgment, and Justices Sotomayor, clarifying that the Court did not need to reach the question of whether federal legislation was the only way to enforce Section 3. Justice Kagan, joined by Justice Jackson filed an opinion concurring in part and concurring in the judgment, emphasizing that the Court should have exercised judicial restraint with regard to stating how Section 3 can be used in the future.

Federal Rules of Civil Procedure

McIntosh v. United States–Justice Sotomayor delivered the opinion for a unanimous Court, holding that a federal district court's failure to enter a preliminary order of forfeiture "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant," as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B), is an error subject to harmless-error review on appeal and does not prevent the court from ordering forfeiture of the property of a criminal defendant derived from the proceeds of his crime.

First Amendment

Lindke v. Freed– Freed used a public Facebook page, which identified him as the city manager of Port Huron, Michigan, to post about both his personal life and about official business. Lindke commented

prolifically on Freed's posts concerning Port Huron's COVID-19 measures before Freed blocked him. Justice Barrett delivered the opinion for a unanimous Court, holding that an individual who holds public office and operates a social-media page engages in state action—and therefore is open to liability under 18 U.S.C. § 1983 for unconstitutional conduct—only if the official (1) had actual authority to speak on the State's behalf on particular matters and (2) exercised or purported to exercise that authority when posting on the social-media page. The Court's holding requires courts to engage in a post-by-post analysis of whether an official's conduct constitutes state action. However, because Facebook's blocking tool operates on a page-wide basis, if any one post constitutes state action, blocking Lindke could be a constitutional violation.

Moody v. NetChoice, LLC—The Court will decide NetChoice's First Amendment facial challenge to Florida's new content-moderation law aimed at social-media programs, S.B. 7072. NetChoice also raised a First Amendment facial challenge to the law's requirement that social-media programs explain when and why they block or delete particular posts. This case was heard along with NetChoice, LLC v. Paxton, which concerns a Texas law with a similar subject matter. *Decision pending*.

Murthy v. Missouri—In response to a suit from varied plaintiffs—epidemiologists, consumer and human rights advocates, academics, as well as Missouri and Louisiana—alleging that the federal government was coercing social-media companies to suppress certain content using public statements, and threats to promulgate unfavorable regulations, the U.S.

District Court for the Western District of Louisiana issued a nationwide injunction prohibiting the federal government from meeting with or seeking to influence social-media companies' content policies. The Supreme Court stayed the injunction and granted certiorari to decide whether the government's alleged requests—meant to prevent dissemination of misinformation—constituted state action that violated users' First Amendment rights. *Decision pending.*

National Rifle Association of America v. Vullo—The National Rifle Association (NRA) alleged that then-superintendent of the New York Department of Financial Services, Maria Vullo, discouraged insurance companies and financial services institutions from engaging in business with the NRA and other gun-promotion organizations. Justice Sotomayor delivered the opinion for a unanimous Court, holding that, assuming the NRA's allegations were true, the NRA had stated a claim that Vullo violated the First Amendment. Specifically, the NRA's claim that a government official was using the power of her office to punish or suppress disfavored expression stated a claim. Justice Gorsuch filed a concurring opinion, providing his interpretation of the majority's opinion. Justice Jackson filed a concurring opinion stressing the distinction between coercion and a First Amendment violation.

NetChoice, LLC v. Paxton—This case was argued with Moody v. NetChoice, LLC. The suit is a challenge to Texas law H.B. 20, and specifically Section 7, which prohibits viewpoint-based censorship of users' posts unless those posts incite or constitute criminal activity; and Section 2, which requires social-media platforms to disclose their content-moderation policies, publish an "acceptable use policy" to clarify the platforms' decisions concerning deleting posts or banning users, and allow users to file complaints and appeal unfavorable decisions by platforms. The district court held that Sections 7 and 2 were facially unconstitutional, but the Fifth Circuit held that H.B. 20, rather than regulating platforms' speech, protects other people's speech and regulates platforms' conduct. *Decision pending.*

O'Connor-Ratcliff v. Garnier—This case was argued with Lindke v. Freed and involved a similar fact pattern: two public officials, members of the Poway Unified School District Board of Trustees, used Facebook and X for their school-board campaigns, but deleted critical and repetitive comments by parents, then blocked them. The parents sued, arguing that the social-media pages were public fora; both the district court and court of appeals agreed, but found the Trustees had qualified immunity. In a per curiam decision, the Court vacated and remanded the decision to allow the court of appeals to apply the standard adopted in *Lindke v. Freed* on how to identify state action when public officials use social media.

Vidal v. Elster—When Elster attempted to register the phrase "TRUMP TOO SMALL" to use on shirts as political commentary, the Patent and Trademark Office (PTO) denied his application based on Section 2(c) of the Lanham Act, which prohibits registering a mark that identifies a living individual without their consent, and Section 2(a), which bars marks that falsely suggest a connection with living or dead persons. Elster sued, arguing that this decision violated his First Amendment rights and was not narrowly tailored to serve a compelling government interest. The question before the Court is whether the government may refuse to register a trademark under 15 U.S.C. § 1052(c) because the mark contains criticism of a government official or public figure without violating the Free Speech Clause of the First Amendment. *Pending*.

Fourth Amendment

Chiaverini v. City of Napoleon, Ohio—Despite efforts to cooperate with police over the matter of allegedly stolen jewelry, misunderstandings and a confrontation with the local police chief resulted in the arrest of Chiaverini, manager of the Diamond and Gold Outlet in Napoleon, Ohio. Later, the court dismissed the criminal case against Chiaverini, and he filed a complaint against the officers and the city. The district court found, and the court of appeals affirmed, that because there was probable cause for Chiaverini's arrest, he had no malicious-prosecution claim. The Court is asked to decide whether a Fourth Amendment malicious-prosecution claim can proceed as to a baseless criminal charge when there is probable cause to bring the other charges. *Decision pending*.

Immigration

Campos-Chaves v. Garland—(Consolidated with *Garland v. Singh*.) The Court will decide whether the government provides adequate notice under 8 U.S.C. § 1229(a), which concerns notice requirements for removal proceedings, if it serves an initial notice that does not include "[t]he time and place at which the proceedings will be held," which is required under Section 1229(a)(1)(G)(i), so long as the government then serves an additional document with that information. *Decision pending*.

Department of State v. Munoz—Whether the denial of a visa to a non-citizen infringes on a constitutionally protected interest of the citizen spouse, and if so, did the government properly justify the denial despite its invocation of the doctrine of non-reviewability of visa application denials. *Pending*.

Wilkinson v. Garland—Justice Sotomayor delivered the 6-3 decision of the Court, joined by Justices Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson, holding that an immigration judge's discretionary decision that a given set of established facts does not satisfy 8 U.S.C. § 1229b(b)(1)(D)'s "exceptional and extremely unusual" hardship standard for determining eligibility for

cancellation of removal is a mixed question of law and fact. Thus, the court of appeals' holding that it lacked jurisdiction to review the immigration judge's hardship determinations was erroneous. Justice Jackson concurred in the judgment, noting that she did not believe that the text of Section 1252(a)(2)(D) supported the majority's holding, although the caselaw did. Chief Justice Roberts filed a dissenting opinion, arguing that the majority read the Court's precedents too broadly. Justice Alito filed a dissent joined by Chief Justice Roberts and Justice Thomas, arguing that reading "questions of law and fact" into the phrase "questions of law" in Section 1252 was erroneous.

Maritime Law

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC–Justice Kavanaugh delivered the opinion for a unanimous Court that under federal admiralty law, choice-of-law provisions in maritime contracts are *presumptively* enforceable under federal maritime law. Justice Thomas filed a concurring opinion, stating that the precedent on which the Court relies is flawed and at odds with admiralty law.

Native Americans

Becerra v. San Carlos Apache Tribe–(Consolidated with *Becerra v. Northern Arapaho Tribe*.) The Indian Health Service (IHS) manages healthcare for Native tribes, and after the Indian Self-Determination and Education Assistance Act, tribes were permitted to administer their own healthcare programs, funded by the IHS. To assist in covering the bureaucratic costs of administering the programs, IHS also provides tribes with contract-support costs (CSC). Congress then allowed tribes to bill outside insurers directly to prevent delays in receiving IHS funds and retain the revenue. The San Carlos Apache Tribe now argues that IHS should also supply CSC for its third-party billing. The Court is asked to decide whether the CSC statute, 25 U.S.C. § 5325(a), requires IHS to provide those funds as well. *Decision pending*.

Preemption

Cantero v. Bank of America, N.A.–Justice Kavanaugh delivered the opinion for a unanimous Court, holding that the court of appeals erred in not applying the standard established by the Court in *Barnett Bank of Marion County, N.A. v. Nelson*, which was expressly incorporated into the Dodd-Frank Act of 2010, for determining whether state laws regulating national banks are preempted. Specifically, a court must ask whether the state law "prevents or significantly interferes with the exercise by the national bank of its powers." Answering the question presented—whether New York's law requiring banks to pay interests on escrow accounts is preempted by federal law, required the court of appeals to apply that standard. Rather than deciding the issue, the Court vacated the court of appeals' opinion and remanded the case to allow the court of

appeals to apply the standard in the first instance.

Moyle v. United States–Whether the federal Emergency Medical Treatment and Labor Act (EMTALA), which requires Medicare-funded hospitals to offer "necessary stabilizing treatment" to individuals seeking emergency treatment, applies to pregnant women in abortion-related emergencies. At issue in the case is an Idaho law that criminalizes most abortions in the State, some of which might constitute emergencies under EMTALA. *Decision pending*.

Redistricting

Alexander v. South Carolina State Conference of the NAACP–Justice Alito delivered the 6-3 opinion of the Court, which Chief Justice Roberts and Justices Gorsuch, Kavanaugh, and Barrett joined, holding that the plaintiff failed to provide sufficient evidence that race was the predominant factor motivating the legislature's redistricting decisions. The Court noted that the challengers could have submitted an alternative map that emphasized race less. Justice Thomas joined as to all but Part III-C, and concurred in part, arguing that the Court should not have examined the expert reports on clear-error review, when the lack of correlation between race and redistricting, the presumption of legislative good faith, and the lack of an alternative map sufficed to show the district court clearly erred in finding race prevailed. Justice Kagan filed a dissenting opinion in which Justices Sotomayor and Jackson joined, disagreeing with the majority's interpretation of the evidence and arguing that presumptions of legislative good faith should not apply in clear-error review.

Separation of Powers

CFPB v. Community Financial Services Ass'n of America–The CFPB promulgated a rule prohibiting lenders from attempting to withdraw funds from a borrower's bank account after two consecutive attempts failed for lack of funds. Lenders challenged the agency's funding scheme, in which the agency receives funding from the Federal Reserve rather than allocated by Congress. Justice Thomas delivered the 7-2 opinion of the Court, which the Chief Justice and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson joined. The Court upheld the CFPB's funding scheme as consistent with the Appropriations Clause. Justice Kagan filed a concurring opinion in which Justices Sotomayor, Kavanaugh, and Barrett joined, adding that the CFPB's funding scheme was and has always been constitutional. Justice Jackson filed a concurring

opinion warning that "when the Constitution's text does not provide a limit to a coordinate branch's power," courts "should not lightly assume that Article III implicitly directs the Judiciary to find one." And Justice Alito filed a dissenting opinion, joined by Justice Gorsuch, arguing that the majority's interpretation of the Appropriations Clause was too lenient.

Trump v. United States–Former President Trump was indicted in August 2023 on four counts relating to the January 6, 2021, attacks on the U.S. Capitol. Trump argued that he could not be prosecuted for his acts as president, and that a former president cannot be prosecuted without first being impeached by the House and convicted by the Senate. The question before the Court is whether, and if so to what extent, a former President enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office. *Decision pending.*

Takings Clause

DeVillier v. Texas–Justice Thomas delivered the opinion for a unanimous Court, holding that DeVillier and the other more than 120 property owners whose land was flooded after the State installed a dam between Houston and Beaumont, Texas, could pursue their Takings Claims through the causes of action available under Texas law. In other words, the Fifth Amendment's Takings Clause, as applied to the States, does not provide a cause of action for challenging an alleged taking by the State.

Sheetz v. County of El Dorado–Justice Barrett delivered the opinion for a unanimous Court, holding that the Fifth Amendment's Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Justice Sotomayor filed a concurring opinion, in which Justice Jackson joined, noting that the Court did not decide whether the permit condition would be a compensable taking if imposed outside the permitting context. Justice Gorsuch filed a concurring opinion arguing that the *Nolan/Dolan* test cannot operate differently when an alleged taking affects a class of properties rather than a particular development. Justice Kavanaugh filed a concurring opinion, in which Justices

Kagan and Jackson joined, noting that the Court did not decide whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition targeting a particular development.

Water Rights

Texas v. New Mexico and Colorado–After the Supreme Court allowed the United States to intervene in a dispute between Texas, New Mexico, and Colorado concerning the waters of the Rio Grande Basin and Elephant Butte, the three States then reached an agreement that would resolve the dispute through a consent decree without the consent of the United States. The United States objected on the ground that a court's approval of a consent decree cannot dispose of valid claims of nonconsenting intervenors, the consent decree would impose obligations on the United States without that party's consent, and it would be contrary to the Rio Grande Compact. *Decision pending.*

Many thanks to *Oyez* and the Supreme Court website, which are invaluable resources.

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U.S. SUPREME COURT & COURT OF CRIMINAL APPEALS UPDATE SEPTEMBER 2023 – JULY 1, 2024

HON. BERT RICHARDSON, *Austin*
KATHLEEN NEILSON, *Austin*
TIFFANY TALAMANTEZ, *Austin*
Texas Court of Criminal Appeals

JUDGE ROBERT ‘BERT’ RICHARDSON

Judge Bert Richardson was elected to the Texas Court of Criminal Appeals in 2014. He served as an Assistant District Attorney for Bexar County and Assistant U. S. Attorney. He was appointed to the 379th District Court of Bexar County in 1999. He is a graduate of St. Mary's University School of Law and is board certified in Criminal Law.

Acknowledgement

This paper was largely drafted by my law clerk, Kathleen Neilson, and my staff attorney, Tiffany Talamantez. If there is anything smart in here or there is some insight that helps you in your practice it comes from them. Conversely, if there is a formatting problem or a use of brackets that you disagree with, that probably came from me. Also, "trail" not "trial" is probably my fault. I hope something in here helps you. It certainly helped me. As did Ms. Neilson and Ms. Talamantez, and I cannot acknowledge them enough.

TABLE OF CONTENTS

U.S. SUPREME COURT & COURT OF CRIMINAL APPEALS UPDATE SEPTEMBER 2023 - JULY 1, 2024

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 6, 2023 and July 1, 2024. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued between October 1, 2023 and July 1, 2024. It even has a case from the Supreme Court of Texas, too. If you feel that a particular case was overlooked, please email me through Nichole Reedy at nichole.reedy@txcourts.gov and we'll do our best to fix any perceived error. The paper is updated throughout the various terms so if you would like the final version of the paper, please remember to email Nichole Reedy and she will put you on the list to get it when we finish it.

Additionally, we've included hyperlinks to the location where you can read the opinion on the web. I apologize in advance if it doesn't work, but that does not translate into me or my staff acting as an IT help desk. I mean, I sure hope it works, and generally it pulls the opinions from the respective websites up on Google Chrome whenever I try it, but if it doesn't work for you, neither I nor Nichole would have any idea how to help you. Not that we wouldn't desperately want to help you, just that it's not in our area of knowledge or expertise. So, if it doesn't work for you, I apologize and I wish you way more than luck.

II. SEARCH AND SEIZURE

A. Reasonable Suspicion

1. Officer had reasonable suspicion to conduct traffic stop of driver for failure to maintain a single marked lane despite officer's mistaken reliance upon CCA's misinterpretation of the statute in a non-binding and subsequently disavowed portion of *Leming v. State*. An officer initiated a traffic stop after observing Bernard Daniel failing to remain in a single lane of traffic. At the time of the offense, there were no other vehicles near Daniel's vehicle, nor did it appear that Daniel was violating any other traffic laws. There was no indication that Daniel's failure to maintain a single marked lane was unsafe. During the traffic stop, the officer smelled alcohol on Daniel's breath. Daniel admitted that he had been drinking but refused a field sobriety test. The officer obtained a warrant for a blood sample, and the tests showed that Daniel's blood alcohol content was over the legal limit.

Daniel filed a pre-trial motion to suppress, contending that the officer did not have the requisite reasonable suspicion required for the traffic stop. During the suppression hearing, Daniel argued that Sec. 545.060(a) of the Texas Transportation Code requires the motorist to have strayed from his lane when it was not safe to do so. Because there were no vehicles near Daniel at the time when he crossed into another lane, he did not act in an unsafe manner. The trial court denied Daniel's motion and concluded that the officer had probable cause for the traffic stop. Daniel was convicted for driving while intoxicated, which was elevated to a felony based on his prior criminal history. Daniel challenged the denial of his motion to suppress on appeal. The court of appeals reversed Daniel's conviction, relying on its prior decision in *Hernandez v. State*, S.W.2d 867 (Tex. App.—Austin 1998, pet. ref'd). In that case, the Third Court of Appeals had held that a violation of Sec. 545.060(a) is a single offense, and a violation does not occur without unsafe movement. The court of appeals reasoned in Daniel's case that because the movement of Daniel's vehicle was not unsafe, he did not commit a traffic offense and the officer lacked reasonable suspicion to conduct the traffic stop.

The Court of Criminal Appeals reversed the court of appeals' decision and affirmed the trial court's judgment. ***Daniel v. State*, 683 S.W.3d 777 (Tex. Crim. App. Feb. 14, 2024) (7:1:1)**. Writing for the Court, Judge McClure explained that since the enactment of Sec. 545.060(a) in 1995, interpretations of the statute have varied amongst the intermediate courts. In 2016, the Court issued a fractured opinion in *Leming v. State*, 493 S.W.3d 552 (Tex. Crim. App. 2016). In that case, four judges construed Sec. 545.060(a) as two separate offenses. According to four judges, it was one offense to change marked lanes when it is unsafe, and it was another offense to fail to remain entirely within a marked lane regardless of

whether the deviation was unsafe. In 2022, however, a majority of the Court rejected this approach in *Hardin v. State*, 664 S.W.3d 867 (Tex. Crim. App. 2022). In *Hardin*, the court essentially adopted the approach articulated in *Hernandez*, that the failure to maintain a single marked lane must be unsafe to give rise to a traffic stop for that traffic offense. In *Daniel*, The State argued that it was reasonable for the officer to believe that the statute only required Daniel to have failed to maintain a single lane of traffic, even if it was not unsafe for him to have done so, regardless of the various statutory interpretations amongst the courts. The Court agreed; since Daniel's offense occurred in 2017, Judge McClure reasoned that a controlling interpretation of Sec. 545.060(a) did not exist until 2022—when the Court issued its opinion in *Hardin*. Thus, the Court found that the officer's mistaken interpretation of the statute was entirely reasonable given the nuanced statutory language and the conflicting case law from the Court and the lower courts.

Judge Yeary filed a **concurring opinion**, writing separately to share his opinion (as articulated in *Leming*) that the Court's opinion in *Hardin* was incorrect because it mandated adherence to an erroneous interpretation of Sec. 545.060(a). Believing the statute to identify two distinct ways to commit the offense, he declared that *Hardin* should be overruled.

Judge Walker filed a **dissenting opinion**. Because *Hernandez* had been the law in Bell County since 1998, officers enforcing the law had known for twenty-five years that a stop for failing to maintain a single marked lane required a showing that the vehicle's movement was also unsafe. Therefore, Judge Walker opined that the officer's mistake of the law was not reasonable.

2. Lawful refusal to consent may not be considered when determining if the facts gave rise to reasonable suspicion. Police pulled Marlon Juna Lall over for a traffic violation. After the purpose of the stop had concluded, the officer prolonged the stop for a canine sniff of the vehicle without Lall's consent. Lall was subsequently charged with possession with intent to deliver more than four but less than 200 grams of methamphetamine based in part upon evidence seized after the canine sniff. Before trial, Lall filed a motion to suppress, arguing that the officer lacked reasonable suspicion to prolong the traffic stop to conduct the canine sniff of his vehicle. The trial court denied the motion and a jury found Lall guilty. On appeal, Lall argued that the trial court erred in denying his motion to suppress. The court of appeals held that the officer had reasonable suspicion to prolong the stop for the canine sniff, relying in part on the fact that Lall refused consent for the officer to search his vehicle.

The Court of Criminal Appeals vacated the judgment of the court of appeals. ***Lall v. State*, 686 S.W.3d 766 (Tex. Crim. App. Mar. 27, 2024) (7:2:0)**. In a per curiam opinion, the Court clarified its holding in *Wade v. State* that the lawful refusal to consent could not be the prominent factor in the reasonable suspicion calculus. *Wade v. State*, 422 S.W.3d 661 (Tex. Crim. App. 2013). In *Wade*, the Court held that police lacked reasonable suspicion to prolong a traffic stop based on the suspect's refusal to consent and nervousness. In so holding, the Court had suggested that a person's refusal to cooperate with police during a consensual encounter could be a factor in determining whether an investigative detention was justified, so long as it was not the triggering fact. However, the Court explained that statement was at odds with its conclusion in *Wade* that the lawful refusal to cooperate, by itself, cannot provide the basis for a detention. To further clarify its proposition in *Wade*, the Court explained that exercising a constitutionally protected right cannot give rise to reasonable suspicion; otherwise, it is not a right. The Court concluded that the court of appeals should not have considered Lall's lawful refusal to consent to the search of his vehicle when determining if the facts of his case gave rise to reasonable suspicion. The Court remanded the case so that the court of appeals could conduct a reasonable suspicion analysis without considering Lall's refusal to consent.

Presiding Judge Keller and Judge Keel concurred without written opinion.

B. Suspicious Places – Gas station after a hit-and-run was a suspicious place in light of intoxicated driver's admission that he had hit something, evidence of collision on his vehicle, and existence of exigent circumstances. While driving with his wife as a passenger, Sean McGuire hit a motorcycle with his vehicle, killing the motorcyclist.

McGuire drove to a nearby gas station and called his mother and two law enforcement friends. At the scene of the accident, officers found evidence indicating that McGuire had hit the motorcyclist with his vehicle. An officer responding to the collision went to the gas station to investigate, where he encountered McGuire, his wife, and his mother. Another officer who arrived at the gas station observed parts of the motorcycle wrapped around the front of McGuire's vehicle. McGuire admitted to the officer that he hit something while driving and that his wife told him that he hit a person. McGuire showed signs of intoxication. After failing to take a field sobriety test, he was taken to the hospital to have a blood draw performed.

The State charged McGuire with felony murder for causing the motorcyclist's death while driving intoxicated, intoxication manslaughter with a vehicle, and failure to stop and render aid. The jury convicted him of felony murder and failure to stop and render aid. On appeal, the court of appeals reversed the felony murder conviction in light of *Missouri v. McNeely*, 569 U.S. 141 (2013), but affirmed the conviction for failure to stop and render aid. The case was remanded for a new trial without evidence of the blood draw.

Before his second trial began, McGuire filed a motion to suppress evidence stemming from his warrantless arrest. He argued that the only exception to a warrantless arrest that applied to his case was under Art. 14.01(b) which required the offense to have been committed within the presence of law enforcement. The State argued that the warrantless arrest was lawful under Art. 14.03(a)(1) because McGuire was found in a suspicious place. At the suppression hearing, the trial court granted McGuire's motion but excluded from the motion any physical evidence obtained from the warrantless arrest. On the State's appeal, the court of appeals relied on *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005) to hold that exigency was required under the definition of suspicious places found in Art. 14.03(a)(1). Because the State did not provide evidence of exigency, the court of appeals held that the requirements of Art. 14.03(a)(1) had not been met and affirmed the trial court.

The Court of Criminal Appeals reversed the lower courts' suppression of all evidence stemming from McGuire's arrest and remanded the case back to the trial court. ***State v. McGuire*, 689 S.W.3d 596 (Tex. Crim. App. Feb. 21, 2024) (4:1:4:0)**. Writing for the Court, Judge Richardson explained that regardless of whether exigent circumstances are absolutely required under Art. 14.03(a)(1), the Court found that exigent circumstances existed in McGuire's case which justified his warrantless arrest. The officers' observations at the scene of the accident and at the gas station were sufficient to give officers probable cause to arrest McGuire. Though the issue of exigency was not properly raised, the totality of the facts showed that McGuire was in a suspicious place and that exigent circumstances existed. The Court found the following circumstances supported a finding of exigency: the need to collect and preserve physical evidence at the scene, the need to preserve evidence of intoxication in McGuire's blood, and the general difficulty of getting a warrant at night. Because exigency existed in McGuire's case, there was no need to disavow *Swain* at this time.

Judge Keel filed a **concurring opinion** joined by Judges Yeary, Slaughter, and Presiding Judge Keller. Because the Court did not answer the question before it—whether exigency is needed to justify a warrantless arrest under Art. 14.03(a)(1)—Judge Keel concurred only in the judgment. She explained that the Legislature has never imposed an exigency requirement on Art. 14.03(a)(1), which is notable because other statutes governing warrantless arrests in the code of criminal procedure explicitly require exigency. Further, this Court has never imposed an exigency requirement on Art. 14.03(a)(1), but rather, we have included exigency in the totality of circumstances that must be analyzed to assess an arrest's validity under this statute. McGuire's warrantless arrest was justified under Art. 14.03(a)(1), notwithstanding any exigency, because he was located a few hundred feet from the crash site, motorcycle parts were stuck in the grill of McGuire's truck, he showed signs of intoxication, he admitted to hitting something, and his wife stated that he hit a person.

Judge McClure concurred without written opinion.

[**Commentary:** Notably the Court unanimously upheld the warrantless arrest and overturned the trial court's suppression. However, no single rationale prevailed. This means we may see this issue raised

again, but with an entirely different make-up of the Court reviewing it.]

III. PROCEDURE

A. Bail

1. Under the Damon Allen Act, a public safety report must be reviewed by a magistrate when making a bail determination and appellate courts must review that report through the proper channels. Effective January 1, 2022, the Damon Allen Act requires a magistrate to consider a public safety report before setting bail for a person charged with a Class B misdemeanor offense or higher. The Act had an exemption period that expired on June 1, 2022, which exempted magistrates from having to consider the public safety report during a bail consideration that took place before April 1, 2022.

During his initial bail hearing on February 15, 2022, the trial court initially set Guillermo Gayosso's bail at $500,000. On June 16, 2022, the trial court reconsidered its decision and lowered his bail to $250,000. On appeal, the court of appeals wrote in a footnote that it was unsure whether the Act applied to Gayosso's case because the record did not indicate when he was arrested but then the court included the date of Gayosso's arrest in the body of its opinion. The court of appeals noted that the record showed that the trial court considered Gayosso's criminal background history, which it presumed would have been drawn from a public safety report. The court also noted that there was no argument on appeal that the trial court did not consider all the circumstances and factors required by law.

Appellant sought discretionary review to seek to lower the bond further, but the Court refused his grounds for discretionary review. Instead, the Court granted review on its own motion and vacated the court of appeal's decision. ***Ex parte Gayosso*, 685 S.W.3d 100 (Tex. Crim. App. Dec. 6, 2023)**. Writing for the Court, Presiding Judge Keller explained that the court of appeals was mistaken when it concluded that the record did not contain the date of Gayosso's arrest because he testified at his bail hearing that he turned himself in on February 15, 2022. In deciding whether the exemption applied to Gayosso, the Court determined that the exemption applied to his initial bail setting but it did not apply to his bail reconsideration setting because it occurred after the exemption date. Therefore, the trial court was required to review Gayosso's public safety report when it made its bail determination. Because the record was unclear as to whether the trial court considered Gayosso's public safety report, his Petition for Discretionary Review was dismissed without prejudice, and his case was remanded to the court of appeals for further proceedings consistent with the Court's opinion.

The State filed a motion for rehearing. In its motion, the State expressed concern that the Court's opinion implied that public safety reports should be added to the appellate record and, in doing so, would violate existing laws that require data privacy of criminal history records. The Court of Criminal Appeals denied the State's motion.

Presiding Judge Keller filed a **concurring opinion** addressing the State's concerns. Judge Keller explained that the Court's opinion observed that public safety reports can be reviewed through the proper channels, but that statement was only a recognition that the report the trial court reviews will not be in the appellate record. To review the report through the proper channels, appellate courts must re-run the report in accordance with the requirements of the Damon Allen Act.

Judge Newell filed a **dissenting opinion** in which Judges Hervey, Richardson, and Slaughter joined, noting that Gayosso's argument has always been that the trial court improperly balanced statutory considerations when making its bail determination—not that the trial court failed to consider the Damon Allen Act. Neither party argued on discretionary review that the trial court failed to comply with the Damon Allen Act. Therefore, the Court's decision to grant and remand on its own motion injected unnecessary complications into the proceedings. Judge Newell further noted that the Court's remand for the court of appeals to seek out a public safety report through proper channels was inconsistent with its preference that complaints on appeal be preserved in the trial court, supported by the record, and advanced by the complaining party. And because the Court assumed error from a silent record and remanded the case, it seemed to have engrafted a "show your work"

requirement into the Act without being prompted by either party; this will likely lead to *sua sponte* abatements by courts of appeals for findings and conclusions to clarify the record which will only result in holdings that the error was harmless or not preserved. Judge Newell would have granted the State's motion, withdrew the Court's opinion in this case, and refused discretionary review outright.

[**Commentary:** Since the Court issued its opinion in *Gayosso* the Fort Worth Court of Appeals has alternatively held that any error in failing to consider the public safety report was harmless and that any complaint on that issue was not preserved. *See Ex parte Delong*, 2024 WL 725111 (Tex. App. – Fort Worth, Feb. 22, 2024) (holding that any error in the trial court's failure to consider the public safety report was harmless); *see also Ex parte Chavez*, 2024 WL 1207302 (Tex. App. – Fort Worth, Mar. 21, 2024) (holding any unraised complaint regarding the trial court's failure to consider the public safety report was not preserved for review). The Amarillo Court of Appeals considered the issue after assuming it was preserved, but then held any possible error was harmless. *See Ex parte Segovia*, 2024 WL 1642141 (Tex. App. – Amarillo, Apr. 16, 2024).]

2. Bond Forfeiture – Sureties are not liable for civil filing fees that the State is exempt from paying unless a statute expressly requires a civil defendant to pay a fee if the State prevails, but sureties cannot be required to pay a fee that improperly duplicates a fee already charged. Darrell David was indicted for unlawful possession of a firearm by a felon and failed to appear at a trial setting. A judgment nisi was entered for the forfeiture of his bond. After the final judgment of forfeiture was signed, the clerk issued a bill of court costs. David's surety, Continental Heritage, filed a motion to correct costs, contending that civil filing fees were not authorized in bond forfeiture proceedings since bond forfeiture cases are criminal cases. The trial court denied Continental Heritage's motion to revise the court costs. On appeal, the court of appeals concluded that civil filing fees could be assessed in a bond forfeiture proceeding.

The Court of Criminal Appeals vacated the judgment of the court of appeals. ***Continental Heritage Insurance Company v. State*, 683 S.W.3d 407 (Tex. Crim. App. Jan. 17, 2024) (9:0)**. Writing for the Court, Presiding Judge Keller explained that bond forfeiture proceedings deriving from criminal prosecutions are criminal matters despite being procedurally controlled by the Rules of Civil Procedure. The Court reasoned that the State is liable for most civil filing fees even if it loses but is exempt from paying some fees. Since those exempt fees are never charged, a losing civil defendant does not have to pay them unless a statute expressly authorizes payment. The Court concluded that a surety must only pay the filing fees the State would have to pay if it lost unless a statute requires a defendant to pay the filing fee when the State wins. Further, a surety cannot be required to pay a fee that improperly duplicates a fee already charged. The Court did not make a final determination regarding the fees Continental Heritage was charged, but instead remanded the case for further proceedings consistent with its opinion.

Subsequently, the Court granted Continental Heritage's motion for rehearing and withdrew its original opinion. The Court corrected its opinion to clarify that formal rules governing civil suits existed before 1941 but explained that its statement that they did not in the original opinion did not require the Court to change its decision. The Court explained that if the Legislature intended for bond-forfeiture proceedings to be governed solely by the Rules of Civil Procedure, the Legislature could have easily said so, but it did not.

[**Commentary:** For those paying attention to votes, Judge Newell concurred to the original opinion, but joined the new opinion after the motion for rehearing was granted.]

B. Indictments

1. In cases involving multi-count indictments, facial constitutional challenges are cognizable in a pretrial writ of habeas corpus if a grant of relief on would result in immediate release from prosecution for at least one count. The Court of Criminal Appeals consolidated two cases into one opinion. In one case, Tonya Couch challenged her four indictments for money laundering, seeking relief on the ground that Sec. 34.02(a)(4) of the Texas Penal Code was facially unconstitutional because it criminalizes thought,

namely the intent to finance or invest. The trial court denied relief, and the court of appeals affirmed the trial court's ruling. In the second case, Glenda Hammons challenged two counts of her three-count indictment for injury to a child, seeking relief on the ground that Sec. 22.04(a)(2) of the Texas Penal Code was unconstitutionally vague for its failure to define "serious mental deficiency, impairment, or injury." The trial court denied relief, and the court of appeals upheld the trial court's ruling.

In Couch's case, the Court of Criminal Appeals vacated the judgment of the court of appeals and remanded to the court of appeals to address the cognizability of Couch's claim. In Hammons' case, the Court of Criminal Appeals refused Hammons' petition or discretionary review but granted review on its own motion and remanded Hammons' case to address the cognizability of Hammons' claim. On remand, the court of appeals held that the claims in both cases were not cognizable on a pretrial writ. In Couch's case, the claim was not cognizable because she would not be immediately released from prosecution, finding that intending to finance or invest were different manner and means of committing money laundering. In Hammons' case, the claim was not cognizable because she would not be immediately released from prosecution even if two of the counts in her three-count indictment were quashed. Both Couch and Hammons filed petitions for discretionary review with the Court of Criminal Appeals.

The Court of Criminal Appeals affirmed the judgment of the court of appeals in Couch's case but reversed the judgment of the court of appeals in Hammons' case. ***Ex parte Couch & Ex parte Hammons*, 678 S.W.3d 1 (Tex. Crim. App. Oct. 25, 2023) (8:1:0)**. The Court held that Couch's claim was not cognizable, but that Hammons' claim was. Writing for the Court, Judge Keel explained that Couch's single-count indictment alleged four different manner and means in which one commits the single offense of money laundering—not four different offenses. Thus, granting Couch relief on her claim would not release her from prosecution for the offense alleged in her indictment. Accordingly, Couch's claim was not cognizable in a pretrial habeas application. On the other hand, Hammons' claim was cognizable in a pretrial habeas application because she challenged the statute's constitutionality that defined two counts of her three-count indictment. Even if Hammons could be tried on the third count, she would be released from prosecution for the other two alleged offenses, and trial on those counts would not proceed.

Judge Yeary concurred without written opinion.

2. Defendant's claim that his indictment was time-barred was cognizable in a pretrial habeas writ, and his indictment was time-barred because it was brought more than two days after the offense. The State indicted Lucas Vieira for the offense of aggravated assault by threat on July 9, 2021. The offense, as alleged in the indictment, was committed on July 7, 2019. Vieira filed a pretrial application for writ of habeas corpus, claiming the indictment was time-barred under Art. 12.04 of the Texas Code of Criminal Procedure because it was filed two days after the two-year statute of limitations period for aggravated assault ended. The State argued that when considering both Art. 12.04 and Sec. 311.014(c) of the Texas Government Code, the indictment was timely filed. The court of appeals concluded that the indictment was within the statute of limitations period, reasoning that the date of the offense and the date of the indictment are excluded from the computation of time.

The Court of Criminal Appeals reversed the judgments of the lower courts and dismissed the indictment. ***Ex parte Vieira*, 676 S.W.3d 654 (Tex. Crim. App. Sept. 27, 2023) (8:1:0)**. Writing for the Court, Presiding Judge Keller reviewed the language of both statutes to conclude that the indictment was untimely filed. Art. 12.04's plain language required the indictment to have been filed on July 8, 2021—one day too late. Sec. 311.014(c), as relied on by the State, required the indictment to have been filed on July 7, 2021—two days too late. The Court found that the language of both statutes excludes the same first day; Art. 12.04 excludes the date of the offense, and Sec. 311.014(c) excludes the date in the first month that the statutory limitation period is computed from, which is the date of the offense. The State argued that these two statutes worked in tandem to give the State an extra day beyond the two-year period, but the Court disagreed. If both statutes were applied together, the clear meaning of the statutes' text would be violated. Therefore, the Court concluded that Vieira's indictment was time-

barred because it was not brought within the two-year statute of limitations.

Judge Keel concurred without written opinion.

3. State was not required to prove elements alleged in facially valid indictment for sexual assault without consent despite information in caption that indicated victim of sexual assault was a child under the age of 17 who could not legally consent. The State indicted Francisco Delarosa Jr. on three counts of sexual assault. The body of the indictment charged Delarosa with three counts of sexual assault for non-consensual contact between his sexual organ and that of the pseudonymous complainant LAM. On the other hand, the caption of the indictment referred to the three counts as "sexual assault of a child" under Sec. 22.011(a)(2) which only required the State to prove that the complainant was a child younger than 17.

On appeal, Delarosa argued that the evidence was insufficient to prove that non-consensual sexual contact occurred, as required by the indictment. The court of appeals held the evidence was sufficient to uphold the conviction. The court reasoned that the State proved a lack of consent when it proved the complainant's age and Delarosa's awareness of the complainant's age. The court of appeals affirmed Delarosa's conviction but remanded to the trial court to correct the judgments to reflect three counts of sexual assault instead of sexual assault of a child.

The Court of Criminal Appeals reversed the judgment of the lower court and entered a judgment of acquittal for each count of sexual assault. ***Delarosa v. State*, 677 S.W.3d 668 (Tex. Crim. App. Oct. 4, 2023) (5:4)**. In concluding the evidence was legally insufficient to support Delarosa's conviction, the Court held that the State was required to prove beyond a reasonable doubt that Delarosa committed three counts of sexual assault without the complainant's consent, but the State did not do so. Writing for the Court, Judge Keel explained that the body of the indictment alleged a facially complete offense of non-consensual sexual assault, and the State was obligated to prove what it alleged. The Court also explained that the captions reference to the victim as a child did not render the indictment as a whole ambiguous.

Presiding Judge Keller filed a **dissenting opinion**, joined by Judge Hervey, in which she would have found the indictment defective. However, though defective, Judge Keller would also have found that the indictment sufficiently alleged sexual assault of a child. Since the jury was authorized to return a verdict on that offense, the Court should have upheld its verdict against Delarosa's sufficiency challenge.

Judge Yeary filed a **dissenting opinion** in which he would have found the evidence legally sufficient to show that Delarosa committed sexual assault of a child because the jury's verdicts and Delarosa's judgment both reflect convictions for that offense.

Judge Slaughter dissented without written opinion.

[**Commentary:** I realize that this is a "sufficiency" case, but the impact of this case, as you can discern from the dissenting opinions, is more likely to be felt in cases involving the evaluation of indictments. Though not expressly stated, the Court seems to draw a distinction between a facially valid indictment in felony court that merely alleges a misdemeanor offense and one that actually alleges a felony, albeit one the State did not intend to charge. The Court seems to hold that in a case in which there is something missing from the body of the indictment then resort to the caption to clarify the ambiguity is appropriate particularly when subject-matter jurisdiction can be established through reference to information in the caption. The dissenters' positions depend upon a rejection of Judge Keel's interpretation of the sufficiency of the indictment, which is why this case seems to impact charging instruments more than sufficiency. That said, practitioners will probably hate that the sufficiency of the indictment issue is reached through the circuitous route of the hypothetically correct jury charge. It's not a straight up motion to quash issue, though Judge Keel makes a good point on that front. She notes for the Court that it is unreasonable to require the defendant to object to a facially valid charging instrument that charges him with a lesser offense than the one the State intended to charge. We'll see how quickly that hot take ages. As for the truly "sufficiency" related issues, those are discussed in greater detail below under the "Offenses" section.]

4. State was not required to elect particular manner and means of committing alleged offense because indictment alleged every statutory manner and means for committing the offense. The State indicted Jemadari Chinua Williams for aggravated promotion of prostitution. The indictment tracked the statutory language, to allege six different manner and means of committing a single offense. Williams filed a pre-trial motion to quash, arguing that the indictment failed to notify him which of the six possible methods of committing the offense he was being charged with. The State responded that the indictment was sufficient because it tracked the statutory language and that the State was not required to elect which manner or means it intended to prove at trial. The trial court denied the motion to quash, and Williams was convicted. On appeal, Williams argued that the State failed to specify which of the six manner and means of committing the offense in its indictment, and the court of appeals agreed. The court of appeals found that under *Ross*, the State must, upon timely request from the defendant, allege the particular manner or means it seeks to establish. *See State v. Ross*, 573 S.W.3d 817 (Tex. Crim. App. 2019). The court of appeals reversed Williams' conviction and remanded the case back to the trial court with instructions to dismiss the indictment.

The Court of Criminal Appeals reversed the court of appeals' judgment. ***Williams v. State*, 685 S.W.3d 110 (Tex. Crim. App. Jan. 10, 2024) (6:0:1:2)**. The Court held that the court of appeals misconstrued *Ross*—the statement that the State must specify the particular statutory method on which it will rely appears to be dicta. Writing for the Court, Presiding Judge Keller explained that when a statutory term or element is further defined by statute, the charging instrument does not ordinarily need to allege the definition. The exception to that rule was articulated in *Ferguson*: when an act or omission is statutorily defined, and that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the State must allege the particular manner or means it seeks to establish. *Ferguson v. State*, 622 S.W.2d 846 (Tex. Crim. App. 1981). The principle articulated by *Ferguson* and recited in *Ross* developed as an exception to the general rule that statutory definitions do not have to be included in a charging instrument. Thus, the State is not required to elect between alternative statutory methods of committing an offense alleged in an indictment when it chooses to plead every statutory method.

Judge Yeary filed a **dissenting opinion**. He would not have resolved this issue of statutory construction as the Court did—by assuming that the offense statute specified the manner and means of committing aggravated promotion of prostitution—rather than the elements of six distinct offenses, simply because Williams used the words "manner and means" at trial and before the court of appeals. Instead, he would have remanded Williams' case to the court of appeals to determine the correct construction of the offense statute before addressing the issue on discretionary review.

Judge Newell filed a **dissenting opinion**, joined by Judge Walker. In *Ferguson*, the Court held the indictment deficient because it left the defense to guess or assume that the State was going to prove one or all types of conduct. In most cases, a charging instrument that tracks the statutory text will provide adequate notice. But if the prohibited conduct is statutorily defined to include more than one manner or means of commission, the State must, upon timely request, allege the particular manner or means it seeks to establish. Judge Newell would have found that given the indefinite meaning of the statutory terms, the State's refusal to clarify which manner and means it intended to prove failed to provide Williams with adequate notice of the charges against him.

[**Commentary:** Note that the Court assumes away the issue of whether these are different offenses or different ways of committing the same offense. And while the Court may be correct in concluding that the question of how to construe the statute was not before the court, that leaves a large issue open for the future.]

C. Waiver of Counsel – The statutory right to withdraw a waiver of counsel "at any time" is not absolute, and defendant was adequately advised of the dangers of self-representation in light of his alternation between self-representation and representation through counsel during the proceedings. The State indicted Noel Christopher Huggins for the state jail felony offense of possession

of methamphetamine enhanced by two prior felony convictions. At his arraignment, Huggins elected to represent himself. The trial court reviewed portions of a written waiver of counsel with Huggins. The trial court highlighted Huggins rights to representation, appointed counsel, a reasonable opportunity to hire an attorney, self-representation, and withdrawal of his waiver of counsel. After reading the waiver, Huggins returned the signed waiver to the trial court and acknowledged that he had been fully advised of his right to counsel and the dangers and disadvantages of self-representation. The trial court granted Huggins' waiver of counsel.

At the following hearing, Huggins stated that he still wished to represent himself. At a later pretrial hearing, however, Huggins made a request for counsel, and the trial court appointed him an attorney. Soon thereafter, Huggins informed the trial court that he had fired his attorney and wanted to represent himself again. Huggins' attorney withdrew as counsel, and the trial court appointed a second attorney simultaneously. At the following hearing, Huggins was represented by his second attorney. At a subsequent hearing, Huggins again stated that he wanted to represent himself, so he fired his second attorney and signed a second waiver of counsel which the trial court granted.

On the day of trial, Huggins stated that he wanted to waive his right to a jury trial, plead guilty, and have the court assess punishment. The State explained the paperwork to Huggins, and the trial court confirmed his understanding of the punishment range, as well as his rights to a jury trial, an appeal, and an appointed counsel for an appeal. Huggins plead guilty to the possession offense, plead "true" to the first enhancement, and "not true" to the second enhancement. During his punishment hearing the next day, Huggins stated he no longer wanted to represent himself and needed an attorney. The trial court denied Huggins' request for a third attorney and, in finding both enhancement paragraphs "true," sentenced him to 18 years.

On appeal, Huggins argued that his second waiver of counsel was not knowing or intelligent because the trial court failed to admonish him of the dangers of self-representation, and that the trial court violated Art. 1.051(h) of the Texas Code of Criminal Procedure by failing to allow him to withdraw his waiver. The court of appeals affirmed the trial court and found that Huggins' waiver was knowing, voluntary, and intelligent, and that he failed to establish that withdrawal of his second waiver would not delay trial or prejudice the State.

The Court of Criminal Appeals affirmed the court of appeals' judgment. ***Huggins v. State*, 674 S.W.3d 538 (Tex. Crim. App. Sept. 6, 2023) (7:1:1)**. Writing for the Court, Judge Keel concluded that additional admonishments about the dangers and disadvantages of self-representation were unnecessary in Huggins' case because he was aware of those dangers and disadvantages. The record revealed that Huggins knew that self-representation was foolish, and that in representing himself previously in one of the enhancement cases, he knew that he lacked the legal knowledge to effectively represent himself. The Court found that additional admonishments were unnecessary but warned that, under different circumstances, additional admonishments may be required and that trial courts may want to provide them out of an abundance of caution.

The Court further explained that under Art. 1.051(h), the language "at any time" does not mean under any circumstances. The Court furthered that a defendant's right to self-representation or counsel cannot be manipulated to delay the proceedings or interfere with the administration of justice. *See Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988); *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976). The statute does not require the trial court to unconditionally accommodate a defendant's teetering between counseled- and self-representation, and by following Huggins' interpretation, the statute would enable manipulation of the court. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). In Huggin's case, the trial court did not abuse its discretion by denying his request to withdraw his second waiver of counsel.

Judge Hervey concurred without written opinion.

Judge Yeary filed a **dissenting opinion**. He agreed that both waivers were knowingly and voluntarily rendered but disagreed with the Court's reasoning. Referring to *Geeslin v. State*, he would find

that an accused's prior experience cannot serve to validate a waiver of counsel when the accused was not adequately admonished under *See Geeslin v. State*, 600 S.W.2d 309 (Tex. Crim. App. 1980); *Faretta v. California*, 422 U.S. 806 (1975). But Yeary furthered that *Faretta* was not applicable to Huggins' case because there is no constitutional right to self-representation at the punishment stage. Judge Yeary disagreed with the Court's statutory interpretation and would have found that the language of Art. 1.051(h) allowed a defendant to withdraw his waiver and obtain prospective assistance of counsel from that point on regardless of the circumstances of the withdrawal.

D. Discovery – Trial court had inherent authority to suppress 911 tape pursuant to a violation of the Michael Morton Act after the State announced ready for trial three times without asking police if they had a recording of the 911 call. Dwayne Robert Heath was charged with the offense of injury to a child. Trial counsel requested discovery, which was produced. The case was placed on the trial docket and the State announced ready for trial on three occasions. Days before the fourth jury trial setting, the prosecutor learned of a material recording of a 911 call for the first time and disclosed it to Heath's counsel. Heath sought to exclude the call at trial despite acknowledging that he was not asking for a continuance. The trial court granted that request concluding that the State violated Article 39.14(a) by not disclosing the 911 call "as soon as practicable." The State appealed. The court of appeals affirmed the trial court's order granting Heath's motion to suppress.

The Court of Criminal Appeals affirmed, holding that "the state," as used in Article 39.14, includes law enforcement, and "as soon as practicable" means when discovery in the possession of the "the state" is capable of being produced through reasonable diligence. ***State v. Heath*, 642 S.W.3d 591 (Tex. Crim. App. June 12, 2024) (6:0:3)**. Writing for the Court, Judge Newell explained that under article 39.14 discoverable evidence "in the possession, custody, or control of the state" must be disclosed "as soon as practicable." In context of the entire statute, the general reference to the "state" was a reference to the State of Texas and necessarily included law enforcement. Where the Legislature intended for a reference to "the state" to mean only a particular representative of The State of Texas, the text of the statute did so through specific modification of the word "state" such as by referring to "counsel for the state." By reading the word "state" to mean only the prosecutor would read an absurd redundancy into the statutory phrase "counsel for the state." Further, reading "the state" to refer only to items in the possession, custody, or control of the prosecutor would create a conflict between 39.14(a) and 39.14(h), the statutory subsection that codifies the prosecutorial obligations under *Brady*. Additionally, the Court explained that including items in the possession of law enforcement is also consistent with Article 2.1397, which requires law enforcement agencies to document their compliance with the obligation to turn over discovery pursuant to Article 39.14(a).

The Court also explained that there was no "scienter" requirement in the text of the statute. The Michael Morton Act only requires that discoverable evidence be produced "as soon as practicable," a requirement that is triggered upon receipt of a timely discovery request and does not contain a knowledge requirement. "As soon as practicable" means as soon as reasonably possible or feasible. If a simply request by a prosecutor will result in the discovery of evidence, it is reasonably possible for the prosecutor to disclose the evidence. The failure of the prosecutor to exercise reasonable diligence to ascertain what discoverable evidence is at its disposal can result in a failure to disclose evidence "as soon as practicable." In this case, law enforcement was in the possession of the 911 call since the date of the alleged offense. Despite a timely discovery request and after multiple announcements of ready for trial, the prosecutor discovered the 911 call only after meeting with the witness who made the 911 call. This late disclosure, though accomplished as soon as the prosecutor became aware of the evidence, did not satisfy the obligation to disclose discoverable evidence as soon as practicable.

Finally, the Court held that the trial court had the inherent authority to exclude the 911 call for the discovery violation. While the Court recognized that a trial court was not required to exclude the evidence absent a showing of bad faith on the part of the prosecution, it nevertheless had the authority to do so in light of the prosecutor's failure to search for the evidence. Here, the trial court did not abuse its

discretion in determining that the State's failure to inquire about the existence of the evidence sooner was a willful violation of its obligations under Article 39.14 even if it did not amount to a showing of bad faith.

Judge Keel, joined by Presiding Judge Keller, and Judge Yeary filed a **dissenting opinion**. The dissent would not interpret "the state" to include law enforcement because the Legislature did not specifically do so. Although "the state" means different things throughout the Code of Criminal Procedure, in the context of Article 39.14, the reference is to the State as a party or the prosecution as its representative. The State as a party and the prosecutor as the party's representative are interchangeable. The dissent notes that the purpose of Article 2.1397 was to ensure that law enforcement disclosed to the prosecution discoverable material, which the state is then obligate to disclose to the defense. The dissent expresses concern that the Court's reading would authorize the defense to submit discovery requests directly to law enforcement and that it suggests a role for law enforcement concerning decisions belonging to the prosecution such as what evidence to admit at trial. Here, because the prosecutor disclosed the 911 call as soon as she learned of its existence, the call was disclosed as soon as practicable.

[**Commentary:** Depending on who you talk to this is a controversial decision. I urge practitioners to read both the Court's opinion and the dissent. Make up your own minds. I would note that the Court goes out of its way to call this a statutory violation rather than a constitutional or ethical violation. It distinguishes between "bad faith" violations as constitutional or ethical violations and "willful" violations as violations of statutory obligations. Perhaps this distinction is vanishingly thin. Or perhaps, as a practical matter, taking the dispute out of the context of "bad faith" may make disclosure easier in the future if the failure to disclose is no longer seen as something that could impact the prosecutor's job and reputation. Or it could lead to statutory amendments limiting disclosure in the future. Either way Texas has backed into providing discovery to defendants. Time will determine in which direction this opinion moves the pendulum if it moves the pendulum in any direction at all. One final observation though, in *Burton v. State*, 2024 WL 2002042 (Tex. App.—Houston [14th Dist.] 2024) the Fourteenth Court of Appeals declined to follow the court of appeals opinion in *Heath*. This was before the CCA affirmed that decision in *Heath*. But that case was one in which the defendant appealed rather than the State. All the Court held in *Heath* was that a trial court could suppress evidence for an inadvertent violation of Article 39.14. In *Burton*, the defense argued that trial courts were required to suppress evidence for an inadvertent violation of 39.14. The defense filed a petition for discretionary review in that case. We shall see if the Court would go farther than it does in *Heath* and hold that suppression is required.]

E. Alternate Jurors – An alternate juror's erroneous participation in jury deliberations violated statute prohibiting people other than the jury from being with the jury during deliberations as well as conversations with jurors about a case on trial. The State charged Joe Luis Becerra with unlawful possession of a firearm by a felon, and he proceeded to trial before a jury. A petit jury of twelve was selected and sworn in and one alternate juror was also selected. After closing arguments, the jury retired to deliberate, and, unbeknownst to either party, the alternate juror retired to the jury room with the regular jury. Approximately forty-six minutes later, the State realized there were thirteen people in the jury room, and once notified, the trial court immediately removed the alternate juror. The court held a hearing regarding the alternate juror and the parties agreed to the court instructing the jury to disregard anything the alternate said and restart deliberations. Becerra moved for a mistrial, which the court denied. After the court gave its instructions, the jury resumed deliberations and returned a guilty verdict, with each juror confirming the verdict when polled individually.

Subsequently, Becerra filed a motion for new trial alleging that the alternate juror's participation in deliberations and a preliminary vote on his guilt violated his constitutional and statutory right to a jury composed of twelve people under Art. V, sec. 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure. He also alleged that the alternate's presence in the jury room and improper participation in a preliminary vote on his guilt violated Art. 36.22 of the Texas Code of Criminal Procedure, which prohibits non-jurors from talking with jurors about the case or being with the jury during

deliberations. As to harm, Becerra argued that Art. 36.22 of the Texas Code of Criminal Procedure shifted the burden to the State to show a lack of harm. In support of his motion for new trial, Becerra included an affidavit from one of the petit jury members which stated that the jury did not revote on the issue of guilt after the alternate juror was removed. The State objected to the admission of the juror's affidavit pursuant to Rule 606(b) of the Texas Rules of Evidence. A hearing was held, and the trial court overruled the State's objection, finding that the affidavit fell within an exception to the prohibition on juror testimony concerning whether there was an outside influence upon any juror. Ultimately, the court denied Becerra's motion for new trial. The trial court concluded that Becerra's complaints about the alternate juror were waived and that, even if preserved, any error was harmless.

On appeal, Becerra complained that his constitutional right to a jury composed of twelve people under Art. V, sec. 13 of the Texas Constitution was violated, Art. 31.011, 33.011, and 36.22 of the Texas Code of Criminal Procedure were violated, and the trial court erred in failing to grant a mistrial or new trial. The court of appeals concluded that Becerra's constitutional and statutory claims were not preserved because the objection and motion for mistrial were not timely made when the alternate retired to deliberate with the jury. Becerra petitioned the Court of Criminal Appeals to review the lower court's determination that these claims were defaulted. The Court granted review and held that because Becerra objected as soon as he became aware of the error, he had preserved his constitutional and statutory claims for review. The Court reversed and remanded for the court of appeals to consider the merits of Becerra's complaints.

Upon remand, the court of appeals held that the trial court did not abuse its discretion by denying Becerra's request for a mistrial or motion for new trial. At the time of the request for a mistrial, the court reasoned there had been no showing that the alternate juror participated in deliberations or communicated with the regular jurors about the case. Thus, while Art. 36.22 prohibits persons from being with the jury while it deliberates or conversing with jurors about the case on trial, Becerra failed to meet his burden to raise a presumption of harm at the time of the motion for mistrial. In considering the juror's affidavit, the court held that only a portion was admissible under Rule 606(b) because nothing in the remainder of the affidavit indicated whether the alternate juror participated in deliberations beyond voting on guilt or innocence prior to the alternate's removal. The court of appeals then held that Art. V, sec. 13 of the Texas Constitution and Art. 33.01 were not violated because the "ultimate verdict" rendered was voted on by a panel of twelve jurors. In considering Becerra's claim that Art. 36.22 was violated, the court found no rule that established that the presence of the alternate jurors in the jury room during deliberations is absolutely improper. Thus, the court of appeals concluded that the trial court did not abuse its discretion in denying the motion for new trial because neither the alternate juror's presence nor his initial participation in voting was sufficient to create a reasonable probability that the alternate juror's outside influence had a prejudicial effect.

The Court of Criminal Appeals remanded the case to the court of appeals for further proceedings consistent with its opinion. ***Becerra v. State*, 685 S.W.3d 120 (Tex. Crim. App. Feb. 7, 2024) (5:0:4)**. Writing for the Court, Judge Newell explained found that the inadvertent presence and participation of the alternate juror in the jury's initial deliberations did not implicate Appellant's right to a jury of twelve people under the Texas Constitution and Art. 33.01 because the trial court only composed a petit jury of twelve people. Nor did the alternate juror's presence and participation in a portion of the jury's deliberations violate Art. 33.011 because the alternate was properly discharged after the jury rendered its verdict in accordance with the statute. In a felony case, the only way the constitutional and statutory provisions can be violated is if a district court impanels a jury greater or fewer than twelve. That a district court qualifies alternate jurors does not alter the composition of the impaneled jury. The Court's suggestion in *Trinidad* that there might be a constitutional or statutory violation of the twelve-person jury requirement if an alternate participates in the jury's "ultimate verdict" was unsupported dicta because *Trinidad* did not deal with a situation in which the alternate juror participated in deliberations at all. Consequently, the Court expressly disavowed that language.

Though the alternate's participation in deliberations did not rise to the level of a constitutional violation, it violated Art. 36.22's prohibition on unauthorized persons being present with the jury while the jury is deliberating, and its prohibition against conversing with the jury about the case. The Court explained that an alternate juror is distinct from a member of the petit jury and does not become member of the regular jury until the trial court replaces a disqualified member of the regular jury with the alternate. This is consistent with the historical understanding of the text of the statute which predated the existence of alternate jurors. Given the statutory history, the use of the word "jury" in the statute could only have been understood to mean a member of the petit jury constituted by the trial court. Similarly, the statutory use of the word "juror" could only have been understood as a reference to a member of the regular jury not an alternate juror. With this understanding an alternate juror is necessarily an "other" person prohibited from being with the jury during deliberations and conversing with the jury about the case. The Court remanded the case for a statutory harm analysis in light of the statutory violation.

Judge Yeary filed a **dissenting opinion**. In disagreeing with the Court, Judge Yeary believed the presence and participation of an alternate during jury deliberations violated Art. V, sec. 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure. He also would not conclude that the error was harmless beyond a reasonable doubt, as did the court of appeals, and he would have reversed the judgment on that basis alone. Judge Yeary agrees with the Court in that the alternate juror's presence and participation during jury deliberations constituted a violation of Art. 36.22. However, he would not have addressed the question of harm under Rule 44.2(b) because that question wasn't before the Court.

Judge Keel filed a **dissenting opinion** in which Presiding Judge Keller and Judge Slaughter joined. Judge Keel opined that the alternate juror's participation and vote in jury deliberations before the verdict was returned was not error, reasoning that the jury was never composed of more than twelve people. Since alternates are treated the same as jurors under Art. 33.011, there was also no violation of Art. 36.22 because this statute does not apply to jurors. But assuming there was error, there was no harm because twelve jurors ultimately convicted Becerra. Even if there were a thirteenth juror, Becerra would not be harmed because a greater number of fact finders would generally benefit the defense.

[**Commentary:** Note that this case also deals with the admissibility of juror affidavits under Rule 606(b) which is discussed below. It also deals with how courts should conduct a proper statutory harm analysis for this type of error which is discussed below under Appeals. On the big question of the case, namely whether this is a constitutional rather than a statutory violation, the Court notes that Becerra only raised a challenge to the makeup of the jury. He did not argue that having more than 12 jurors violated his personal right to a jury trial. The United States Supreme Court has held in *Williams v. Florida*, 399 U.S. 78 (1970) that the right to a jury of 12 is not part of a defendant's personal right to a jury trial. However, recently in *Khorrami v. Arizona*, 143 S.Ct. 22 (Nov. 7, 2022) the United States Supreme Court denied certiorari on the question of whether the right to a jury trial for a felony included a right to at least 12 jurors. I mention this because Justice Gorsuch dissented and went on at great length to criticize *Williams*. The basic import was that historically the founding fathers would have understood the right to a jury trial as necessarily including a jury of 12. Whether he would take this argument to mean that a jury of 13 is also unconstitutional remains to be seen. But I point this out to note that there may be some room for a defendant to argue that an alternate juror's participation in jury deliberations violates a right to a jury trial even if it doesn't alter the composition of the jury. I have no idea if such an argument would be successful. I am just pointing out that the argument was not made in this case.]

F. Double Jeopardy – Jury's verdict of "not guilty by reason of insanity" was an acquittal for purposes of the Fifth Amendment's Double Jeopardy Clause. Damian McElrath, who had recently been diagnosed with schizophrenia, killed his mother because he believed she was poisoning him. McElrath immediately called 911 and told the dispatcher that he killed his mother and asked if what he did was wrong. He later admitted to officers that he killed his mother during an interrogation. McElrath

was charged with malice murder, felony murder, and aggravated assault, and his case went to trial.

Under Georgia law, a jury may give a verdict of "not guilty by reason of insanity" if the jury found the defendant did not have the mental capacity to distinguish between right and wrong, or if the act was committed because of a delusional compulsion that the defendant's will could not overpower. At trial, the jury returned a split verdict: "not guilty by reason of insanity" on the malice murder count and "guilty but mentally ill" on the other two counts. The aggravated-assault conviction served as the predicate for felony-murder and those two convictions merged. McElrath was sentenced to life imprisonment for the felony-murder conviction.

On appeal, McElrath argued that his conviction should be vacated because the "guilty but mentally ill" verdict conflicted with the "not guilty by reason of insanity" verdict. Under Georgia law, a jury's verdict in a criminal case may be set aside if the verdict involves findings by the jury that are not legally and logically possible of existing simultaneously. The Supreme Court of Georgia agreed and concluded that the two verdicts were incompatible because each verdict required a different mental state that could not exist at the same time. The court vacated both verdicts and authorized a retrial. On remand, McElrath argued that Georgia was prohibited from retrying him for malice murder under the Double Jeopardy Clause of the Fifth Amendment because he had been found "not guilty by reason of insanity." The trial court rejected this argument. McElrath appealed. The Supreme Court of Georgia affirmed the lower court and concluded that, for double jeopardy purposes, inconsistent verdicts were equivalent to mistrials where the jury is unable to reach a verdict. The Supreme Court of the United States granted certiorari.

The Supreme Court of the United States reversed the judgment of the Supreme Court of Georgia. ***McElrath v. Georgia*, 601 U.S. 87 (Feb. 21, 2024) (9:1:0)**. Delivering the opinion of the unanimous Court, Justice Jackson held that the jury's verdict of "not guilty by reason of insanity" on the malice murder count meant that the prosecution's proof was insufficient to prove McElrath was criminally liable for the offense. Georgia argued that because the "not guilty by reason of insanity" was inconsistent with the jury's other two verdicts, all three were legally void. The United States Supreme Court disagreed. According to the Court, an acquittal occurs when there has been a ruling on the question of guilt or innocence. In McElrath's case, the jury's verdict of "not guilty by reason of insanity" constituted a ruling that the prosecution's proof was insufficient to establish criminal liability for the offense of malice murder. The Court further explained that an acquittal is still an acquittal, even if the jury returns inconsistent verdicts. To ascertain the basis of the jury's verdict, Georgia argued, acquittals can only apply to general verdicts. The Court rejected this argument, concluding that, after an acquittal, the Double Jeopardy Clause forbids courts from speculating on the reasoning behind the jury's determination.

Justice Alito concurred with the Court but wrote separately to clarify its holding. In his view, McElrath's case differs from cases where a trial judge refuses to accept inconsistent verdicts on separate counts and sends the jury back to further deliberate. Alito concludes that the Court's holding does not express any view on whether a trial court's rejection of inconsistent verdicts on separate counts constitutes an acquittal for double jeopardy purposes.

[**Commentary:** While the type of inconsistent verdict at issue in this case was based upon Georgia's insanity defense, this case can apply to other jurisdictions on the broader question of what constitutes an acquittal. The Court unanimously holds that the existence of a double jeopardy issue flows from the jury's ruling on the question of guilt or innocence. And in this case the Court did not hold that there was an acquittal because of logically inconsistent verdicts but instead the jury entered a verdict of "not guilty by reason of insanity" on the case that he State subsequently sought to retry the defendant on.]

G. Motion to Adjudicate Guilt Hearings - A defendant's right to be physically present under the Due Process Clause is a waiveable only right that applies in a hearing on a motion to adjudicate. Darren Trammel Hughes pled guilty to tampering with a governmental record, and the trial court deferred adjudication, placing Hughes on three years of community supervision. Subsequently, the State

moved to adjudicate guilt because Hughes violated the terms of his community supervision. A hearing on the motion was held via a teleconference hearing conducted using Zoom due to reasons related to the COVID-19 emergency. Several times during the hearing, the trial court ordered Hughes to be muted while trying to speak. The trial court revoked Hughes' deferred adjudication community supervision and sentenced him to ten years imprisonment. On appeal, Hughes contended that his right to be present under the Due Process Clause was violated. The court of appeals reversed the trial court's judgment, holding that Hughes' right to be present under the Confrontation Clause had been violated because Hughes could not speak to his counsel in confidence during witness testimony. Hughes, however, did not raise a Confrontation Clause claim in his appeal. The State filed its petition with the Court of Criminal Appeals, contending that the court of appeals improperly confused the right to be present under the Confrontation Clause with the right to be present under the Due Process Clause and that the Due Process Clause-based right is subject to forfeiture.

The Court of Criminal Appeals affirmed the judgment of the court of appeals and was remanded to the trial court for further proceedings. ***Hughes v. State*, --- S.W.3d ---, 2024 WL 2306275 (Tex. Crim. App. May 22, 2024) (5:0:4)**. Writing for the Court, Judge Walker explained that just like parole and probation revocations, deferred adjudication community supervision revocations also result in a loss of liberty and thus, due process is implicated. Walker reasoned that even though a hearing on a motion to adjudicate guilt is not a formal prosecution of an offense, criminal charges are levied against the defendant, and the hearing is the only opportunity for the defendant to defend himself against the charges. The Court reaffirmed that the due process right to be present is not forfeitable, and unless a defendant waives that right, he may raise the right for the first time on appeal. In Hughes' case, he did not waive his right to be present at his revocation hearing; thus, this issue was preserved for appellate review. Walker agreed that the court of appeals confused the Confrontation Clause and Due Process Clause. However, because the parties' arguments concerned both clauses and the court of appeals found Hughes' right to be present was violated when considered under the Due Process Clause, the Court concluded that a remand was unnecessary. Walker explained that Hughes' due process right to be present was violated because his ability to communicate with counsel was lost when the trial court muted him, making him a spectator in a proceeding that ultimately resulted in the loss of his liberty. The Court found that Hughes was harmed when the trial court muted him when he tried to say that a key witness was lying while the witness was giving crucial evidence, affecting his ability to defend himself against the charges.

Presiding Judge Keller filed a **dissenting opinion**, in which Judges Keel and Slaughter joined. Keller opined that, at most, Hughes' right to be present was partially infringed upon because he was not wholly absent from the proceedings; he was physically present via electronic video conferencing. Furthermore, Keller believed Hughes forfeited his right to be present because he did not object and thus, he did not preserve this claim for appellate review.

Judge Yeary filed a **dissenting opinion**, disagreeing with the Court's disposition of the case. Yeary finds that the Court dismissed the only ground for review raised by the State's petition for discretionary review. In coming to its conclusion, the Court examined issues that were not decided on by the court of appeals. Instead of rendering a decision on Hughes' due process claim, he believed the Court should have sent the case back to the court of appeals.

H. Restitution – Defendant's offenses did not cause property damage, and thus, restitution for damaged property could not be imposed against him. While driving in Bowie County, Zimbabwe Raymond Johnson collided with a utility pole and an antique truck but continued driving until his car became incapable of continuing. Johnson was charged under Sec. 550.025 of the Texas Transportation Code for failing to comply with a duty when, after striking a fixture because he did not take reasonable steps to inform the owner or person in charge of the fixture. He was also charged under Sec. 550.002 for failing to comply with a duty when, after being involved in an accident-causing damage to a vehicle because he did not stop to notify the owner of the antique truck. The jury convicted Johnson of the lesser-included offenses

of attempt to commit those offenses and assessed punishment at a $200 fine for each offense. The trial court-imposed restitution of $200 for the utility pole offense and $10,000 for the vehicle offense. On appeal, the court of appeals held that restitution was improper because the offenses for which Johnson was convicted did not cause damage to the pole and truck. The court of appeals deleted the restitution awards.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Johnson v. State*, 680 S.W.3d 616 (Tex. Crim. App. Dec. 20, 2023) (7:2)**. Writing for the Court, Presiding Judge Keller explained that Art. 42.037 of the Texas Code of Criminal Procedure provides that the offense for which a defendant is convicted must be the cause of the damage for which restitution is awarded. Therefore, it is not enough for the State to show that a defendant caused the damage; the State must show that the offense for which a defendant was convicted caused the damage. In Johnson's case, the State did not show that his failure to perform his duty was the cause of the damage to the pole and the truck.

Judge Newell filed a **dissenting opinion**, joined by Judge Walker. Under Art. 42.037 of the Texas Code of Criminal Procedure, restitution is part of a criminal judgment if a defendant is convicted of an offense that results in damage to or destruction of property. According to Judge Newell, there is no offense unless there is a collision, and after the collision, the duty to provide information arose. Johnson was involved in a collision that resulted in damage even if his failure to comply with the duty to provide information didn't cause the damage by itself. Judge Newell would have held that the trial court had the authority to impose restitution as part of its judgment in both causes.

I. Trial court was not required to issue findings of fact when denying request for DNA testing because inmate did not request findings of fact and failed to show that his subsequent DNA testing requests were not made to unreasonably delay the execution of his sentence. In 1992, David Leonard Wood was convicted of capital murder and sentenced to death for the killing of three young women and three teenage girls. The Court of Criminal Appeals affirmed his conviction and sentence on direct appeal in 1995. Wood filed a habeas application in 1997, and the Court denied relief in 2001. Since then, Wood litigated a second habeas application and filed serial motions for DNA testing. The first DNA motion was granted in November 2010, and testing was conducted in 2011. The trial court ultimately denied the remaining DNA motions on March 3, 2022. Wood appealed the trial court's denial to the Court, contending that the trial court was required to issue findings of fact after denying his requests for DNA testing, that the State lost or destroyed over a dozen pieces of potentially exculpatory biological evidence, and that the trial court erred in denying DNA testing on biological evidence collected from six crime scenes and from an alternate suspect.

The Court of Criminal Appeals affirmed the trial court's order. ***Wood v. State*, --- S.W.3d ---, 2024 WL 2306277 (Tex. Crim. App. May 22, 2024) (8:0)**. The Court concluded that Wood failed to meet the second prong of Art. 64.03(a)(2) because he failed to show that his subsequent DNA testing requests were not made to unreasonably delay the execution of his sentence. *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(B). Writing for the Court, Presiding Judge Keller explained that the trial court was not required to issue findings of fact when it denied Wood's request for DNA testing because Wood did not request findings of fact, nor does Art. 64.03 require findings absent that request. Regarding the claim that the State lost or destroyed over a dozen pieces of potentially exculpatory biological evidence, the Court held that Chapter 64 authorizes DNA testing as a remedy only for evidence that exists, so long as certain conditions are met. However, it did not authorize a remedy for evidence that no longer existed because the State destroyed it. The Court further explained that Wood must file a habeas application to complain about the State's destruction of evidence in a post-trial setting.

In addressing Wood's contention that the trial court erred in denying DNA testing on biological evidence, the Court held that Wood had not established that his request for DNA testing of biological evidence was not made for the purpose of unreasonably delay. The Court reasoned that Chapter 64 was enacted in 2001 and the appropriate DNA testing technology was available in 2003. Still, Wood did not file his first DNA motion until 2010 and filed serial motions for

testing, with the most recent one being received in 2017, even though DNA samples had been obtained from the alternate suspect decades earlier. The Court further explained that Wood filed at least four motions for DNA testing over five years, with the last motion asking for 100 pieces of evidence to be tested, some of which were meritless and were filed one at a time creating further delay.

Judge Richardson did not participate.

J. District courts have power to issue a protective order under Chapter 7B of the Code of Criminal Procedure even without "territorial jurisdiction." Rachel Goldstein and James Sabatino dated for about two years in Massachusetts; their relationship ended in 2017. In March 2020, after almost three years with no communication, Sabatino began contacting Goldstein through texts and calls, informing her that he had found sexually explicit photos and conversations shared between her and someone she dated before Sabatino. Goldstein became worried that Sabatino would use these texts and images to control her and ruin her career.

In May 2020, a Massachusetts court granted Goldstein a protective order against Sabatino. He subsequently violated the order and was arrested. In June, the Massachusetts court extended the protective order another six months and include da prohibition on any further contact by email, by text, or via a third party. That same month, Goldstein moved to Harris County, Texas. While the Massachusetts protective order was still in effect, Sabatino began filing small-claims lawsuits in Massachusetts against Goldstein.

In October 2020, Goldstein filed an application for a protective order against Sabatino in Harris County. Sabatino was served and a zoom hearing was held. The district court considered the text-message exchanges and the lawsuits filed against Goldstein. The district court found that it had jurisdiction over the parties and the subject matter and that there was reason to believe Goldstein was a victim of stalking under the Texas Penal Code and then-Chapter 7A of the Code of Criminal Procedure. The district court granted a lifetime protective order preventing Sabatino from, among other things, communicating with Goldstein except through an attorney or going near Goldstein's residence or place of work.

Sabatino appealed, challenging the district court's jurisdiction over him and the protective order. Goldstein argued that Sabatino waived any challenge over personal jurisdiction by failing to file a special appearance and that the district court had subject matter jurisdiction because Goldstein lived in Harris County. The court of appeals agreed in part and held that the district court had subject matter jurisdiction because Goldstein applied for the protective order in the district court of the county where she resides. It did not address the challenge to personal jurisdiction, however, holding instead that this was better understood as a challenge to territorial jurisdiction. According to the court of appeals, territorial jurisdiction is a distinct jurisdictional requirement that cannot be waived. The court of appeals then dismissed the case for lack of territorial jurisdiction because none of the conduct that gave rise to the protective order took place in Texas.

The Texas Supreme Court disagreed. ***Goldstein v. Sabatino*, --- S.W.3d ---, 2024 WL 2490533 (Tex. May 24, 2024) (9:0)**. Writing for a unanimous Court, Justice Lehrmann explained that the concept of "territorial jurisdiction" is a distinctly criminal concept necessary for the criminal prosecution of a case in Texas. However, because protective-order proceedings under Chapter 7B of the Code of Criminal Procedure are undisputedly civil matters, the court of appeals should not have applied the concept of "territorial jurisdiction" to the case. While Chapter 7B authorizes a protective order when the court finds reasonable grounds to believe that the respondent engaged in conduct that would qualify as an

offense under the Penal Code, that is not akin to prosecuting the respondent for the underlying offense. A protective order does not punish for past conduct, it protects the applicant from future harm. Further, the Court recognized that the United States Supreme Court had retreated from an earlier holding in *Pennoyer v. Neff*, 95 U.S. 714 (1877) that the concept of "territorial jurisdiction" applies in civil cases. Turning to the question of personal jurisdiction, the Court explained that the district court lacked personal jurisdiction over Sabatino. First, there were no minimum contacts with the forum state. Second, even though Sabatino failed to file a special appearance, as a pro se litigant he challenged jurisdiction at his first opportunity, namely during the zoom hearing. And under the rules of civil procedure, a special appearance can be made in person through an objection to the court.

IV. EVIDENCE

A. Trial court committed reversible error by admitting defendant's rap videos glorifying criminal activity to rebut defense claim of lack of sophistication or peaceful character because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Larry Jean Hart was charged with capital murder while committing or attempting to commit the felony offense of burglary. On the night of the offense, Hart drove an acquaintance and three other individuals he did not know to an apartment complex where the complainant lived. At trial, Hart testified that he stayed inside the car while the four passengers robbed the complainant and shot him to death. Hart also stated that his acquaintance had told him that he was going to break into the complainant's home, but that Hart didn't believe that the four passengers were going to break into the apartment; he thought he was just giving them a ride as a favor. During Hart's testimony, the trial court excused the jury to conduct a competency evaluation on Hart. The evaluation revealed that Hart was competent but had a low IQ, making him more naïve and unable to think abstractly about motives or consequences. The jury did not hear the results of Hart's evaluation. Hart continued his testimony, stating that he only knew his acquaintance by his nickname and was unaware he was giving him a ride to commit a crime.

On cross-examination, the State moved to introduce character evidence through two rap videos as evidence of Hart's level of sophistication. The first rap video contained only a still image containing three cartoon cough syrup bottles, the title of the song, "I.W.T." (I Won't Tell), and Hart's rap name, "Block Da Foo Foo." The second rap video shows a crowd of people dancing and singing, and at one point, Hart performs his portion of the song, and references weapons, cough syrup, and being a "trap king." Hart's trial attorney objected on relevance grounds, as the State hadn't proven that Hart wrote the lyrics to the songs, how long it took him to write the lyrics, or if the voice on the video is Hart's voice since he appears to be lip-syncing. His attorney also objected to the prejudicial effect of the videos because the videos glorified criminal activity. The trial court overruled the objections because Hart's testimony that he was a friendly person had brought his character into question. The State continued crossing Hart, and he testified that another rapper wrote the lyrics, that he was only performing, and that he didn't own any guns. Based on his denial of owning guns, the State then introduced additional rap lyrics and photos from Hart's Facebook account. The trial court overruled Hart's trial attorney's relevancy and prejudice objections. Hart testified that the posts were either lyrics written by other rap artists or slang that he didn't intend to imply he owned a gun. Hart's mother also testified that Hart often doesn't understand others' intentions and is eager to please others. The jury found Hart guilty and sentenced him to life without parole.

On appeal, Hart argued, among other things, that the trial court erred by admitting the rap videos and Facebook posts. As to the rap videos, the court of appeals held that the videos were relevant to guilt or innocence because they were a "small nudge toward proving a fact of consequence—specifically, appellant's ability to comprehend, and to form intent" as to his acquaintance's plan to break into the complainant's house. The court of appeals held that because Hart put his credibility at issue during his testimony, it was not error for the trial court to admit evidence rebutting it. In its Rule 403 balancing test,

the court of appeals noted that the videos were relevant to rebut Hart's ability to communicate and comprehend things. The court furthered that the trial court could have concluded that the State's need for the evidence outweighed that the jury could be encouraged to "vilify [Hart's] character for cultural reasons." Still, it noted that the evidence did have the potential to mislead the jury. The court found that the trial court did not abuse its discretion in admitting the videos. The dissent agreed with the majority that the evidence was admissible as character evidence but should have been excluded under Rule 403. Because the evidence would have an enormous prejudicial effect due to the persistent cultural bias about rap music, and because the State never proved that Hart wrote the lyrics, the evidence did not show Hart's communication and comprehension skills. The dissent further explained that even assuming Hart wrote the lyrics, there was no evidence he wrote them alone or how long it took him to write them.

Agreeing with the dissent of the lower court, the Court of Criminal Appeals reversed and remanded to the trial court for a new trial. ***Hart v. State*, 688 S.W.3d 883 (Tex. Crim. App. May 8, 2024) (5:1:4)**. Writing for the majority, Judge McClure explained how the rap videos were highly prejudicial in the context of a guilt-innocence proceeding. Hart's testimony did not dispute that he wrote one of the rap songs and, thus, was probative of his comprehension skills. The State, however, did not produce any evidence showing that Hart had written the lyrics, but the song and video were probative to show that Hart had a generalized prior knowledge about criminal activity. The Court assumed the court of appeals was correct in finding that the evidence proved Hart's ability to comprehend and form intent regarding his acquaintance's intent to break into the complainant's home. In looking at the time needed to develop the evidence, McClure noted that approximately twenty-eight percent of Hart's testimony was spent on the extraneous evidence, which had the potential to confuse the jury. In addressing the prejudicial dangers of the evidence, the Court concluded that the State did not offer any evidence showing that the lyrics and the videos were representative of Hart's character outside of their artistic rendering, nor did it show any relevancy to the charged offense. As for the State's need for the evidence, McClure explained that the State had other options to address Hart's mental state when he drove the four individuals to the complainant's home. Thus, the State's need for the extraneous evidence was weak. In weighing all these factors together, the Court found that the rap videos were unfairly prejudicial and proved very little about Hart's communication and comprehension abilities. The Court also found that the admission of the rap videos had more than a slight effect on the jury's verdict and, thus, Hart was harmed by their introduction. McClure reasoned that the rap videos were not connected to the particular facts of the charged offense, which then casted Hart as a criminal in a general sense. Hart was also harmed by the State interjecting its interpretations of slang words used in the videos into Hart's testimony and that the trial court did not provide a limiting instruction to restrict the jury's use of the videos to their stated purpose. Because the Court found that Hart had shown reversible error in the admission of the rap videos, it did not address the Facebook posts.

Judge Richardson filed a **concurring opinion**, which Judges Hervey and Newell joined. Richardson opined that singing about crime is not a new idea, and using a defendant's art in the guilt-innocence phase of trial only as character evidence without something substantially connecting the art to the charged offense has the potential of being unfairly prejudicial because it invites the jury to render its decision based on "emotion, cultural differences, [and] musical taste." Richardson provided a list of examples of lyrics from various genres of music to show how common it is for musical artists to sing about crime.

Presiding Judge Keller filed a **dissenting opinion**, which Judges Yeary, Keel, and Slaughter joined. Keel believes that under Rule 105, Hart's failure to request a limiting instruction forfeited his claim regarding the admission of the rap videos.

Judge Yeary filed a **dissenting opinion**, which Presiding Judge Keller and Judge Keel joined, contending that the Court failed to defer to the trial court's broad discretion in admitting or excluding evidence, nor did the Court show that the trial court's decision to admit the rap videos was outside the zone of reasonable disagreement. The State's offer of the rap videos and the trial court's admission of those

videos were fair responses to Hart's testimony that he was too naïve to form the mental state required to commit the offense.

Judge Keel filed a **dissenting opinion** in which Presiding Judge Keller and Judge Yeary joined. Keel opined that when compared with the violent nature of the charged crime, the rap video evidence was not inflammatory. Additionally, Keel believes the Court departed from Rule 403 which only authorizes that the trial court "may" exclude evidence if its probative value is substantially outweighed by any prejudicial impact. The evidence, Keel furthered, was probative of a disputed point related to criminal intent—whether Hart was too naïve to know that his acquaintance was going to break into the complainant's home. Lastly, the Court was incorrect to consider evidence the jury didn't hear, namely the psychiatrist's testimony regarding Hart's low IQ; the Court should have only considered evidence the jury did hear.

B. Expert testimony

1. Testifying expert that restates testimonial statements from a non-testifying analyst as basis for testifying expert's opinion violates the Confrontation Clause. Jason Smith was charged with several drug related offenses. Arizona sent items seized in the execution of a search warrant to a state-run crime lab for testing. An analyst performed testing on the items seized and authored a report indicating that items submitted contained methamphetamine, marijuana, and cannabis. At trial, however, the State called a different expert witness who testified to the analyst's findings, the scientific method used to analyze the substances, and, ultimately, offered an "independent opinion" that the substances were methamphetamine, marijuana, and cannabis. Smith was convicted.

On appeal, Smith raised a Confrontation Clause challenge to the use of the substitute expert's testimony. The Arizona Court of Appeals affirmed Smith's convictions holding that because the underlying analyst's work was the basis of the testifying expert's opinion, there was no constitutional violation in the expert testifying to the underlying analysts work.

The Supreme Court disagreed. ***Smith v. Arizona*, 144 S.Ct. 1785 (June 21, 2024) (5:4:0)**. Writing for the Court, Justice Kagan explained that the underlying analysts' statements came into evidence, through the testifying expert, and were offered for the truth of the matter asserted thus implicating the Confrontation Clause protections. The Court rejected the State's argument that the statements were admissible under the Rules of Evidence concluding that the Sixth Amendment's protections cannot be defined by reference to non-constitutional bodies of law. Although the analysts' statements were the basis for the expert's opinion that opinion was based on accepting the truth of the statements. The testifying expert had no personal knowledge as to the testing done. While the statements were hearsay, the Court left open the question of whether they were testimonial although it offered some perspective on making that determination including that some lab records will not have an evidentiary purpose. With that, the Court reversed and remanded.

Justice Thomas concurred in part. Justice Thomas joined the Court in all but Part III of the opinion, in which the Court briefly touched on the inquiry into whether the statements were testimonial. Justice Thomas disagreed with the suggestion that the lower court should consider each statement's "primary purpose." Rather, Justice Thomas would have the lower court consider whether the statements have the "requisite formality and solemnity [such as affidavits, depositions, prior testimony, or confessions] to qualify as testimonial."

Justice Gorsuch also concurred in part joining the Court's opinion except for Part III. Justice Gorsuch emphasized that the issue of whether the statements were testimonial was not before the Court and questioned the Court's guidance on the matter.

Justice Alito, joined by Chief Justice Roberts, concurred with the judgment. Justice Alito was, however, concerned with the Court's treatment of the Rules of Evidence and its suggestion that testifying experts could offer the challenged testimony via answers to hypothetical questions, a practice he finds has been rebuffed in modern times. While Justice Alito agrees that the testimony at issue was hearsay, but he would conclude it was so under the Rules of Evidence as well. Under Rule 703, the expert would be permitted

to testify to an expert based on the information in another analyst's report, but he could not testify that any of the information was correct. Justice Alito saw no need to call into question testimony about information underlying an expert's opinion under the Rules of Evidence.

[**Commentary:** The opening paragraph of the opinion starts with a declaration that should not surprise anyone, namely that "a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court-statements to prove the results of forensic testing." This is what the Court of Criminal Appeals already recognized in *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. 2015). And in *Smith*, the Court clarifies that it is dealing with an expert who re-states an absent lab analyst's factual assertions to support his own opinion testimony. The real question, which the Court did not have to address was whether an expert who simply gives his or her opinion about lab results without conveying assertions made by another analyst violates the Confrontation Clause. Does it violate the Confrontation Clause for an expert to testify to an opinion that is based in part upon assertions by a non-testifying expert when the non-testifying expert's assertions are not introduced? This opinion seems to nudge courts in the direction of saying it would. But the Court does not say that yet. And Justice Thomas seems to signal that the Court could also go the other way in the future and say that the non-testifying expert's statements were not testimonial. I have no idea how it will turn out. It is worth noting though that Texas has a notice-and-waiver statute that allows the State to introduce a certificate of analysis if the defendant does not object on Confrontation Clause grounds at least 10 days before trial. *See Williams v. State*, 585 S.W.3d 478 (Tex. Crim. App. 2019). Final note, make sure to consider this case in conjunction with ***Null v. State*, 690 S.W.3d 305 (Tex. Crim. App. June 12, 2024)**, which deals with the issue of evidentiary reliability, discussed below.]

2. A testifying expert may rely on underlying facts and data from a non-testifying expert or lab if experts in the field would reasonably do so for purposes of evidentiary reliability under Rule 702. Alan William Null was convicted of a sexually assaulting a young girl, C.A. DNA profiles developed from C.A.'s sane kit and a voluntary DNA sample from Null were compared by an analyst who determined that Appellant's DNA was present on items from the SANE kit. At punishment, evidence linking Null to a previous sexual assault was admitted. The punishment victim's SANE kit had been sent to a third-party laboratory, Bode Technologies, where an analyst developed DNA profiles and authored a report. Mary Symonds, a Houston Forensic Science center analyst testified, over objection, that she compared Null's DNA profile to those developed at Bode and determined that Null's DNA was present on the victim's shorts. Symonds relied upon the computer generate DNA data to form her opinion and the lab report generated by Bode Technologies was not introduced into evidence.

On appeal, Null challenged the admission of Symond's testimony under Rule 702 as unreliable. The court of appeals sitting en banc affirmed the conviction but ordered a new punishment holding that Symond's testimony was unreliable. The court reasoned Symonds had no personal knowledge concerning Bode's DNA testing and was instead acting a surrogate to introduce information from a non-testifying expert. Chief Justice Christopher dissented; he would have concluded that the trial court could have taken judicial notice of the validity of DNA analysis as a forensic science. The court of appeals opinion was based upon an interpretation of Rule 702, not the Confrontation Clause.

The Court of Criminal Appeals reversed the court of appeals and held that the trial court did not abuse its discretion in admitting Symonds' expert testimony. ***Null v. State*, 690 S.W.3d 305 (Tex. Crim. App. June 12, 2024) (6:3:0)**. Writing for the Court, Judge Hervey explained that under Rule 702, facts or data underlying an expert opinion must be reliable, which is a quantitative rather than qualitative analysis although quality may be an issue under Rule 703. In other words, the issue under Rule 702 is the quantity of the evidence relied upon for the expert to reach an opinion, but the quality of evidence relied upon would be considered under Rule 703. Under Rule 703, the evidence relied upon must be the type of evidence experts in the field would reasonably rely upon. Further, the Rule 702 analysis is similar to determining whether an expert opinion is inadmissible under Rule 705(c), which requires the facts or data underlying the expert opinion provide a sufficient basis for that

opinion. Here, Symonds relied upon data that experts in her field would reasonably rely on, and that is enough to render the opinion reliable, and therefore admissible. And while the court of appeals had held that it would violate due process to hold that the trial court could have taken judicial notice of the widespread acceptance of DNA science, the Court rejected this conclusion holding instead that the court of appeals discussion on that point was dicta as the court of appeals should not have reached that issue at all.

Judge Yeary filed a **concurring opinion** but wrote separately to emphasize that the Federal Rules of Evidence do not have a controlling effect. Judge Yeary notes that the underlying facts and data supporting an expert's opinion need not be admissible themselves, but they must be the kind that experts in the field would reasonably rely on. However, he is weary that a Rule 702 and Rule 705(c) analysis would always be the same because one concerns whether the expert's testimony is sufficiently reliable and the other concerns whether the data and facts relied upon are sufficient to support the opinion.

[**Commentary:** Unlike ***Smith v. Arizona*, 144 S.Ct. 1785 (June 21, 2024) (5:4:0)** discussed above, this case involves the evidentiary reliability of the expert opinion analyzing "lab results." More precisely, it addressed a challenge based upon the rules of evidence not the constitution. Though there was a Confrontation Clause objection in the trial court, the argument on appeal appears to have been based upon a violation of evidentiary rules. This also isn't about the introduction of statements by a non-testifying lab analyst through a "surrogate" testifying analyst. Had the Confrontation Clause issue been squarely addressed, it might have answered the unanswered question from *Smith*. Does a testifying expert's opinion about lab results violate the Confrontation Clause if the testifying expert bases that opinion upon statements from a non-testifying expert that are not introduced? Like the least fun game of Battleship ever, reviewing courts keep hitting all the issues around this one. It is worth noting though, that the Court likens the information the DNA expert relied upon in this case to the evidence in *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. 2015). In that case, the expert relied upon computer generated data rather than factual assertions by other experts. Given that characterization, we'll have to see whether it's truly necessary for the Court to reconsider its opinion in this case in light of *Smith*. Add to that the fact that *Smith* was a Confrontation Clause case and *Null* is an evidence rule case. Time will tell. Still, practitioners should read both *Smith* and *Null* when considering the admissibility of expert testimony regarding lab results. If nothing else, it could help make sure error is properly preserved so that the United States Supreme Court can finally sink that battleship.]

3. Under The Federal Rules of Evidence an expert witness may now testify that, in most circumstances, a "blind mule" knows he or she was hired to take drugs from point A to point B without violating Rule 704(b)'s prohibition against an expert stating an opinion about a defendant's culpable mental state. Delilah Guadalupe Diaz was discovered attempting to enter the United States at the Mexican border with over 54 pounds of methamphetamine in her vehicle. Diaz claimed she had no knowledge that drugs were in the car but was ultimately charged with importing methamphetamine. At trial, the government offered expert testimony from a Homeland Security Special Agent that drug traffickers "generally do not entrust large quantities of drugs to people who are unaware they are transporting them." Diaz objected that this testimony violated Federal Rule of Evidence 704(b) which prohibits an expert from giving an opinion about whether the defendant has a mental state that constitutes an element of the crime charged. The trial court permitted testimony that "in most circumstances" a driver knows that they are hired to transport drugs from one location to another. The court of appeals found that because the expert did not offer an opinion as to whether Diaz knowingly transported methamphetamine, the testimony did not violate Rule 704(b).

The Supreme Court affirmed holding that the testimony did not constitute an opinion on whether Diaz had the requisite mental state of knowingly transporting methamphetamine. ***Diaz v. United States*, 144 S.Ct. 1727 (June 20, 2024) (5:1:3)**. Writing for the Court, Justice Thomas explained that Rule 704(a) abolished the historical practice excluding opinion testimony on the ultimate issue by permitting the same with the exception of Rule 704(b). Rule 704(b) only applies to opinions as to the ultimate issue of the

requisite mental state for the particular defendant. Here, the expert's testimony concerned most drug couriers in most circumstances. Thus, the ultimate issue was still left to the jury's determination. The rule does not preclude testimony that concerns or refers to the topic of mental states.

Justice Jackson concurred but joined the opinion in full. Justice Jackson wrote separately to emphasize that Rule 704 is party agnostic in prohibiting expert testimony about whether the defendant had or did not have a particular mental state at the time of the offense. Likewise, both parties are permitted to elicit testimony "on the likelihood" that the defendant had a particular mental state "based on the defendant's membership in a particular group." Here, for example, Diaz herself offered testimony that a driver of her particular car would not be aware that it contained drugs as they were secreted. This leaves open for the jury the ultimate question of whether Diaz herself had the requisite mens rea. The concurrence emphasizes the importance that this type of mental-state evidence can assist the jury with determining a particular defendant's mental state.

Justice Gorsuch, joined by Justices Sotomayor and Kagan, dissented. The dissent does not believe that Rule 704 permits this type of testimony pertaining to the mental state of "most" people, which it finds could be used to urge a jury to convict a defendant by finding he or she is like most people. The dissent would hold that the agent's testimony plainly violated Rule 704(b), which violates expert testimony on "about whether the defendant" had a mental state such that it makes no difference whether the testimony was definitive or probabilistic. Matters concerning defendants' mental state are left to the trier of fact alone. The government generally relies on circumstantial evidence and reasonable inferences to establish a defendant's mens rea and it does not serve the criminal justice system to permit the government or defendants to offer warring experts as to the probability of what most drug couriers, for example, know or do not know. The dissent also points out that such testimony may be prohibited under Rule 403 based on the risk of unfair prejudice. Finally, the dissent posits there is likely a reliability problem as to testimony that offers an opinion as to another person or group of persons thoughts.

[**Commentary:** Rule 704 of the Texas Rules of Evidence specifically authorizes an opinion on an ultimate issue. While the dissent in this case may have a lot of persuasive force, the case seems to suggest that perhaps the federal courts might want to follow Texas's lead. After all, it's kind of a fig leaf to say the expert didn't testify about the defendant's culpable mental state, he only testified about the culpable mental state of "most people" in a hypothetical situation. This would seem to water down the federal rule's prohibition against giving an opinion on an ultimate issue. Conversely, on the state-law front, given how much more permissive Rule 704 is in Texas, does case law regarding the admissibility of evidence of diminished capacity make sense? *See, e.g., Crumley v. State*, 670 S.W.3d 799 (Tex. App.—Dallas 2023, pet. filed).]

C. Remote testimony by a witness did not violate the Confrontation Clause because the witness's stated fear of retaliation despite a lack of evidentiary corroboration justified the trial court's finding of necessity. A jury convicted Jeffrey Merritt McCumber of continuous sexual abuse of a child. The outcry witness, Alyssa Crawford, was allowed to testify at trial remotely over McCumber's Confrontation Clause objection. Crawford testified she lived in Colorado and that she could not come to Texas to testify in person because she feared retaliation, she was caring for her husband who had a broken back, and she had a conflicting court appearance in Colorado. As to the retaliation, she testified that weeks after her report to the sheriff her home was broken into three times and people began driving by her home threatening her and her family. She was afraid to return to Texas because of McCumber's family and friends in the area. The trial court found a necessity without specifying which part of Crawford's testimony established that necessity. The trial court allowed the remote testimony in light of this necessity.

The court of appeals held that the trial court erred to permit the remote testimony. The court held that the trial court failed to provide case-specific reasons to support its necessity finding and, further, that the record did not support a finding that the remote testimony furthered an important public policy. The court held that the error was harmful given the

emphasis on Crawford's testimony. The court of appeals reversed the trial court's judgment.

In a plurality opinion, the Court of Criminal Appeals held the trial court's necessity finding was supported by the record. ***McCumber v. State*, ---S.W.3d---, 2024 WL 3049830 (Tex. Crim. App. June 19, 2024) (4:3:2)**. Writing for the plurality, Judge Keel explained that the Confrontation Clause permits remote testimony when it is necessary to further an important public interest and the reliability of the testimony is otherwise assured. Remote testimony does not violate the Confrontation Clause if the trial court makes a "case-specific" necessity finding, but that does not mean a factually detailed finding is required. It just means that a particular witness needs an accommodation. According to the plurality, the trial court's finding here met that requirement. Preventing retaliation serves an important public-policy interest and the record supports the trial court's findings on this ground. Crawford's testified to a basis for her fear, and the trial court made an implicit credibility finding in favor of Crawford. Assuming, without deciding, that it is relevant that the State previously announced ready and only began attempting to locate Crawford shortly before trial neither consideration weighs against the trial court's public policy finding.

Judge Richardson, Judge Newell, and Judge McClure concurred without opinion.

Judge Walker, joined by Judge Hervey, filed a **dissenting opinion**. Judge Walker would have held that the trial court did not make the required findings, the trial court did not specify which of Crawford's three excuses it was relying upon and its statement that "there is necessity shown" is not sufficiently case-specific. The dissent also noted the poor audio quality and would hesitate to defer to any implicit credibility finding on that basis. Turning to witness's fear, the dissent reasoned there was no testimony concerning who threatened Crawford or linking McCumber to the threats, no evidence that she reported any threat or break-in, and no testimony that simply being in McCumber's presence would cause her fear or trauma. The dissent would have held that the additional reasons offered to justify the remote testimony were insufficient as well.

D. Juror affidavit regarding deliberations after alternate juror was excused from jury room was admissible under Rule 606(b). This case is discussed above in greater detail about the issue of an alternate juror's participation in jury deliberations. This summary focuses solely upon the issue of the admissibility of a juror affidavit regarding the effect of the alternate juror's participation. As a refresher on the facts of the case, the State charged Joe Luis Becerra with unlawful possession of a firearm by a felon, and he proceeded to trial before a jury. During jury deliberations the alternate juror retired to the jury room with the regular jury unbeknownst to either party. Becerra moved for mistrial and later Becerra filed a motion for new trial to complain about the alternate juror's participation. In support of his motion for new trial, Becerra included an affidavit from one of the petit jury members which stated that the alternate juror participated in a preliminary vote and that the jury did not revote on the issue of guilt after the alternate juror was removed. The State objected to the admission of the juror's affidavit pursuant to Rule 606(b) of the Texas Rules of Evidence. A hearing was held, and the trial court overruled the State's objection, finding that the affidavit fell within an exception to the prohibition on juror testimony concerning whether there was an outside influence upon any juror. Ultimately, the court denied Becerra's motion for new trial. In its analysis, the court of appeals considered the portion of the affidavit detailing the alternate juror's participation in a preliminary vote, but it held the remainder of the affidavit inadmissible.

Ultimately, the Court of Criminal Appeals held that the alternate juror's participation in jury deliberations violated Art. 36.22, which prohibits unauthorized presence with the jury during deliberations and unauthorized communication with the jury about the case. The Court remanded the case for a statutory harm analysis. With regard to the admissibility of the juror affidavit, the Court held that the court of appeals must consider the entire juror affidavit. The Court explained that the affidavit in this case could have provided a slight nudge to show that either the jury was affected by the alternate juror's previous participation or that the jurors followed the trial court's instructions to disregard the alternate juror's participation. Consequently, the court of appeals erred

to not consider the entire affidavit because the trial court's ruling admitting the entirety of the affidavit was not outside of the zone of reasonable disagreement. On remand, the court of appeals should consider the entire juror affidavit when evaluating whether the alternate juror's presence and participation during deliberations affected Becerra's substantial rights. ***Becerra v. State*, 685 S.W.3d 120 (Tex. Crim. App. Feb. 7, 2024) (5:0:3:1)**.

[**Commentary:** The big issue in this case involved the alternate juror's participation in jury deliberations. That is discussed in greater detail above in the Trial Procedure section of the paper. Additionally, the proper harm standard for this type of error is discussed in greater detail in the Appeals section of the paper. And while there were two dissents in this case, neither focused on the evidentiary admissibility issue.]

V. OFFENSES

A. SIGNIFICANT DECISION? - Federal statute prohibiting possession of a firearm by persons subject to domestic violence restraining orders does not violate the Second Amendment. Zackey Rahimi had a restraining order issued against him, which included a finding that he had committed family violence, that the violence was likely to occur again, and that he posed a physical threat to the safety of his then-girlfriend. The restraining order also suspended Rahimi's gun license for two years. However, after becoming a suspect in several shootings, a search warrant was executed at Rahimi's home, which revealed a pistol, firearm, and ammunition. Rahimi was charged with a federal firearms violation for possessing a firearm while subject to a domestic violence restraining order. 18 U.S.C. § 922(g)(8).

Pretrial and on appeal, Rahimi unsuccessfully challenged the statute as violative of his Second Amendment right to keep and bear arms. However, after the Supreme Court's decision in *New York Rifle & Pistol Assn., Inc. v. Buren*, 597 U.S. 1 (2022), the Fifth Circuit substituted its earlier opinion and reversed the district court concluding that, under *Bruen*, the statute was unconstitutional because it did not fit within the historical understanding or tradition of firearm regulation.

The Supreme Court disagreed holding that Section 922(g)(8) survives Rahimi's facial challenge. ***United States v. Rahimi*, 144 S.Ct. 1889 (June 21, 2024) (π)**. Writing for the Court, Chief Justice Roberts concluded that there is a tradition in firearm regulation disallowing individuals who pose a credible threat to the safety of others from possessing firearms. The Court's historical inquiry focused on two sources of regulation aimed at individuals who physically threatened others – surety laws and "going armed" laws. Surety laws allowed magistrates to require a bond of those suspected of future misbehavior and could be invoked to prevent violence including spousal abuse and the misuse of firearms. "Going armed" and affray laws were aimed at prohibiting arming oneself and fighting in or terrorizing the public. Thus, the burden imposed by Section 922(g)(8) fits within that tradition. The Court noted the statute is limited in duration and concluded that temporarily disarming an individual found to pose a credible threat to the safety of another is consistent with the Second Amendment.

Justice Sotomayor, joined by Justice Kagan concurred noting her continued disagreement with the *Bruen* decision but concluding that nevertheless the statute is wholly consistent with the history and tradition of firearm regulation. The concurrence would conclude that this regulation could pass constitutional muster under any level of scrutiny in any event given it is narrowly tailored to the compelling interest in keeping firearms away from domestic abusers.

Justice Gorsuch concurred. Justice Gorsuch's opinion elaborates upon the majority's reasoning agreeing that the statute does not diminish any aspect of the right the Second Amendment was originally understood to protect. The concurrence reaffirms the principle from *Bruen* that courts should only consider whether a firearm regulation is analogous to past practices to determine whether a statute passes a facial Second Amendment challenge. Justice Gorsuch also notes this opinion does not answer whether the statute is always lawfully applied.

Although he joined the majority in full, Justice Kavanaugh concurred and wrote to expand upon the proper roles of text, history, and precedent in constitutional interpretation.

Justice Barrett concurred noting that the Court has taken an originalist approach to the Second Amendment in *Bruen* and that some courts have struggled in considering history in this context. For example, here the Fifth Circuit applied *Bruen* too narrowly because a regulation need not be "an updated model" of a historical regulation to pass constitutional muster. Rather, Justice Barrett finds the majority reaches the "right level of generality" in concluding that the principle of preventing individuals who threaten physical harm to others from misusing firearms is rooted in our nation's history.

Justice Jackson concurred noting that, had she been on the Court when *Bruen* was decided, she would have joined the dissent but agreeing that the Court fairy applies *Bruen* in this case. The concurrence finds that post-*Bruen*, however, courts applying the history-and-tradition test may indicate issues with that test's workability. The concurrence finds consistent analyses and outcomes may be difficult to achieve looking only to historical evidence and varying degrees of generality.

Justice Thomas dissented. Justice Thomas concludes that "not a single historical regulation justifies the statute at issue." The statute here is not consistent with the historical tradition of surety laws, according to the dissent, because its approach is more severe. Although surety laws may have shared a common justification, sureties did not alter the right to bear arms. The dissent finds that the disarmament of allegedly "dangerous" persons in a historical context led to the Second Amendment as a resistance against those types of restrictions. That notwithstanding, the goal of the statute at issue here – preventing interpersonal violence – is not historically supported by "dangerous" persons laws, which sought to quell insurrection and rebellion. Simply preventing irresponsible or unfit persons from possessing firearms is too general a justification or historical comparison. Affray laws were criminal statutes and thus harder to impose than Section 922(g)(8), which imposes the burden of disarmament for a civil restraining order. The dissent would conclude that the government cannot strip someone of their Second Amendment right for being subject to a protective order even if never accused or convicted of a crime.

[**Commentary:** I struggled a little on where to put this in the paper, which is why I put a question mark after "SIGNIFICANT DECISION." It sure feels like a significant decision, but it also validates domestic violence protective orders as well as statutes that make it a crime to violate such orders. And before *Bruen*, such procedures and statutes were relatively commonplace, making this opinion kind of a return to the status quo. Still, it was a highly anticipated opinion, and clearly the justices thought it was important given the number of side opinions. And speaking of the number of side opinions, I apologize if I cannot consistently notate what side opinions exist just with numbers. I essentially threw up my hands on this case because eight justices joined the majority, but two justices joined an additional concurring opinion, and then four justices wrote individual concurring opinions nobody else joined. Only one justice dissented. For clarity's sake, the vote breakdown was as follows:

> Roberts, C.J., delivered the opinion of the Court, in which Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson, JJ., joined. Sotomayor, J., filed a concurring opinion, in which Kagan, J., joined. Gorsuch, J., Kavanaugh, J., Barrett, J., and Jackson, J., filed concurring opinions. Thomas, J., filed a dissenting opinion.

Hope it makes sense. Also, kind of makes me wonder who these people are trying to convince? Their various, idiosyncratic views on how to analyze things do not seem to be pointing towards one cuisine reigning supreme. It's kind of like they are all stuck together in some Second Empire drawing room created by Jean-Paul Sartre and hell is other justices. But I digress.

As for the opinions themselves, how accurately is the Court really applying *Bruen* if the dissenters to *Bruen* (and a judge who would have dissented to *Bruen*) are joining the opinion? If, as Justice Barrett notes, this is the "right level of generality" then how meaningful was *Bruen*. Justice Thomas has a point when he notes that laws curtailing the behavior of dangerous people isn't the same as taking away their guns. Those who disagree with the opinion are likely to see a huge amount of generalization now built into the phrase

"historical tradition or understanding." Though the concurring justices protest, will the focus shift from "historical tradition or understanding" to the "right level of generality"? Of course, what do I know? I'm just thinking out loud. And I'm no Ed Sheeran.

Parting thoughts: At the most basic level, *Bruen* was a case in which the regulation essentially required the New York citizen to prove he was safe in order to exercise his Second Amendment right. That violated the Second Amendment according to the Court. *Rahimi* was a case in which the government actually proved to a neutral magistrate that a person with a Second Amendment right was unsafe and a judge restricted the person's Second Amendment rights. That did not violate the Second Amendment according to the Court. Presumably the process at issue in this case to secure the restraining order was okay under the Second Amendment, but I guess we shall see.]

B. Sexual Assault – Fact that victim of sexual assault was a child did not establish that sexual assault occurred "without consent." The State indicted Francisco Delarosa Jr. on three counts of sexual assault. The body of the indictment charged Delarosa with three counts of sexual assault for non-consensual contact between his sexual organ and that of the pseudonymous complainant LAM. On the other hand, the caption of the indictment referred to the three counts as "sexual assault of a child" under Sec. 22.011(a)(2) which only required the State to prove that the complainant was a child younger than 17. At trial, the State established that Delarosa had met the victim after Delarosa's daughter became good friends with the victim. The victim testified that she and Delarosa had sex almost every weekend when she was between fourteen and seventeen years old. She believed she was in love with Delarosa but wrote in her journal that she was aware that as a minor she was unable to give consent. No one asked her if she had consented to the sexual assault.

The abstract portion of the jury charge defined sexual assault of a child in terms of non-consensual sexual contact. The jury charge informed the jury that Delarosa had been charged with "sexual assault of a child, but the abstract portion of the charge described non-consensual sexual assault. But the application paragraphs allowed the jury to find Delarosa guilty if it found that he had committed sexual assault of child. It did not require the jury to find the assault occurred without consent. The jury found Delarosa guilty of three counts of sexual assault of a child, as was listed on the jury verdict forms. The judgment form stated that Delarosa was convicted of sexual assault of a child.

On appeal, Delarosa argued that the evidence was insufficient to prove that non-consensual sexual contact occurred, as required by the indictment. The court of appeals held the evidence was sufficient to uphold the conviction. The court reasoned that the State proved a lack of consent when it proved the complainant's age and Delarosa's awareness of the complainant's age. The court of appeals affirmed Delarosa's conviction but remanded to the trial court to reform the judgement to reflect convictions for three counts of sexual assault instead of sexual assault of a child.

The Court of Criminal Appeals reversed and entered a judgment of acquittal for each count of sexual assault. ***Delarosa v. State*, 677 S.W.3d 668 (Tex. Crim. App. 2023) (5:0:4)**. Writing for the Court, Judge Keel explained that the State was required to prove beyond a reasonable doubt that Delarosa committed three counts of sexual assault without the complainant's consent. The body of the indictment alleged a facially complete offense of non-consensual sexual assault, and the State was obligated to prove what it alleged. The Court rejected the argument that "child" is a proxy for "without consent" because had the Legislature intended "child" to be a proxy for "without consent," it wouldn't have created two ways of charging sexual assault—lack of consent and sexual contact with a child. The Court also rejected the argument that "mental defect" includes the diminished capacity of a minor because the Legislature included references to "youth" in other similarly worded sections of the Penal Code and thus, would have included that language in Sec. 22.011 if that was its intent. All the evidence in the case suggested that the relationship between Delarosa and his child victim was otherwise consensual despite being super awful. Because the State failed to prove a lack of consent, it failed to provide sufficient evidence to prove each element of the offense alleged beyond a reasonable doubt.

Presiding Judge Keller filed a **dissenting opinion**, joined by Judge Hervey. Presiding Judge Keller took issue with the indictment and would have analyzed the sufficiency of the evidence under the elements of the offense of sexual assault of a child rather than sexual assault without consent. Because the jury was authorized to return a verdict on that offense, the Court should have upheld its verdict against Delarosa's sufficiency challenge.

Judge Yeary filed a **dissenting opinion** in which he would have found the evidence legally sufficient to show that Delarosa committed sexual assault of a child because the jury's verdicts and Delarosa's judgment both reflect convictions for that offense.

Judge Slaughter dissented without written opinion.

[**Commentary:** As discussed above, this case is probably more interesting as a holding regarding the sufficiency of the indictment. And the dissenter's arguments regarding sufficiency depend upon disagreement with that portion of the opinion. But if you agree with Judge Keel that the hypothetically correct jury charge required proof of a lack of consent, then it is hard to argue that the evidence in this case was legally sufficient. If you want to read more about the aspect of the case dealing with the sufficiency of the indictment, it is under the Trial Procedure section above.]

C. Compelling Child Prostitution and Trafficking a Child – Drugging a four-year-old child and making her available for sex was insufficient to establish offense of compelling prostitution or human trafficking based on compelling prostitution but the evidence established an attempt to commit those offenses. Andrew James Turley was convicted of compelling prostitution of a child under 18 and trafficking a child based on the commission of compelling prostitution. Law enforcement intercepted an ad Turley posted on Craigslist concerning his four-year-old daughter. An undercover officer responded to the ad and agreed to pay Turley $1,000 for a sexual encounter with the child. On the day of the arranged encounter, Turley drugged his daughter with a sleep aid and, after verifying the undercover brought the money, showed the officer to her room. Turley was arrested on scene.

On appeal, Turley challenged the sufficiency of the evidence. The court of appeals reversed both convictions agreeing that the statutes each require proof that another person, the child in this case, was "caused to commit the offense of prostitution." The child could not commit the offense of prostitution because, given her age, she lacked the capacity to consent to sexual conduct as a matter of law. Further, the evidence here established the child was drugged and asleep at the time of the offense.

In a per curiam opinion, the Court of Criminal Appeals held that the evidence was legally insufficient to support the convictions. ***Turley v. State*, ---S.W3d---, 2024 WL 3167301 (Tex. Crim. App. June 26, 2024) (5:2:2)**. However, the Court's reasoning differed from the lower court. The Court concluded that, regardless of the victim's age or mental state, the record fails to show any conduct that could give rise to the conclusion that the child committed prostitution per the statutory definition, which would require evidence that she "offer[ed] to engage, agree[d] to engage, or engage[d] in sexual conduct" in exchange for a fee. Tex. Penal Code § 43.02(a)(1). Thus, a rational jury could not have concluded that Turley caused the victim to commit prostitution. However, the evidence is clearly sufficient to show that he attempted to do so. The sexual contact with the victim did not occur only because this was a sting operation, Turley did acts clearly amounting to more than mere preparation. For attempt in this context, it is not necessary that Turley intended that the victim herself knowingly offer to engage, agree to engage, or engage in prostitution, the child's culpability under the prostitution under the statute is not material to the question of attempt. Thus, the Court reformed the judgments to the offenses of attempted compelling prostitution and attempted trafficking based on compelling prostitution.

Judge Newell, joined by Judge Walker, filed a **concurring opinion**. The concurrence noted that when Turley was prosecuted, the offense of compelling prostitution was the only first-degree offense that could apply to his conduct. It was not until 2019 that the Legislature elevated the offense of promotion of prostitution involving a child from a second-degree to a first-degree felony. Trafficking, based upon the promotion or compelling of prostitution, however, arguably requires a showing that it was a child that

promoted or compelling the prostitution or that the underlying prostitution was completed. Thus, the concurrence noted the statute may warrant amendment to avoid that issue in the future.

Judge Yeary filed a **dissenting opinion**. The dissent would not reform the judgments at this stage and would instead remand to the lower court to consider the issue of reformation in the first instance. The dissent notes that the State, as the petitioning party, did not argue for reformation and the lower court, concluding that evidence was insufficient, also did not consider the issue. The dissent's view is that if the evidence is fatally lacking for the charged offenses, it is fatally lacking for attempt as well because Turley could not cause the victim to knowingly offer to agree to, or engage in sexual conduct for a fee. Even considering an application of the theory of party liability, the dissent reasons Turley would still have to cause the child to knowingly engage in the conduct of prostitution, which she could not do at that time. The dissent raised the possibility that the doctrine of impossibility could be implicated but given the questions raised, the dissent would remand.

[**Commentary:** We are all doomed as a species.]

D. Forgery – The forgery value ladder under subsection (e-1) of Sec. 32.21 of the Texas Penal Code operates as a statutory element to be proven at the guilt-innocence phase, but the State is not required to negate its applicability if it alleges a particular type of forged instrument under subsections (d) and (e) of the forgery statute. On this issue, the Court of Criminal Appeals consolidated two cases into one opinion. In one case, Trenton Kyle Green was indicted for a third-degree felony under Sec. 32.21(e) for making a counterfeit $20 bill. The indictment did not allege whether Green engaged in this forgery to obtain property or services. In Green's pretrial motion to quash, Green argued that he must be prosecuted under subsection (e-1) because the indictment, as alleged, would require a showing that he committed the forgery to obtain a property or service and the facts will show Green attempted to pass a counterfeit $20 bill in exchange for a $2 lighter. Because the value of the obtained property was less than $100, Green argued that the offense would be a Class C misdemeanor under (e-1) and would remove jurisdiction from the district court. The trial court agreed and granted Green's motion to quash.

In the second case, Bobby Carl Lennox was tried and convicted on three counts of state-jail felony forgery under Sec. 32.21(d) for forging stolen checks in the amounts of $137, $130, and $150 and passing them at a convenience store. On appeal, Lennox argued that his sentence was illegal because, given the value ladder in subsection (e-1) and the value of the checks passed, his offenses were Class B misdemeanors. He also argued that the jury charge was erroneous because it improperly charged the offenses as state-jail felonies when they should have been charged as Class B misdemeanors; this issue was treated as an unobjected-to-jury charge error.

In Green's case, the court of appeals held that Sec. 32.21 divided forgery offenses into two groups: those where the defendant forged the writing to obtain or attempt to obtain a property or service and those where the defendant forged a particular type of writing for some reason other than to obtain or attempt to obtain a property or service. The court further explained that the defendant's specific purpose in forging the document determines the offense classification. the court of appeals concluded that the State failed to provide notice to Green of the offense classification the State was charging him with because it had failed to allege a purpose in the indictment. The court of appeals upheld the trial court's order quashing the indictment because the State failed to allege facts necessary to determine jurisdiction of the court.

The court of appeals issued its opinion in Lennox's case on the same day as it issued its opinion in Green's case. Relying on its reasoning in Green's case, the court of appeals held in Lennox's case that the guilt-phase jury charge contained egregious error because the jury charge should have charged the offenses as Class B misdemeanors under the value ladder in subsection (e-1). The court reasoned that because Lennox's purpose in forging the checks was the element that would elevate the offense from a Class B misdemeanor under subsection (e-1) to a state-jail felony under subsection (d), the failure to ask the jury to resolve that issue was error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court of appeals reformed the judgments to three Class B misdemeanors

and remanded the case to the trial court to hold a new punishment trial.

It only gets more complicated from here on out.

The Court of Criminal Appeals vacated the court of appeals' judgments. ***State v. Green & Lennox v. State*, 682 S.W.3d 253 (Tex. Crim. App. 2024) (8:1:0)**. Writing for the Court, Judge Slaughter explained that the court of appeals' holdings were based on an erroneous understanding of the structure of Sec. 32.21 and due process requirements under *Apprendi*. Under sec. 32.21 (the forgery statute), a defendant commits an offense if he forges a writing with the intent to defraud or harm another. An offense under this statute is generally a class A misdemeanor unless the writing is a particular type of writing under subsection (d) or (e). For example, if a defendant forges a writing that purports to be a check, then the offense is a state jail felony under subsection (d). For another example, if a defendant forges a writing that purports to be an issue of money, the offense is a third-degree felony under subsection (e). For reference, the State in Green's case alleged that Green had forged a $20 dollar bill (to buy a $2 lighter), so his offense would be a third-degree felony if the State prosecuted him under subsection (e). And in Lennox's case, the State alleged that Lennox forged a check which would be a state-jail felony under subsection (d).

But to make matters complicated, if a defendant forges a writing to obtain or attempt to obtain a product or service the degree of offense is tied to a value ladder in subsection (e-1). So, if the defendant forges a writing (any type of writing) in order to obtain a property or service under (e-1) the degree of offense is based upon the value of the property or service that the defendant obtains or attempts to obtain. The Legislature added this "value ladder" as a floor amendment with little to no discussion, and the text of the statute makes subsection (d) or (e) is also "subject to" subsection (e-1).

According to the Court, subsection (e-1) was intended to operate as a statutory element, meaning that Sec. 32.21 contains four separate forgery offenses: the Class A misdemeanor offense under subsection (b); the state-jail and third-degree felony offenses under subsections (d) and (e); and the forgery to obtain property or services offense under subsection (e-1). So, if the State charges a forgery offense under subsections (d) or (e) of Sec. 32.21, but the facts show that the defendant's offense could also fall under the value ladder in subsection (e-1) and (e-1) would result in a reduced offense classification, then the defendant is entitled to be convicted and punished under (e-1). Under those circumstances, the defendant may raise a claim that he is being prosecuted under the wrong subsection of Sec. 32.21 as a basis for having his offense reduced under the value ladder. The Court, however, did not decide whether a defendant can raise this claim pretrial. And finally, the Court held that the "subject to" clause in subsections (d) and (e) does not require the State to negate the applicability of subsection (e-1) because the Legislature did not use the precise statutory language giving rise to an exception. The Court remanded these causes for further proceedings consistent with its opinion.

Judge Yeary concurred without written opinion.

[**Commentary:** This is a very complicated opinion because the statute at issue is poorly drafted. Practitioners should read it very carefully. I would add that in *Williams*, discussed above, the State can allege every manner and means, and the defendant is not entitled to have the State elect which one. But here, the defendant is apparently entitled to have the degree of offense he is charged with reduced if the facts show he sought to forge something to obtain property or services that's of such a low value that the crime drops below a state-jail or third-degree felony. Not sure how that will play out in practice. I am confident it will lead to mischief. This is not a criticism of the opinion, of course. This statute is just really challenging.]

E. Tampering with Physical Evidence – Defendant concealed evidence when he threw marijuana out of his vehicle's window while refusing to stop his vehicle for a valid traffic stop. Texas Highway Patrol observed Desean Laverne McPherson driving over the speed limit and initiated a traffic stop. Upon activating the overhead lights and pulling behind McPherson's truck, McPherson moved to the shoulder of the highway but kept driving. The officer noticed brown objects being thrown out of McPherson's vehicle. Not knowing what these objects were, the officer activated his siren so that he could

return to the exact location where the objects were thrown. During the traffic stop, the officer noticed the windows were rolled down, but they had been rolled up when he first witnessed McPherson's truck. The officer asked McPherson what he had thrown out of his truck, and McPherson told him that they were napkins. McPherson was issued a speeding ticket, and the officer let him go. The officer reviewed the video recording from his vehicle and recorded the GPS coordinates of where he had previously activated his siren. After returning to the area, the officer found five marijuana joints wrapped in brown cigar paper. McPherson was detained shortly thereafter.

On appeal, McPherson argued that the evidence did not support his conviction because he did not conceal the evidence. The court of appeals agreed with McPherson and found that a rational jury could not have reasonably inferred that McPherson concealed the joints. The court reasoned that McPherson had revealed that which was previously concealed from the officer, the officer knew where the joints landed, and the joints were in plain view on the side of the highway. The court of appeals reformed the judgment to attempted tampering.

The Court of Criminal Appeals reversed, holding that McPherson concealed the marijuana joints while an investigation was in progress. ***McPherson v. State*, 677 S.W.3d 663 (Tex. Crim. App. 2023) (8:1:0)**. Writing for the Court, Judge Keel reasoned that when McPherson threw the joints from his moving truck and led the officer miles away from where they landed, he concealed the evidence, and the concealment continued until the officer found the joints. That the officer eventually found the joints did not negate that McPherson had concealed the evidence.

Judge Newell concurred without written opinion.

F. Evading Arrest or Detention – State is not required to prove a defendant knows his attempted arrest or detention is lawful to convict for evading arrest or detention. An officer observed Harry Donald Nicholson, Jr. sitting inside his vehicle in a gas station parking lot and throwing trash out of his window. The officer approached Nicholson about the littering. Upon request, Nicholson provided the officer with his driver's license number and exited his truck to pick up the litter. Dispatch alerted the officer that Nicholson had active felony warrants. The officer then attempted to arrest Nicholson, but Nicholson maneuvered away from the officer, got into his vehicle, and started driving away. Unfortunately for everyone involved, Nicholson drove his truck into another officer's vehicle while attempting to leave the parking lot. A jury convicted Nicholson of aggravated assault of a public servant and evading arrest or detention with a vehicle.

On appeal, the court of appeals affirmed the aggravated assault charge but found that improper jury instructions on the evading arrest or detention charge egregiously harmed Nicholson. The court of appeals explained that the trial court erred by not including a required element of the offense in the jury charge—that Nicholson knew that the officer was attempting to arrest or detain him. However, because the majority found the evidence sufficient to support his conviction for evading arrest, the court of appeals reversed and remanded Nicholson's case for a new trial on the evading charge only.

The Court of Criminal Appeals affirmed the court of appeals in reversing Nicholson's conviction of evasion of arrest and remanded for a new trial. ***Nicholson v. State*, 682 S.W.3d 238 (Tex. Crim. App. 2024) (5:2:2)**. Writing for the Court, Judge Richardson explained that Sec. 38.04 of the Texas Penal Code was ambiguous because it leads to two reasonable constructions where one construction leads to an absurd result, namely, a defendant would be responsible for determining the lawfulness of the stop. After considering the legislative history and the statute's apparent purpose, the Court found that the evading person must only know that the person arresting or detaining him is a peace officer. The Court concluded that Nicholson was egregiously harmed when the jury failed to include the element that Nicholson knew the officer was attempting to arrest him and that the evidence was sufficient to conclude that Nicholson knew the officer was attempting to arrest or detain him.

Judge Yeary filed a **concurring opinion** agreeing with the Court's disposition of the case by affirming the court of appeals' reversal on the jury charge error but disagreeing with the remand for a new trial based

on a trial error that the Court did not address on the merits. He argued that the Court answered a question regarding an issue that did not appear to impact the court of appeals' ultimate disposition: whether Sec. 38.04(a) required proof of knowledge that the arrest was lawful. Judge Yeary believed it more appropriate for the Court to affirm the court of appeals' judgment remanding for trial error.

Judge Keel concurred without an opinion. Judges Walker and McClure dissented without written opinion.

[**Commentary:** Read the opinion for yourself and pay attention to the statutory history. This problem seems to have stemmed from the fact that the evading arrest statute did not used to have the word "lawfully" inserted into the statutory requirements. Court had interpreted that version of the statute as requiring the State to prove that the defendant knew police were trying to arrest or detain him. Additionally, a separate statutory section created an exception to the offense if the arrest or detention was unlawful. With this exception provision the State was essentially required to prove that the attempted arrest or detention was lawful but not that the defendant knew it was lawful. Then the Legislature amended the statute with the stated purpose of streamlining the text and it removed the exception section and placed the word "lawfully" in the text of the offense itself. So, it was clear that the Legislature did not actually intend to require the State to prove that a defendant knew his attempted arrest or detention was lawful, but the text of the statute opened up that interpretation. It seems that a more holistic view of the statute including its history and resort to extra-textual sources gets to what the legislature actually intended, but "deferring" to the Legislature's text seems at odds with what the Legislature was actually trying to accomplish. I am not necessarily making a point that one approach is better than another, just noting that perhaps the Legislature isn't always putting the care into drafting statutes that reviewing courts attribute to it (cough, cough, forgery value ladder, cough, cough).]

G. Public-Camping – City ordinances criminalizing public camping on public property, sidewalks, streets, alleyways, or in city parks do not violate the Eighth Amendment. Gloria Johnson and John Logan, two individuals experiencing homelessness, filed suit against the City of Grants Pass, Oregon ("the City") alleging, among other things, that the city's public-camping laws violated the Eighth Amendment's Cruel and Unusual Punishments Clause. The city's public-camping laws at issue prohibited sleeping on public sidewalks, streets, or alleyways; camping on public property; and camping or parking overnight in city parks. Violations of these ordnances could result in a fine for a first offense, a ban from city parks for multiple citations, and a charge of criminal trespass punishable by imprisonment for a violation of such a ban. The district court certified the Plaintiff's class-action on behalf of involuntarily homeless people in the City and enjoined the City from enforcing its public-camping laws.

On appeal, a divided Ninth Circuit affirmed in part. The court of appeals agreed that unsheltered individuals in the City qualify as "involuntarily homeless" because the City's homeless population exceeds "available" shelter beds. And, applying circuit precedent that held that the Eighth Amendment bars enforcing public-camping ordinances like these against homeless individuals whenever the number of homeless individuals in a jurisdiction exceeds the number of practically available shelter beds, the majority held homeless individuals in Grants Pass cannot be punished for public camping. The court of appeals denied rehearing over the objection of 17 judges and the City filed a petition for certiorari.

The Supreme Court reversed. ***City of Grants Pass, Oregon v. Johnson*, 144 S.Ct. 2202 (2024) (5:1:3)**. In an opinion written by Justice Gorsuch, the Court held that the Eighth Amendment does not prohibit the enforcement of public-camping ordinances. The Court first noted that the Cruel and Unusual Punishments Clause, rooted in 18th century English law, is aimed at the method or kind of punishment that may be imposed for a violation of criminal statutes. Thus, the Court held that the Eighth Amendment is a poor foundation for a challenge that asks instead whether particular behavior may be criminalized. But even so, the Court held that none of the punishments at issue, a fine, city park ban, or imprisonment for repeat offenses, qualify as cruel because they are not unusual nor are they designed to add elements of terror, pain, or disgrace. The Court noted that the Plaintiffs themselves do not

"meaningfully contest" these conclusions but rather argue an exception exists for statutes that punish one's status pointing to the Court's 1962 decision in *Robinson v. California*, 370 U.S. 660 (1962), which held a statute making it a criminal offense to be addicted to the use of narcotics unenforceable as cruel and unusual. The Court held that the public-camping laws at issue are nothing like the law at issue in *Robinson*, however, because the ordinances do not criminalize a status but rather forbids an action, namely public camping. The Court again rejected any invitation to extend *Robinson*. Rather, the Court determined that the Eighth Amendment simply does not provide guidance on what conduct a city or State may proscribe. According to the Court, the public policy issues raised by the issue of homelessness are best left to the people.

Justice Thomas concurred. Justice Thomas joined the Court in full but wrote separately to note that the Court should eventually dispose of the "erroneous holding" in *Robinson*, which Justice Thomas notes rested on the Court's understanding of public opinion rather than the fixed meaning of the Cruel and Unusual Punishment's Clause. Further, Justice Thomas notes that the Cruel and Unusual Punishments Clause is not implicated in the first place for the consideration of fines because at the time the Clause was enacted "punishment" was understood to refer only to the penalty imposed for the commission of a crime. The theory that the Clause is implicated because the fines may later lead to a criminal trespass offense requires speculation and is a broad view of the Clause that has not been endorsed. Justice Thomas would have held that either way, the respondent's claim here fails.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented. The dissent would have held that for people without access to shelter, bans on public camping punishes them for the status of being homeless, which is cruel and unusual. The dissent pointed to the public hearings held by the city council and the ordinance's text, which define "campsite" as a place where bedding or bedding materials are placed "for the purpose of maintaining a temporary place to live," as evidence that the ordinances target status. To the extent conduct is implicated, the dissent would hold that conduct defines the status of being homeless. To this point, the dissent noted that the majority affirms the criminalization of said status as long as the ordinance "tacks on an essential bodily function" such as sleeping. The dissent concludes that criminalizing sleeping outside when an individual has nowhere else to go is prohibited by the Eighth Amendment.

VI. JURY INSTRUCTIONS

A. Attempted sexual assault jury charge that did not limit the definition of sexual assault to the conduct alleged in the indictment was not egregiously harmful because the case did not concern an alternative means of committing the offense. Brian Christopher Reed was indicted for sexual assault for allegedly penetrating the complainant's sexual organ with his sexual organ without consent. At trial, the court instructed the jury on attempted sexual assault and assault by offensive or provocative touch. The application paragraph for the attempted sexual assault offense stated that the jury should convict Reed if it found that he had the intent to commit "sexual assault" and did an act that amounted to more than mere preparation to commit that offense. "Sexual assault" was defined in the statutory language but was also defined to the jury as intentionally and knowingly penetrating the anus or sexual organ of another person, not his spouse, by any means without the person's consent. The jury convicted Reed of the lesser-included offense of attempted sexual assault.

On appeal, Reed argued that the trial court's charge for attempted sexual assault should have been limited to the indictment's allegation that he used his sexual organ, not that he committed the offense by any means as the trial court instructed. The court of appeals concluded that the jury charge was erroneous because it expanded the theory of liability beyond the language of the indictment and found the error to have caused egregious harm. The court of appeals reversed Reed's conviction.

The Court of Criminal Appeals reversed the court of appeal's judgment. ***Reed v. State*, 680 S.W.3d 620 (Tex. Crim. App. 2023) (6:2:1).** The Court assumed, without deciding, that the jury instruction for the lesser-included offense of attempted sexual assault was erroneous. In assuming the instruction was erroneous, the Court concluded that any harm to Reed was theoretical when considering the entire jury charge, the

state of the evidence, and the final arguments of the parties. Writing for the Court, Judge Walker explained that although there was an evidentiary conflict regarding whether Reed used his sexual organ or his mouth, this conflict was related to the more significant question of whether to believe the victim's claim that she did not consent to Reed using his sexual organ, or Reed's claim that the victim gave him consent to use his mouth. The case largely revolved around the issue of consent, so the erroneous jury instruction did not affect the basis of Reed's case, deprive him of a valuable right, nor vitally affect his defensive theory. Because the court of appeals declined to address Reed's other two issues on appeal, his case was remanded for the court of appeals to consider his remaining issues.

Judges Hervey and Yeary concurred in the result without written opinion.

Judge Keel dissented without written opinion.

B. Failure to instruct jury on the requested defense of necessity in DWI case resulted in "some harm" because it effectively prevented the jury from considering a defensive justification. Bethany Maciel went with her brother and sister-in-law to Northgate, a bar and club district in College Station, to party. Maciel became so intoxicated she did not feel safe to drive her car home, so her intoxicated brother drove her home. Maciel testified that her brother became physically sick and stopped the vehicle abruptly in the middle of the road. Maciel claimed to have switched seats with him before attempting to move the vehicle to a nearby parking lot. She claimed she could not get the car to move because the parking brake was on, so she argued she had not been driving. She also requested a necessity instruction based upon her testimony that she was trying to move the car from the road, but the trial court denied her request. Before the jury, defense counsel only argued the theory that the state failed to prove that Maciel had operated the vehicle and did not argue necessity.

On appeal, Maciel argued that the trial court erred in denying her request for a necessity instruction. The court of appeals affirmed the conviction, but the Court of Criminal Appeals reversed and remanded for consideration of harm. On remand, the court of appeals held the error was harmless noting that the evidence did not support a showing of imminent harm to justify the necessity and that because Maciel was intoxicated she did not have a reasonable belief that her conduct was immediately necessary to avoid imminent harm. Further, the court of appeals noted that Maciel did not present a justification defense in her closing argument, nor did Maciel question the juries about the necessity defense during voir dire. Justice Benevides dissented to argue that the court of appeals could not re-litigate whether Maciel was entitled to the necessity instruction.

The Court of Criminal Appeals reversed, holding that the lack of a necessity instruction established some harm. ***Maciel v. State*, 689 S.W.3d 609 (Tex. Crim. App. 2024) (7:1:1)**. Writing for the Court, Judge McClure first agreed with Justice Benevides that the court of appeals was not free to reconsider whether Maciel was entitled to a necessity defense. The Court also observed that the parties and other courts of appeals had held that DWI defendants are not precluded from raising a necessity defense. Finally, the Court faulted the court of appeals for only considering the evidence that undermined Maciel's necessity evidence. Instead, the court of appeals, when evaluating harm, should have allowed for reasonable inferences the jury would have been entitled to make.

As far as the question of harm, the Court noted that the failure to instruct the jury on a confession-and-avoidance defense "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who as admitted to all the elements of the offense." While the Court acknowledged that necessity was not Maciel's only defensive theory, it was clear from opening argument and testimony that there was little dispute that Maciel had operated the vehicle. Further, it was up to the jury to assess the credibility of Maciel's defense and there as evidence, if believed, that would have supported Maciel's claim of necessity. And finally, the Court acknowledged that Maciel did not argue necessity to the jury, that factor did not weigh against harm because without the defensive instruction, such an argument would have been objectionable on several grounds.

Judge Keel concurred without an opinion and Presiding Judge Keller dissented without an opinion.

VII. APPEALS

A. Motion for New Trial – Trial court did not have authority to extend the deadline and preside over a hearing on a motion for new trial after 75-day period expired. Roberto Medina Flores was convicted of second-degree felony sexual assault and timely moved for a motion for a new trial. Under Sec. 22.0035(b) of the Texas Government Code, the trial court had until April 25, 2020, to rule on Flores' motion. Before that deadline, the Texas Supreme Court and Court of Criminal Appeals issued a joint emergency order in response to the COVID-19 pandemic that allowed criminal and civil courts to modify or suspend any deadlines and procedures subject only to constitutional limitations. Citing the emergency order, Flores moved to extend the court's 75-day deadline to rule on his motion, which the trial court granted. On May 8, 2020, the trial court denied Flores' motion for a new trial. On appeal, the court of appeals concluded that the trial court erred because the 75-day plenary period is jurisdictional, not procedural, and the trial court could not create jurisdiction based on the emergency order.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Flores v. State*, 679 S.W.3d 695 (Tex. Crim. App. 2023) (9:0)**. Writing for the unanimous Court, Judge Hervey explained that *In re State ex rel. Ogg* made it clear that a trial court cannot expand its jurisdiction by relying on an order like the emergency order at issue in Flores' case. *In re State ex rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021). The trial court entered an order purporting to expand its jurisdiction by seven days, but the requirement that a court must have jurisdiction is not procedural. Therefore, the 75-day jurisdictional deadline cannot be suspended. Judge Hervey concluded that the trial court did not have the authority to preside over the hearing on Flores' motion for a new trial, and its overruling of that motion was void. Flores' motion for a new trial was overruled by operation of law when the 75-day plenary period expired.

B. Jurisdiction – The court of appeals should reconsider its decision to dismiss an appeal for lack of jurisdiction in light of *Ex parte Smith*. Jesus Alberto Guzman Curipoma was arrested and charged with criminal trespass in Kinney County as part of "Operation Lone Star." Curipoma filed a pretrial application seeking habeas relief in Travis County rather than Kinney County. A Travis County judge ruled that the Kinney County Attorney had no authority to appear in Travis County and ultimately granted Curipoma's pretrial writ and dismissed the trespass charge. The Third Court of Appeals dismissed Kinney County's appeal for a want of jurisdiction concluding that the Kinney County Attorney did not have the authority to appeal on the State's behalf in this matter.

In a per curiam opinion, the Court of Criminal Appeals vacated the judgment of the court of appeals and remanded for reconsideration in light *of In re Smith*, 665 S.W.3d 449 (Tex. Crim. App. 2022). ***Ex parte Curipoma*, ---S.W.3d---, 2024 WL 3167273 (Tex. Crim. App. June 26, 2024) (2:4:3)**. *Smith*, which was decided after the lower court's decision in Curipoma's case, also involved a pretrial writ application filed in Travis County challenging detentions resulting from arrests and charges in Kinney County as part of Operation Lone Star. The Court held in *Smith* that Travis County lacked jurisdiction to hear pretrial writ applications relating to prosecutions in a different county. In *Curipoma*, the Court remanded for reconsideration in light of *Smith*.

Judge Slaughter, joined by Judges Richardson, Newell, and Walker, filed a **concurring opinion**. The concurrence agreed with the Court's decision to grant, vacate and remand in light of *Smith* and wrote separately to note that, pursuant to *Smith*, which is controlling, it is clear the proceedings were void from their inception.

Judge Yeary filed a **concurring opinion**. Judge Yeary would hold that the elected attorney who initiates a prosecution is responsible for all aspects of the prosecution and may an appearance in foreign jurisdiction to stop a court from erroneously exercising its authority or undertake an appeal to prevent an unlawful dismissal order. The dissent reasons that Kinney County authorities were the parties holding Curipoma thus, they are the party to the habeas litigation. The right for the State to appeal pertains to "the case," pursuant to Texas Code of Criminal Procedure Article 44.01 and while the pretrial writ application was filed in Travis County it pertains to the

dismissal of a case in Kinney County. It is that dismissal, the dissent reasons, that authorizes the appeal under Article 44.01 meaning Kinney County's Attorney is the only proper representative of the State. The constitutional duty of elected attorneys to represent the state is meaningless if it doesn't include the authority to appear in other counties to preserve their authority to represent the State in their home counties.

Presiding Judge Keller, joined by Judges Hervey and Keel, filed a **dissenting opinion**. The dissent would affirm the lower court dismissing the appeal for lack of jurisdiction. The dissent reasons that the Kinney County Attorney did not have the authority to file a notice of appeal because the habeas action, although related to the underlying trespass case, is a separate action. Because appellate jurisdiction was not properly invoked, the lower court was correct to dismiss the appeal.

[**Commentary:** After *In re Brent Smith*, 665 S.W.3d 449 (Tex. Crim. App. 2022), the Texas Legislature amended Articles 11.05, 11.051, 11.06, and 11.08 to essentially codify that opinion. Now it is clear that if the offense is not a felony, the writ is only returnable to the county in which the defendant is either in custody or the charge is pending. In a felony, the writ must be returned to a judge with felony jurisdiction in the county in which the writ is returnable or any county that adjoins that county. Going forward a writ filed in the wrong county must be dismissed, an issue that was not clear prior to *Smith*. Additionally, this also demonstrates how unique the situation that gave rise to this case is. This is another case involving Operation Lone Star. Will it have applicability outside of that context? The bottom line here is that the case was remanded in light of *Smith* because the court of appeals did not have *Smith* when it issued its opinion. We'll see if the court of appeals holds that the appeal should be dismissed because the underlying order granting habeas relief was void or whether it should be dismissed because the party appealing had no authority to appeal. And if it results in an unpublished opinion, will it make a noise?]

C. Legal Sufficiency Standard of Review - Witness' factually unsupported opinion testimony that a bar's parking lot was a "premises" licensed to sell alcoholic beverages did not establish the element beyond a reasonable doubt. Ijah Baltimore went to a bar, leaving his gun in the saddlebag of his motorcycle while he was inside. After exiting the bar, he went to his motorcycle, retrieved his gun from the saddlebag, and placed it in the waistband of his pants in preparation for leaving the bar. Before leaving his parking spot, he got into a physical altercation with two men and one of the men threw his gun on the roof of the bar. Baltimore was charged with a Class A misdemeanor offense of unlawful carrying of a weapon which was enhanced to a third-degree felony because the offense was alleged to have occurred on the "premises" of an establishment licensed to sell alcoholic beverages.

At trial, the State presented evidence that the establishment was a bar and that neither the bar nor the parking lot in front of the bar were under Baltimore's control. The State's evidence that the parking lot was included within the bar's "premises," however, consisted of opinion testimony from a detective who stated that the parking lot satisfied the legal definition of "premises," but he was never asked to give a basis for that opinion. The State also elicited testimony from a witness of the altercation who testified that the parking lot was part of the "property" of the bar, but the State did not ask her to give a basis for that opinion either. The remainder of the testimony established that the Crying Shame was a bar licensed to sell alcohol and that the offense occurred in the parking lot in front of the bar's entrance. The jury found Baltimore guilty of the third-degree felony offense of unlawful carrying of a weapon.

The court of appeals held that the State's evidence was legally insufficient to support the statutory enhancement. According to the court of appeals, the State did not provide any factual basis to support that the parking lot was directly or indirectly under the control of the bar. Rather, the State only provided unsupported opinion testimony Baltimore's conviction was reversed, he was held guilty of the lesser-included Class A misdemeanor offense, and his case was remanded to the trial court for a new punishment hearing.

The Court of Criminal Appeals affirmed the judgment of the court of appeals and remanded for a new punishment hearing. ***Baltimore v. State*, 689**

S.W.3d 331 (Tex. Crim. App. 2024) (6:0:3). Writing for the Court, Judge Newell relied upon the Court's recent opinions in *Curlee v. State*, 620 S.W.3d 767 (Tex. Crim. App. 2021), *Edwards v. State*, 666 S.W.3d 571 (Tex. Crim. App. 2023), and *Flores v. State*, 620 S.W.3d 154 (Tex. Crim. App. 2021) to explained that the Court has repeatedly held that unsupported opinions do not always satisfy the beyond a reasonable doubt standard by themselves. In Baltimore's case, a detective testified that the parking lot was the "premises" of the bar, but the State did not offer any basis for this opinion, such as familiarity with the business or parking lot. Thus, the detective's opinion was factually unsupported. The Court reasoned that the detective did not go to the parking lot on the night of the offense and there was no indication that he had ever been to the bar on any other occasion for any other reason, nor did he tie his law enforcement experience to his legal conclusion that the bar controlled the parking lot. Similarly, the Court held that the eyewitness' testimony that the parking lot was the bar's property was equally unsupported. The State offered no testimony to suggest the eyewitness had any personal knowledge about the bar, or that she had even been there before the night in question. The Court also explained that the proximity of the parking lot to an establishment is not necessarily determinative of control and to conclude otherwise would be mere speculation because a permit or license applicant can exclude a portion of the property from its "premises."

Judge Yeary filed a **dissenting opinion**, opining that *Curlee* was wrongly decided, and he would not have asked the court of appeals to reconsider its opinion in Baltimore's case in light of the Court's decision in *Curlee*. Yeary explained that he wouldn't have left the court of appeal's decision alone either but instead, would have determined which definition of "premises" was appropriate as applied to the statutory enhancement.

Judge Keel filed a **dissenting opinion**, which Presiding Judge Keller joined. Keel believed it was reasonable for the jury to conclude that a bar's "premises" included an adjacent parking lot. Keel opined that the Court assumed that the witnesses offered opinion testimony but even if the witnesses' statements were opinions about a statutory element, their testimony regarding "premises" was not contradicted, unreliable, or nonexistent. Keel furthered that even if the Court's precedent supports its opinion in this case, the evidence presented supported the statutory element because it was reasonable for the jury to infer that the proximity of the parking lot to the building infers control by the establishment.

[**Commentary:** I placed this opinion here rather than the "OFFENSES" section because this case is more about the standard of review for legal sufficiency than the elements of the underlying offense. And, as I will explain below here in the commentary, any discussion of the elements of this offense would not terribly helpful because the elements of the underlying offense have changed since this case was tried. With that in mind, there are two points to make about this opinion. First, the Court is clear that this was a failure of proof not a legal determination that a parking lot in front of a bar cannot be a part of that bar's premises. The State appears to have taken the position that "everybody knows" the parking lot was part of the bar's premises. This opinion reminds prosecutors that the State has the burden to prove every element of an offense beyond a reasonable doubt. It can't just fall back on "everybody knows" particularly when it comes to proof of a legal element. To that end, the Court cites with apparent approval to a court of appeals case in which the evidence was legally sufficient to prove that the parking lot in front of a bar was part of the bar's premises. In that case, however, the State called a TABC agent and introduced the bar's license to sell alcohol into the record. While the Court cites to this as an example and does not hold that such proof is always necessary, it is illustrative of how preparation prior to trial can help the State prove its case. Second, as alluded to above, the statutes regarding where citizens can carry firearms have been amended since this case, and those amendments seem to make clear that parking lots are now excluded from the definition of "premises." Perhaps I buried the lede on this, but this change in the law highlights how meaningless it would be to send the case back to the court of appeals to figure out the proper definition of "premises." I say meaningless because as the court points out regardless of whether the Court applied the definition of "premises" in the Alcoholic Beverage Code or the Penal Code, the State was still required to prove that the parking lot was part of the "premises licensed by

the state to sell alcoholic beverages." So, under either definition, the State was still required to prove some form of exercise of control by the bar over the parking lot. The Court held that the State had only established that through speculation rather than logical inference.]

D. Statutory Harm – Reviewing courts do not need to rely upon a rebuttable presumption of harm for statutory error arising from alternate juror's participation in jury deliberations. This case was discussed above in subsection E of the Trial Procedure section of the paper. This summary will only discuss the appellate issue of harm. To refresh on the facts, the State charged Joe Luis Becerra with unlawful possession of a firearm by a felon, and he proceeded to trial before a jury. During jury deliberations, an alternate juror retired to the jury room with the regular jury unbeknownst to either party. The Court of Criminal Appeals held that this error was not a violation of the constitutional right to a twelve-person jury. Instead, it was a violation of Article 36.22 which prohibits improper presence in the jury room during deliberations as well as unauthorized communications with the jury about the case.

On the issue of harm, Becerra argued that Art. 36.22 of the Texas Code of Criminal Procedure shifted the burden to the State to show a lack of harm, and the state never rebutted that presumption of harm. The court of appeals did not analyze harm consistent with this presumption. He sought discretionary review on this issue with the Court of Criminal Appeals.

The Court of Criminal Appeals clarified the proper standard for assessing statutory harm and remanded the case to the court of appeals for further proceedings consistent with its opinion. ***Becerra v. State*, 685 S.W.3d 120 (Tex. Crim. App. 2024) (5:0:4)**. Writing for the Court, Judge Newell acknowledged that the Court had held in *Mauney v. State*, 85 Tex. Crim. 184 (1919) that a violation of the previous version of Art. 36.22 gave rise to a rebuttable presumption of harm. However, the placement of "burdens" upon the parties for the assessment of harm is inconsistent with the lack of such burdens when assessing harm from other similar errors. Further, assigning a burden to show or rebut a presumption of harm is particularly appropriate in Becerra's case given that neither party was responsible for the error of allowing the alternate juror to participate in part of the jury deliberations. This rebuttable presumption of harm arose prior to the promulgation of Rule 44.2(b) of the Rules of Appellate Procedure that only speaks in terms of a difference between constitutional and statutory harm without regard to burdens or presumptions. And finally, reliance upon a rebuttable presumption in practice has been indistinguishable from an ordinary harm analysis. Thus, Rule 44.2(b) is the appropriate standard for evaluating harm when an alternate juror participates in jury deliberations in violation of Art. 36.22. In remanding the case back to the court of appeals for a harm analysis pursuant to 44.2(b), the Court instructed that the court of appeals must examine the record as a whole to determine whether the error affected Becerra's substantial rights.

Judge Yeary filed a **dissenting opinion** explaining that he would not have addressed the application of the presumption of harm under Rule 44.2(b) because that question wasn't before the Court. Judge Keel filed a **dissenting opinion** in which Presiding Judge Keller and Judge Slaughter joined. Judge Keel opined that even assuming there was error, there was no harm because twelve jurors ultimately convicted Becerra. Even if there were a thirteenth juror, Becerra would not be harmed because a greater number of fact finders would generally benefit the defense.

[**Commentary:** I suppose this is as good a place as any to point out that this isn't exactly a 5-4 case. Three of the dissenters would have gone farther than the majority and essentially held that there could never be harmless error from allowing an alternate juror to participate in jury deliberations. Only one dissenter argued that the error was harmful.]

E. Court of Criminal Appeals holding in *Ex parte Pue* that Texas law defines whether a prior out-of-state conviction was final for purposes of enhancing punishment applies retroactively. In 2015, Tanya McMillan was convicted of theft, which was enhanced to a first-degree felony offense by use of her 2001 federal felony conviction from Alaska. McMillan was sentenced to ten months imprisonment and five years of supervised release for the federal conviction. In McMillan's post-conviction habeas application, she contended that her federal conviction was not final when the theft offense occurred because

she had been placed on supervised release, meaning that her sentence was suspended. Therefore, she argues, the theft offense was unlawfully enhanced, making her sentence illegal. In *Ex parte Pue*, the Court of Criminal Appeals held that Texas law defines whether a prior conviction is final for the purposes of enhancing the punishment of an offense under Sec. 12.42 of the Texas Penal Code as opposed to another jurisdiction's law. *Ex parte Pue*, 552 S.W.3d 226, 235 (Tex. Crim. App. 2018). The question McMillan's case posed was whether *Pue* applied retroactively.

The Court of Criminal Appeals held that *Pue* applies retroactively. ***Ex parte McMillan*, 688 S.W.3d 336 (Tex. Crim. App. 2024) (6:3:0)**. Writing for the Court, Judge Richardson explained that *Pue* was the first time the Court specifically provided an authoritative interpretation on which law to use for determining finality of a foreign conviction, as there was no statewide interpretation prior to *Pue*. The Court denied McMillan relief, holding that her federal conviction was final under Texas law, reasoning that her term of supervised release was part of the sentence imposed, not a suspension of her sentence. Furthermore, all her appeals had been exhausted, and a mandate was issued before she was arrested for the theft offense.

Presiding Judge Keller filed a **concurring opinion**, agreeing that *Pue* applied retroactively but that it did so because a construction of a statute that impacts the punishment range for an offense must be applied retroactively. Keller did not believe the Court adequately explained why McMillan's federal conviction was final under Texas law. McMillan's conviction was final under Texas law, Keller explains, because federal supervised release is a part of the federal sentence and not a suspension of that sentence.

Judge Yeary filed a **concurring opinion**, disagreeing that the issue of retroactivity was properly before the Court and found the Court's opinion to be advisory. Yeary also did not agree that McMillan's challenge was cognizable in a state post-conviction habeas corpus proceeding but agreed with the Court in denying relief.

Judge Keel concurred without written opinion.

F. Defendant's appeal was permanently abated on the State's motion when the defendant died while his remand to the court of appeals was still pending. A jury convicted William Rogers of burglary of a habitation. On direct appeal, he challenged the trial court's failure to instruct the jury on certain defensive issues. The court of appeals concluded any error was harmless. The Court of Criminal Appeals granted Rogers' Petition for Discretionary Review and concluded that if error existed, it was harmful. The Court remanded to the court of appeals to decide whether the trial court erred in failing to instruct on the defensive issues. On remand, the court of appeals held that the trial court did not err. Rogers filed his second Petition for Discretionary Review with the Court. The Court issued an opinion reversing the court of appeals, holding that Rogers was entitled to jury instructions on the defensive issues. During the period within which the State was entitled to file a motion for rehearing (though the State acknowledged that it did not intend to file a motion for rehearing), Rogers died. The State filed a "Motion to Withdraw Appellate Opinions and Permanently Abate the Appeal" because Rogers had died before the case had become final.

In a per curiam opinion, the Court of Criminal Appeals granted the State's motion, withdrew both of its opinions, and ordered the court of appeals to also withdraw both opinions. ***Rogers v. State*, 677 S.W.3d 705 (Tex. Crim. App. 2023) (7:4:2)**. Rogers' entire appeal was permanently abated to a higher court. *See Brown v. State*, 439 S.W.3d 929 (Tex. Crim. App. 2014) (granting State's motion to permanently abate the appellant's appeal after he died).

Judge Richardson filed a **concurring opinion**, joined by Judges Hervey, Walker, and Slaughter. Judge Richardson explained that the Court was correct in permanently abating Rogers' appeal but concurred to include the Court's majority opinion from Rogers' second petition for discretionary review in hopes of preventing other defendants from suffering the same deprivations of equal justice under the law as Rogers had suffered.

Presiding Judge Keller and Judge Keel dissented without written opinion.

[**Commentary:** This is an esoteric aspect of criminal appellate law. If a defendant dies before his appeal becomes final, the case is permanently abated. Sort of like an unresolvable tie. But here, Judge Richardson published a side opinion to the abatement order and included the original majority opinion. While the abatement deprives the original opinions (in the CCA and the court of appeals) of any precedential value, it remains to be seen how advocates might use the opinion in the future. I look forward to seeing the proper citation form.]

VIII. HABEAS CORPUS

A. Death Penalty

1. False evidence relating to statistical probability estimates for certain DNA mixtures was not material when it was not shown that there was a reasonable likelihood that the outcome would have been different had the false evidence been replaced with the accurate evidence. A jury convicted Areli Escobar of capital murder and the trial court sentenced him to death based on the jury's answers to the special issues. The Court of Criminal Appeals affirmed his conviction on direct appeal and denied his initial post-conviction habeas application. Escobar filed a second post-conviction habeas application, and the Court remanded his claims to the convicting court for consideration on the merits. The convicting court recommended that relief be granted on two of Escobar's claims: (1) the DNA evidence relied upon by the State was scientifically unreliable, and (2) his right to due process was violated by the use of false DNA evidence. Thereafter, the State filed a document objecting to numerous findings and conclusions made by the convicting court but stated that it agreed with the convicting court that Escobar was entitled to relief on those two claims.

The Court disagreed with the convicting court's recommendation to grant relief and dismissed Escobar's second application. After the dismissal, the State filed a suggestion for reconsideration to the Court, conceding that Escobar was entitled to relief. The Court denied without the State's request without written order. Escobar then submitted a petition for writ of certiorari to the Supreme Court of the United States. In its response to the petition, the State conceded error. Specifically, the State believed that the DNA evidence used to convict Escobar may have been contaminated because contamination issues were found at the lab where Escobar's evidence was processed. The State furthered that reversal of the Court of Criminal Appeals' judgment was warranted. The Supreme Court granted certiorari, vacated the Court's judgment, and remanded Escobar's case back to the Court for further consideration due to the State's concession of error.

After considering the arguments made on certiorari and reviewing Escobar's supplemental evidentiary materials, the Court of Criminal Appeals reaffirmed its denial of relief. ***Ex parte Areli Escobar*, 676 S.W.3d 664 (Tex. Crim. App. 2023) (5:1:3)**. Writing for the Court, Presiding Judge Keller explained that neither the concession of error on certiorari nor the evidence submitted on remand, changed its conclusion that no due process violation had occurred in Escobar's case. Although the statistical estimates for certain DNA mixtures used to convict Escobar constituted false evidence, the Court reasoned that the correctly revised DNA estimates did not show a reasonable likelihood that Escobar would not have been convicted because the corrected estimates would still inculpate him.

Judge Richardson concurred without written opinion.

Judges Hervey, Newell, and Walker dissented without written opinion.

[**Commentary:** Applicant has filed a petition for certiorari in this case. It looks as though the United States Supreme Court ended its term without deciding to grant or deny. Not sure what that means, but as of this writing I got nothing.]

2. Habeas applicant's death sentence was reformed to life imprisonment without parole because he met the diagnostic criteria for intellectual disability. In 2008, a jury convicted Randall Wayne Mays of capital murder for the shooting death of a law enforcement officer. After the jury answered the special issues submitted to it, the trial court sentenced Mays to death. The Court of Criminal Appeals affirmed his conviction and sentence on direct appeal. Thereafter, Mays filed his first

application for habeas corpus, raising nine claims, including a claim that that he had a mental illness and, thus, his pending execution was not constitutionally permissible. The Court denied relief. Mays also filed a habeas corpus petition in federal court, which argued that he should not be executed because he had an intellectual disability. The federal district court denied relief, and the Fifth Circuit denied a certificate of appealability. The Supreme Court of the United States denied certiorari.

When Mays' execution date was set, he challenged his competency to be executed under Art. 46.05 of the Texas Code of Criminal Procedure in the trial court. *See* Tex. Code Crim. Pro. Ann. art. 46.05 ("A person who is incompetent to be executed may not be executed."). The trial court denied his challenge. The Court, however, determined that Mays had made a sufficient threshold showing for the appointment of experts. The trial court later determined that Mays was competent to be executed, and the Court affirmed that decision. Mays again challenged his competency to be executed after his second execution date was set. The trial court denied the challenge, and Mays appealed the decision to the Court, which was still pending on the date this opinion was published.

In 2020, Mays filed a subsequent writ of habeas corpus with the Court and a motion for a stay of execution. In his subsequent writ, Mays raised four claims challenging the validity of this conviction and the resulting sentence of death. In one of his claims, Mays asserted that he is intellectually disabled and ineligible for the death penalty under *Atkins*. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of persons with intellectual disabilities are prohibited under the Eighth Amendment). The Court determined that Mays' intellectual disability claim satisfied Art. 11.071, Sec. 5 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Pro. Ann. art. 11.071 (relief not granted on subsequent writ of habeas corpus unless clear and convincing evidence shows that no rational juror would have answered in the state's favor on one or more of the special issues). The Court stayed Mays' execution and remanded to the trial court to review the merits of the intellectual disability claim.

In 2022, the trial court held a hearing, and Mays submitted the medical reports from two of his experts. The first expert's report concluded that Mays met the criteria for a diagnosis of mild intellectual disability according to the 5th Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR) and the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Support. The second expert's report said that Mays met the full diagnostic criteria for intellectual disability according to current standards. In 2023, the trial court signed its "Agreed Findings of Fact and Conclusions of Law" and recommended that relief be granted on Mays' intellectual disability claim, specifically citing the DSM-5-TR. The court concluded that Mays had shown by clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled.

The Court of Criminal Appeals granted relief by reforming Mays' sentence of death to life imprisonment without parole. ***Mays v. State*, 686 S.W.3d 745 (Tex. Crim. App. 2024) (5:0:4)**. In its per curiam opinion, the Court found that Mays met the diagnostic criteria for intellectual disability under *Atkins* and *Moore*. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019). However, Mays' other claims failed to satisfy the requirements of Art. 11.071, Sec. 5, and were dismissed as an abuse of the writ without reviewing the merits.

Presiding Judge Keller filed a **dissenting opinion** in which Judge Slaughter joined, disagreeing with the Court's remedy in granting Mays relief on his intellectual disability claim. Presiding Judge Keller believed this remedy conflicts with Texas Code of Criminal Procedure Art. 1.13, which requires a jury trial in death penalty cases. Because the question of intellectual disability is a factual issue, the Court should have remanded for a new punishment hearing at which a jury could decide the intellectual disability issue.

Judge Yeary filed a **dissenting opinion**, joined by Presiding Judge Keller. Judge Yeary questioned whether Mays procedurally defaulted his intellectual disability claim because he did not raise that claim at trial, on appeal, or in his first application for writ of habeas corpus. Because Mays was tried eight years

after *Atkins*, he could have raised intellectual disability at trial. He also questioned whether Mays' claim of intellectual disability was properly measured under the diagnostic criteria adopted by the latest DSM manual. Judge Yeary believes each successive DSM manual contains less rigorous diagnostic criteria and may no longer correspond to society's "so-called" evolving standards of decency under the Eighth Amendment. Nor is he convinced that no rational jury would fail to find that Mays is intellectually disabled based on the evidence, even under the current DSM-5-TR standards. Lastly, Judge Yeary questioned the relief granted by the Court because he thought the more appropriate disposition may have been to remand the case to empanel a new jury to determine the issue of Mays' intellectual disability.

[**Commentary:** I have observed in an opinion before that the criteria for determining whether someone is intellectually disabled has become untethered from the rationale relied upon by the United States Supreme Court in *Atkins* to hold that an intellectually disabled criminal defendant's lessened moral blameworthiness is exempt from the death penalty. *See Ex Parte Wood*, 568 S.W.3d 678, 686 (Tex. Crim. App. 2018) (Newell, J. concurring) ("But to the extent that Applicant can build a claim of intellectual disability upon the shifting sands of clinical psychological standards detailed in *Moore*, this case demonstrates that the determination of intellectual disability has become untethered from the original rationale for the exception to the imposition of the death penalty announced in *Atkins*."). And in *Petetan v. State*, 622 S.W.3d 321, 332 (Tex. Crim. App. 2021) the Court noted the inherent tension between the clinical perspective attendant to a diagnosis of intellectual development disorder and the legal determination of moral blameworthiness. As the Court explained, "At its core, *Atkins* seems to rest its justification for a death-penalty exemption upon the assumption that intellectual disability is a character trait that lessens moral culpability and so the retributive value of punishment. But the clinical criteria for diagnosing someone with intellectual development disorder seems to look forward to how the diagnosis can better assist the individual function in society without regard to any consideration of moral blameworthiness." I point these things out not just because I am vain, but to direct practitioners to the one problem inherent with remanding for a new punishment hearing. Having a jury make another determination of intellectual disability will be inherently fraught because all the experts will be forced to rely upon the same diagnostic criteria in evaluating the defendant that resulted in the determination of intellectual disability on the writ. Under that diagnostic criterion, the defendant is intellectually disabled regardless of how morally blameworthy people might feel he is. And to the extent that the Court wants to have a jury consider moral blameworthiness based upon factors outside of diagnostic criteria, the Court tried that already. *See, e.g., Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). It didn't end well. *See Moore v. State*, 581 U.S. 1 (2017) (Moore I); *see also Moore v. Texas*, 139 S.Ct. 666 (Moore II); *see also Ex parte Moore*, 587 S.W.3d 787 (Tex. Crim. App. 2019). The reality is that *Atkins* and *Moore* have tied the determination of intellectual disability to ever-changing diagnostic criteria and even if the Court were to say it is not bound by such criteria that wouldn't solve the problem. Seeking out other criteria to assist in a "moral blameworthiness" diagnosis seems likely to result in reliance upon the same type of criteria listed in *Briseno* and rejected in *Moore*. Even more problematic is the question of how the State should litigate the issue of intellectual disability to a jury when it will be forced to concede that all the diagnostic evidence points to a determination that the defendant is intellectually disabled. Such a course of action seems to invite emotional (and by definition irrational) jury decision-making. But maybe there are some answers on the horizon? There is currently a petition before the United States Supreme Court in *Smith v. Alabama*, 67 F. 4th 1335 (11th Cir. 2023) (cert. filed) asking for clarification regarding Supreme Court precedent in this area. Perhaps this case will clarify this area of the law. It looks as if the United States Supreme Court ended its term without granting or denying certiorari.]

3. Habeas court did not have authority under Art. 11.071, Sec. 3 of the Texas Code of Criminal Procedure to issue an ex parte order compelling a third party to create new evidence. Pursuant to its post-conviction investigation, the Office of Capital and Forensic Writs sought and received a sealed *ex parte* order from the habeas court, compelling the University

of Texas Medical Branch-Galveston to conduct brain imaging on OCFW's client. UTMB challenged the *ex parte* order by filing a motion to set aside the discovery order. While the habeas court initially granted the motion, it subsequently denied the order and reinstated the original *ex parte* order. UTMB sought leave from the Court of Criminal Appeals to file a Petition for a Writ of Mandamus and requested the Court vacate the remaining *ex parte* order. OCFW argued that the habeas court had the authority to issue the *ex parte* order under Art. 11.071, Sec. 3 of the Texas Code of Criminal Procedure.

The Court of Criminal Appeals granted leave to file and granted UTMB's Petition for a Writ of Mandamus, which was to be issued if the habeas court failed to comply with its opinion. ***In re University of Texas Medical Branch-Galveston*, 677 S.W.3d 696 (Tex. Crim. App. 2023) (6:3:0)**. Writing for the Court, Judge Newell explained that Sec. 3 of Art. 11.071 authorizes a habeas court to entertain *ex parte* requests in only two instances: (1) a request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims, and (2) a claim for reimbursement for expenses for habeas corpus investigation that are reasonably necessary and reasonably incurred. The *ex parte* order compelling UTMB to administer brain imaging did not involve a request for prepayment of expenses nor a claim for reimbursement of expenses. Thus, the habeas court did not have authority under Sec. 3 of Art. 11.071 to enter the order at issue *ex parte*.

Judge Slaughter filed a **concurring opinion** agreeing with the Court's conclusion that the habeas court lacked authority to issue the order compelling UTMB to conduct brain imaging but disagreed that this case could be resolved by relying on the *ex parte* nature of the habeas court's order. Instead, Judge Slaughter maintains that a habeas judge has implicit authority to order pre-application discovery under Art. 11.071.

Judges Keel and McClure concurred without written opinion.

[**Commentary:** It is worth pointing out that the habeas court's order actually combined two different things. It not only ordered brain imaging, but it also ordered a transfer of the prisoner to have UTMB conduct the brain imaging. It is not clear whether UTMB was being ordered to conduct brain imaging without payment or whether it was agreeing to conduct brain imaging for agreed payment. The statute seems to contemplate that a defendant can seek payment or reimbursement for brain imaging, but the request in this case was for the imaging itself not the payment for the imaging. Exit question: What if the habeas court's order had just been a prisoner transfer order rather than a prisoner transfer order and an order for imaging?]

B. Habeas applicant denied due process right to a fair trial and an impartial judge when prosecutor involved in trial was simultaneously employed as a law clerk for the trial judge presiding over Applicant's trial. Michael David Lewis was convicted of capital murder and sentenced to life without parole. In his application for a writ of habeas corpus, Lewis contended that one of the prosecutors in his capital murder case was also employed as a law clerk for the trial judge presiding over his capital murder trial. The question before the Court was whether the fact that the prosecutor was the trial judge's law clerk when he prosecuted Lewis' case entitled him to relief.

The Court of Criminal Appeals agreed that Lewis was entitled to relief. ***Ex parte Lewis*, 688 S.W.3d 351 (Tex. Crim. App. 2024) (5:2:3)**. In a per curiam opinion, the Court concluded that Lewis was denied his due process rights to a fair trial and impartial judge. Regardless of any actual bias, a judge may be disqualified due to an appearance of impropriety, such as it appeared in Lewis' case. The undisputed facts established that the trial court allowed his law clerk to represent one of the parties appearing before him in a contested legal matter. This undisclosed employment relationship between the trial judge and the prosecutor appearing before him tainted Lewis' trial.

Judge Richardson filed a **concurring opinion**, which Judge Walker joined. Though he joined the Court's opinion, Richardson wrote separately to explain further why Lewis' case was "utterly bonkers." Adding to the impropriety of this dual-employment relationship was that the relationship between the trial judge and the prosecutor went undisclosed to Lewis and his trial counsel. Neither the prosecutor nor the trial judge should have been involved in Lewis' case.

Richardson agreed with the Court that the prosecutor's dual-natured employment tainted Lewis' right to a fair trial.

Presiding Judge Keller filed a **dissenting opinion** in which Judges Yeary and Keel joined, opining that the Court unnecessarily jeopardizes thousands of convictions out of Midland County. Keller believes there was no conflict of interest on behalf of the judge because it was the prosecutor, not the judge, who was dually employed. Keller explained that the prosecutor did not work for the judge on Lewis' case, nor has Lewis shown that the prosecutor's work for the judge on other cases created a due process violation on the judge's part. Keller concludes that the prosecutor was effectively screened from Lewis' case.

C. Ineffective Assistance of Counsel – Ninth Circuit's application of *Strickland v. Washington* ineffective assistance standard was erroneous; *Eddings v. Oklahoma* does not prevent a sentencer from finding mitigation evidence unpersuasive. Danny Lee Jones was convicted of murdering three people, including a seven-year-old child, to facilitate the theft of an expensive firearm collection. At the time of his conviction, Arizona law required a sentence of death be imposed if one or more statutorily enumerated aggravating factors existed and mitigating factors were not sufficiently substantial to call for leniency. The trial court found four aggravating and four mitigating circumstances had been established but concluded the mitigating circumstances did not outweigh the aggravating and sentenced Jones to death. The Arizona State Supreme Court affirmed.

In state post-conviction, Jones unsuccessfully alleged trial counsel was ineffective for failing to present mitigating neuropsychological evidence. In federal habeas, Jones again alleged ineffective assistance. After the district court held an evidentiary hearing and denied relief, the Ninth Circuit Court of Appeals reversed holding there was a reasonable probability based on evidence presented in federal habeas that Jones would not have received the death penalty had that evidence been presented at sentencing. The court of appeals denied en banc review with ten judges dissenting. The Supreme Court granted certiorari.

The Supreme Court reversed. ***Thornell v. Jones*, 602 U.S. --- (2024) (6:0:3)**. Writing for the Court, Justice Alito explained that the Ninth Circuit departed from a proper application of the *Strickland* standard by 1) failing to adequately consider the aggravating factors; 2) failing to assess the relative strength of expert witnesses; and 3) concluding the district court erred by finding evidence of Jones's mental health conditions unpersuasive mitigation evidence. Even where mitigating evidence may be substantial, *Strickland*'s prejudice prong requires establishing a reasonable probability of a different result. Considering the mitigating evidence, the aggravating circumstances were "weighty." Jones committed multiple homicides. He was motivated by pecuniary gain. The murders were cruel, and one victim was a child.

Moreover, much of the mental health evidence raised on habeas had been previously presented. Both new and old mental health evidence failed to establish a link between Jones's conduct on the night of the murders and any mental illness. The state court was aware cognitive impairments, substance abuse, and child abuse suffered by Jones and post-conviction evidence added little or was uncorroborated or contradicted.

Finally, the Court labeled a Ninth Circuit rule, which prohibits a court assessing a *Strickland* claim from assessing the relative strength of expert witnesses as "unsound." The Court also admonished the Ninth Circuit for seemingly using the Court's holding in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a sentencer may not "refuse to consider . . . any relevant mitigating evidence," to fault the district court for finding mitigation evidence unpersuasive. Evaluating the strength of all the evidence and comparing the aggravating and mitigating factors, the Court concluded Jones was not entitled to relief.

Justice Sotomayor, joined by Justice Kagan filed a dissenting opinion. Although the dissent agreed that the Ninth Circuit erred to all but ignore the aggravating circumstances, it found the majority went too far to reach, in the first instance, the merits of such a complex and fact-intensive case rather than remanding.

Justice Jackson dissented. Justice Jackson concluded that the majority erred to find that the Ninth

Circuit ignored the aggravating factors. Rather, the dissent found lower court's analysis consistent with its obligations under *Strickland*.

[**Commentary:** Practitioners in Texas will likely regard the Court's analysis as familiar. Aggravating factors strong. Mitigation evidence weak. New mitigation evidence not really new. Failure to present new mitigation evidence not prejudicial. Perhaps the interesting wrinkle for practitioners in this case is the Court's correction of the Ninth's Circuit's application of *Eddings v. Oklahoma*. The Court makes clear that language in that case saying that a sentencer must consider mitigation evidence does not translate to saying that the sentencer must always find that evidence persuasive. Other than that, it is a relatively fact-specific opinion that restates the proper standard of review for determining prejudice on claims of ineffective assistance.]

D. Serving a deferred adjudication community supervision for a felony offense does not constitute being a convicted felon for purposes of the offense of unlawful possession of a firearm. Shanea Lynn Reeder was placed on a deferred-adjudication community supervision for the felony offense of distributing a controlled substance. While on community supervision, she was arrested for unlawful possession of a firearm after law enforcement located a handgun in her vehicle. Reeder pleaded guilty to the firearm charge and the trial court sentenced her, pursuant to a plea bargain, to five years imprisonment.

Reeder filed a post-conviction writ application arguing that the conviction was improper because she was not a convicted felon when she was arrested for unlawful possession of a firearm. After remand, it was determined that Reeder did not have any other prior felony conviction that could have served as the underlying felony for purposes of the offense. Thus, the Court of Criminal appeals considered whether serving a deferred-adjudication community supervision constitutes having been convicted of a felony pursuant to the statute.

The Court held serving deferred-adjudication community supervision does not mean a person has been convicted of a felony for purposes of the unlawful possession of a firearm statute. ***Ex parte Reeder, ---*** **S.W.3d---, 2024 WL 3167671 (Tex. Crim. App. June 26, 2024) (6:2:1)**. Writing for the Court, Judge Hervey explained that the unlawful possession of a firearm statute prohibits a person "who has been convicted of a felony" from possessing a firearm after conviction and before the fifth anniversary of the person's release from confinement, community supervision, parole, or mandatory supervision, whichever date is later. The term conviction presupposes a judgment of guilt. Deferred adjudication expressly means the proceedings will be deferred without an adjudication of guilt. When the Penal Code intends to treat deferred-adjudication supervision as a conviction, it expressly states so as with firearm-licensing and habitual offender statutes. In the context of unlawful possession of a firearm, deferred-adjudication community supervision is not a conviction. Reeder was laboring under a misapprehension as to the fact of whether he had been convicted of a felony when he entered the plea of guilty and thus, the plea was involuntary.

Judge Keel concurred.

Presiding Judge Keller filed a **concurring opinion** in which she agreed with granting relief but raised three concerns. First, that Reeder did not allege that his plea was involuntary. Rather, relief should be granted on the ground raised, which is that the conviction and sentence is not authorized by law. The concurrence also takes issue with a footnote by the majority indicating that if the statute at issue was ambiguous, the rule of lenity may apply to resolve that ambiguity because the rule of lenity does not necessarily apply to the Penal Code and is not necessary to resolve the claim. Finally, the concurrence finds the record is not clear about what Reeder or trial counsel knew about the law at the time of the plea as there is no affidavit from trial counsel.

Judge Yeary filed a **dissenting opinion**. Judge Yeary disagreed with vacating the conviction on the grounds that the plea was involuntary and would have instead remanded for a second time for a determination of whether any other felony conviction may have supported the conviction.

[**Commentary:** Would carrying a firearm while on deferred adjudication violate the conditions of deferred adjudication? Would making "not carrying a gun" a

condition of deferred adjudication probation run afoul of *New York Rifle & Pistol Assn., Inc. v. Buren*, 597 U.S. 1 (2022) after ***United States v. Rahimi*, 144 S.Ct. 1889 (June 21, 2024)**?]

E. Multiple-punishments double jeopardy violation claims can fall within the Article 11.07 § 4 exception to the statutory prohibition against filing subsequent writs. Victor White was convicted via a three-count indictment for attempted capital murder, attempted murder, and aggravated assault. White filed a subsequent habeas application alleging that his trial was unfair, his trial counsel was ineffective, and he suffered a double jeopardy violation. The Court of Criminal Appeals barred as subsequent White's claims of an unfair trial and ineffective assistance. But the Court held that White's claim that his convictions for attempted murder and aggravated assault violated double jeopardy was not barred as subsequent and granted relief. ***Ex parte White*, 688 S.W.3d 916 (Tex. Crim. App. 2024) (5:0:4)**.

Presiding Judge Keller filed a **dissenting opinion** in which Judges Yeary, Keel, and Slaughter joined. Keller maintained that White's double jeopardy claim was not based on new facts or law, so he could only meet an exception to the subsequent writ bar by meeting the "innocence gateway" exception. Keller furthered that this exception required White to show by a preponderance of the evidence that "but for" the double jeopardy violation, no rational juror could have found him guilty beyond a reasonable doubt. She would have held that White did not meet this exception because the State has the right to prosecute and obtain jury verdicts on two offenses in a single trial, even if the offenses are the same for double-jeopardy purposes. Since a double jeopardy violation occurs only after a guilty verdict, it cannot be a "but for" cause of the finding of guilt.

D. Actual Innocence – Kerry Max Cook established that no rational jury would convict him in light of newly discovered evidence that an alternative suspect had testified falsely against him, and the alternate suspect's DNA was found on the victim's clothing. Kerry Max Cook was convicted of the murder of Linda Jo Edwards for the first time in 1978 and sentenced to death. The year prior, Edwards' roommate, Paula Rudolph, discovered her body in her bedroom. Rudolph stated that the night before she had very briefly seen a figure standing in Edwards' room. Initially, Rudolph believed this figure to be James Mayfield, although at trial she identified Cook as the figure she had seen. Mayfield was the married supervisor with whom Edwards had been having an affair. The affair was exposed shortly before the murder after Edwards attempted suicide because Mayfield had returned to his wife. Mayfield maintained for decades, under oath, that he had no sexual contact with Edwards for weeks before her death. Cook, who was staying in the same apartment complex as Edwards and Rudolph, became a suspect in the months that followed that murder after his fingerprints were discovered on the apartment's exterior sliding glass door.

The Court of Criminal Appeals affirmed Cook's first conviction on direct appeal in 1987. After the United States Supreme Court remanded the case for further consideration in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988), on the issue of expert testimony admitted regarding future dangerousness, this Court reversed that conviction because, as in *Satterwhite*, the expert had examined Cook without first consulting Cook's counsel. Cook's second trial resulted in a mistrial because the jury could not reach a verdict. Cook was tried a third time, convicted, and sentenced to death. However, this Court again reversed because the trial court admitted testimony from the first trial from a witness who was deceased but disallowed the witness's contradictory grand jury testimony and his statement to the police. The State had failed to disclose the witnesses' prior inconsistent statements. We noted that prior to the third trial, Cook filed a pretrial habeas corpus application and the habeas findings "established numerous undisputed acts of misconduct by the district attorney's office," which we generally accepted. *Cook v. State*, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996). Without detailing all of the additional evidence that was found to have been improperly withheld, the habeas court found a jail-house snitch who alleged Cook confessed to him had been given an undisclosed deal and later recanted; the State possessed evidence that Cook had been to Edwards' apartment contradicting the State's theory that the two did not know one another and thus the fingerprint would only have been left if Cook committed the murder; and an

expert testified falsely, at the behest of the State, regarding the age of the fingerprint. Immediately before Cook's fourth trial, and before State-requested DNA testing was complete, Cook took a no-contest plea deal that allowed him full credit for time served and no further incarceration.

After the plea, DNA testing revealed Cook was excluded as a contributor to a semen stain on Edwards' underwear, the sperm fraction of the stain was instead determined to be consistent with Mayfield contradicting his earlier testimony denying sexual contact with Edwards for weeks before her death. Cook's DNA was not found on any item tested. In 2016, Mayfield, in exchange for immunity, made several admissions, not all detailed here, which included: 1) that despite his previous claims, he had sex with Edwards less than two days before her death; 2) he admitted their affair had ruined him causing him to lose his job and possibly his marriage and nevertheless he persisted in the affair; 3) he was aware Rudolph told others she believed she had seen him in Edwards' room the night of the murders; 4) and he admitted to failing his first polygraph before passing his second although he denied having asked a colleague about help with "beating a polygraph." Other new evidence adduced following the guilty plea included: an apartment manager and neighbor who saw Mayfield's vehicle parked at the complex the day of the murder and, after Edwards' body was discovered, Rudolph told her she did not plan on "telling the police anything," evidence impeaching the character of a reserve deputy sheriff who alleged (for the first time) thirteen years after Cook's first trial that Cook confessed under questionable circumstances during the first trial, and expert testimony contradicting the accuracy of expert testimony admitted regarding "lust murders." Ultimately, this case came to the Court with a recommendation that relief be granted on the basis of false testimony but denied on actual innocence.

After considering the record, the Court of Criminal Appeals granted relief on the basis of actual innocence. ***Ex parte Cook*, ---S.W.3d---, 2024 WL 3050792 (Tex. Crim. App. June 19, 2024) (6:2:1)**. Writing for the Court, Judge Richardson explained that the newly discovered pieces of evidence, including the DNA evidence, evidence of false testimony, and State misconduct, affirmatively established Cook's innocence. The Court concluded, after considering the totality of the evidence and the newly discovered evidence no rational jury would convict Cook. The Court weighed the weaknesses in the State's case including 1) the State's highly improbable timeline of events, 2) improper State conduct including withhold exculpatory and impeaching evidence, 3) deception regarding the age of the fingerprint, 4) destroying a relevant piece of physical evidence before DNA testing, 5) problems and inconsistencies with Rudolph's identification testimony and inconsistencies with Cook's appearance – his hair color and length and his height – and dress, 6) problems with the criminal profile developed and relief upon by the State, 6) weaknesses in the alleged uncorroborated confession to a reserve deputy, 7) the DNA testing results inculpating Mayfield, and 8) Mayfield's admissions. As to the fingerprint, the Court noted, for example, that Cook's fingerprint was not found anywhere else, including on the murder weapons or Edwards' bedroom, and the State possessed evidence explaining that Cook may have been in the apartment days earlier even though he initially denied knowing Edwards. After consideration of these points and others, the Court concluded the State, over all of the years, could now show nothing more than that Cook was just "in the wrong place at the wrong time to his extreme misfortune.

Judge Keel concurred.

Presiding Judge Keller filed a **concurring opinion**. Judge Keller would hold instead that the habeas court's recommendation that Cook being granted a new trial on the basis of false evidence is supported. She disagreed, however, that Cook established himself to be actually innocent reasoning that the confession to the reserve deputy and Rudolph's identification together with the fingerprint, would be "minimally sufficient" to find Cook guilty.

Judge Yeary filed a **dissenting opinion**. Judge Yeary agreed with Judge Keller that Cook had not established actual innocence, but Judge Yeary would instead deny relief on any ground. The dissent concluded that Cook had not established that any *materially* false testimony had a reasonable likelihood of affecting the judgment of a jury.

[**Commentary:** This is a long and fact specific opinion. This summary obviously cannot do it justice. I leave it to you to digest all the opinions for yourself. Exit question(s): Does the Court's consideration of all the errors and misconduct from the previous trials suggest that Cook expands the scope of what can be considered during an actual innocence review, or is the applicability of the case going to be limited to its facts and circumstances?]

IX. FEDERAL LAW

A. Federal Offenses

1. Federal bribery statute does not criminalize officials from accepting gratuities after performing an official act. James Snyder was the mayor of the city of Portage, Indiana in 2013 when the city awarded two contracts to a local trucking company. In 2014, the trucking company cut a $13,000 check to Snyder, which federal law enforcement regarded as a gratuity for the contracts. Snyder claimed the check was for providing consulting services. Despite his claims, Snyder was convicted in federal court of accepting an illegal gratuity, pursuant to 18 U.S.C. § 666(a)(1)(B) and sentenced to 1 year and 9 months in prison. Snyder appealed arguing that § 666(a)(1)(B) only applied to bribes, not gratuities. The Seventh Circuit disagreed, holding that it applied to both.

The Supreme Court reversed. ***Snyder v. United States*, 144 S.Ct. 1947 (2024) (6:1:3)**. Writing for the Court, Justice Cavanaugh explained that 18 U.S.C. § 666(a)(1)(B) does not make it a federal crime for state and local officials to accept gratuities for their past official acts. The Court rested its decision on the text, statutory history, statutory structure, statutory punishments, federalism, and fair notice. The Court noted that the statute does not bear resemblance to the federal gratuities provision in Section 201(c), which makes it a crime for federal officials to accept a payment "for or because of any official act," while it is similar to Section 201(b)'s bribery provision by requiring a corrupt state of mind and intent to be influenced. Additionally, the Court noted that gratuities language was omitted from a prior version of the Section 666 in 1986 and that no other provision has been identifies that prohibits bribes and gratuities in the same provision. Section 201, for example, in two different provisions also provides two separate punishments for bribes and gratuities and the result sentencing disparities work against the government's argument that gratuities are included here. In sum, the Court held "a state or local official does not violate Section 666 if the office has taken the official act before any reward is agreed to, much less given" although it may be otherwise illegal. The Court reversed the court of appeals and remanded for further proceedings.

Justice Gorsuch filed a concurring opinion. Justice Gorsuch joined the Court's opinion. However, he noted that the rule of lenity proscribes the result reached because the statute leaves the reader with reasonable doubt as to whether it covers the defendant's conduct.

Justice Jackson filed a dissenting opinion joined by Justices Sotomayor and Kagan. The dissent disagreed that Section 666 could not reach Snyder's conduct simply because he argues there was no agreement for the payment beforehand. Gratuities may be a reward for some future act of a public official or a past act already taken. The dissent argued that the text of Section 666 clearly establishes that gratuities are criminalized because is prohibits agreeing to accept "anything of value from any person, intending to be influence ore rewarded." The dissent pointed to several examples of how Section 666 has been invoked to criminalize the acceptance of gratuities to demonstrate that the statute's limitations are working to prevent overbreadth.

2. The Sarbanes-Oxley Act's prohibition on obstructing, influencing, or impeding an official proceeding requires that the actor impaired (or attempted to impair) the availability or integrity for use of records, documents, objects, or other things in an official proceeding. A federal grand jury indicted Joseph Fischer for invading the Capitol building on January 6, 2021. Specifically, the indictment charged Fischer with obstruction of an official proceeding under 18 U.S.C. § 1512(c) based upon his conduct on January 6. Fischer moved to dismiss this count arguing that the statute requires the defendant to have taken some action with respect to a document, record, or other object in order to corruptly

obstruct, impede or influence an official proceeding. The District Court agreed and dismissed the count.

A divided panel on the D.C. Court of Appeals reversed. The court of appeals concluded that Section 1512(c)(2) covers all forms of corrupt obstruction. Thus, the court held that a person involved in assaultive conduct, in attempt to stop Congress from performing the official action of certifying the results of the presidential election, could be charged with corruptly obstructing, influencing or impeding an official proceeding. The dissent, however, concluded that Section 1512(c)(2) applies only to acts like the ones specified in Section 1512(c)(1) that "affect the integrity or availability of evidence" at an official proceeding.

The United States Supreme Court reversed. ***Fischer v. United States*, 603 U.S. --- (2024) (5:1:3)**. Writing for the Court, Chief Justice Roberts explained that the Government must allege that a defendant impaired (or attempted to impair) the availability or integrity of records, documents, or objects or other things used in an official proceeding. The "otherwise" clause in Section 1512(c)(2) covers matters not specifically contemplated by Section (c)(1) but it is not untethered from (c)(1)'s requirements. Rather, the list in (c)(2) is a residual clause, the scope of which is defined by reference to (c)(1). The Court reasoned that otherwise (c)(2) would subsume all of the conduct specified in the preceding provision, namely – altering, destroying, mutilating, or concealing a record, document, or other object or attempting to do so. According to the Court, Section 1512(c)(2) criminalizes impairing the availability or integrity of records, documents, or objects used in an official proceeding other than those ways specified in 1512(c)(1). The Court pointed to the doctrine of noscitur a sociis, which means a word is "given more precise content by the neighboring words with which it is associated." As well as ejusdem generis, which means a general or collective term at the end of a list of specific terms is generally controlled and defined by reference to the specific classes that precede it. "Otherwise" in this context links a set of specific examples to a general phrase to capture other forms of evidence and other means of impairing its integrity or availability. Untethering the residual clause would also lump together the specific types of conduct listed in other subsections, which have discrete penalties. Finally, reading the provision otherwise, would criminalize a broad swath of conduct that could expose activists and lobbyists alike to imprisonment. If Congress wanted to criminalize any conduct that delays or influences a proceeding in any way, it would have said so.

Justice Jackson filed a concurring opinion. Justice Jackson agreed with the majority's determination that subsection (c)(2) is limited by the preceding list of criminal violations in subsection (c)(1), but she wrote separately to elaborate on how that interpretation flows from the legislative purpose of the statute. Congress enacted Section 1512(c) as part of the Sarbanes-Oxley Act, which was intended primarily to target document destruction rather than to create a sweeping, all-purpose obstruction statute. While many statutes have passed all-encompassing obstruction statutes, those are classified as misdemeanors while Section 1512(c)(2) is a felony that imposes a 20-year maximum sentence.

Justice Barrett filed a dissenting opinion joined by Justices Sotomayor and Kagan. Justice Barrett would have held that the statute applies to Fischer's alleged conduct, which blocked an official proceeding from moving forward. The dissent opined that Section 1512(c)(2) covers conduct that obstructs, influences, or impedes an official proceeding or attempts to do so, and the phrase "otherwise" does not narrow that scope. Rather, it means only "in a different manner" or by other means. In any event, the dissent reasoned that using physical force against a person to influence testimony in an official proceeding counts as impairing the integrity of "other things" used in an official proceeding.

B. Federal Sentencing

1. Defendants have a Fifth and Sixth Amendment right to have a jury determine beyond a reasonable doubt whether past offenses were committed on separate occasions for purposes of an Armed Career Criminal sentencing enhancement. Paul Erlinger was convicted of being a felon in possession of a firearm and because the district court found he had three prior qualifying offenses; the district court found the Armed Career Criminal Act ("ACCA") required a sentence of 15 years imprisonment. However, this sentence was vacated

after circuit precedent indicated two of the felonies did not qualify as the requisite "violent felonies" or "serious drug offense[s]." At resentencing, the Government pursued the ACCA enhancement on the basis of different prior convictions stemming from burglaries Erlinger committed over a few days when he was 18 years old. Mr. Erlinger maintained that these were not separate offenses but instead were part of a single criminal episode, which could thus not be separate qualifying convictions. The district court rejected Erlinger's request to have a jury make the determination about whether these burglaries were separate offenses and found they were and thus imposed the mandatory 15-year sentence required by ACCA.

On appeal, before the Seventh Circuit, the Government reversed its position and conceded that the Constitution would require that a jury to determine whether the predicate offenses were committed on different occasions. However, the Court of Appeals affirmed the district court's sentence pointing to circuit precedent holding that a judge may have the separate occasions finding.

The United States Supreme Court held that the Fifth and Sixth Amendments require that a jury, not a judge, make the factual determination required by ACCA to impose ACCA's mandatory minimum sentence. ***Erlinger v. United States*, 144 S.Ct. 1840 (2024) (6:2:3)**. Writing for the Court, Justice Gorsuch began by pointing to the tradition in English law of the right to a jury trial, which the founding fathers felt was too often deprived. The Sixth Amendment right to a jury trial and the Fifth Amendment right to due process together are "the heart of our criminal justice system." As such, the Supreme Court has determined that only a jury may determine those facts that increase the range of punishment to which a criminal defendant is exposed. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2024). The same is true of any fact that increases a defendant's minimum punishment. See *Alleyne v. United States*, 570 U.S. 99 (2013). The Court reasoned that Erlinger's case "is nearly on all fours" with both *Apprendi* and *Alleyne*. Thus, while a court, under *Almendarez-Torres*, 523 U.S. 224 (1998), may determine "the fact of a prior conviction," Erlinger had the right to have a jury make the factual determination of whether the prior offenses occurred on at least three separate occasions. The Court recognizes that there may be instance in which the determination is needlessly straightforward but finds that the Fifth and Sixth Amendments contain no efficiency requirement. The Court took no position as to whether the prior offenses were committed on separate occasions but vacated the Seventh Circuit's judgment and remanded for further proceedings.

Chief Justice Roberts concurred. The Chief Justice joined the Court's opinion but also agreed with Justice Kavanaugh's assessment that a violation of the right to have the jury make the requisite determination would be subject to harmless error review. Thus, on remand the court of appeals should consider the contention that the error was harmless.

Justice Thomas filed a concurring opinion. While Justice Thomas agrees that the Court correctly applied its precedent, he wrote separate to stress that the Court should revisit its determination in *Almendarez-Torres* that there is a narrow exception for trial judges to find "the fact of a prior conviction" even if that increases a defendant's punishment. The concurrence notes, as did the majority, that the holding is a departure that may conflict with the Sixth Amendment.

Justice Kavanaugh, joined by Justices Alito and Jackson, dissented. The dissent would hold that a judge may make the different-occasions determination. Based on *Almendarez-Torres*, the dissent concludes that a judge may make determinations "based on recidivism" to apply sentencing enhancements. The dissent, based on stare decisis, is opposed to overruling *Almendarez-Torres*, which it contends was not egregiously wrong nor has it had negative consequences and reliance interests favor adhering to it. Even if the dissent were to agree with the Court's Sixth Amendment determination, the dissent finds that any error was harmless because there can be no reasonable doubt that the burglaries were committed on different occasions. The dissent points to the different victims, different dates, and different locations and concludes that any Sixth Amendment error was harmless.

Justice Jackson dissented. Justice Jackson's view is that *Almendarez-Torres* establishes that a judge may make the different occasions determination. Further, the dissent expresses its view that *Apprendi*, although

binding precedent, was wrongly decided and thus, Justice Jackson cannot agree with what she views that the Court's extension of that decision. Instead, Justice Jackson agrees with Justice Kavanaugh that there is a well-established recidivism exception to *Apprendi*. The dissent notes that sentencing authority has been historically in the hands of courts, which includes several factual determinations. The Legislature, in an attempt to bring more consistency to sentencing, brought forth the sentencing factors to be considered or disregarded by courts. In the dissent's view, *Apprendi* was a "significant blow" to the legislative attempt to bring about consistency and fairness in sentencing. Also, the dissent cautions the decision conflates elements and sentencing factors and notes that the Constitution itself does not mention sentencing at all. The dissent's view is that the *Apprendi* doctrine has prevented legislatures from implementing schemes to achieve fairer sentencing although it may provide safeguards to individual case, the potential for prejudice is a practical problem. The dissent finds juries making determinations about past criminal behavior is unworkable.

[**Commentary**: Here the court draws a distinction to say trial courts can determine the fact of a conviction, presumably with certified judgments, but not necessarily the timing of the underlying offenses. It may be worth watching to see if the Court eventually applies Apprendi to the fact of prior convictions as well. Or it may suggest as Chief Justice Roberts does, that we are going to move into saying the failure to have a jury make the "different occasions" determination is error, but harmless. Exit question: Whither *Niles v. State*, 55 S.W.3d 562 (Tex. Crim. App. 2018)?]

2. A defendant facing a mandatory minimum sentence is eligible for safety-valve relief under 18 U. S. C. Sec. 3553(f)(1) only if each of the provision's three conditions are satisfied. Mark Pulsifer pleaded guilty to distributing at least 50 grams of methamphetamine and faced a mandatory minimum sentence of 15 years. At his sentencing, Pulsifer claimed that the court could sentence him without considering the mandatory minimum under the federal "safety valve" provision. The "safety valve" provision exempts qualified defendants from being sentenced to the mandatory minimum. To qualify for this provision, the sentencing court must find that the defendant does not have: (A) "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense," (B) "a prior 3-point offense," and (C) "a prior 2-point violent offense." 18 U.S.C.A. § 3553(f)(1). Because Pulsifer did not have a prior 2-point violent offense conviction as required by subparagraph (C), he argued that he was eligible to be sentenced without regard to the mandatory minimum. Under Pulsifer's interpretation, a defendant would only be ineligible for the "safety valve" provision if he met all three requirements. The Government argued that Pulsifer was ineligible because he had two prior three-point offenses. Under the Government's view, Pulsifer was disqualified under subparagraphs (A) and (B) because he had six criminal history points. The district court agreed with the Government's interpretation, and the Eighth Circuit affirmed.

The Supreme Court of the United States granted certiorari because the courts of appeals were split over how to read the "safety valve" provision's criminal history requirement, and subsequently affirmed the Eighth Circuit. ***Pulsifer v. United States*, 601 U.S. 124 (2024) (6:0:3)**. Delivering the opinion of the Court, Justice Kagan believed that both parties offered a grammatically permissible reading of the provision. Pulsifer argued that the word "and" joined subparagraphs (A), (B), and (C); thus, ineligibility for the provision required that he met all three requirements. The Government argued that the word "and" meant that Pulsifer could only be eligible if he did not meet all three requirements. When considering the sentencing guidelines with the text and context of paragraph (f)(1), the Government's interpretation is the only plausible statutory construction. Pulsifer's interpretation, on the other hand, would create two issues. First, subparagraph (A) would be rendered meaningless because a defendant who meets the requirements under (B) and (C) would always have more than four criminal history points under (A). Second, Pulsifer's interpretation would grant relief to defendants with a more serious criminal history while barring relief from defendants with a lesser criminal history. For example, a defendant who had a three-point offense under (B) and a two-point violent offense under (C) would be denied relief. But a second defendant with multiple three-point offenses, satisfying

(A) and (B), could get relief only because he does not have a two-point violent offense. Pulsifer's interpretation would distort the intent of the provision—to assess which defendants should have entitlement to a lesser sentence based on the seriousness of their criminal history.

Pulsifer contended that even if his interpretation created these two issues, that ultimately did not matter because a sentencing judge retained complete discretion to impose a lengthy sentence. Justice Kagan replied that if sentencing guidelines could always overpower the provision, then Congress wouldn't have created the provision. Congress amended the provision to expand eligibility for relief for defendants with a less serious criminal history. Though Pulsifer argued that his interpretation was more aligned with the intent of Congress because it affords more opportunity for relief to defendants, that does not advise how the statute should be interpreted. Both parties' interpretations expand eligibility for relief; because Pulsifer's interpretation would grant more relief than the Government's does not automatically make it the better interpretation. Lastly, the Court rejected Pulsifer's invocation of the rule of lenity. While there are two grammatically correct interpretations of the provision, there is only one contextually possible interpretation—the Government's interpretation.

Justice Gorsuch filed a dissenting opinion, in which Justices Sotomayor and Jackson joined. Congress amended the provision to give more defendants a chance to avoid mandatory minimum sentences and instead receive sentences that correspond more appropriately to a defendant's criminal history. After the amendment, a defendant may be eligible for the "safety valve" if he "does not have" all three traits found under (A), (B), and (C). The Government's interpretation would mean that a defendant could only be eligible if he does not meet any of the three traits. Justice Gorsuch concluded that adopting this interpretation guarantees that more defendants will be denied eligibility for individualized sentencing. Furthermore, nothing would prevent the Government from interpreting any other statute in this way to attain its preferred result.

3. State drug conviction counts as an Armed Career Criminal Act predicate if state drug conviction involved a drug on the federal schedules at the time of that conviction. Justin Rashaad Brown and Eugene Jackson were separately convicted of the federal offense of being a convicted felon in possession of a firearm. An Armed Career Criminal Act enhancement was recommended for in both cases based on prior state felony drug convictions. Under the ACCA, a 15-year mandatory minimum sentence is imposed on defendants convicted for unlawful possession of a firearm if they also have a criminal history that demonstrates a propensity for violence. A defendant with three prior drug convictions for a "serious drug offense" will qualify for the ACCA enhancement. For a state drug conviction to qualify as a "serious drug offense" under the ACCA, the state conviction must carry a maximum ten-year sentence and involve a controlled substance as defined under federal law. The question before the Supreme Court was whether a state drug conviction constitutes a "serious drug offense" if a drug that was on the federal schedules on the date of the offense, but it was later removed.

Brown argued that his prior state felony drug convictions did not qualify as "serious drug offense[s]" because the federal and state definitions of "marijuana" matched on the date of those convictions, but the definition was later modified and no longer matched when Brown was sentenced for those convictions. In Jackson's case, the federal definition of cocaine was amended and no longer matched the state definition when he committed the instant offense, and thus his two prior convictions for possession and distribution of cocaine were no longer qualified as "serious drug offense[s]." In both cases, the district courts sentenced Brown and Jackson to enhanced sentences, and the appellate courts affirmed.

The Supreme Court of the United States affirmed the judgments of the courts of appeal. ***Brown v. United States*, 144 S.Ct. 1195 (2024) (6:0:3)**. Writing for the Supreme Court, Justice Alito explained that precedent and statutory context support that the federal and state definitions must when on the date the offense is committed because the ACCA is a recidivist statute, which requires courts to look to the law in effect on the date the defendant violated it. Finding otherwise would lead to strange results because, for the purposes of the ACCA, a defendant's criminal history would

cease to exist solely because the crime was redefined; the fact that an earlier conviction occurred is what matters when determining whether a defendant poses a risk of future dangerousness.

Justice Jackson filed a dissenting opinion, in which Judge Kagan joined, and in which Justice Gorsuch joined in part. Jackson argued that "serious drug offense" is defined by the ACCA, establishing that courts should apply the federal drug schedules in effect at the time of the federal firearms offense that triggers ACCA's potential application.

C. Federal Regulation

1. Federal courts may not defer to a federal agency's "permissible" interpretation of the law simply because it is ambiguous; Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc. is overruled. This case involves a herring fisheries. Prior to 1976 unregulated foreign vessels dominated fishing in the international waters off the U.S. coast. Congress then enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA) extending the jurisdiction of the United States to 200 nautical miles beyond U.S. territorial sea. It also claimed "exclusive fishery management authority over all fish" within that area, known as the "exclusive economic zone." The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce. The MSA established eight regional fisher management councils that developed fishery management plans. These plans included a requirement that those who operate fisheries must pay for one or more observers to be carried on board domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery."

Several family-owned business that operated in the Atlantic fishery filed suit against the NMFS and challenged the rule that they be required to pay for observers. They argued that the MSA, which incorporated the Administrative Procedure Act (APA), does not authorize NMFS to mandate that they pay for observers. The District Courts in the respective cases granted summary judgement to the Government out of deference to the agency's (NMFS's) interpretation of the MSA pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The courts of appeals in the respective suits affirmed. As with the trial courts, the courts of appeals deferred to the regulatory agency's interpretation of the statute pursuant to the *Chevron* doctrine. The United States Supreme Court granted certiorari to determine if it should overrule *Chevron*.

It decided it should, and it did. ***Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) (6:2:2).** Writing for the Court, Chief Justice Roberts explained that Article III of the Constitution assigns the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies." Thus, the "interpretation of laws" is the "proper and peculiar province of the courts." The Court noted that this has historically been the case even though the Court also applied deferential review to regulatory agency rulings when a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. But this deference was cabined to fact-bound determinations.

The Court then noted that the Administrative Procedures Act (APA) was enacted in 1946 to provide contours of judicial review of agency action. According to the Court, the APA essentially codified the "unremarkable, yet elemental proposition" that courts decide legal questions by applying their own judgement. It specifies that courts, not agencies will decide "*all* relevant questions of law" arising on review of agency action. The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgement in determining the meaning of statutory provisions. When a statute delegates discretionary authority to an agency, the role of a reviewing court under the APA is, as always to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.

According to the Court, *Chevron* cannot be squared with the APA. Under *Chevron*'s two step analysis, courts were required to defer to an agency's statutory interpretation when the statute was silent or ambiguous with respect to a specific issue. *Chevron* was poorly reasoned in that it failed to reconcile its framework with the APA. Rather, it defies the command of the APA that the reviewing court and not

the agency whose action it reviews is to decide all relevant questions of law and interpret statutory provisions. The Court also rejected the argument that statutory ambiguities are implicit delegations to agencies because an ambiguity in a statute does not necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. Finally, the Court rejected the argument that *stare decisis* required the Court to persist in adhering to the *Chevron* doctrine, noting that *Chevron* has proven to be fundamentally misguided and unworkable.

Justice Thomas joined the majority but filed a concurring opinion as well. He opined that *Chevron* also violates the Constitution's separation of powers. It compels judges to abdicate their judicial power. It also permits the Executive Branch to exercise powers not given to it.

Justice Gorsuch also joined the opinion and filed a separate concurring opinion. He explained his understanding of how common law and *stare decisis* should inform judicial decision-making. In his view, judges should engage in judicial humility. According to Justice Gorsuch, judges interpreting precedent must assess the weight of past decisions against those who have come before. Ultimately, however, he agreed that *Chevron* was essentially poorly reasoned and proven unworkable.

Justice Kagan filed a dissenting opinion that Justice Sotomayor. Justice Kagan noted that *Chevron* has served as a cornerstone of administrative law for 40 years. In her view, *Chevron* deference reflects what Congress would want because it knows that it cannot write perfectly complete regulatory statutes. Justice Jackson did not participate in the consideration of the decision in one of the cases, but joined the dissent only as it applied to the case she could participate in.

[**Commentary:** This is a very heady opinion that alters the balance of our current federal governmental system. And, as you might expect, there's lots of judicial pontification on the concept of judicial humility. "Everyone look at me!" Broad strokes this opinion will force Congress to specify exactly what types of decisions it is delegating to regulatory agencies. It may also lead to Congressional limits on judicial review of regulatory agency decisions. As one who is not really an expert on federal administrative law, I have no doubt that my summary of this opinion is inadequate. I suppose I take some comfort in the fact that this case is specific to federal administrative law and judicial review of federal agency decisions that it may not be obvious to a criminal law practitioner in Texas just how this case will impact that practice. It is at best a harbinger to the state practitioner, but I have provided a link to the opinion for all to review the case independently.

Parting thought: Because it is entirely a civil matter I did not do an in depth discussion of ***S.E.C. v. Jarkesy*, 144 S.Ct. 2117 (2024) (6:2:3)**. However, I do think it is important to note that the United States Supreme Court also recognized an additional restriction upon federal regulatory agencies. In *Jarkesy*, the Court held that the Seventh Amendment right to a jury trial in civil cases applied to cases in which the Securities and Exchange Commission sought monetary penalties for fraud. So, while *Loper* removes *Chevron* deference when a regulatory agency's decision is reviewed, *Jarkesy* recognizes a civil procedural protection for those subject to agency action. Again, *Jarkesy* is purely civil in nature, so I didn't want to belabor it. However, I did want to mention it to you in this context and provide you with a link to the opinion in case you were interested in reviewing it yourself.]

2. A semiautomatic rifle equipped with a bump stock, which allows for the trigger to be rapidly reengaged, is not a machinegun under the National Firearms Act ("the Act"). Michael Cargill surrendered two bump stocks to the ATF, he then filed suit alleging the ATF lacked statutory authority to issue its final rule because bump stocks are not machine guns, which as defined by the Act are "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). The district court concluded that a bump stock fits this statutory definition of machine gun and affirmed the ATF.

After initially affirming, a majority of the court of appeals, on en banc rehearing, agreed that § 5845(b) was at least ambiguous as to whether bump stocks met the definition of machine gun and the rule of lenity thus

required resolving that ambiguity in Cargill's favor. A plurality of the court agreed the definition actually excludes bump stocks because it fires only one shot each time the trigger acts and to fire more than one shot, the shooter must "maintain manual, forward pressure on the barrel." The Supreme Court granted certiorari to address a circuit split on the issue.

The Supreme Court affirmed holding a semiautomatic rifle equipped with a bump stock is not a machinegun "because it cannot fire more than shot 'by a single function of the trigger.' And, even it could, it would not do so automatically" because the shooter "must do more than simply engage the trigger one time." ***Garland v. Cargill*, 602 U.S. 406 (2024) (5:1:3)**. Writing for the Court, Justice Thomas explained that the ATF had on numerous occasions concluded bump stocks cannot automatically fire more than one shot by a single trigger function. The ATF changed course in 2017 after a gunman opened fire on a Las Vegas crowd with weapons equipped with bump stocks. In 2018, the ATF issued its final rule requiring bump stocks be destroyed or surrendered. "Function of the trigger" refers to the mode of action by which the trigger activates the firing mechanism, which for most firearms means the physical trigger movement required to shoot. According to the Court, a semiautomatic rifle without a bump stock fires only one shot per "function of the trigger." The Court then detailed the trigger assembly of a semiautomatic rifle (including demonstrative figures) to conclude that the firing cycles of a semiautomatic rifle equipped with a bump stock remains the same. The bump stock "merely reduces the amount of time that elapses between separate 'functions' of the trigger" making it easier for the shooter to press the trigger again very quickly. The Court compared this to a shooter with a lightning-fast trigger finger. Further, the Court disagreed that there is a difference between an initial trigger pull and subsequent "bumps" of the shooter's finger against the trigger. Rather, every bump is a separate function and a semiautomatic rifle equipped with a bump stock does not fire more than one shot by a single function of the trigger. And even if such a rifle could fire more than one shot by a single function of the trigger, it would not do so automatically because the trigger must be engaged, and the shooter must keep it pressed down to continue shooting. By analogy, the Court concluded that maintaining forward pressure is no less additional input than operating the pump action on a model 37, which the ATF concedes is not a machinegun.

Justice Alito joined the majority but filed a concurring opinion to note that the Las Vegas shooting spree strengthened the case for amending § 5845(b). However, Congress did not amend the statutory text, which is clear and must be followed. According to Justice Alito, the remedy for the disparate treatment of bump stocks and machine guns is congressional action.

Justice Sotomayor filed a dissenting opinion joined by Justices Kagan and Jackson. The dissenters would hold that a bump stock equipped semiautomatic rifle is a machine gun. The dissent noted that like an M16 all one must do is maintain forward pressure on the gun to fire continuously. According to the dissent, "function of the trigger" does not mean the mechanism by which the trigger resets mechanically to fire again, rather it more naturally means a single initiation of the firing sequence.

D. Lawsuit placing airline passenger on "No Fly List" was not rendered moot by the FBI's declaration that an airline passenger "will not be placed on the No Fly List in the future" because the challenged practice could still recur. In 2009, Yonas Fikre, a U.S. citizen and Sudanese emigrant, traveled by plane from Portland, Oregon, to Sudan for business. While in Sudan, Fikre visited the U.S. embassy, where FBI agents informed him that the United States Government had placed him on the "No Fly List." The agents questioned Fikre about the mosque he attended and told him that he could be removed from the list if he became an FBI informant against the members of his religious community in Portland; Fikre declined. Fikre then traveled to the United Arab Emirates, where he was interrogated, tortured, and detained by authorities at the alleged request of the FBI. Fikre then sought asylum in Sweden and remained there until February 2015, when he returned to Portland. While in Sweden, Fikre filed suit against the FBI, alleging that his procedural due process rights were violated because he was not provided notice that he was added to the "No Fly List," nor did the FBI provide him with a remedy that would remove him from the list. Fikre further alleged that the FBI unconstitutionally placed him on the list because of his race, national origin, and

religious beliefs. He sought a declaratory judgment that the FBI had violated his constitutional rights and an injunction prohibiting the FBI from keeping Fikre on the "No Fly List."

In May 2016, the FBI informed Fikre that he had been removed from the list but did explain why. Subsequently, the district court dismissed Fike's case as moot due to the removal. The Ninth Circuit reinstated Fikre's case because it was unclear whether he could be put back on the list for the same unknown reasons. Before the district court, an FBI official filed a declaration stating that Fikre "will not be placed on the No Fly List in the future based on the currently available information." The district court again dismissed Fikre's case as moot. And again, the Ninth Circuit reversed because the FBI's declaration did not indicate why Fikre had been placed on the list in the first place, nor did it ensure that he wouldn't be placed on the list again.

The Supreme Court of the United States affirmed the judgment of the Ninth Circuit. ***Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024) (9:2:0)**. Justice Gorsuch delivered the unanimous opinion of the Court, explaining that a defendant's "voluntary cessation of a challenged practice" will render a case moot only if the defendant shows that "the practice cannot reasonably be expected to recur," and this principle applied to governmental defendants. At this stage of litigation, the Court held that the FBI official's declaration was not sufficient to establish that Fikre would not be placed back on the "No Fly List" because he was not informed of the conduct that got him on the list in the first place. Under the facts alleged at this preliminary stage, the FBI failed to meet its burden of proving that Fikre's case was moot.

Justice Alito filed a concurring opinion, which Justice Kavanaugh joined, to clarify his understanding of the Court's decision does not suggest that the Government must disclose classified information to prove mootness. Instead, non-classified or discovery information may suffice to show that the alleged unlawful conduct is not likely to recur.

E. Asset Forfeiture

1. In civil forfeiture of personal property cases, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing. After Halima Culley loaned her car to her son, he was pulled over by police and arrested for possession of marijuana. Similarly, Lena Sutton loaned her car to her friend, who was pulled over by police and arrested for trafficking methamphetamine. The state seized both vehicles. Alabama civil law authorized the state to seize vehicles incident to arrest if the state promptly initiated a forfeiture case. In Culley's case, the state initiated a forfeiture case ten days after the seizure of her car and thirteen days after the seizure of Sutton's car. In Culley's case, she waited six months before answering the complaint, and waited another year before raising an innocent owner defense. Shortly after raising the defense, an Alabama state court granted Culley's motion for summary judgment and ordered her car be returned. Almost two years after the state filed its forfeiture action in Sulley's case, the state court granted summary judgment in favor of Sutton, finding that she met Alabama's innocent-owner defense and ordered her car be returned.

While their cases were pending, Culley and Sutton separately filed class-action lawsuits in federal court under 42 U.S.C. Sec. 1983, arguing that the state violated their due process rights under the Eighth and Fourteenth Amendments by retaining their vehicles without providing a preliminary hearing. Culley's complaint was dismissed because Culley had played a significant role in the delay of her case. The federal district court entered summary judgment against Sutton because Sutton never requested an earlier hearing. The Eleventh Circuit consolidated both cases and affirmed both judgments, agreeing with the lower courts that the Constitution requires no separate preliminary hearing. The Supreme Court of the United States granted certiorari due to a conflict amongst the courts of appeal on whether the Constitution requires a preliminary hearing in civil forfeiture cases.

The Court affirmed the judgment of the Eleventh Circuit. ***Culley v. Marshall*, 601 U.S. 377 (2024) (6:2:3)**. The Court held that after a state seizes personal property and seeks civil forfeiture of that property, due process requires a timely forfeiture hearing, but it does not require that a separate preliminary hearing be held to determine whether the state may retain the seized personal property pending a

forfeiture hearing. Writing for the Court, Justice Kavanaugh explained that the Due Process Clause usually requires notice and a hearing before the government seizes personal property, but the Constitution only requires a timely forfeiture hearing after the state has seized personal property; a preliminary hearing is not required. The seizure of personal property is different from the seizure of real property, which requires notice and a hearing before seizure by the state.

Justice Gorsuch filed a concurring opinion, which Justice Thomas joined, agreeing with the Court's conclusion but wrote separately to explain that this case leaves many unanswered questions regarding the impact that contemporary civil forfeiture practices may have on due process. For example, law enforcement's increasing dependence on money received from civil forfeitures gives these agencies a strong financial incentive to seize personal property and initiate forfeitures. These incentives, Gorsuch furthered, seem to influence how law enforcement agencies conduct seizures of personal property, often making it difficult for people to retrieve their property once a forfeiture proceeding has been initiated.

Justice Sotomayor filed a dissenting opinion, which Justices Kagan and Jackson joined, disagreeing with the Court's holding that the Due Process Clause never requires the minimal safeguard of a preliminary hearing for innocent car owners. The Court's broad opinion prevents the lower courts from addressing the well-documented abuses of the civil forfeiture system. Sotomayor highlights the same typical scenario as Gorsuch—that law enforcement is incentivized to initiate forfeiture proceedings because their budgets depend on the revenue from the forfeiture of personal property.

2. A district court's failure to enter a preliminary order of forfeiture before a defendant's sentencing does not bar the court from ordering forfeiture at sentencing but the failure to do so is subject to a harm analysis. Louis McIntosh and two accomplices committed several violent robberies, including one robbery where they bound and gagged a man by gunpoint in the man's home and stole $70,000 in cash from the man. Five days after the robbery, McIntosh purchased a BMW with $10,000 in cash and money orders, listing his mother as the purchaser. McIntosh was indicted on multiple counts of Hobbs Act robbery and firearm offenses and was convicted by a jury on all counts. The indictment read that McIntosh must forfeit any property or proceeds derived from the offense. McIntosh received a pretrial bill of particulars which included the BMW as being subject to forfeiture. He was convicted on all counts by a jury. At McIntire's sentencing hearing, the Government sought a forfeiture of $75,000 and the BMW and said it would submit a proposed order of forfeiture by the following week. McIntosh objected to the forfeiture of the BMW because no evidence connected the vehicle to the robbery proceeds. The district court overruled the objection based on the evidence presented at trial, imposed a forfeiture of $75,000 and the BMW, and memorialized an order for the Government to submit an order of forfeiture within a week. The Government did not submit its order of forfeiture to the district court as instructed.

On appeal, the Second Circuit granted the Government's unopposed motion to remand to the district court to submit is order of forfeiture. Before the district court, McIntosh objected to the Government's order because it was not submitted prior to sentencing as required under Rule 32.2(b)(2)(B) of the Federal Rules of Criminal Procedure. McIntosh argued that he was prejudiced by the delay because the BMW lost value, crediting less money against his $75,000 judgment. The district court overruled the objections and entered an amended judgment which included the order of forfeiture, concluding that the provision was a time-related directive and McIntosh was not prejudiced by any delay. The Second Circuit concluded that Rule 32.2(b)(2)(B) was a time-related directive that did not bar the judge from ordering forfeiture even though no preliminary order was filed prior to sentencing. Because the forfeiture amount included all proceeds from the robberies, not just those that McIntosh received, the Second Circuit vacated the district court's judgment in part and remanded to recalculate the forfeiture amount to reflect only the proceeds that McIntosh received. McIntosh filed a petition for a writ of certiorari with the Supreme Court of the United States, alleging that the lower courts were split on whether there were consequences for failing to abide by the requirements of Rule 32.2(b)(2)(B).

While his petition was pending, the district court entered its final order of forfeiture which was recalculated to $28,000, and the BMW.

In a unanimous opinion, the Supreme Court of the United States affirmed the judgment of the Second Circuit. ***McIntosh v. United States*, 601 U.S. 330 (April 17, 2024) (9:0)**. Delivering the opinion of the Supreme Court, Justice Sotomayor explained that Rule 32.2(b)(2)(B) is a time-related directive for three reasons. First, the rule's plain text affords a flexible deadline for entering a preliminary order based on the phrases "unless doing so is impractical" and "sufficiently in advance." These phrases reveal that sometimes entering a preliminary order may be impractical or may not be done sufficiently in advance of sentencing. Second, other parts of Rule 32.2 have consequences for noncompliance; thus, it would be unusual for there to be no consequences for violations of sec. (b)(2)(B). Lastly, mandatory claim-processing rules generally concern the actions of the parties, not the court, and McIntosh has not shown the existence of a mandatory claim-processing rule that governs the court. Because McIntosh did not contest the harm analysis of the lower courts or in his certiorari petition and brief, the Supreme Court did not address the issue of harm. The Supreme Court did note, however, that McIntosh had notice of the forfeiture because it was notated on his indictment. Furthermore, if McIntosh was concerned with preserving the value of the BMW, he could have sought an interlocutory sale.

F. An American citizen does not have a fundamental liberty interest in having her non-citizen spouse admitted to the country. Luis Asencio-Cordero, sought to enter the United States to live with his wife, Sandra Munoz. Asencio-Cordero's visa application was denied, however, because his is affiliated with MS-13. Because of national security concerns, the consular office did not disclose the basis for the decision. Munoz, however, filed a lawsuit challenging the consular officer's decision to deny the visa. She claimed that the right to live with her non-citizen spouse in the United States is implicit in the "liberty" protected by the Fifth Amendment. She also claimed that the consular office violated her due process by failing to disclose the basis for rejecting Asencio-Cordero's application.

The United States Supreme Court held, as a threshold matter, that Munoz does not have a fundamental liberty interest in her non-citizen spouse entering the country. ***Department of State v. Munoz*, 144 S.Ct. 1812 (2024) (5:1:3)**. Writing for the Court, Justice Barrett explained that Munoz could not establish that her asserted right is "deeply rooted in this Nation's history and tradition." Instead, Congress's longstanding regulation of spousal immigration—including bars on admissibility—cuts the other way. The Court has recognized a narrow exception to the doctrine of consular nonreviewability where the denial of a visa allegedly burdens the constitutional rights of a citizen. In that situation the Court considers whether the Executive gave a "facially legitimate and bona fide reason" for denying the visa. But here, Asencio-Cordero cannot invoke the exception himself as a non-citizen, and Munoz does not have fundamental liberty interest in bringing him into the country.

Justice Gorsuch filed a concurring opinion. He did not join the Court's opinion and wrote separately to note that Munoz, through her lawsuit, was given the reason that her husband's visa was denied. Consequently, she was not deprived of procedural due process to protect a liberty interest. So, there was no need to address whether she had a liberty interest to begin with.

Justice Sotomayor filed a dissenting opinion joined by Justices Kagan and Jackson. According to Justice Sotomayor, the right to marry is a fundamental right, and the refusal of the government to provide a basis for excluding her husband burdened her fundamental right to marriage. Therefore, the exception to consular nonreviewability applied to Munoz and she was entitled to a facially legitimate and bona fide reason" for the exclusion of her husband from the country.

[**Commentary:** It sure seems like affiliation with MS-13 would be a facially legitimate and bona fide reason for denying a visa application.]

X. FIRST AMENDMENT

A. A public official who prevents someone from commenting on the official's social media page engages in state action suppressing speech in violation of the First Amendment only if the official

both (1) possessed actual authority to speak on the State's behalf on a particular matter; and (2) purported to exercise that authority when speaking in the relevant social media posts. James Freed converted his private Facebook profile to a public profile. Because his profile was public, anyone could leave comments on Freed's posts. Years later, Freed was appointed city manager of Port Huron, Michigan, and updated his Facebook profile to reflect his new position: "City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his own profile, mostly posting about his personal life but he also posted information that related to his government position. He often responded to comments left by residents on his posts that concerned the local community but would sometimes delete comments he deemed inappropriate.

During the COVID-19 pandemic, Kevin Lindke left comments on Freed's posts about his dissatisfaction with Port Huron's response to the pandemic. Freed deleted Lindke's comments and eventually, Freed blocked Lindke from being able to comment on his profile at all. Lindke sued Freed, arguing that his First Amendment rights were violated because Freed's Facebook profile was a public forum. By deleting Lindke's comments and blocking his access to Freed's page, Freed was engaging in impermissible viewpoint discrimination. The district court concluded that Freed managed his Facebook profile in a private capacity and granted summary judgment to Freed. The Sixth Circuit affirmed and held that an official's activity is state action only if state law required officials to maintain a social media account, the official used state resources to manage the account, or the account belonged to a state office.

The Supreme Court of the United States vacated the judgment of the Sixth Circuit. ***Lindke v. Freed*, 601 U.S. 187 (2024) (9:0)**. Delivering the opinion of the unanimous Court, Justice Barrett explained that the question before the Court was whether Freed, a state official, was engaged in state action when deleting and blocking Lindke's comments from his Facebook page. According to the Court, social media posts that expressly invoke state authority to make an announcement not available elsewhere are state speech, whereas posts that repeat or share information available elsewhere are likely personal speech. If Freed was acting as a state official he violated Lindke's First Amendment rights, but if he was acting as a private citizen, then he did not. Based upon analogous cases addressing the identification of state action it the First Amendment context, the Court held that a public official's social media activities will constitute state action if the official: (1) had actual authority to speak on the state's behalf, and (2) purported to exercise that authority when speaking on social media. Under the first prong, Lindke must show that Freed had more than just some authority to speak on behalf of the state, meaning Lindke's censorship must be connected to speech on a matter that was within Freed's official scope of authority. Under the second prong, Lindke must show that Freed was speaking in furtherance of his official responsibilities which requires fact-specific categorization of Freed's Facebook posts. To prevail, Lindke must show that Freed purported to exercise state authority in specific Facebook posts with the type of social media technology used being critical to the analysis. Facebook's blocking feature, for example, operates on a user's entire page, and thus, a court must consider whether Freed engaged in state action with respect to all of Freed's posts on which Lindke wanted to comment. With this guidance, the Court remanded the case for further proceedings consistent with its opinion.

[**Commentary:** In a similar case decided on the same day, ***O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024) (per curiam)**, the Supreme Court of the United States vacated the judgment of the Ninth Circuit and remanded the case for further proceedings consistent with its opinion in *Lindke v. Freed*. In that case, Michelle O'Connor-Ratcliff and T.J. Zane created public Facebook pages to promote their election campaigns for the Poway Unified School District (PUSD) Board of Trustees. Both O'Connor-Ratcliff and Zane won their elections and continued to post content regarding PUSD on their public pages and to communicate with their constituents. Their Facebook profiles noted their official positions. O'Connor-Ratcliff also created a public Twitter page, which she used for the same purpose as her Facebook page. When Christopher and Kimberly Garnier's children (who attended PUSD schools) posted lengthy and repetitious critical comments on O'Connor-Ratcliff and Zane's social media, O'Connor-Ratcliff and Zane

deleted these comments. They eventually blocked the Garniers from commenting altogether. We'll have to see how those cases turn out on remand.]

B. Superintendent of the New York Department of Financial Services may have violated the First Amendment by coercing DFS regulated parties to punish or suppress gun-promotion advocacy by the National Rifle Association. The National Rifle Association (NRA) sued Maria Vullo, the former Superintendent of New York's Department of Financial Services, and others alleging a First Amendment violation. The NRA claimed that Vullo's actions in meeting with insurance companies and issuing guidance letters urging companies to sever or scale back their ties with the NRA in light of the NRA's gun-advocacy violated the NRA's First Amendment rights. The NRA alleged as an example that Vullo had discussed regulatory infractions in the insurance marketplace but indicated DFS was less interested in pursuing infractions unrelated to NRA business as long as company's ceased providing insurance to the NRA. The NRA also alleged one such company struck a deal in which it would scale back NRA related business and, in exchange, DFS would focus its forthcoming enforcement action solely on syndicates that served the NRA while ignoring others writing similar policies. The District Court held that such actions that could be interpreted as threats to regulated industries to either disassociate with the NRA or face enforcement action. The District Court denied Vullo's motion to dismiss because these threats would violate the NRA's First Amendment rights.

The Second Circuit reversed concluding that Vullo was merely carrying out her regulatory responsibilities. The Second Circuit reasoned that press releases and guidance letters were permissible government speech. And while the meeting with executives was a "closer call," the court found the complaint stated no First Amendment violation. Alternatively, the court held that the law was not clearly established and Vullo would be entitled to qualified immunity. The Supreme Court granted certiorari to determine whether the NRA's complaint states a First Amendment claim against Vullo.

The Supreme Court reversed holding that the NRA's complaint sufficiently alleged conduct, which if true, violated the First Amendment. ***National Rifle Assoc. of America v. Vullo*, 144 S.Ct. 1316 (2024) (7:2:0)**. Writing for a unanimous Court, Justice Sotomayor explained that while Vullo was free to criticize the NRA and to pursue violations of state insurance law, threatening enforcement against entities in order to punish or suppress the NRA's gun-promotion advocacy would establish a First Amendment violation. A government official is not free either directly or indirectly to use the power of the State to punish or suppress disfavored expression. Considering Vullo's role with DFS, she had direct regulatory and enforcement authority over insurance companies in New York and told company executives she would focus enforcement solely on those with ties to the NRA. This, the Court explained, could reasonably be understood as a threat. The reaction of one such company, to cease underwriting firearm related policies and scale back NRA related business, confirmed the coercive nature of the communication. The Second Circuit erred to consider the allegations in insolation rather than as a whole and failed to draw reasonable inferences in the NRA's favor as required.

Justice Gorsuch filed a concurring opinion. Although he joined the majority in full, he wrote separately to note what the lower courts' analysis should focus on. In his view, the proper question is whether there is a plausible allegation that conduct could be reasonably understood to convey a threat of adverse government action to punish or suppress the Plaintiff's speech.

Justice Jackson also filed a concurring opinion. Justice Jackson wrote separately to elaborate on the distinction between government coercion and a violation of the First Amendment. In Justice Jackson's view, the Court's First Amendment retaliation cases may provide a better framework for analyzing the allegations against Vullo. She further advised the lowers courts to consider the NRA's censorship and retaliation theories independently on remand.

[**Commentary:** This case goes a little bit farther than ***Murthy v. Missouri*, 144 S.Ct. 1972 (2024) (6:3)**. The United States Supreme Court held in *Murthy* that two States and five social media users lacked standing to sue dozens of Executive Branch officials and agencies for pressuring social media platforms to suppress

protected speech in violation of the First Amendment. In *Vullo*, it seems obvious that a governmental official used her position to coerce entities to punish the NRA for its gun-promotion advocacy. So, the NRA was able to state a claim. Yet in *Murthy*, the Court held that the plaintiffs in *Murthy* failed to link the governmental official's communications to the private platforms' moderation decisions. I acknowledge that *Murthy* is more detailed than that, and I urge you to read the opinion as well as the side opinions. However, I have chosen not to elaborate on the *Murthy* case further in this paper because ultimately it involved a preliminary injunction, and the holding resolved the dispute on the issue of standing. While it might have tangential application to criminal law cases, it is sufficiently collateral in my view to highlight it as an important case for you here without a more extensive summary.]

C. The prohibition on registered trademarks consisting of the name of a living person without written consent does not violate the First Amendment. Steve Elster sought to register the trademark "Trump too small," with an illustration of a hand gesture to use on t-shirts and hats following an exchange at a 2016 Presidential primary debate. The Patent and Trademark Office refused to register the trademark without President Trump's consent pursuant to the names clause of the Lanham Act, which prohibits the registration of a marl that "[c]onsists or comprises a name . . . identifying a particular living individual except by his written consent." The Trademark Trial and Appeal Board affirmed. The Federal Circuit reversed, holding that the "names clause" of the Lanham's Act name clause violates the First Amendment. The Federal Circuit concluded the Government concluded the clause does not serve any substantial government interest and thus, as a content-based restriction on speech, it did not pass even intermediate scrutiny.

The Supreme Court reversed. ***Vidal v. Elster*, 602 U.S. 286 (June 13, 2024) (∞)**. Writing for the Court, Justice Thomas explained that the names clause does not violate the First Amendment. The Court held that the clause imposes a view-point neutral content-based restriction because it turns on whether the mark contains a person's name. In a matter of first impression, the Court considers the applicable level of constitutional scrutiny to apply to such a restriction. Considering the historical tradition of trademark right's coexistence with the First Amendment, the Court determined that the clause need not be evaluated under heighted scrutiny. The Court reasoned that restrictions on trademarking names have a long history generally grounded in the idea that persons have ownership of their own names. The Court did not provide an "exhaustive framework" for when a contest-based trademark restriction passes First Amendment muster but, again looking to history and tradition, it concluded that the Lanham's Act name clause is compatible with the First Amendment. The Court stopped short of suggesting that "an equivalent history and tradition is required to uphold every content-based trademark restriction" and advised that the opinion is a narrow one.

Justice Kavanaugh, joined by Chief Justice Roberts, concurred in part. The concurrence wrote separately to note its view that a contest-based trademark restriction "might well be constitutional even absent" the historical pedigree the Court finds that the names clause enjoys, which could be addressed in a future case.

Justice Barrett, joined by Justices Kagan, Sotomayor, and Jackson, concurred in part. Justice Barrett agreed with the Court's conclusion but disagreed that "history and tradition" settles the constitutional question. Justice Barrett would adopt a standard for analyzing the restriction that considers whether the restriction is reasonable in light of the trademark's system's purpose of facilitating source identification. Justice Barrett, Kagan and Sotomayor agree that contest-based registration restriction do not trigger strict scrutiny although they are subject to judicial review. Ultimately, the Justices agree with the bottom-line that the names clause is constitutional facially and as applied to Elster's mark in this case. Justices Barrett, Kagan and Sotomayor would, however, would adopt the reasonableness standard rather than "delay[ing] the inevitable" of articulating a test for a restriction without a historical analogue.

Justice Sotomayor, joined by Justices Kagan and Jackson, filed a separate concurrence. The Justices, based on trademark law and First Amendment precedent, would find the names clause constitutional

because the restriction is reasonable as well. While Justice Barrett questions the basis and sufficiency of looking for a historical analog to answer the constitutional question, Justices Sotomayor, Kagan, and Jackson would simply ask first, whether the restriction is viewpoint based and, if so, apply strict scrutiny. If not, the restriction need only be reasonable in light of the purpose of the trademark system to pass under the First Amendment. While contest-based restrictions do have a historical basis, the concurrence takes issue with the five-justice majority's use of history to create a "judge-made test." The concurrence reasons that trademarks are primarily to inform the public about who is responsible for a particular product, trademarks are a creation of common-law, and federal registration only provides increased trademark protection, which are not constitutional requirements. With these principles in mind, the concurrence reasons that the risk to free speech in this context is "attenuated." The concurrence finds that the Government has a reasonable interest in not lending its ancillary trademark support to marks that use a consenting individual's name for commercial gain. The concurrence concludes that all nine justices agree that "nothing in today's opinion calls into question the constitutionality of viewpoint-neutral provisions lacking a historical pedigree."

[**Commentary:** I apologize for the notations regarding the vote breakdown, but this term it has become increasing harder and harder to convey the votes through numbers. Here is the way the vote shook out:

> Thomas, J. announced the judgement of the Court and delivered the opinion of the Court, except as to Part III. Alito and Gorsuch, JJ., joined that opinion in full; Roberts, C.J. and Kavanaugh, J., joined all but Part III; and Barrett, joined Parts I, II-A, and II-B. Kavanaugh, J. filed an opinion concurring in part, in which Roberts, C.J. joined, *post*, p. 311. Barrett, J., filed an opinion concurring in part, in which Kagan, J., joined, in which Sotomayor, J., joined as to Parts I, II, and III-B, and in which Jackson, J., joined as to Parts I and II, *post*, p. 311. Sotomayor, J., filed an opinion concurring in the judgement, in which Kagan and Jackson, JJ., joined, *post*, p. 325.

For those concerned that there would be a durable, coherent conservative voting block, perhaps a "wait-and-see" approach is more appropriate? Also, note that the Court had the opportunity to port the "equivalent history and tradition" framework that it had announced in *Bruen* for alleged infringement of Second Amendment rights. Given the Court's apparent retreat from *Bruen* in ***United States v. Rahimi*, 144 S.Ct. 1889 (June 21, 2024)** discussed above, perhaps that is not surprising.]

XI. § 1983

A. A Fourth Amendment malicious prosecution claim under § 1983 is not automatically barred by the existence of both valid and invalid underlying charges. Ohio prosecutors charged Jascha Chiaverini, a jewelry store owner, with money laundering and two misdemeanor offenses: receiving stolen property and dealing in precious metals without a license. The case was later dismissed. Chiaverini then brought a malicious-prosecution suit, pursuant to 42 U.S.C. § 1983, against police officers in Napoleon, Ohio alleging his arrest and detention were unjustified. To prevail, Chiaverini was required to show that the officers lacked probable cause for the charges. The district court granted summary judgment to the officers.

The Sixth Circuit affirmed, holding that probable cause supported the two misdemeanor charges such that the validity of the felony charge, which had been the focus of Chiaverini's malicious-prosecution argument, did not matter. Consequently, it agreed that Chiaverini's malicious prosecution claim was properly dismissed. The United States Supreme Court granted certiorari because other circuits have held that probable cause for one charge does not automatically defeat a malicious-prosecution claim related to another charge.

The Supreme Court vacated the Sixth Circuit's judgment. ***Chiaverini v. City of Napoleon, Ohio*, 144 S.Ct. 1745 (June 20, 2024) (6:0:3)**. Writing for the Court, Justice Kagan explained that courts should evaluate Fourth Amendment malicious-prosecution claims charge by charge. The Court noted, looking to the similar tort claim, that even the City now agrees that the Sixth Circuit rule is wrong. If in invalid charge causes a detention to begin or to continue, the Fourth

Amendment is violated even if a valid charge has also been brought. Looking to the tort claim for malicious prosecution by analogy, courts have said a defendant need not show that every charged lacked probable cause. The question should be whether the unsupported charge causes the seizure at issue. However, the Court remanded for further proceedings because the different views of causation in this context made resolution of the issue premature.

Justice Thomas, joined by Justice Alito, dissented. He disagreed that the tort claim of malicious prosecution is the closest analog for a § 1983 claim such as this one because the elements are not the same as those required to show a Fourth Amendment violation. For example, a malicious prosecution tort claim does not require a seizure whereas a Fourth Amendment violation necessary requires one for a malicious prosecution claim to prevail on a § 1983 claim. The dissent argued that precedent mixing the concepts to require that a malicious prosecution caused a seizure has created problems such as the one presented by a plaintiff with multiple charges. Thus, the dissent would hold that a malicious-prosecution claim may not be brought under the Fourth Amendment if the seizure was justified.

Justice Gorsuch also wrote a dissenting opinion. Justice Gorsuch also expressed doubt about the existence of a Fourth Amendment malicious-prosecution claim. He pointed out that a malicious prosecution claim considers the defendant's subjective intent, while the Fourth Amendment is based on objective reasonableness. Additionally, the Fourth Amendment is concerned with the permissibility of a seizure while a malicious prosecution claim can proceed without any seizure and is based on the appropriateness of a past judicial proceeding. He allowed that such a claim may fall within the Fourteenth Amendment although that may too be limited. Finally, he characterized the Court's decision as doubling down on "a new tort of its own recent invention" that being a Fourth Amendment malicious-prosecution cause of action.

[**Commentary:** Perhaps apropos of nothing, but the way the Supreme Court seems to be approaching the issues raised in these § 1983 suits seems analogous to the CCA's take on cognizability in writs of habeas corpus in ***Ex parte Couch & Ex parte Hammons,* 678 S.W.3d 1 (Tex. Crim. App. Oct. 25, 2023) (8:1:0)** discussed above. There, the CCA held that if a successful habeas claim can remove restrain on one claim, the claim is cognizable pre-trial even if other charges (and the resultant restraint) would be unaffected. In this case, the United States Supreme Court says essentially the same thing with the ability to proceed on a § 1983 claim, namely that if one of the arrests could be characterized as "malicious prosecution" it does not matter that other arrests were objectively reasonable.]

B. Plaintiff bringing § 1983 suit for retaliatory arrest need not present evidence of specific comparator evidence as exception to rule that probable cause to arrest can defeat a § 1983 claim of retaliatory arrest; Just because there is probable cause to arrest does not mean a §1983 claim of retaliatory arrest is barred if there is evidence that no one else has been arrested for that offense. Sylvia Gonzalez ran for a seat on the city council of Castle Hills. On the campaign trial she heard multiple complaints about the city manager. After Gonzalez was elected, her first act was to gather signatures to seek the city manager's removal. The petition was introduced at the next city council meeting. At the end of the second day of the meeting, Gonzalez packed up her things and packed up the petition in her binder. The mayor asked for the petition and she indicated it was in the mayor's possession. He denied it and asked her to check her binder. She did, and found the petition but denied that she intentionally put it in her binder. Hilarity ensued.

An investigation into these events led to a warrant for Gonzalez's arrest for a violation of tampering with a governmental record. The District Attorney ultimately dismissed the charges. Gonzalez brought suit under § 1983 claiming she was arrested in retaliation for her role in organizing the petition against the city manager. To bolster her claim, Gonzalez reviewed the past decade's misdemeanor and felony data in Bexar County, and she found that the tampering statute had never been used to criminally charge someone for trying to "steal a nonbinding or expressive document." The defendants moved to dismiss the complaint arguing that the presence of probable cause defeated the retaliatory-arrest claims. The District Court denied the motion.

The Fifth Circuit reversed. The Fifth Circuit explained that *Nieves* v. Bartlett, 587 U.S. 391 (2019) recognized a narrow exception to the rule that a retaliatory-arrest claim requires pleading and proof of an absence of probable cause to arrest. According to the Fifth Circuit, this narrow exception only applied if a plaintiff offered "comparative evidence" of "otherwise similarly situated individuals who engaged in the same criminal conduct but were not arrested." The Fifth Circuit held that Gonzalez's claim failed because she did not provide such evidence.

The United States Supreme Court disagreed. ***Gonzalez v. Trevino*, 144 S.Ct. 1663 (June 20, 2024) (Per Curiam)**. Writing for the Court, Justice Curiam explained that the Fifth Circuit took an overly cramped view of *Nieves*. The only express evidence required to satisfy the *Nieves* exception is objective evidence that shows circumstances where an officer has probable cause to make an arrest, but typically exercise their discretion not to do so. Gonzalez provided that sort of evidence even if she did not satisfy the specific "comparator evidence" required by the Fifth Circuit. The fact that no one has ever been arrested for engaging in a certain kind of conduct makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past. Having identified Gonzalez's evidence as the type of evidence that could support an application of the *Nieves* exception, the Court remanded the case to assess whether that evidence was sufficient to satisfy it.

Justice Alito wrote a concurring opinion to provide a fuller account of the events leading up to Gonzalez's arrest. He then restated the majority's holding but with different hand gestures. He added, however, that on remand the Fifth Circuit must determine whether Gonzalez's survey of arrests is enough for her claim to advance. Had she provided comparator evidence it would be an easy question, but now the court of appeals must evaluate the sufficiency of the objective evidence presented by Gonzalez.

Justice Kavanaugh also wrote a concurring opinion. He opined that this really isn't a *Nieves* exception case at all. Rather it's a case about whether there was probable cause to believe Gonzalez had the requisite *mens rea* to commit the offense instead of conduct-based comparisons.

Justice Jackson also filed a concurring opinion joined by Justice Sotomayor. Justice Jackson noted that Gonzalez introduced other types of evidence in addition to her arrest-survey evidence. She pointed to details about anomalous procedures used for her arrest and statements in the arrest warrant affidavit suggesting a retaliatory motive. This also constituted objective evidence that could overcome the requirement that Gonzelez plead and prove that there was no probable cause for her arrest.

Justice Thomas filed a dissenting opinion. In his view, the existence of probable cause defeated Gonzalez's claim. He criticized the Court for continuing to recognize the *Nieves* exception. Further, he argued that Justice Curiam for expanding the scope of that narrow exception.

[**Commentary:** This case was handed down on the same day as ***Chiaverini v. City of Napoleon, Ohio*, 602 U.S. --- (2024) (6:0:3)** discussed above. They are both of a piece in that they both reject a purely categorial rule that probable cause to arrest defeats a § 1983 claim predicated upon a wrongful arrest. Both this case and *Chiaverini* show the Court's willingness to allow § 1983 suits against the government to proceed. And although this is a "Per Curiam" opinion, there were several side opinions making the numerical vote break down challenging. Again.]

XII. The President of the United States has absolute immunity for conduct within his constitutional authority and presumptive immunity for official acts within the outer perimeter of his official responsibility. The Government charged Donald J. Trump with conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction of and attempt to obstruct an official proceeding and conspiracy against rights based on conduct by which he allegedly attempted to overturn the results of the 2020 election. Trump moved to dismiss the indictment based on presidential immunity claims. The district court denied the motion to dismiss holding that former Presidents do not possess absolute federal criminal immunity for acts committed while in office.

The Court of Appeals for the District of Columbia affirmed the trial court concluding that Trump had no

structural immunity from the charges in the indictment. The court concluded that if Trump's actions violated criminal laws that would mean those actions were not within the scope of his lawful discretion as President. The court of appeals, like the trial court, did not consider whether or not actions described in the indictment involved official acts.

The Supreme Court vacated the judgment of the D.C. Circuit. ***Trump v. United States*, 144 S.Ct. 2312 (2024) (∞)**. In an opinion written by Chief Justice Roberts, the Court held that with respect to a President's exercise of his constitutional powers, the President has absolute immunity from criminal prosecution and there is presumed immunity for other official acts. A former President may be subject to criminal prosecution for unofficial acts committed while in office. The Court explained that a President's authority to act comes from the Constitution or Congress. Courts may not examine or adjudicate a prosecution over a President's actions within his exclusive constitutional power such as the power to remove and supervise his appointed executive officers and the power to control recognition determinations of foreign countries. However, not all official acts fall within the "conclusive and preclusive" authority of the President and thus, where his authority is shared with Congress, absolute immunity does not follow. While absolute immunity from civil damages for official acts has been recognized, the Court has also rejected claims of absolute Presidential immunity when prosecutors have sought evidence from a President. Recognizing that a criminal prosecution goes far beyond seeking evidence and the countervailing interest of fair and effective law enforcement, the Court concluded that, based on the separation of powers, there is at least a presumptive immunity from criminal prosecution for official acts both to enable the President to carry out his constitutional duties and effective discharge of his powers. Thus, a President is immune from prosecution unless "the Government can show that applying a criminal prohibition to that act would pose 'no dangers of intrusion on the authority and functions of the Executive branch.'"

Given the unprecedented nature of the case, the Court provided guidance on how to differentiate between official and unofficial actions. The analysis begins with assessing the President's authority to take a certain action and the Court recognizes that immunity extends to the "outer perimeter" of the President's official responsibility covering actions "so long as they are not manifestly or palpably beyond his authority." Courts may not inquire into the President's motives nor deem an action unofficial merely because it allegedly violates a generally applicable law.

Turning to the Trump indictments, the Court concluded that former President Trump is absolutely immune from prosecution for alleged conduct involving discussions with Justice Department officials. Investigative and prosecutorial decision-making falls within the province of the Executive Branch and the Constitution vests President with the powers of the executive. As to Trump's alleged attempts to influence the Vice President regarding the election certification, the Court held that discussions between the President and Vice President as to their responsibilities constitutes official conduct and thus Trump is presumptively immune for such conduct as allegedly attempting to pressure the Vice President into taking certain actions. The Government thus bears the burden, on remand, of rebutting that presumption. Likewise, the Court remanded additional allegations of communications with both state and private actors to determine whether Trump's conduct qualifies as official or unofficial acts. Additionally, the Court remanded the allegations of Trump's conduct in connection with January 6, 2021, itself for the same determination. The Court directed the district court to ensure that sufficient allegations support the indictment's charges without considering conduct for which they are immune, otherwise immunity's intended effect would be defeated. The Court rejected Trump's argument that impeachment and Senate conviction must precede a President's criminal prosecution. Likewise, it rejected the Government's arguments that there is no need for such a pretrial review of an indictment against a former President.

Justice Thomas filed a concurring opinion. Justice Thomas wrote separately to discuss another way in which he sees the prosecution at issue may violate the Constitution. The appointment of Special Counsel in this case, Justice Thomas writes, may not be an office established by law and thus, the prosecution may not be conducted by someone not duly authorized to levy a

criminal prosecution. Justice Thomas would remand for the lower courts to consider this issue as well.

Justice Barrett concurred in part. Justice Barrett agreed that the Constitution prohibits criminal prosecutions based on the exercise of the President's core Article II and powers and closely related conduct, but she would frame the issue somewhat differently. Justice Barrett would conclude that there is no immunity from prosecution in cases where the President's official conduct is subject to concurrent Congressional authority that may regulate a President's official conduct. Justice Barrett would apply a two-step analysis that is largely consistent with the majority: first to determine whether the statute at issue reaches the alleged official conduct and second, whether its application to the particular facts is constitutional meaning applying it poses no danger of intrusion on the authority and functions of the executive branch.

Justice Sotomayor filed a dissenting opinion, which Justices Kagan and Jackson joined. The dissent would hold that the Constitution does not shield a former President from answering for criminal and treasonous acts. The dissent argued that the majority's conclusion that all official acts are entitled to at least presumptive, if not absolute, immunity is not grounded in constitutional text, history, or precedent. The dissent noted the framers provided a narrow immunity for legislatures in the constitute in Article I, Section 6. Yet, the Constitution's Impeachment Clause notes that an official impeached and convicted by the Senate is "nevertheless" liable and subject to indictment. Art. 1, Sec. 3. Turning to the standard proposed by the majority, the dissent opined that few criminal prosecutions for official acts would pass the no danger of intrusion test and some intrusions would surely be justified by congressional authority and the constitutional duty of the judicial branch. Turning toward the Trump indictment, the dissent explained that Trump was not indicated for any action within his "unassailable core of Executive power." According to the dissent, this "made-up core immunity" doctrine sweeps too broadly, was not sought by the parties, and has no application to this case.

Justice Jackson filed a dissenting opinion as well, writing separately to explain her view on the majority's opinion and what the "paradigm shift" means, in her view, for the country. The dissent argued that the majority has departed from the traditional system of criminal liability and the protections afforded those accused to develop its own Presidential accountability model for which it offers only basic contours that leaves almost any criminal act open to the protection of immunity so long as they were committed pursuant to his constitutional powers. Furthermore, Justice Jackson argued that the majority's model vests a greater amount of responsibility to courts than prosecutors, who traditional exercise their discretion on whether to pursue alleged violations of the law, or jurors. Justice Jackson warned that, from a practical perspective, the majority's model removes a substantial check and deterrent effect on Presidents that may otherwise use their officer powers to commit crimes.

[**Commentary:** Keep this case in your back pocket for the next time you are prosecuting or defending the current or former President of the United States for or against crimes. On a slightly serious note, this opinion may come up again in the context of separation of powers arguments or cases involving public officials accused of crimes. But really, this is about prosecuting a former President of the United States for conduct engaged in as (or while) President of the United States.

Oh, and while this case was at least a little more coherent regarding the vote break down, I fell back on the infinity symbol just as I did in ***Vidal v. Elster*, 602 U.S. 286 (June 13, 2024)**, discussed above, because it seems like EVERYONE wanted to say something in this case. But for the sake of thoroughness, the break down in *Trump v. United States* went like this:

> Roberts, C.J., delivered the opinion of the Court, in which Thomas, Alito, Gorsuch and Kavanaugh, JJ., joined in full, and in which Barrett, J., joined except as to Part III-C. Thomas, J., filed a concurring opinion. Barrett, J., filed an opinion concurring in part. Sotomayor, J. filed a dissenting opinion, in which Kagan and Jackson, JJ., joined. Jackson, J., filed a dissenting opinion.

More coherent "conservative" voting block here, for sure, just as there's clearly a coherent "liberal" voting block. As an armchair court-watcher, I was struck with both the occasional fragmentation of the Republican-

appointed justices as well as Chief Justice Roberts' repeated authorship of significant majority opinions. Reading between the lines, it almost appears as if he asserted more authority to reduce the influence of Justice Thomas over the Court. But admittedly, this is a small sample size, so your mileage may vary. As always, I leave it to you to reach your own conclusions.]

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[The. End.]