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Articles

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The State Bar of Texas
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Email: TheAppellateAdvocate@gmail.com
Website: www.tex-app.org
Twitter: @AppAdvoc

Editor's Note

Dear Readers,

This issue continues our tradition of great articles from section members on topics of appellate interest. If you have an article or an article idea, we would love to hear from you. Please contact us with your proposals. And, if you are not a section member, we still would love your submissions and, more importantly, your membership in the section. Please visit our section website http://www.tex-app.org/ to see all of the potential membership benefits.

Jody Sanders
jody.sanders@kellyhart.com

Julia Peebles
juliampeebles@gmail.com

Chair's Report

J. Brett Busby, Justice, Supreme Court of Texas

As a lawyer who has spent his career specializing in appeals on both sides of the bench, I am honored to chair the Appellate Section this year. The work of the Section is off to a great start thanks to our Council members and committee chairs, who are among the best of the best in the appellate bar. If you are not yet a member of one of our committees and would like to meet and work with these fine lawyers, please contact me to discuss how you can get involved. Here are some highlights of recent projects and plans for the upcoming year:

Online CLE. The Section offers many valuable member benefits, including free CLE videos that you can watch for credit by logging into our website at www.tex-app.org. Thanks to Online CLE Committee Chairs Marla Broaddus and Steve Hayes, we add new videos regularly on topics of interest to appellate practitioners. In addition, the chairs of our Local Bar CLE Committee, Tom Leatherbury and Connie Pfeiffer, have developed partnerships with several local bar appellate sections that will allow us to include videos of some of their recent CLE programs.

Legislative update. As the 86th Texas Legislature begins its session, stay up to date on developments in Austin with Jerry Bullard's excellent legislative update emails. In his emails, Jerry identifies bills that would affect trial or appellate litigation or the judiciary, and he updates readers on their progress through the legislative process. If you would like to receive these emails, contact Jerry at jdb@all-lawfirm.com.

Coffees with the Courts. Our Judicial Liaison Committee, chaired by Chief Justice Sandee Marion and former Justice Jason Boatright, is planning coffees that will give our members an opportunity to meet the new justices on many of our courts of appeals. More information on these coffees is coming soon.

Amicus Committee. Do you have an appeal that raises an issue of importance to Section members? If so, remember that the Appellate Section operates an active Amicus Committee. The

committee carefully screens requests for amicus participation. If the Section authorizes the committee to author a brief, the committee finds a lawyer willing to write a brief on behalf of the Section on a pro bono basis. The completed brief is then reviewed by the State Bar of Texas prior to filing. The purpose of the Amicus Committee is not so much to advocate for a particular outcome in a particular case, but to express the Section's position that a key issue in a case warrants resolution by the court, either because of inconsistency in treatment of the issue by other appellate courts or because the issue is a novel one that the Section believes should be decided—one way or the other—for the benefit of its members, the courts, and those with cases before the courts. To request an amicus brief or volunteer to author a brief, please contact Amicus Committee Chairs Audrey Vicknair (avicknair@vicknairlaw.com) and Brandy Voss (brandy@brandyvosslaw.com).

Forms Committee. The Section has a new Forms Committee, which is creating a list of frequently filed appellate motions and will make forms for those motions available to our members on the Section website. If you have a form motion to suggest, please send your idea and a sample motion to Forms Committee Chairs Lucy Forbes (lucy@forbesfirm.com) and Karen Precella (karen.precella@haynesboone.com).

Get involved. Our success as a Section is due to the hard work of many volunteers participating in a wide range of projects. Serving on committees, as a council member, and as an officer has given me the opportunity to work with and learn from talented appellate specialists across Texas on issues of importance to the Section's membership, the judiciary, and the parties in our appellate courts. We have a wide variety of opportunities for you to participate in the work of the Section. I invite you to review the list of committees on our website (www.tex-app.org) and contact me if you are interested in getting involved. We will welcome you gladly. I look forward to talking with you about becoming active in the Section and hearing your ideas on how the Section can best serve our members.

J. Brett Busby
Chair, State Bar of Texas Appellate Section
brett.busby@txcourts.gov

Disclaimer

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

Nominations Welcomed for the Texas Appellate Hall of Fame

The Appellate Section of the State Bar of Texas is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

Hall of Fame inductees will be honored at a luncheon presentation and ceremony held by the Appellate Section during the State Bar's Advanced Civil Appellate Practice course on Thursday, September 5, 2019. Nominations should be submitted in writing to halloffametx@outlook.com no later than Monday, July 15, 2019.

Please note that an individual's nomination in a prior year will not necessarily carry over to this year. As a result, if you nominated someone previously and would like to ensure his/her consideration for induction this year, you should resubmit the nomination and nomination materials.

Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the State). The more comprehensive the nomination materials, the better. All material included with any nomination will be forwarded to the voting trustees for their consideration in deciding whom to induct as part of this year's Hall of Fame class.

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of the State of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicia of excellence in the practice of appellate law in the State of Texas.

Crafting the Final Judgment

Chris Dove

An attorney who sits down to draft the judgment in a case faces a task that seems simultaneously simple and tricky. On the one hand, the task should be simple because the issues in the case should have been honed and clarified by reducing them to a jury charge, findings and conclusions, or summary judgment motions. Drafting the judgment should be as simple as explaining the ultimate impact of the jury's verdict. On the other hand, attorneys have good reason to suspect that the process is more complicated than that, and fear that procedural traps may prevent the judgment from having its intended effect, or the appeal from presenting the issues for review.

A good starting point is Rule 301, which states:

> The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity.

In other words, the prevailing party should be given everything it sought in its pleadings and proved at trial, but not more. But in most cases, there are multiple claims against multiple defendants, and the potential for cross-claims and counterclaims as well. Sorting out these various possibilities is the greatest challenge when drafting a final judgment.

This paper will focus primarily on the two most difficult challenges that arise when trying to reduce a jury's verdict in a complex case to final judgment: (1) ensuring the final resolution of all claims against all parties; and (2) electing remedies where necessary, so that the prevailing party receives "all the relief to which he may be entitled" but does not receive a double recovery. The Texas Supreme Court clarified both of these principles in important opinions issued in the last few months—*In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) and *Sky View at Las Palmas, LLC v. Mendez*, No. 17-0140, 61 Tex. Sup. Ct. J. 1268, 2018 WL 2449349, at *4-6 (Tex. June 1, 2018).

In discussing these two principles, this paper will also argue that it is important to draft the judgment with two very different audiences in mind—(1) the appellate courts; and (2) the clerks and sheriffs who will aid in executing on the judgment. Attorneys may be driven to add complexity to preserve arguments or avoid waiver on appeal, but complexity will only make it more difficult for a clerk or sheriff to collect the judgment.

I. Ensure The Judgment Finally Resolves All Claims Against All Parties

The drafter's primary consideration is to ensure that the judgment is final—that is, that the judgment has thoughtfully disposed of all claims that the parties have brought against each other in the case.[1] A final judgment allows the drafter to obtain a judgment that can be enforced (unless superseded during appeal), forces the judgment debtor to promptly move forward with any appeal, and ensures that all of the issues in the case have been considered and adjudicated. Without a clear resolution of all claims against all parties, a party may think the lawsuit has concluded, only to be surprised to discover many months later that a claim remains unresolved—which means the suit is still pending, the district court continues to hold plenary jurisdiction, and the deadline for filing an appeal has not yet begun to run.

There are two ways to make sure that a judgment is final, and a savvy attorney will use both of them.

A. Actually Dispose Of All Claims Against All Parties

A judgment is final if it actually disposes of all claims against all parties—that is, if it "disposes of all pending parties and claims in the record, except as necessary to carry out the decree."[2] "Because the law does not require that a final judgment be in any particular form, whether a judicial decree

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[1] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).

[2] *Id.* at 195; *see also id.* at 200.

is a final judgment must be determined from its language and the record in the case."[3] A particular order does not have to expressly address each and every claim to serve as the "final judgment" in the case—"if a court has dismissed all of the claims in the case but one, an order determining the last claim is final."[4]

We can draw two lessons from this very old principle.

First, make sure that all of the claims and parties are accounted for. When drafting what you believe to be a "final judgment" in a case, it makes sense to take the time to carefully review the live pleadings, summary judgment rulings, dismissals, nonsuits, jury verdict, and any concessions at trial, and make a list of the claims and parties that had ever been at issue in the case. Then, go down the list to make sure that each of those claims against each of those parties was actually resolved through some order of the court—or are resolved in the final judgment itself. This methodical approach will not only ensure that claims have not fallen through the cracks, but will also satisfy Rule 301's requirement that "the judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any…."[5] Yes, it is possible to use certain words to ensure finality, regardless of whether the judgment thoughtfully disposes of all claims and all parties. (See below.) But finality should be the result of thoughtful review, not a happy accident.

If there was a trial on the merits, hopefully this work will have already been done. When drafting the jury charge or findings and conclusions, it is just as sensible to ensure that all claims and parties have been expressly resolved. But it is good practice to carefully review them again when drafting the judgment. Even after a jury trial, this author has seen significant debate erupt over how a final judgment should address related parties that fell by the wayside (perhaps sued to ensure that the "correct" party was before the court), how to address

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[3] *Id*. at 195; *see also id.* at 200.

[4] *Id*. at 200.

[5] Tex. R. Civ. P. 301.

requests for equitable relief that would not be in the jury charge because it can only be awarded by the court, and how to address requests for declaratory relief that may (or may not) overlap with the causes of action in the case. Moreover, there can be a significant temptation to draft the judgment expansively to include even those theories that were abandoned at trial, or considered less important.

Second, make sure that an interlocutory order is actually interlocutory. The final judgment rule has two sides—if an order actually disposes of the last claim in the case, it is a final judgment even if it does not purport to be one.[6] This most often occurs when a district court severs or dismisses the remaining claims, thereby making the severance or dismissal order a final judgment of the claims that previously had been adjudicated.[7] The dismissal order can be a final judgment even if it only narrowly addresses the final claim to be adjudicated, and does not have to acknowledge in so many words that it is a final judgment.[8]

Two problems can arise from orders that become final judgments by disposing of the last claim or party in the case—(1) the parties might not expect that the order is final, because it was not clearly labeled as such; and (2) the parties might intend the order to be final, but fail to recognize that claims or parties remain in the case. The first problem can arise from simple oversight, and can be avoided only by a methodical consideration of what claims and parties remain in the case. The surprise value can be amplified if an otherwise clearly interlocutory order inexplicably includes finality language, as in *In re Elizondo*, discussed below.

The second problem most often occurs when the severance or dismissal order does not actually resolve all of the claims against all parties in the case. Courts do not presume that dismissal orders are final judgments, especially where there

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6 *Lehmann*, 39 S.W.3d at 200.

7 *See H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963).

8 *See Lehmann*, 39 S.W.3d at 200.

has been no trial on the merits.[9] Additionally, "[a] judgment dismissing all of a plaintiff's claims against a defendant, such as an order of nonsuit, does not necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order."[10]

Sometimes parties miss the mark when trying to make an interlocutory order final. A recent example is *In re Brothers Oil & Equipment, Inc.*, in which a plaintiff won summary judgment against three defendants, and then nonsuited two other defendants for the stated purpose of making the summary judgment order "final."[11] But the nonsuit did *not* make the order final, because the plaintiff still had other claims against the three defendants that had not been addressed in the summary judgment motion.[12] The plaintiff had "won" against these defendants, perhaps, but had not adjudicated all claims against them. (It is worth noting that the nonsuit order did not contain the finality language discussed below.)

Accordingly, when drafting a severance motion or notice of nonsuit, give careful consideration to how you draft the proposed order—because it could end up being a final judgment.

B. Make The Judgment Final By Using Finality Language

Fortunately for the judgment drafter, "magic" words can achieve finality with 100% certainty.[13] The Texas Supreme Court seemingly adopted a bright-line rule of finality in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001), and then emphatically reiterated the inflexibility of this rule in *In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) (per curiam). *Elizondo* confirms that no matter what else an order might say, it is final

[9] *Id*. at 199.

[10] *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009).

[11] No. 03-17-00349-CV, 2017 WL 3902617, at *3. (Tex. App.—Austin Aug. 22, 2017, no pet.).

[12] *Id*. at *3.

[13] *Cf. Lehmann*, 39 S.W.3d at 209-13 (Baker, J., concurring) (complaining that the *Lehmann* majority merely replaced one set of "magic language" for another).

for purposes of appeal if it contains the following words:

> This judgment is final, disposes of all the claims and all the parties and is appealable.[14]

Elizondo held that these words were so "clear and unequivocal" that the court's review must end there, without reviewing the rest of the order for any countervailing evidence that the trial court intended it to be interlocutory.[15] The Court held that it "makes sense" that a court must take a finality phrase "at face value," because "[i]f it were otherwise, finality phrases would serve no purpose."[16] Though this rule might lead to unintended consequences in specific cases, the Court acknowledged, its very inflexibility has the virtue of warning litigants that they must take prompt action to address the errors in what is indisputably a final judgment.[17] "It is a rigid rule, but that is why it is useful. … Blunting *Lehmann*'s blade would neither cushion finality's cuts nor reduce their number."[18]

1. *Elizondo* Was The Perfect Test Case

Elizondo provided an excellent test case for the Court to declare whether the "magic words" always and forevermore convert an order into a final judgment. Just about the *only* thing about the *Elizondo* order that suggested finality was the "magic words" from *Lehmann*. The order was titled "Order on Defendants' Summary Motion to Remove Invalid Lien," which strongly indicates that the order disposed of only one issue in the case.[19] The motion sought only limited relief, and the order granting the motion did not say anything about the plaintiffs' other claims.[20] Simply put, the *Lehmann* finality phrase had no business being included in this limited order.

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[14] *Elizondo*, 544 S.W.3d at 825, 829.

[15] *Id*. at 827-28.

[16] *Id*. at 828.

[17] *Id*. at 829.

[18] *Id*.

[19] *Id*. at 825.

[20] *Id*.

And when the plaintiff brought the finality language to the district court's attention (after that court's plenary power had expired), the court issued an amended order that omitted the finality phrase.[21]

Nevertheless, the *Elizondo* Court insisted on an absolutely rigid, bright-line rule of finality. Though it may be "necessary to review the record" to ascertain whether an order is a final judgment when finality language is absent, the Court explained, there is no need to "review the record" when the *Lehmann* finality language is included, because those very words state a clear and unequivocal intent to make the order a final judgment.[22] The Court also rejected the argument that the district court had power under Rule 329b to correct this "clerical error" in the judgment.[23] The inclusion of finality language was an error in *rendering* the judgment, not in *entering* the judgment—and as such was a judicial error that the district court must correct during the period of plenary power or not at all.[24]

2. *Elizondo* Was Not A Foregone Conclusion

Elizondo gives the impression that this absolutely rigid rule of finality was the inevitable result of the Court's prior decisions, but it was hardly a foregone conclusion. The Court's decision in *Lehmann* pointed the way forward to a bright-line rule, but did not necessarily foreclose the possibility of exceptions along the way.

Lehmann's primary holding was that without more, the words of the famous "Mother Hubbard" clause—"all relief not expressly granted is denied"—were too ambiguous to make a judgment final.[25] When aided by the longstanding presumption that a judgment is final and appealable if rendered after a

[21] *Id.*

[22] *Id.* at 828.

[23] *Id.* at 829.

[24] *Id.* (citing *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986) and *Dikeman v. Snell*, 490 S.W.2d 183, 185-86 (Tex. 1973)).

[25] *Lehmann*, 39 S.W.3d at 198-99.

conventional trial on the merits, the "Mother Hubbard" clause "would make clear that a post-trial judgment on the merits, presumed to have disposed of all claims, did indeed do so."[26] "But in an order on an interlocutory motion, such as a motion for partial summary judgment, the language is ambiguous… It may mean only that the relief requested *in the motion*—not all the relief requested by anyone in the case—and not granted by the order is denied."[27] Likewise, the words "final" or "appealable" would not themselves be sufficient evidence of the district court's intent to enter a final judgment.[28] The Court contrasted the inherent ambiguity of the "Mother Hubbard" clause with "[a] statement like, 'This judgment finally disposes of all parties and all claims and is appealable,'" which "would leave no doubt about the court's intention."[29] Here, the Court identified specific words that "would leave no doubt"—which Justice Baker's concurrence criticized as merely exchanging one set of "magic language" for another.[30] *Elizondo* represents the final result of the Court's thinking.

Nevertheless, much of the rhetoric in *Lehmann* was about the district court's "intent" as expressed in the judgment, and *Lehmann* contemplates that a court must review the judgment and the record to ascertain whether the judgment is truly final.[31] Finality language can provide the necessary assurance of the district court's intent, the *Lehmann* Court reasoned, but otherwise it is necessary to determine whether the judgment actually disposes of all claims and all parties in the case.[32] The Court warned that it does not matter whether it would have been *proper* for the district court to enter a final judgment on the basis of the record; "[g]ranting more relief than the movant is

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[26] *Id.* at 198-99, 203-04.

[27] *Id.* at 204 (emphasis in original).

[28] *Id.* at 205.

[29] *Id.* at 206.

[30] *Id.* at 213 (Baker, J., concurring).

[31] *Id.* at 204-06.

[32] *Id.*

entitled to makes the order reversible, but not interlocutory."[33] A partial summary judgment order containing finality language may be "erroneous" for exceeding the issues presented to the court, but it is nevertheless "final."[34]

Lehmann may have left open the possibility that an order might be ambiguous about the district court's intent, in a circumstance where the *Lehmann* finality language was plainly inconsistent with the rest of the order's text. But the Texas Supreme Court largely foreclosed that possibility in *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010) (per curiam). In *Daredia*, American Express took a default judgment against one of two parties, but included the *Lehmann* finality language in the proposed order.[35] The Court held that this finality language also disposed of American Express's claims against the other party who had not been mentioned in the judgment.[36] The Court rejected American Express's entreaty to look to the record, which plainly demonstrated that it would have been improper to enter a final judgment. "Even if dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective."[37]

Elizondo extends the Court's rigid, bright-line rule in two ways that were not made crystal clear in *Lehmann* and *Daredia*.

First, the *Elizondo* Court declares that "*Lehmann*'s test holds that an order is final if it 'states' that it is—not if the court intends it to be."[38] This proposition is not as self-evident as the Court seems to believe it is. It would be more accurate to say that *Lehmann*'s test holds that an order is final if it "states" that it is using sufficiently detailed language, *precisely because* such words unequivocally manifest the district court's intent to render a final judgment. If finality language brings a court's finality review to an end, it is not because intent is irrelevant

[33] *Id*. at 204.

[34] *Id*. at 200.

[35] *Daredia*, 317 S.W.3d at 248.

[36] *Id*. at 249.

[37] *Id*.

[38] *Elizondo*, 544 S.W.3d at 828.

under *Lehmann*. It is because the Court holds in *Elizondo* that such language is so utterly unequivocal that the intent of the drafter cannot be called into doubt by any other aspect of the judgment or the record—for perfectly valid and useful policy reasons, one might add. But any time "intent" is the true measure, a court will be tempted to follow the usual rule to construe the language of a judgment or order as a whole.[39]

Second, *Elizondo* applies *Lehmann* to an order that does not even purport to be a "judgment."[40] In light of the *Elizondo* Court's insistence that the *Lehmann* finality language renders the rest of the order and the record irrelevant, this may be a distinction without a difference. But the rhetoric of *Lehmann* and *Daredia* focused on "judgments," and it was not unreasonable to wonder whether their logic would apply even to a document that makes no sense as a final judgment—though the *Elizondo* Court correctly notes that *Lehmann* describes its rule as applying to "an order or judgment."[41]

Elizondo thus states an absolutely rigid rule of finality. Drafters can include this finality language in a judgment to be absolutely certain that it is final. But this can also backfire, if the *Lehmann* finality language is included in an order meant to be interlocutory. That may seem implausible in light of *Elizondo*, but it has been this author's experience that the *Lehmann* finality language gets automatically and unthinkingly included in many draft judgments. Perhaps a defendant has a good argument for partial summary judgment, but only a colorable argument for disposing of the rest of the case—and yet files a proposed order that grants summary judgment on all of the plaintiff's claims. In those circumstances, it is entirely possible that the district court could sign a proposed order that is actually a final judgment even though the court only intended it to resolve some of the issues presented in the judgment. (This author has had to unwind precisely this situation in the past.)

[39] *See, e.g.*, *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003); Amicus Curiae Brief of the State Bar of Texas Appellate Section in *In re Elizondo* at 5 (making this point).

[40] *Elizondo*, 544 S.W.3d at 828-29.

[41] *Id*. at 829 (citing *Lehmann*, 39 S.W.3d at 205).

3. Judgments Must Be "Definite and Certain"—But It Is Not Clear How To Reconcile This With *Elizondo*

For all of its worthwhile effort to eliminate confusion and lay down a bright line rule, *Elizondo* will not eradicate all conflict in the future. The proof is a fascinating 2016 case from the Fourteenth Court of Appeals, *In re Blankenhagen*,[42] in which a judgment included finality language but obviously omitted critical details necessary to make the judgment enforceable. This case illustrates the problems that may continue to exist in the future, while also demonstrating the need to draft judgments with the clerks and sheriffs in mind.

The Texas Supreme Court has long held that a final judgment is one that not only "fully disposes of all issues and all parties in the lawsuit," but also "must be definite and certain."[43] "A judgment must be sufficiently definite and certain to define and protect the rights of all litigants, or it must provide a definite means of ascertaining such rights, to the end that ministerial officers can carry the judgment to execution without ascertainment of facts not therein stated."[44] "Thus, a judgment cannot condition recovery on uncertain events, or base its validity on what the parties might or might not do post-judgment."[45]

In applying this principle, Texas courts seem to bend over backwards to find that judgments are sufficiently definite, or that any remaining actions are purely ministerial in nature.[46]

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[42] 513 S.W.3d 97 (Tex. App.—Houston [14th Dist.] 2016, pet. dism'd, mand. denied).

[43] *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985); *International Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 350 (Tex. 1971).

[44] *Hinde*, 701 S.W.2d at 639 (quoting *Steed v. State*, 183 S.W.2d 458, 460 (Tex. 1944)).

[45] *Hinde*, 701 S.W.2d at 639.

[46] *See*, *e.g.*, *Hinde*, 701 S.W.2d at 639 (judgment was final because it definitely stated the total amount owed, even though it allowed the judgment creditor to obtain a credit by reinstating an insurance policy, because the court clerk would be able to issue a writ of execution regardless); *Spray*, 468 S.W.2d at 350 (uncertainty about outcome of appeal does not prevent the finality of a judgment containing a conditional award of attorneys' fees); *see also, e.g.*, *Grishman v. Sims*, No. 05-17-01057-CV, 2018 WL

But even in light of this practical deference, some courts have held that a judgment was too contingent or too uncertain to be final and appealable.[47]

The *Blankenhagen* court was confronted with a default judgment that contained the "magic" language of finality from *Lehmann*.[48] Nevertheless, the default judgment did not state how much the judgment debtor owed.[49] The default judgment ordered the payment of "the amounts as set out in the Initial Decision" pursuant to a dispute-resolution procedure, but the Initial Decision said only that "the cost estimates for these repairs range from $366,636.31 to $513,316.31."[50] The Fourteenth Court of Appeals held that "the Default Judgment is not a final judgment because the amount of relators' damages has not yet been determined and cannot be ascertained…."[51]

The *Blankenhagen* court recognized that the default judgment had the *Lehmann* finality language in it, but held that "we do not interpret *Lehmann* as overruling or creating an exception to the supreme court's prior decisions that a judgment must be definite and certain to be final."[52] The court believed it was compelled

3616883, at *3-4 (Tex. App.—Dallas 2018, no pet.) (judgment ordering the winding up of a business was final, even though it did not specify the amounts of money that would be distributed in the winding-up process).

[47] *See, e.g.*, *Sherer v. Sherer*, 393 S.W.3d 480, 487-90 (Tex. App.—Texarkana 2013, pet. denied) (judgment for an accounting was not final and appealable because it was uncertain whether the accounting would be objectionable, or what amount of damages would be found); *Riner v. Neumann*, No. 05-07-01053-CV, 2008 WL 4938438 (Tex. App.—Dallas 2008, no pet.) (mem. op.) (judgment was not final because it awarded damages calculated "per day for each day after July 12, 2007 that WADE RINER retains possession of the real property described below…" and the clerk could not issue a writ of execution because the clerk would not know how long Riner would retain possession); *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (judgment was interlocutory because there was no way for the clerk to know how to calculate prejudgment interest)

[48] *In re Blankenhagen*, 513 S.W.3d at 101.

[49] *Id*. at 100-01.

[50] *Id*. at 101.

[51] *Id*.

[52] *Id*. at 102.

to follow prior Texas Supreme Court authority directly on point, because *Lehmann* did not directly speak to the situation where the judgment was not definite and certain.[53]

Of course, *Blankenhagen* was decided before *Elizondo* provided a clear, bright-line holding that *every* order containing the magic *Lehmann* language is a final judgment. *Elizondo* fully embraces the benefits and collateral consequences of its bright-line rule. Accordingly, it seems likely that the Court would want to extend its bright-line rule by holding that a judgment that contains finality language is final, even if it is indefinite or uncertain.

But that leaves the obvious question—what should an appellate court *do* with an indefinite or uncertain judgment? An indefinite or uncertain judgment *simply is not final*, even if it says it is. It is not "final" because more work must be done before the clerk can issue a writ of execution; the clerk cannot fill in the necessary blanks with the words "finally disposes of all parties and all claims and is appealable." Confronted with this logical impossibility, and the weight of its prior decisions, it is conceivable that the Court may retreat from its bright-line rule in those very few cases where the judgment is indefinite or uncertain.

It seems more likely, however, that the Court will ultimately find a way to explain that an "invalid" judgment can nevertheless be "final" for purposes of appeal. Perhaps the Court will analogize to the idea that an overbroad summary judgment order is "erroneous" but nevertheless "final," as the Court explained in *Lehmann*.[54] This may create additional challenges where the judgment creditor does not file its own appeal or otherwise seek to modify the judgment. For example, imagine a case like *Blankenhagen* where no party appeals from a default judgment, and the clerk refuses to issue a writ of execution—but after the district court's plenary power has expired. Is the judgment creditor out of luck because the judgment is final yet awards no sum certain? Does res judicata bar future litigation on the claim?

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[53] *Id.*

[54] *Lehmann*, 39 S.W.3d at 200.

At any rate, the requirement that a judgment be "definite and certain" arises from the fact that a judgment is not a hypothetical document that opens the door to the appellate courts. A judgment must be interpreted and understood by the clerks that issue writs of execution, and by the sheriffs that actually seize property under its authority. The lesson is clear—avoid these potential finality problems by reading your judgment like a clerk or a sheriff will.

II. CAREFULLY ELECT YOUR REMEDIES, AND PRESERVE THE RIGHT TO ELECT ALTERNATIVES

Another major consideration when drafting a final judgment is electing between alternative theories of liability, and preserving the right to a lesser remedy if the preferred remedy is disturbed on appeal.

A. The Judgment Cannot Award More Than One Recovery For A Single Injury

The Texas Supreme Court has held that a "party is generally entitled to sue and to seek damages on alternative theories."[55] However, "a party is not entitled to a double recovery"[56]—a principle that it has sometimes called "the one satisfaction rule." The Court has explained that "[a] double recovery exists when a plaintiff obtains more than one recovery for the same injury."[57] That is, the test is not necessarily whether the defendant or defendants committed the same *acts* under each theory of recovery, but whether the theories of recovery lead to the same *injury*.[58] "There can be but one recovery for one

[55] *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998) (citing *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987)).

[56] *Id.*

[57] *Id.* (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991)).

[58] *Id.*

injury, and the fact that more than one defendant may have caused the injury or that there may be more than one theory of liability, does not modify this rule."[59] Obviously, this can lead to disputes about whether the jury found multiple injuries, or a single injury—and this concern should be first and foremost addressed when drafting the jury charge to ensure sufficient findings to support either position.

The "one satisfaction rule" also requires that judgments incorporate credits for settlements where appropriate. A nonsettling defendant can seek a credit for damages paid by a settling defendant by proving that the settlement agreement exists, which then shifts the burden to the plaintiff to prove that the settlement proceeds related to a different injury.[60] Determining settlement credits presents continuing challenges for courts and litigants. In June 2018, for example, the Texas Supreme Court held in *Sky View at Las Palmas, LLC v. Mendez* that the court of appeals erred by looking to the causes of action asserted against the various defendants to deny a settlement credit, when the record showed that all of the allegations arose from the same injury.[61]

Sky View also resolved certain lingering questions about the scope of the "one satisfaction" rule. The one-satisfaction rule applies to contract and tort alike, and does not require a finding that the defendants were joint tortfeasors.[62] (In 2014, the federal Fifth Circuit predicted the opposite conclusion when making its "*Erie* guess" in *GE Capital Commercial, Inc. v. Worthington National Bank*.[63]) If there is a single injury, there can be only one recovery—regardless of the number of legal theories or defendants leading to that injury.

The one-satisfaction rule motivates the prevailing party to characterize the jury's answers to damage questions as arising

[59] *Stewart Title*, 822 S.W.2d at 8.

[60] *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998).

[61] No. 17-0140, 61 Tex. Sup. Ct. J. 1268, 2018 WL 2449349, at *4-6 (Tex. June 1, 2018).

[62] *Id.* at *7-9.

[63] 754 F.3d 297, 306-07 (5th Cir. 2014).

from different "injuries," so that each of these damage awards can be included in the judgment.

B. To Avoid A Double Recovery, The Prevailing Party Must Elect Its Remedies

To avoid the double-recovery problem, the plaintiff must elect its remedies when drafting the judgment. "When a party tries a case on alternative theories of recovery and a jury returns favorable findings on two or more theories, the party has a right to a judgment on the theory entitling him to the greatest or most favorable relief."[64] The party must elect the remedy or combination of remedies that provides the greatest relief, without creating a double-recovery, and without mixing and matching remedies that are only available under particular causes of action.[65] For example, in *Tony Gullo Motors I, L.P. v. Chapa*, the Court explained that the plaintiff faced the difficult choice between recovering under contract (attorneys' fees but no mental anguish or exemplary damages), fraud (mental anguish and exemplary damages but no attorneys' fees), or Deceptive Trade Practices Act (mental anguish and attorneys' fees but limited exemplary damages).[66]

Where the prevailing party fails to make a proper election, the court must do it for him.[67] Rule 301 compels the court to draft a judgment that will "give the party all the relief to which he may be entitled."[68] Accordingly, "where the prevailing party fails to elect between alternative measures of damages, the court should utilize the findings affording the greater recovery and render judgment accordingly."[69]

Some courts of appeals have held that it is unnecessary

[64] *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988).

[65] *Waite Hill*, 959 S.W.2d at 184; *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303-04 (Tex. 2006).

[66] *Tony Gullo Motors*, 212 S.W.3d at 304.

[67] *Birchfield*, 747 S.W.2d at 367.

[68] TEX. R. CIV. P. 301; *see Birchfield*, 747 S.W.2d at 367.

[69] *Birchfield*, 747 S.W.2d at 367.

for the plaintiff to formally elect between alternative liability theories if they lead to the same damage award.[70] This conclusion draws some jurisprudential support from the Supreme Court's vigorous insistence that litigants may receive only one satisfaction for a single *injury*, without regard to the various liability theories leading to that single injury.[71] Moreover, "the imposition of joint and several liability avoids the possibility of a double recovery" that might otherwise arise if the defendants were each required to pay the full amount of damages.[72]

C. Old Waiver Rules Create An Area Of Continuing Uncertainty

When the prevailing party elects its remedy, it does not have to formally waive recovery on the other theories of liability.[73] However, some courts have held that if a party *does* formally waive recovery on the other theories, it cannot come back later and use them to seek an alternative recovery.[74]

Thus far, the case law has not cast much light on how such a waiver might occur. Obviously, a party would formally waive the alternative theories if she expressly did so in a motion for entry of judgment.[75] But the case law more clearly explains how to *avoid* waiver, than how a waiver might occur. In two separate cases, the Texas Supreme Court noted that a party avoided any allegation of waiver by incorporating the jury's findings in the

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[70] *See Alief ISD v. Perry*, 440 S.W.3d 228, 245 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Hatfield v. Solomon*, 316 S.W.3d 50, 59 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

[71] *Stewart Title*, 822 S.W.2d at 7.

[72] *Alief ISD*, 440 S.W.3d at 245 (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390-92 (Tex. 2000) and *Direct Value, L.L.C. v. Stock Bldg. Supply, L.L.C.*, 388 S.W.3d 386, 394-95 (Tex. App.—Amarillo 2012, no pet.)).

[73] *Birchfield*, 747 S.W.2d at 367.

[74] *See, e.g.*, *Ellis v. Ferguson*, No. 05-90-01414-CV, 1991 WL 165187 (Tex. App.—Dallas Aug. 26, 1991, writ denied).

[75] *See Boyce Iron Works*, 747 S.W.2d at 787 ("The motion contained no waiver of the alternative negligence findings.").

court's judgment.[76] In *Boyce Iron Works*, the Court explained that "[b]y incorporating the jury's findings in the court's judgment, Boyce did everything it could to preserve the right of recovery under the alternative theory."[77]

Boyce Iron Works does not contend that it is necessary to incorporate the jury's findings in order to avoid waiver.[78] The Court was actually discussing the fact that the party moving for entry of judgment need not formally waive the alternative findings, and can raise the alternative grounds for the first time after the court of appeals has rendered its adverse judgment.[79] Moreover, the Fourteenth Court of Appeals has rejected the argument that a party waives its right to an alternative recovery by failing to incorporate the jury's findings into the judgment.[80] Courts have allowed parties to seek recovery on alternative theories in many cases, even without noting that the prevailing party had incorporated the jury's findings into the judgment. So it is not at all clear that a party waives the right to recover under alternative theories by failing to include the jury's findings in the judgment.

Nevertheless, the cautious drafter will include the *Boyce Iron Works* language in the judgment, to ensure that there can be no time wasted on the allegation that the alternative grounds were waived. That language would ideally state that "this judgment incorporates all jury findings, for all purposes," or words to that effect.[81] (The Fort Worth Court of Appeals has held that "it was not necessary for the court to use the words 'for all purposes,'" even though they were noted in *Boyce Iron Works*,[82]

[76] *Boyce Iron Works*, 747 S.W.2d at 787; *Oak Park Townhouses v. Brazosport Bank of Texas, N.A.*, 851 S.W.2d 189, 190 (Tex. 1993).

[77] *Boyce Iron Works*, 747 S.W.2d at 787.

[78] *Id*.

[79] *Id*.

[80] *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 650-51 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citing *Commonwealth Lloyd's Insurance Co. v. Downs*, 853 S.W.2d 104, 109 (Tex. App.—Fort Worth 1993, writ denied)).

[81] *Boyce Iron Works*, 747 D.W.2d at 786("In fact, the final judgment incorporated all jury findings, for all purposes.").

but there would be no reason to exclude those words either.)

D. Should The Judgment Include Alternative Elections?

It is one thing to avoid allegations of waiver by incorporating the jury's findings into the judgment for all purposes. But some attorneys draft the judgment to include an explanation of how the prevailing party would elect to recover under various hypothetical outcomes in the appellate courts. This author recommends against that practice for three reasons: it is unnecessary, it can be pointless, and it often makes the judgment hard to read.[83]

1. It Is Not Necessary To Include Alternative Theories In The Judgment Itself

First, it is unnecessary to use the judgment to explain how the prevailing party would want the judgment rewritten if the court of appeals reversed certain findings on appeal. A party is not required to raise its alternative theories of recovery in the judgment; indeed, the Texas Supreme Court has repeatedly held that a party can seek to elect its alternative theories for the very first time in a motion for rehearing in the appellate court.[84] That is because a party "who has obtained a favorable judgment" has "no reason to complain to the trial court."[85] Once the appellate court has issued its opinion and judgment, the prevailing party can make its new election by filing a motion for rehearing explaining how the new judgment should be

[82] *Waffle House, Inc. v. Williams*, No. 02-05-00373-CV, 2011 WL 3795224 (Tex. App.—Fort Worth 2011, pet. denied).

[83] *But see, e.g.*, Anne M. Johnson, *Translating a Jury Verdict Into A Judgment*, STATE BAR OF TEXAS 26TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE (2012) (an excellent discussion of the rules governing final judgments, asserting that "[a] plaintiff who elects a single theory of recovery should consider whether the judgment should reflect alternative recoveries.").

[84] *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 603 (Tex. 2008) (citing *Boyce Iron Works*, 747 S.W.2d at 787).

[85] *Id.*

drafted, or can make those elections in the trial court if further proceedings are necessary.[86]

Of course, it may make sense to avoid delay and expense by proactively addressing any potential election-of-remedies issues *before* the court of appeals issues its judgment. However, election of remedies can be addressed in the appellate briefs, without including those elections in the actual judgment. The Fourteenth Court of Appeals has repeatedly noted that parties may brief their election of alternative remedies in the original submission of briefs in the case.[87] It is not clear why such elections would need to be included in the judgment itself, as opposed to the appellate briefs, especially considering the Texas Supreme Court's steadfast insistence that alternative theories need not be elected until after the court of appeals has issued its opinion and judgment.

2. It Can Be Difficult To Predict All Possible Outcomes

Second, it can be difficult to predict all the possible alternatives that might result from the court of appeals' disposition of the case. For example, courts have noted the difficulty of electing alternative remedies when the parties did not anticipate a particular outcome,[88] or when the prevailing party is entitled to retrial of one of the potential theories of recovery,[89] or because the briefing and record do not seem to fully address the outcome of the appeal.[90]

[86] *Bruce v. Cauthen*, 515 S.W.3d 495, 517 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (accepting appellee's election of remedies offered in a motion for rehearing).

[87] *Flutobo, Inc. v. Holloway*, 419 S.W.3d 622, 628 & n.4 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Energy Maintenance Services Group I, LLC v. Sandt*, 401 S.W.3d 204, 218 n.9 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Hatfield*, 316 S.W.3d at 60 n.3.

[88] *Energy Maintenance*, 401 S.W.3d at 218 n.9.

[89] *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88, 113 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

[90] *Lake v. Cravens*, 488 S.W.3d 867, 912 (Tex. App.—Fort Worth 2016, no pet.) (remanding for election of remedies because the issues surrounding the election between alternative remedies "are not fully briefed by the

It may be straightforward to anticipate potential outcomes in more straightforward cases. But as the number of causes of action and defendants increases, it becomes more and more difficult to anticipate how the case might turn out in the appellate courts. Such complexity should not be included in a final judgment, especially when those difficult problems can be elected more clearly through a motion for rehearing after the court of appeals has eliminated those contingencies.

3. It Makes The Judgment Hard To Read

The third point flows from the second. Alternative findings in the judgment simply make the judgment difficult to read and apply, because each new alternative judgment must be carefully restated and conditioned. This violates the general rule that a judgment should be easy for the clerk and sheriff to read. The point is simple, and perhaps anathema to the appellate lawyer. But a judgment is not merely for the appellate courts—it is the operative document that you will use to try to get your client paid.

Conclusion

A common theme runs through this paper—all of these problems can be avoided by carefully and methodically thinking about the consequence of orders and judgments. Hopefully, this paper has identified ways in which a methodical approach can help you improve the final judgments that you draft.

parties or developed by the appellate record").

Permissive Interlocutory Appeal and Mandamus: Picking Your Procedural Path Prudently

Kennon L. Wooten & Robyn B. Hargrove

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PERMISSIVE INTERLOCUTORY APPEAL AND MANDAMUS: PICKING YOUR PROCEDURAL PATH PRUDENTLY

I. INTRODUCTION

In the last several years, Texas law has broadened the scope of interlocutory orders that may properly be appealed before final judgment. This is the result of changes in legislation and by the judiciary.

In 2011, the Texas Legislature eliminated the requirement that opposing parties agree to certification of an issue for permissive interlocutory appeal under Section 51.014(d) of the Texas Civil Practice and Remedies Code.[1] Parties seeking permissive interlocutory appeal in Texas state courts may now do so unilaterally, much like with federal permissive appeals under 28 U.S.C. § 1292(b). Subject to permission from the trial and appellate courts, a party may now pursue a permissive interlocutory appeal on any "controlling issue of law" about which there is a "substantial ground for difference of opinion." TEX. CIV. PRAC. & REM. CODE § 51.014(d).

In addition, the Texas Supreme Court has broadened the scope of proper mandamus review. In *In Re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding), the court articulated a fact-specific balancing test for when the lack of an adequate appellate remedy justifies mandamus. Under this test, mandamus is now proper when the benefits outweigh the costs, considering the facts of the particular case and the public policy concerns of imprudently granting mandamus relief.

As a result of these changes, the line between permissive interlocutory appeals and mandamus review has become blurred. Practitioners are now often faced with deciding which procedure will be the best vehicle for obtaining appellate review of an interlocutory court order that is not appealable as a matter of right. At times, this can be a difficult choice.[2]

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[1] Acts 2011, 82nd Leg., R.S., ch. 203, § 2.01, eff. Sept. 1, 2011, 2011 Tex. Sess. Law Serv. Ch. 203.

This article addresses and compares the procedural requirements and legal standards for permissive interlocutory appeals and mandamus petitions. In addition, this article provides practice pointers for assessing when one procedure is a better fit over the other, and for assessing when the most prudent course may be to pursue both procedural paths simultaneously.

II. PERMISSIVE INTERLOCUTORY APPEAL OVERVIEW

Successfully bringing a permissive interlocutory appeal under Section 51.014(d) of the Texas Civil Practice and Remedies Code requires navigating a complex set of procedural hurdles and persuading both the trial and appellate court that discretionary appeal is appropriate. Assuming these hurdles are met, permissive interlocutory appeals provide an opportunity for review of interlocutory orders involving important legal questions that are otherwise not appealable until final judgment.

A. Applicable Legal Standard

Successfully bringing a permissive interlocutory appeal requires persuading both the trial and appellate courts that (1) the issue involves a controlling question of law as to which there is a substantial ground for difference of opinion and (2) an immediate appeal from the order may materially advance the

[2] This article addresses only the permissive interlocutory appeal procedure under Section 51.014(d) of the Texas Civil Practice and Remedies Code and the mandamus procedure, both of which are discretionary. There are, of course, other statutory interlocutory appeals that are available as a matter of right, such as the appeals authorized by Section 51.014(a)–(c) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)–(c) (allowing interlocutory appeals as a matter of right for certain specified interlocutory orders, including the appointment of a receiver or trustee, class certification orders, temporary injunctions, denial of governmental/sovereign immunity, and the denial of a motion to dismiss under the Texas Citizens Participation Act). When one of these interlocutory appeal procedures is available, there is no need to consider filing a permissive interlocutory appeal or a petition for writ of mandamus.

ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d). Courts have defined a "controlling question of law" as follows:

> [A] controlling question of law is one that deeply affects the ongoing process of litigation. If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling. Generally, if the viability of a claim rests upon the court's determination of a question of law, the question is controlling. . . .

Gulf Coast Asphalt Co., L.L.C. v. Lloyd, 457 S.W.3d 539, 544–45 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also Ace Amer. Ins. Co. v. Guerra*, No. 13-16-00628-CV, 2017 WL 929485, at *1 (Tex. App.—Corpus Christi March 9, 2017, no pet.).

Texas cases have not thoroughly addressed all the circumstances in which a "substantial ground for difference of opinion" may be found. *See, e.g., Gulf Coast*, 457 S.W.3d at 544 ("There has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion . . . ."). Recent opinions from the Fourteenth Court of Appeals have held that a "substantial ground for difference in opinion" exists when "'the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely. . . .'" *Undavia v. Avant Med. Group, P.A.*, 468 S.W.3d 629, 632 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (quoting *Gulf Coast*, 457 S.W.3d at 544–45). It is not clear, however, whether these are the only circumstances in which the statutory standard may be satisfied.

Texas courts also have not yet analyzed in detail all the circumstances in which an interlocutory appeal will materially advance the ultimate termination of the litigation. This makes

sense because the question is necessarily going to be fact specific. One commentator suggests referring to case law interpreting the analogous federal statute for guidance. *See* Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L. J. 729, 747–49 (1998); *see also* Connie Pfeiffer, *Permissive Interlocutory Appeals in Texas*, 72 The Advocate 48, 49–50 (Fall 2015). The federal cases consider factors such as whether the legal ruling will have a major impact on the plaintiff's recovery or defendant's liability and whether it will significantly impact the length or complexity of the trial or encourage settlement before trial. McElhaney, 29 ST. MARY'S L. J. at 751 n.22.

Often, the question of whether a legal ruling involves a controlling question of law will overlap with the question of whether its resolution will materially advance the ultimate termination of the litigation. In one recent opinion, the Amarillo Court of Appeals declined to review a trial court's determination that a particular contract provision was ambiguous. *See Austin Commercial, L.P. v. Texas Tech Univ.*, No. 07–15–00296–CV, 2015 WL 4776521, at *2 (Tex. App.—Amarillo Aug. 11, 2015, no pet.) . The court explained that an ambiguity ruling would affect the presentation of evidence at trial, but was not "determinative of the ultimate dispute between the parties" because it left open the issue of the parties' intent. *Id.* Although the court did not expressly say this, implied in its holding is that appellate review on just the ambiguity question would not materially advance the outcome of the litigation. A trial would still be required on the meaning of the contract provision.

When a trial court's ruling addresses a single legal question that impacts only one facet of a claim, "it is no less disruptive than an adverse evidentiary ruling or the striking of an expert." *Gulf Coast*, 457 S.W.3d at 545. Therefore, unless the appellant can show that resolution of that discrete issue would "considerably shorten final resolution of the case," the appeal would not materially advance the outcome of the litigation. *Id.* However, an interlocutory order dismissing several causes of action as a matter of law has more of a meaningful impact and is reviewable. *See ADT Security Servs., Inc. v. Van Peterson Fine*

Jewelers, No. 05–15–00646–CV, 2015 WL 4554519, at *3 (Tex. App.—Dallas July 29, 2015, no pet.).

A good example of a case in which an interlocutory ruling would materially impact the litigation is when determination of a single legal issue will materially impact the remaining claims. *See, e.g.*, *Certain Underwriters at Lloyd's, London v. Cardtronics, Inc.*, 438 S.W.3d 770, 774 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (allowing appeal where "the remaining issues in the case after the partial summary judgment depend upon the ultimate resolution of this issue"); *Asplundh Tree Expert Co. v. Goertz*, No. 03-16-00760-CV, 2016 WL 7046853, at *1 (Tex. App.—Austin Dec. 1, 2016, no pet.) (granting petition for interlocutory appeal where determination of limitations tolling issue would impact the trial of multiple consolidated claims). *But see Autobuses Ejecutivos, LLC v. Cuevas*, No. 05-13-01379-CV, 2013 WL 6327207, at *1 (Tex. App.–Dallas Dec. 4, 2013, no pet.) (denying petition for permissive appeal and reasoning: "Although petitioners claim that without a decision from this Court on the choice of law issue they will have to do additional discovery, we conclude that this issue will not materially advance the ultimate termination of the litigation.").

B. Procedure for Obtaining a Permissive Interlocutory Appeal

The procedural requirements for seeking permissive interlocutory appeal are strict and require parties to adhere to a tapestry of technical requirements laid out in Section 51.014(d)–(f) of the Texas Civil Practice and Remedies Code, Texas Rule of Civil Procedure 168, and Texas Rule of Appellate Procedure 28.3. Because the appellate courts construe the requirements for permissive appeal strictly, adherence to these technical, procedural requirements is crucial. *See, e.g.*, *Blakenergy, Ltd. v. Oncor Elec. Delivery Co., LLC*, No. 02-14-00241-CV, 2014 WL 4771736, at *1 (Tex. App.—Fort Worth 2014, no pet.) (declining to entertain a permissive appeal "[g]iven the requirement [to]

construe section 51.014 strictly"); *see also Rogers v. Orr,* 408 S.W.3d 640, 642 (Tex. App.—Fort Worth 2013, pet. denied) ("We strictly construe a statute authorizing an interlocutory appeal because it is an exception to the general rule that only final judgments are appealable.").

Dismissal statistics indicate that appellate courts are reluctant to overlook even minor procedural missteps. Based on data gathered from 2011–2015, the courts most commonly denied petitions for permissive interlocutory appeals because of technical problems with the trial court's order granting permission to appeal. *See* Richard B. Phillips, Jr. and Michael Schneider, *Interlocutory Appeal Update*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW CLE, 38 (2015). A more recent Westlaw search confirms that courts continue to regularly deny permissive interlocutory appeals due to these technical failures. *See, e.g.*, *Eagle Gun Range, Inc. v. Bancalari*, 495 S.W.3d 887, 888–89 (Tex. App.—Fort Worth 2016, no pet.) (denying petition when the trial court's order listed only questions for review, without specifically ruling on each question); *B&T Towing, LLC v. Sherwood*, No. 13-16-00499-CV, 2016 WL 7975859, at *5 (Tex. App.—Corpus Christi 2016, no pet.) (dismissing appeal when the questions presented in the petition for review differed from the controlling question as articulated by the trial court); *Armour Pipe Line Co. v. Sandel Energy, Inc.*, No. 14-16-00010-CV, 2016 WL 514229, at *4 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (denying appeal where summary judgment order did not identify the basis for its ruling).

1. Securing Trial Court Approval

The first step to seeking a permissive interlocutory appeal is trial-court approval. Absent such approval, the appellate court will not have jurisdiction to accept the appeal. *See, e.g.*, *Bahr v. Emerald Bay Prop. Owners Ass'n*, No. 09-15-00363-CV, 2016 WL 1054506, at *1 (Tex. App.—Beaumont Mar. 17, 2016, no pet.).

In the motion for permission to appeal, the party seeking

leave to appeal must (1) identify the "controlling question of law as to which there is a substantial ground for difference of opinion" and (2) explain why an immediate appeal would "materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *see also* TEX. R. CIV. P. 168.[3]

If the trial court decides to grant permission to appeal, it must state its permission *in the order to be appealed* rather than in a separate order. TEX. R. CIV. P. 168 ("Permission must be stated *in the order to be appealed*.") (emphasis added). Importantly, this means that if the trial court originally signs an order that does not grant permission to appeal, the trial court must amend the order to include permission to appeal. *Id.* ("An order previously issued may be amended to include such permission.").

The order granting permission to appeal "must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. It is critical that the order give a substantive ruling on the controlling question of law it is approving for appeal. *See, e.g.*, *Eagle Gun Range*, 495 S.W.3d at 889–90; *Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Doe*, No. 13-13-00463-CV, 2013 WL 5593441, at *2 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) (denying petition for interlocutory review because the trial court did not provide a basis for its denial of summary judgment and "[w]ithout a substantive ruling by the trial court as to why [the trial court] denied the . . . motion, no controlling question of law has been presented for our analysis"). Section 51.014(d) is not a certified-question procedure; it only allows review of a concrete decision by the trial court. *See Eagle Gun Range*, 495 S.W.3d at 889 ("Without any indication in the appellate record of the trial court's substantive ruling on the specific legal issues presented for our determination, this permissive appeal

[3] The trial court may also grant a permissive interlocutory appeal on its own initiative. TEX. R. CIV. P. 168 ("On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute.").

does not meet the strict jurisdictional requirements of section 51.014(d).").

2. Securing Appellate Court Approval

If the trial court grants permission to appeal, the court of appeals then independently determines whether to accept the appeal. TEX. R. APP. P. 28.3(a) ("When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal."). This is accomplished via a petition-for-review procedure involving strict jurisdictional deadlines and requirements.

The petition for permissive interlocutory appeal "must be filed within 15 days after the order to be appealed is signed" or within the time as extended by Rule 10.5(b) of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 28.3(c)–(d). Failure to comply with these timelines will deprive the court of appeals of jurisdiction. *See, e.g.*, *Romero v. Gonzalez*, No. 13-16-00172-CV, 2018 WL 771893, at *1 (Tex. App.—Corpus Christi Feb. 8, 2018, no pet.).

The petition for permission to appeal must "(1) contain the information required by Rule 25.1(d) to be included in a notice of appeal; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e)(1)–(4).

The respondent may respond by filing its own brief within ten days. TEX. R. APP. P. 28.3(f). The court of appeals then decides to grant or deny the petition. This determination is made without oral argument, no earlier than ten days after the petition is filed. TEX. R. APP. P. 28.3(j). If the court grants the petition, the appeal is governed by the rules for accelerated appeals. TEX. R. APP. P. 28.3(k).

A court of appeals has no jurisdiction to grant an interlocutory appeal if the procedural requirements addressed above are not satisfied. *See Eagle Gun Range, Inc.*, 495 S.W.3d at 889–90. Further, the court of appeals need not accept such an appeal, even if within its jurisdiction: "An appellate court *may* accept [such] an appeal . . . if the appealing party . . . files . . . an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(f) (emphasis added).

However, courts will at times issue opinions explaining the basis for their denial of the interlocutory appeal. *See, e.g.*, *Gunter v. Empire Pipeline Corp.*, 395 S.W.3d 269, 271 (Tex. App.—Dallas 2013, no pet.) (holding in a published opinion that a trial court's determination of a motion to quash was not reviewable when "the parties are attempting to use an order on a motion to quash as a vehicle for obtaining a pretrial evidentiary ruling"). This is often the case when the appellate court concludes that the petition did not present a question of law as to which there was a substantial ground for difference of opinion. *See, e.g.*, *Undavia*, 468 S.W.3d at 634 (denying a petition for interlocutory appeal and articulating the basis for its conclusion that "appellants' position . . . is contrary to well-established Texas law"); *Phoenix Energy, Inc. v. Breitling Royalties Corp.,* No. 05-14-01153, 2014 WL 6541259, at *2 (Tex. App.—Dallas Oct. 17, 2014, no pet.) (mem. op.) (explaining in a memorandum opinion why there was not a substantial basis for difference of opinion); *Texas Farmers Ins. Co. v. Minjarez*, No. 08-12-00272-cv, 2012 WL 5359284, at *1 (Tex. App.—El Paso Oct. 31, 2012, no pet.) (same); *Target Corp. v. Ko*, No. 05-14-00502, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (same). These opinions, although not binding, may provide helpful guidance to the trial court and the parties on how the appellate court will ultimately rule following final judgment.

Finally, the Texas Supreme Court has jurisdiction to review interlocutory appeals under Section 51.014(d) if it determines that the appeal presents a question of law that is important to the jurisprudence of the State. TEX. GOV'T CODE §§ 22.001(a)–

(b); *see also Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011) (reviewing court of appeals' judgment in a permissive interlocutory appeal).

III. MANDAMUS OVERVIEW

Compared with the procedure for seeking permissive interlocutory appeal, the procedure for seeking mandamus review is relatively straightforward. The petitioner does not need to seek trial-court approval; nor is there a preliminary briefing procedure regarding whether the mandamus should be considered. But the substantive legal requirements for mandamus—although now less strictly categorical—still set a high threshold.

A. Legal Standard

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Frank Kent Motor Co.*, 361 S.W.3d 628, 630 (Tex. 2012) (orig. proceeding). To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court (1) committed a clear abuse of discretion and (2) the relator has no adequate remedy at law. *Id.; see also In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 471 (Tex. 2008) (orig. proceeding). The relator has the burden of establishing both requirements of mandamus relief. *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding).

1. Clear Abuse of Discretion

A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). With respect to factual issues or matters within the trial court's discretion, the appellate court may not substitute its judgment for that of the trial court; reversal is only proper when "the

trial court could reasonably have reached only one decision." *Walker*, 827 S.W.2d at 840.

A trial court has no discretion "in determining what the law is or applying the law to the facts," so a misinterpretation or misapplication of the law meets this first prong. *Id.* at 840; *see also In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 248 (Tex. 2010) (orig. proceeding) ("A trial court abuses its discretion when it fails to analyze or apply the law correctly."). This is the case even when the law is unsettled. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding).

2. No Adequate Remedy at Law

Even when the trial court has made a clear error, mandamus will not issue "when the law provides another plain, adequate, and complete remedy." *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding). Mandamus is not proper when there is "'a clear and adequate remedy at law, such as a normal appeal.'" *Walker*, 827 S.W.2d at 840 (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)).

In *Walker*, the Texas Supreme Court held that "[m]andamus is intended to be an extraordinary remedy, available only in limited circumstances." *Walker*, 827 S.W.2d at 840. The *Walker* court cautioned that, without the requirement that there be no adequate remedy on appeal, mandamus would cease to be an extraordinary remedy and "appellate courts would 'embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts.'" *Id.* at 842 (quoting *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991)). The *Walker* court delineated several categories of orders that would meet this test, such as when the trial court orders the production of privileged material, issues a discovery ruling that will effectively preclude a fair trial on the merits, and denies important discovery such that the missing information cannot be made part of the appellate record. *Id.* at 843. It emphasized the importance of a bright-line rule limiting mandamus to these kinds of exceptional cases. *Id.* It also explained that the mere cost and delay associated with

waiting until after final judgment to appeal would not, in and of itself, make an appeal inadequate. *Id.* at 842.

Following *Walker*, intermediate appellate courts employed a "categorized approach to determining whether mandamus relief [was] available." Barnard, Marialyn, J., *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY'S L.J. 143, 149 (2014). In its 2004 *In re Prudential* decision, however, the Texas Supreme Court loosened the reins. *In re Prudential*, 148 S.W.3d 124.

In re Prudential articulates a more flexible, case-specific approach to determining whether there is an adequate remedy by appeal:

> The operative word, 'adequate,' has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. . . . An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments.

Id. at 136 (emphasis added).

The court maintained that mandamus remains a selective procedure, available to "correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal." *Id.* at 138. At the same time, however, the court emphasized flexibility in determining whether the benefits of mandamus in a particular case outweigh the detriments, explaining that "rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue." *Id.* at 137; *see also In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (holding that the inquiry "has no comprehensive definition" and is decided on a case-by-case basis).

As a result, Texas mandamus law is now more flexible, allowing for a fact-specific determination of whether mandamus is sufficiently beneficial to merit an exception to the final-

judgment rule. *In re McAllen Med. Ctr.*, 275 S.W.3d at 469. The court may now consider, for example, "whether mandamus can spare the litigants and public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *In re Keenan*, 501 S.W.3d 74, 76 (Tex. 2016) (orig. proceeding) (quoting *In re Prudential*, 148 S.W.3d at 136). Further, when the trial court's order would "'skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator's] defense [or claims] in ways unlikely to be apparent in the appellate record,'" mandamus is now proper. *In re Dawson*, __S.W.3d__, No. 17-0122, 2018 WL 3077341, at *4 (Tex. June 22, 2018) (orig. proceeding) (quoting *In re Coppola*, 535 S.W.3d 506, 509 (Tex. 2017)) (discussing the implications of an erroneous denial, or grant, of a motion for leave to designate a responsible third party).

This is not to say that courts freely allow mandamus review any time it is requested. To the contrary, mandamus petitions are still frequently denied. *See, e.g.*, *In re Conocophillips Co.*, 405 S.W.3d 93, 96 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding) ("Allowing mandamus to lie from the denial of a partial summary judgment in these circumstances would contravene the policies underlying limited mandamus review."); *In re State Farm Lloyds*, No. 13-16-00049-cv, 2016 WL 902864, at *3 (Tex. App.—Corpus Christi March 9, 2016, orig. proceeding) (declining to review a summary judgment denial and collecting cases on same). However, because the applicable legal standard is now more flexible and less categorical, effective advocates can be creative in seeking mandamus when needed in order to obtain a faster appellate determination of important legal issues in their case.

B. Mandamus Procedures

The procedure for obtaining mandamus review is governed by Texas Rule of Appellate Procedure 52. Unlike with permissive interlocutory appeals, there is no predicate petition-for-review process in a mandamus proceeding. Rather, the mandamus

procedure is initiated by filing a petition on the merits with the clerk of the appropriate appellate court. TEX. R. APP. P. 52.1.[4]

The mandamus petition must contain the information described in Rule 52.3, including a statement of the case, statement of the issues presented, statement of facts, and argument. TEX. R. APP. P. 52.3(a)–(j). It must be accompanied by an appendix that includes a certified copy of the order complained of and, unless voluminous, the text of any rule or other law (excluding case law) on which the argument is based. TEX. R. APP. P. 52.3(k).

The petitioner must assemble and file with the petition a certified or sworn copy of all the important documents that are material to the mandamus request. TEX. R. APP. P. 52.7(a). This includes the key pleadings and orders; it also includes an authenticated transcript of any relevant testimony. TEX. R. APP. P. 52.7(a).

Rule 52 allows the opposing party to file a response to a petition for mandamus, but a response is not required. TEX. R. APP. P. 52.4. If the appellate court determines that the relator may be entitled to the relief sought, or that a "serious question concerning the relief requires further consideration," it must request a response. TEX. R. APP. P. 52.8(b). If the court of appeals decides to deny the mandamus petition, it may issue an opinion articulating the reason for its denial—but is not required to do so. TEX. R. APP. P. 52.8(d). If it grants a petition, it is required to hand down an opinion. *Id.*

There is no strict deadline for when a petition for mandamus must be filed. However, an unexplained delay in filing can result in a denial of the petition. *See, e.g.*, *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding); *In re Whipple*, 373 S.W.3d 119, 122–23 (Tex. App.—San Antonio 2012, orig. proceeding). The best practice, therefore, is to be prepared and move quickly to seek review after the trial court rules.

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[4] A mandamus petition may be filed directly with the Texas Supreme Court. *See* TEX. R. APP. P. 52.

IV. A STRATEGIC COMPARISON OF PERMISSIVE INTERLOCUTORY APPEALS AND MANDAMUS ACTIONS

As the law has evolved, the distinction between the permissive interlocutory appeal and mandamus has blurred. There are still many scenarios in which one procedure is plainly the appropriate remedy. For example, most discovery orders should be reviewed via mandamus, and not under the permissive interlocutory appeal procedure that is reserved only for "controlling issues of law." However, many interlocutory orders will turn on legal determinations, and for these orders the relative pros and cons of each procedure must be weighed.

A. Primary Differences Between Permissive Interlocutory Appeal and Mandamus

There are a number of important differences between permissive interlocutory appeal and mandamus, both as a matter of procedure and substance. In many cases, these differences will strongly point to using one procedure over the other.

Procedurally, permissive interlocutory appeals are more complex and time-consuming than mandamus proceedings. Before the parties engage in briefing on the merits, they must undergo a petition-for-review process at the court of appeals. Litigants may believe that all the standards for the appeal are met, but find that the trial court does not wish to allow the appeal. Even if the trial court grants leave to pursue the interlocutory appeal, the appellate court may decline to consider the appeal—either due to a technical deficiency or because it simply does not want to address the issue before final judgment.

Mandamus procedures are more streamlined, allowing the parties to proceed directly to briefing on the merits. Most appellate courts have a dedicated mandamus attorney, increasing the likelihood of a speedy appellate resolution. On the whole, therefore, mandamus procedures are preferable. However, there is an advantage to the interlocutory appeal procedure—it

gives the prospective appellant the opportunity to work with the trial court in framing the issues that will be subject to the petition for interlocutory appeal. Working carefully with the trial court is an opportunity for advocacy. It not only increases a litigant's chances that the appeal will be granted, but affords a unique opportunity to attempt to frame the appellate issues in a way that is favorable on the merits.

Substantively, there are several important differences between mandamus and permissive interlocutory appeal. Mandamus is available to correct a clear abuse of discretion, which can encompass both matters within the discretion of the trial court and pure legal determinations. *See In re Prudential*, 148 S.W.3d at 136. A permissive interlocutory appeal, however, is available only to correct pure legal rulings. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). Most discovery orders, therefore, will be reviewable by mandamus and not permissive interlocutory appeal because they implicate the trial court's discretion.

Even with respect to interlocutory orders that involve only legal questions, there are differences. A permissive interlocutory appeal is available only when the question is "controlling," and when there is a "substantial ground for difference of opinion." TEX. CIV. PRAC. & REM. CODE § 51.014(d). Mandamus standards are more flexible, also contemplating the review of important legal issues, but not necessarily requiring that they be "controlling." *See generally In re Prudential*, 148 S.W.3d at 137. Further, mandamus is available when a trial court makes a clear legal error, and is not limited to errors involving unsettled law. *Id.* at 135.

Mandamus, however, is available only when there is no adequate remedy at law. *Id.* Thus, if an important legal question is decided via an interlocutory order, but that question will ultimately be reviewable following final judgment, the appeals court may decline to review it on mandamus, absent a showing of exceptional circumstances. *See, e.g., In re Conocophillips Co.*, 405 S.W.3d at 96; *In re State Farm Lloyds*, 2016 WL 902864, at *3. Permissive interlocutory appeal, by contrast, may still be available so long as the appellate court agrees that resolution

of the legal question will materially advance the resolution of the litigation. The obvious example of this is an interlocutory summary judgment ruling, which is typically not reviewable by mandamus but may be considered by permissive interlocutory appeal.

B. Specific Examples of Orders Properly Reviewable by Mandamus

Mandamus law is well developed and therefore has the benefit of established categories of interlocutory orders that are considered properly reviewable. If an interlocutory order falls within one of these categories, pursuing mandamus relief instead of permissive interlocutory appeal will typically be the best course. Following are examples of cases in which mandamus relief is frequently available and therefore may be preferable to a permissive interlocutory appeal.

1. Discovery Orders

Mandamus is frequently used to review certain categories of discovery rulings that would not be correctable on appeal. For example, mandamus is appropriate when the trial court erroneously allows the discovery of trade secrets or privileged information. *See, e.g.*, *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998) (orig. proceeding) (trade secrets); *Walker*, 827 S.W.2d at 843 (privileged documents). Mandamus review is also available when the trial court orders the production of "patently irrelevant" documents, *In re CSX Corp.*, 124 S.W.3d at 153, or when an erroneous denial of discovery would cause the discovery to be missing from the appellate record. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding).

Permissive interlocutory appeal is not typically allowed in connection with discovery rulings. *See, e.g., Gunter*, 395 S.W.3d at 271; *Blakenergy*, 2014 WL 4771736, at *1 (declining to review trial court's denial of discovery related motions). Mandamus is therefore typically the more appropriate procedure.

2. Certain Sanctions Orders.

Mandamus has been allowed to review certain sanctions orders, such as death-penalty sanctions that "have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding); *see also In re Garza*, 544 S.W.3d 836, 840–41 (Tex. 2018) (orig. proceeding) (mandamus was proper to remedy an overreaching sanctions order that would render trial meaningless). Because the imposition of sanctions is within the discretion of the trial court,[5] such an order would not likely be considered a "controlling issue of law" subject to permissive interlocutory appeal.

3. Rulings on Significant Pretrial Procedural Issues.

Mandamus can be proper when a trial court's ruling on an important procedural issue impacts a party's substantive rights but will not be reviewable on appeal from final judgment. For example, mandamus review is available to correct an erroneous order denying the disqualification of counsel. *See, e.g.*, *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133–34 (Tex. 1996) (orig. proceeding). Mandamus is proper when a trial court's ruling on a plea in abatement or plea to the jurisdiction interferes with another court's dominant jurisdiction. *See, e.g.*, *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287 (Tex. 2016) (orig. proceeding) (plea in abatement); *In re SWEPI, LP*, 85 S.W.3d 800, 808–09 (Tex. 2002) (orig. proceeding) (plea to the jurisdiction). And mandamus is proper to enforce a contractual right that implicates important procedural matters. *See, e.g.*, *In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193, 195–96 (Tex. 2002) (orig. proceeding) (contractual appraisal process); *In re Prudential*, 148 S.W.3d at 138 (contractual waiver of the right to trial by jury); *In re Pirelli Tire, LLC*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding) (forum selection clause). In most of these cases, mandamus is

[5] *See Powell*, 811 S.W.2d at 917.

a better fit than permissive interlocutory appeal because these procedural issues are not necessarily "controlling issues of law" but they nevertheless involve important substantive rights.

C. Summary Judgment Orders Are Typically Reviewable by Permissive Interlocutory Appeal Rather than Mandamus

The primary scenario in which a permissive interlocutory appeal may be superior to mandamus is when the trial court has issued an interlocutory summary judgment order that addresses a controlling issue of law in the case. The Texas Supreme Court grants mandamus relief from a denial of summary judgment only in extraordinary circumstances. *See In re USAA*, 307 S.W.3d 299, 314 (Tex. 2010) (orig. proceeding) (holding that when a trial had already been conducted in a forum that lacked jurisdiction, commencing a second trial on a claim that could potentially be barred by limitations was sufficiently extraordinary to merit mandamus relief); *see also In re McAllen Med. Ctr.*, 275 S.W.3d at 466 (allowing mandamus review of summary judgment on medical liability claims in which expert reports are required by statute, explaining that the Legislature has already balanced the "relevant costs and benefits"). Otherwise, mandamus is generally not an appropriate remedy for a denial of summary judgment. *See In re McAllen Med. Ctr.*, 275 S.W.3d at 465 ("[M]andamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion"); *In re Conocophillips Co.*, 405 S.W.3d at 96 ("Allowing mandamus to lie from the denial of a partial summary judgment in these circumstances would contravene the policies underlying limited mandamus review."); *In re State Farm Lloyds*, 2016 WL 902864, at *3 (declining to review a summary judgment denial that would not skew the proceedings, potentially affect the outcome of the litigation, or compromise the presentation of the case). This is because a summary judgment ruling is reviewable on appeal following final judgment.

Permissive interlocutory appeals, however, are frequently

used to obtain review of important interlocutory summary judgment rulings. *See, e.g.*, *Lakes of Rosehill Homeowners Assoc., Inc. v. Jones*, 552 S.W.3d 414, 422 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (reversing trial court's order granting partial summary judgment on plaintiff's tort claims); *Asplundh Tree Expert Co. v. Abshire*, 517 S.W.3d 320, 346 (Tex. App.—Austin 2017, no pet.) (affirming trial court's denial of motion for summary judgment on grounds that the *American Pipe* tolling doctrine tolled the statute of limitations on plaintiffs' claims); *Cardtronics*, 438 S.W.3d at 784 (affirming partial summary judgment for insured on key policy interpretation issue); *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, 390 S.W.3d 603, 607–08 (Tex. App.—Dallas 2012, no pet.) (reviewing trial court's denial of summary judgment on multiple causes of action). Permissive interlocutory appeal is therefore typically the better procedure for appealing interlocutory summary judgment rulings.

Importantly, though, permissive interlocutory appeal of a summary judgment order will not be available when the order is just a generic grant or denial. "Section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it." *Gulley v. State Farm Lloyds,* 350 S.W.3d 204, 208 (Tex. App.—San Antonio 2011, no pet.). "The legislature's institution of the procedure authorizing a trial court to certify an immediate appeal of an interlocutory order was premised on the trial court having first made a substantive ruling on the controlling legal issue being appealed." *In re Estate of Fisher,* 421 S.W.3d 682, 684–85 (Tex. App.—Texarkana 2014, no pet.). A partial summary judgment order does not necessarily decide a controlling question of law. *Id.* "When a trial court in its order on a motion for summary judgment provides no basis for its denial, the trial court fails to make substantive ruling on the controlling question of law sought to be appealed." *Great Am. E & S Ins. Co. v. Lapolla Indus., Inc.,* No. 01–14–00372–CV, 2014 WL 2895770, at *2–3 (Tex. App.— Houston [1st Dist.] June 24, 2014, no pet.); *see also De La Torre v. AAG Properties, Inc.,* No. 14–15–00874–CV, 2015 WL 9308881, at

*2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.) (denying interlocutory appeal because the trial court's order did not state the reason for denying the motion for summary judgment). Accordingly, if the order at issue does not contain a precise legal ruling, permissive interlocutory is not proper, even if the legal issues are controlling.

D. Interlocutory Orders that Are Potentially Reviewable Via Both Permissive Interlocutory Appeal and Mandamus

1. Orders on Rule 91a Motions

Texas Rule of Civil Procedure 91a allows defendants to move to dismiss a cause of action on the grounds that it has no basis in law or fact. TEX. R. CIV. P. 91a. As with summary judgment, a grant of a Rule 91a motion may result in a final judgment from which the parties may take an ordinary appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.012. If the Rule 91a ruling is interlocutory, however, both mandamus and permissive interlocutory appeal may be available. *See Conocophillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018) (suggesting that a party could have challenged the trial court's denial of its Rule 91a motion via either a mandamus action or a permissive interlocutory appeal).

a. Mandamus

The Texas Supreme Court has held that mandamus is available to review a denial of a Rule 91a motion to dismiss. *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding). The court in *Essex* concluded that mandamus was appropriate "[i]n light of the conflict of interest and prejudice" of allowing the plaintiff to sue both the defendant and its insurer and "to spare the parties and the public the time and money spent on fatally flawed proceedings." *Id.* Although *Essex* is not a categorical holding that an appellate remedy for denial of a Rule 91a motion is inadequate, the foregoing language has been cited for this proposition.

Since *Essex*, at least one court of appeals has broadly held that mandamus's adequate-remedy prong is

met when a denial of a Rule 91a motion is appealed. *In re Odebrecht Constr., Inc.*, 548 S.W.3d 739, 745 (Tex. App.—Corpus Christi 2018, orig. proceeding) ("In laying the groundwork for a rule mandating the early dismissal of baseless causes of action, the Legislature has effectively already balanced most of the relevant costs and benefits of an appellate remedy, and mandamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims."); *see also In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding) ("[M]andamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims."). Other courts of appeals, however, apparently continue to require that the adequate-remedy prong of mandamus be satisfied when reviewing Rule 91a denials. *See, e.g.*, *In re Houston Specialty Ins. Co.*, No. 14-17-00928-CV, 2017 WL 6330984 (Tex. App.—Houston [14th Dist.] Dec. 12, 2017, no pet.) (denying mandamus relief for denial of Rule 91a motion without specifying grounds); *In re S. Cent. Houston Action*, No. 14-15-00162-CV, 2015 WL 1508726 (Tex. App.—Houston [14th Dist.] Mar. 31, 2015, no pet.) (same).

Recently, the Texas Supreme Court provided additional support for the availability of mandamus relief from a Rule 91a denial. In *Koopmann*, the court refused to review an earlier Rule 91a denial in an appeal from a summary judgment. 547 S.W.3d at 880. The court "note[d] that [the movant] could have challenged the trial court's denial of its motion to dismiss at the time it was denied," either by mandamus or permissive appeal. *Id.* But because "[i]t chose not to," and given the procedural posture of the case, the court "reject[ed] [the movant's] argument that it [was] entitled to recover attorney's fees as the prevailing party on the motion under Rule 91a . . . ." *Id.* *Koopmann* can be read to imply that no adequate remedy exists from the denial of a Rule 91a motion, particularly with respect to who gets Rule 91a attorney's fees.

It is less clear, however, that mandamus is proper to review

a trial court's interlocutory order *granting* a Rule 91a motion. When the court grants a Rule 91a motion, dismissing certain causes of action as a matter of law, the Legislature's requirement for an early and speedy resolution of baseless claims is satisfied. Thus, an argument could be made that the adequate-remedy prong of mandamus review is not met. In that scenario, review via permissive interlocutory appeal may be the better course.

b. Permissive Interlocutory Appeal

In *Koopmann*, the Texas Supreme Court indicated that a permissive interlocutory appeal, like mandamus, is an appropriate method by which to seek review of a Rule 91a denial. *See Koopmann*, 547 S.W.3d at 880. This makes sense—Rule 91a rulings involve questions of law, and because they involve the potential dismissal of claims, the legal questions they raise are likely to be viewed as "controlling."

Because Rule 91a is a fairly new procedure, examples of successful permissive interlocutory appeals from Rule 91a denials are limited. However, a number of courts have reviewed Rule 91a orders through the permissive interlocutory appeal procedure, including orders both granting and denying Rule 91a motions. *See, e.g.*, *GoDaddy.com*, 429 S.W.3d 752, 753-54 (Tex. App.—Beaumont 2014, pet. denied) (reversing a Rule 91a denial); *Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *1 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming a trial court's order granting a Rule 91a motion).

As with summary judgment orders, Rule 91a orders are not reviewable if they do not strictly comply with the requirements of Section 51.014(d) of the Texas Civil Practice and Remedies Code. If the order does not make a substantive ruling on the legal questions at issue, the appellate court will not have jurisdiction to consider the appeal. *See Eagle Gun Range*, 495 S.W.3d at 889 (declining permissive interlocutory appeal of an order generically denying a Rule 91a motion because "Section 51.014(d) does not contemplate using an interlocutory appeal as a mechanism to present certified questions").

2. Orders Granting Motions to Dismiss Under the TCPA

Chapter 27 of the Texas Civil Practice and Remedies Code—the Texas Citizens Participation Act (TCPA)—governs claims that involve the "constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." TEX. CIV. PRAC. & REM. CODE § 27.002. The TCPA contains detailed procedures related to such claims, and it allows a party defending the claims to file a motion to dismiss. *Id.* § 27.005.

To prevail on a TCPA motion to dismiss, the defendant must establish by a preponderance of the evidence that the plaintiff's action implicates a right subject to the TCPA. *Id.* § 27.005(b). The plaintiff then must present by "clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). The question of whether a prima facie case has been presented is a question of law for the court. *See In re Lipsky*, 411 S.W.3d 530, 539 (Tex. App.—Fort Worth 2013, orig. proceeding); *see also Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 282 (Tex. App.—Dallas 2015, pet. denied) ("We review de novo the trial court's determinations that the parties met or failed to meet their burdens of proof under section 27.005.").

Sections 27.008 and 51.014(a)(12) of the Texas Civil Practice and Remedies Code provide for an accelerated interlocutory appeal of the trial court's *denial* of a motion to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.008(a)–(b); 51.014(a)(12). Because the statutes do not address the court's *grant* of such a motion, however, an interlocutory order that grants a TCPA motion is not subject to interlocutory appeal as a matter of right. *See Cavin v. Abbott*, No. 03-18-00073, 2018 WL 2016284, at *3 (Tex. App.—Austin April 30, 2018, no pet.); *Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 WL 1404745, at *1 (Tex. App.—Austin April 14, 2017, no pet.).

However, because TCPA motions often involve questions of law, it is likely that an interlocutory order granting a motion to dismiss under the TCPA would be appropriately reviewed under the permissive interlocutory appeal statute. In addition,

if the TCPA plaintiff can establish that an improper grant of a TCPA motion has the potential to skew the proceedings, potentially affect the outcome of the litigation, or compromise the presentation of the case, mandamus may also be proper. *See generally In re State Farm Lloyds*, 2016 WL 902864, at *3 (concluding that mandamus review of a summary judgment denial was improper in the absence of those circumstances).

3. Other Interlocutory Orders Involving Important Legal Rulings

Because of the more relaxed legal standards now applicable to permissive interlocutory appeals and mandamus review, both procedures may be available for a variety of interlocutory orders involving an important legal determination that will have a significant impact on the litigation. In fact, the First Court of Appeals recently acknowledged that arguments in favor of a permissive interlocutory appeal often also support mandamus. *See Arnold & Itkin, L.L.P. v. Dominguez*, 501 S.W.3d 214, 225 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

Dominguez involved potential appellate review of a plea to the jurisdiction and, alternatively, plea in abatement, on the basis of ripeness. The trial court denied the pleas and the defendant lawyers then simultaneously petitioned for mandamus relief and requested permission to file a permissive interlocutory appeal. Because the parties had submitted briefing on the merits in connection with the petition for writ of mandamus, the opinion addressed the relief sought in the mandamus context. *Id.* at 220. The court conditionally granted mandamus relief because the legal question of ripeness was a central issue in the complex litigation, and "a complex trial on these claims would be an unreasonable use of resources for both the judicial system and the parties." *Id.* at 225.

Because it had ruled on the mandamus petition and not yet granted the petition for interlocutory appeal, the court dismissed the petition for interlocutory appeal as moot. However, it noted that "the arguments in favor of accepting the permissive appeal similarly suggest that mandamus relief

would be appropriate." *Id.* at 225. As *Dominguez* acknowledges, there is now a significant overlap between these procedures.

Another potential example is the review of court orders granting and denying motions to apply foreign law. Courts have agreed to review these orders on permissive interlocutory appeal. *See, e.g., Am. Nat. Ins. Co. v. Conestoga Settlement Trust*, 442 S.W.3d 589, 593 (Tex. App.—San Antonio 2014, pet. denied) (reviewing trial court's ruling on a choice-of-law motion under Texas Rule of Evidence 202); *Winspear v. Coca-Cola Refreshments, USA, Inc.*, No. 05-13-00712-CV, 2014 WL 2396142, at *1 (Tex. App.—Dallas April 9, 2014, pet. denied) (reviewing choice-of-law ruling that had the potential to render the contract at issue unenforceable). *But see Cuevas*, 2013 WL 6327207, at *1 (denying petition for permissive appeal because review of a choice-of-law ruling would not materially advance the ultimate termination of the litigation). Historically, courts have been reluctant to grant mandamus on this type of ruling, which is reviewable on appeal after final judgment. *See, e.g.*, *Transportes Aeros Nacionales, S.A. v. Downey*, 817 S.W.2d 393, 395 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (characterizing a choice-of-law ruling as an "incidental ruling" for which there is an adequate remedy by appeal); *In re Western Aircraft, Inc.*, 2 S.W.3d 382, 384 (Tex. App.—San Antonio 1999, orig. proceeding) (same). However, with a more flexible standard for mandamus, the remedy may now be appropriate in an exceptional case.

E. Choosing Between Mandamus and Permissive Interlocutory Appeal—or Choosing to File Both Simultaneously

In the event a litigant receives an adverse ruling on a critical question of law early in the case, she will be faced with a choice: pursue a permissive interlocutory appeal, a mandamus, or both. This decision will hinge on procedural considerations rather than the standard of review. A trial court's pure legal ruling will be reviewed under a *de novo* standard regardless of which procedure is used. *See, e.g., GoDaddy.com, LLC*, 429 S.W.3d

at 754 (*de novo* review applied to trial court's legal rulings in a permissive interlocutory appeal); *In re Seven-O Corp.*, 289 S.W.3d 384, 388 (Tex. App.—Waco 2009, orig. proceeding) (*de novo* standard of review applies to mandamus review of legal determinations by the trial court).

The decision, therefore, hinges on which procedure provides the best platform for convincing the appellate court to agree to take the appeal. The following factors may impact which platform is the better fit with this goal in mind.

1. Is the trial court willing to grant a request for a permissive interlocutory appeal? If the answer to this question is no, permissive interlocutory appeal is jurisdictionally unavailable and mandamus is the only possibility.
2. Does the trial court's order satisfy every technical requirement of Rule 51.014(d)? Again, the answer to this question is jurisdictional.
3. Is the legal question ruled on by the trial court sufficiently unsettled such that there is substantial ground for difference of opinion? If so, either mandamus or permissive interlocutory appeal may be a possibility.
4. Does the order fall into one of the categories that Texas courts have held are properly subject to mandamus review? If the law is settled that the order is properly reviewable by mandamus, there would be no reason to pursue the more cumbersome permissive interlocutory appeal procedure. Mandamus is more streamlined and allows the appeals court to perform its review in a familiar context.
5. Is the order a denial of summary judgment or another similar legal ruling that is fully reviewable following final judgment? If so, permissive interlocutory appeal may be the best route, unless you can show that the case involves extraordinary circumstances.

At times, the safest route may be to consider pursuing both appeal procedures simultaneously. For example, an

interlocutory order that addresses a key legal issue but does not fall into one of the traditional mandamus categories is theoretically reviewable through either permissive interlocutory appeal or mandamus. As the First Court of Appeals recently acknowledged, pursuing both of these remedies simultaneously makes sense, as the reasons why mandamus is proper often also support granting a permissive interlocutory appeal. *See Dominguez*, 501 S.W.3d at 225.

There is precedent for filing interlocutory appeals and mandamus actions simultaneously. In *CMH Homes v. Perez*, 340 S.W.3d 444 (Tex. 2011), the petitioner, CMH Homes, filed an interlocutory appeal under Section 51.016 of the Texas Civil Practice and Remedies Code, challenging the trial court's appointment of an arbitrator. CMH Homes did not separately file a mandamus petition, but it asked the court of appeals, in the alternative, to consider its appeal as a mandamus. *Id.* at 447. The Texas Supreme Court concluded that interlocutory appeal was not available for that particular order, but that it could appropriately treat the proceeding as a mandamus. *Id.* at 453. The court noted: "[I]t is our practice when confronted with parallel mandamus and appeal proceedings 'to consolidate the two proceedings and render a decision disposing of both simultaneously.'" *Id.* (quoting *In re Valero Energy Corp.*, 968 S.W.2d 916, 917 (Tex. 1998)).[6]

The advantage to a "belts and suspenders" approach is that it increases the chance of obtaining appellate review in "gray area" cases. For example, if it is not clear whether the "substantial ground for difference of opinion" standard is met for purposes of a permissive interlocutory appeal, the appellate court may elect to treat the appeal as a mandamus to resolve a

[6] Unfortunately, in the permissive interlocutory appeal context, simply asking for mandamus review as an alternative is not a possibility. The petition-for-review procedure under Section 51.014(d) precludes this approach. Therefore, the best route is to initiate both proceedings simultaneously, as was done in *Dominguez*, and let the appellate court choose whether to review the order as a mandamus, to grant the petition for an interlocutory appeal, or to decline them both. *See generally Dominguez*, 501 S.W.3d at 225.

legal question that it recognizes is of critical importance to the case. On the other hand, if the court is concerned that the legal issue, although important, may not satisfy the requirement that there be no adequate remedy at law, it may elect to review the order as a permissive interlocutory appeal.

Litigants should be selective, of course, about burdening the appellate courts with duplicative filings. But in those cases in which interlocutory appellate review is critically important and the appropriate procedure is unclear, the "belt and suspenders" approach may be the most prudent course.

V. CONCLUSION

As the scope of permissive interlocutory appeal and mandamus has evolved, the distinction between the two procedures has become blurred. Attorneys who wish to seek discretionary appellate review of an interlocutory order should be familiar with the relative pros and cons of each in order to make an informed decision about the best path for seeking review in a particular case. And in some cases, pursuing both procedures simultaneously may be the best course.

An Interview of Chief Justice John T. Boyd

Tim Newsom, Young & Newsom, P.C., Amarillo, Texas

The following is an excerpt of two interviews of Chief Justice John T. Boyd (**JTB**). The first was conducted on September 5, 2007, by Laurie Ratliff (**LR**) and Justice William G. "Bud" Arnot (**BA**). The second was conducted on September 8, 2015, by Tim Newsom (**TN**).

Justice Boyd served as an Associate Justice and as the Chief Justice of the Amarillo Court of Appeals. When he retired on his 75th birthday, on August 22, 2002, he was the longest-tenured active state judge at the time. *Plainview Daily Herald*, https://www.myplainview.com/news/article/Judge-Boyd-stepping-down-on-75th-birthday-9017456.php.

Justice Boyd's interview is part of an ongoing effort by the State Bar of Texas Appellate Section to preserve and document matters of historical interest to members of the bar. The video of Justice Boyd's oral history is available at this link on the Section's website: https://vimeopro.com/user45474482/oralhistoryproject/video/181397061

BA: Why don't you start by telling us where you were born and raised?

JTB: I was born in the big city of Plainview, Texas, and raised there. Went to Virginia Military Institute during World War II and we all got drafted. When I came back from overseas, I had discovered that I liked girls and so I transferred to Baylor University and finished up there, where I met my wife.

BA: What year was that when you went off to VMI?

JTB: 1944-1945.

BA: So the war was already on?

JTB: Oh, yes. I got in on the tail end of it. I went to the Aleutian Islands, a little island called Shemya. The Air Force was bombing Japan from there. Although I was in the Army, I spent all my time at that Air Force base. I operated a service club that escorted USO troops. I got the World War II Victory Medal, the Good Conduct Medal, and the Expert Marksman Medal.

TN: What was it that got you interested in the law?

JTB: I always wanted to be a lawyer and I always wanted to be a judge. I saw a movie, *Cass Timberlane*, with Spencer Tracy. He played a judge in a small town in the movie. He had to convict some of his greatest friends and supporters and I always thought, well, that seemed like a pretty good thing and I'd like to be one.

I think judges have one of the most, if not the most important role in the protection of democracy and in the operation of the United States of America. I'm proud of the judiciary. I have been acquainted with a large number of judges over the years since 1969 when I was on the [trial] bench and I have never found a group of individuals that I think more of, that I feel was more dedicated to the pursuit of integrity and sincerely seeking right. So I'm proud of the judiciary, proud of the Texas judiciary.

TN: Tell us a little bit about your law practice in Plainview.

JTB: I went into partnership with Lucian Morehead from September, 1950, until January 1, 1969. Lucian was a brilliant individual. He had a partner, Meade Griffin, who later went on the Supreme Court of Texas. Meade was one of those old-time trial lawyers that tried

everything and did an excellent job of it. He trained Lucian and I'm pleased that I had the opportunity to be around somebody like that.

In a small town like Plainview, you did everything; some criminal, some insurance companies, income taxes, family law. Plainview was a wonderful town to practice law in at that time. We knew everybody; it was a good place to practice law.

LR: Any clients or cases that stand out in your mind from those early days?

JTB: In those days, you tried cases on Saturday. That was the entertainment. The farmers would come to town once a week, generally. And the courthouse would be packed, no air conditioning, windows up, but those people would be down there watching that trial almost like a football game. They didn't root or yell, but they would get out and they'd talk. That also kinda turned me on about being a judge. I thought that's a pretty good deal, sitting in that cat bird's seat and make all those decisions.

TN: You were appointed to the trial bench, as I understand it. Who was it that appointed you and when did that happen?

JTB: John Connally appointed me to the district court in Plainview on January 1, 1969. I was his last appointment.

TN: How long were you on the trial bench?

JTB: Until I was appointed to the Court of Civil Appeals on January 1, 1981. [Later that year] the court became the Court of Appeals [having jurisdiction of appeals of criminal cases].

TN: What are some of the differences you saw between being a trial judge and an appellate judge?

JTB: As a trial judge, you had more immediate contact with the people around you, especially in a town the size of Plainview. Sometimes domestic relations cases were difficult because you knew the people who were participating, you knew the lawyers. You knew pretty well if a lawyer was trying to snow you to get a continuance. When you go to the appellate bench, you don't have the immediate contact with the people around you. You have fellowship with your judges. The rest of it is in books.

There was a lot more comradery in the Panhandle in those days. You knew not only knew the lawyers, you knew their families. When you recessed, you would go across the street to the drugstore and drink coffee together. The atmosphere of the legal profession has changed a lot. Old men always say that. But practicing law used to be more fun than it is now.

TN: You started in '81 at the Court of Appeals here in Amarillo, and then when did you officially semi-retire?

JTB: I retired when I was seventy-five, which was in 2005.

TN: You also were the Chief Justice of the Amarillo Court of Appeals.

JTB: Yes, for six years.

BA: I would like to visit with you a little bit about the difference and changes you've seen in the judiciary. For example, when you came on the Court of Appeals I don't believe you had staff attorneys or briefing clerks.

JTB: No. When I went up there, the Court of Civil Appeals

had one briefing attorney for three judges. When Pete Laney was Speaker of the House, he recognized the need and the funds were increased until we had one briefing attorney per judge and then a staff attorney overseeing all of them.

One of the biggest changes I've noticed is the increase in the number of women judges. When I first became a judge, we only had three women judges in Texas. Pat Moore, from Lubbock, Mary Lout Robinson who is still an active federal judge, and Carol Haberman in San Antonio. Now, we've probably got nearly as many female judges as we've got male judges, and in terms of numbers they've been increasing very rapidly. I think that's a healthy sign; it gives a different viewpoint. And, also, I think, judges are younger and more alert, and a little better prepared academically when they go on the bench.

LR: What about changes in technology while you were on the Court of Appeals?

JTB: WE had a yellow pad when I first went up there, and a pen, and we'd write the opinion. My secretary used carbon paper to type the opinions, which meant that if you made a mistake or made a change, you had to go back through there and erase it. So, yeah, we've made a lot of progress.

LR: Have you seen the level of advocacy improve or change over time?

JTB: I think by and large young lawyers now are more cognizant of recent decisions of the court. They're not as colorful as they used to be, as when that generation would perform for the people coming [to watch a trial] on Saturday. It was a lot of fun even on the appellate level, sometimes we enjoyed hearing those jury arguments. But, yes, the

young lawyers now are extremely competent. They know the law, they do an excellent job.

LR: Did you ever have a slight preference for one bench or the other?

JTB: I really loved being a trial judge. I liked the live contacts, the electricity that's in the air when, on Monday morning when you've got some cases that may settle, other cases that you're gonna try. I liked the immediacy on the trial bench. I think it's good to start out on the trial bench and then move up to the appellate bench.

TN: Will you describe what you think are some of the good qualities that you would expect to see in lawyers that appear in front of you, either at the trial bench or the appellate bench?

JTB: Never try to snow the Judge. You need to be absolutely honest because, if you lie to a judge and he or she finds out about it, then your credibility is lost. And that's a terrible blow to your practice of law.

TN: What are some of the words of advice that you could give to appellate attorneys in their brief writing?

JTB: Well, again, it's important to be very careful that the cases are accurately cited and accurately described to the judge. You don't need to repeat over and over and over again. You need to confine your points to the real question in the case, and you need to be completely honest.

TN: Tell us about the [Judiciary Achievement Award] you received.

JTB: It is an award by your fellow judges. It's the most

heartwarming award that a judge can get because that's your peers. That's the people you're with, the people that know your record.

TN: I've heard it said that it's very hard, if not impossible, to win your case on appeal at oral argument but it's awfully easy to lose your case on appeal at oral argument. What are some of the pointers that you could give to lawyers for [oral argument]?

JTB: Well, one of the things you can do is misquote a case. If it's not material, it's not going to help you. It's important to give accurate citations. And if a case is against you, you need to distinguish it. You need to face it, distinguish it, because the judges or their briefing attorneys will find them.

To be completely frank, I wish we had more civility among our profession. Again, I'm getting old and I guess that's a part of getting old, but we used to have more fellowship between lawyers. You need to represent your client. That's your obligation. But at the same time, you can be civil to the lawyers on the other side. I think that's important because people judge all lawyers by the conduct they see. And the bar in recent years has regrettably, it seems to me, lost some of that civility. Practicing law is hard enough anyway, but there's no need to make it hard on anybody else. You can represent your client, but you can win a case without playing a game of gotcha on the other side.

I'm eighty-eight years old, and I can say that I have found the average lawyer is a loyal, dedicated person. I am proud of the legal profession. Lawyers, after all, are the final defense of the individual against the government. And I think in the United States, our lawyers have done a first-rate job of that, and it will be

a sad day for our country if the legal profession is ever held in such ill repute that we don't get our best and brightest like you coming into it. I am concerned about that because of the general attitude that so many people have of lawyers, which simply is not true. One thing that gives rise to that is lawyers by their nature have to be somewhat combative. They have to not be shy about speaking out. They have to take unpopular cases. They have to represent the individual against the government. Not always an easy thing to do but it is one that has set the United States of America apart from the rest of the world, with the possible exception of the British Commonwealth.

LR: You were the head of the Judicial Section [of the State Bar of Texas]. That means you were representing the other courts of appeals' justices, correct?

JTB: Actually, all of the judges when you're Chairman of the Judicial Section. You had to appear before the Legislature. I served on a committee that presented to the Legislature a plan to change the method of selecting judges that, in capsule form, provided that the initial appointment would be similar to the Missouri plan. [Under that plan], a broad-based committee would make a recommendation of three names to the Governor who would select one and appoint that individual to serve. He or she would serve for two years and then run in a non-partisan election. If they survived that initial election, then in the future they'd run on a retention basis, i.e., people would vote on whether they should be retained or not. There are weaknesses in that process. But, it seemed like a pretty good middle road to us. The Senate bought it, but the House did not and that didn't work.

To me, the vice of partisan elections is the appearance of impropriety when a judge goes and asks anybody for

money. You don't have Republican laws, you don't have Democrat laws. This is my personal view. I think when a judge attains the bench, he or she should not be involved in politics. Our system, of necessity, involves you in politics. I would like to see the system change. There is no perfect way to select judges. With all its weaknesses, maybe retention elections are the thing. Judges need to be reminded that the judicial posts belong to the people, not to those individuals.

TN: Judge, you've had a long distinguished career. It's been my honor and privilege to be able to interview you.

JTB: Let me tell you something, it is my privilege. I love the lawyers of Texas. They have been so much better to me than I deserve. The young lawyers like you represent the hope of our country, because I'll swear it seems like we're in a mess now and we need bright young lawyers to lead us out of it. Lawyers have always led the commonwealth countries, and I hope that never changes.

United States Supreme Court Update

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

Alien Tort Statute

Jesner v. Arab Bank, PLC, 138 S.Ct. 1752 (2018)

Petitioners in this case were allegedly injured or killed by terrorist acts committed abroad. They claim those terrorist acts were in part caused or facilitated by a foreign corporation—Arab Bank, PLC—and seek to impose liability on Arab Bank for the conduct of its human agents under the ATS. The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The District Court dismissed petitioners' claims and the Second Circuit affirmed, holding that the ATS does not apply to alleged international-law violations by a corporation.

The Supreme Court held that foreign corporations may not be defendants in lawsuits brought under the Alien Tort Statute ("ATS").

The Supreme Court affirmed in a fractured opinion by Justice Kennedy, joined in full by Chief Justice Roberts and Justice Thomas, and in part by Justices Alito and Gorsuch. The Court held that neither the language of the ATS nor its precedents supported extending ATS liability to foreign corporations. It further held that extending liability to foreign corporations would not serve the primary purpose of the ATS—

to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. In short, absent further action from Congress, the Court held it would be inappropriate for courts to extend ATS liability to foreign corporations.

Justice Alito concurred in part and concurred in the judgment, writing separately to emphasize why this result is compelled not only by "judicial caution," but also by the separation of powers.

Justice Gorsuch also concurred in part and in the judgment, writing separately to emphasize that the ATS is no excuse for courts to ignore the fundamental prohibition on creating new forms of legal liability.

Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan. The dissenters would hold the text, history, and purpose of the ATS—along with the long and consistent history of corporate liability in tort—confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS.

ANTITRUST

Ohio v. American Express Co., 138 S.Ct. 2274 (2018)

The United States and several states sued American Express ("Amex"), alleging that anti-steering provisions in Amex's contracts with merchants violated § 1 of the Sherman Act. "Steering" refers to the practice whereby merchants accept Amex credit cards to attract cardholders to their stores but, because they wish to avoid higher merchant fees charged by Amex, then dissuade cardholders from using Amex to pay for their purchases. Amex is vulnerable to steering because it earns most of its revenue from merchant fees, unlike competing cards which earn substantial revenue from charging interest

to cardholders.

The anti-steering agreements were vertical restraints and therefore subject to review under the rule of reason. To carry their initial burden under the rule of reason's three-step burden-shifting framework, plaintiffs must prove that the challenged restraint has a substantial anticompetitive effect that harms consumers.

Treating the credit-card market as two separate markets (for merchants and cardholders), the district court held that Amex's anti-steering provisions violated § 1 because they resulted in higher merchant fees. The Second Circuit reversed, holding that the credit-card market is a single market and that the anti-steering provisions were not anticompetitive considering the market as a whole.

The Supreme Court affirmed. In an opinion by Justice Thomas, the majority concluded that the credit-card market is a single market composed of two-sided platforms wherein the credit card facilitates a single, simultaneous transaction between two network users—merchants and cardholders. In effect, a credit-card company sells transactions to merchants and consumers. The majority thus considered the single, two-sided market for credit card transactions to determine the effect of anti-steering provisions.

The Plaintiffs maintained that Amex's anti-steering provisions produced anticompetitive effects because they resulted in higher merchant fees. But the majority held that a price increase on one side of the transaction cannot demonstrate an anticompetitive effect. Rather, establishing anticompetitive effects requires proof that the cost of transactions increased above a competitive level, that the number of credit-card transactions fell, or that competition was otherwise stifled. First, the plaintiffs failed to prove that increased merchant fees resulted from Amex's anti-steering provisions, and the evidence indicated otherwise—for example, competitors increased their merchant fees even at locations that did not accept Amex. Second, although Amex had increased charges to merchants, the number of credit-card transactions had

risen substantially in the relevant period, indicating that rising prices reflected growing demand. Finally, competition in the credit-card industry remained fierce, with Amex's competitors charging lower merchant fees to achieve broader acceptance, sometimes forcing Amex to lower its own fees. Thus, majority concluded that the Plaintiffs failed to prove an unreasonable restraint on trade.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. The dissent disagreed with the majority's characterization of the credit-card market, specifically its use of the phrase "two-sided transaction platform," but it also disagreed that market definition was necessary to evaluate the plaintiffs' claim of anticompetitive effects. Echoing the district court's analysis, the dissent argued that Amex's anti-steering provisions enabled it to raise merchant prices without losing market share or reducing the cost to cardholders. Further, it argued that anti-steering provisions limited price competition by removing the incentive for competitors to lower the price charged to merchants, resulting in higher retail prices to consumers. Because the record contained evidence of actual anticompetitive harm, the dissent argued, there was no reason for a separate analysis of market definition at step one of the rule-of-reason analysis.

Arrest

Lozman v. Riviera Beach, 138 S.Ct. 1945 (2018)

Fane Lozman became a resident of the City of Riviera Beach after he docked his floating home at a City-owned marina. Lozman openly criticized the City's plan to use eminent domain power to seize waterfront homes for private development and filed a lawsuit alleging that the City Council violated Florida's open-meetings law. During a public-comment period, Lozman discussed the arrest of a neighboring city's former officials. A councilmember told

Lozman to stop and called for police assistance when Lozman refused. Lozman was ultimately arrested. The City asserted that Lozman was arrested because he violated the Council's rules of procedure by discussing issues unrelated to the City and refusing to leave the podium, but Lozman claimed that he was arrested in retaliation for his criticism of the Council and lawsuit against the City. Lozman was charged with disorderly conduct and resisting arrest without violence. The state attorney found probable cause for the arrest but dismissed the charges. Lozman then filed a lawsuit under 42 U.S.C. § 1983, asserting that the arrest violated the Fourth Amendment and state law. The District Court instructed the jury that, for Lozman to prevail, he had to prove that the arresting officer was motivated by retaliatory animus against Lozman's protected speech and that the officer lacked probable cause to make the arrest. The jury returned a verdict for the City. The Court of Appeals for the Eleventh Circuit affirmed, holding that the jury determined that the arrest was supported by probable cause and any error was harmless because the existence of probable cause defeated Lozman's claim.

The Court held that, under the facts of this case, the existence of probable cause did not defeat a First Amendment claim for retaliatory arrest under 42 U.S.C. § 1983.

In an opinion delivered by Justice Kennedy, the Court held that the existence of probable cause did not defeat Lozman's First Amendment claim for retaliatory arrest. In *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), the Court held that even if retaliation might have been a substantial motive for the board of education's decision not to rehire a teacher, there was no liability unless the alleged constitutional violation was a but-for cause of the employment determination. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that a plaintiff alleging retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs. In this case, the City argued that just

as probable cause is a bar in retaliatory prosecution cases, it should also be a bar in retaliatory arrest cases. However, the Court declined to decide whether *Hartman* or *Mt. Healthy* should apply in retaliatory arrest cases because of the unique facts of Lozman's claim. Lozman did not sue the arresting officer but instead claimed that the City retaliated against him pursuant to an official policy of intimidation. Lozman alleged more governmental action that simply an arrest and, as a result, must prove the existence and enforcement of an official policy motivated by retaliation. Therefore, the Court held that Lozman need not prove the absence of probable cause to maintain his retaliatory arrest claim and that, on the facts of this case, the *Mt. Healthy* standard applied. The Court remanded to the Court of Appeals to consider any arguments in support of the District Court's judgment that the City preserved.

Justice Thomas filed a dissenting opinion, asserting that he would have held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory arrest claim.

Bankruptcy Law

Lamar, Archer & Cofrin, LLP v. Appling, 138 S.Ct. 1752 (2018)

Respondent Scott Appling hired the petitioner law firm to represent him in business litigation. After Appling fell behind on his bills to the tune of $60,000.00, the law firm informed Appling that it would withdraw from representation if he did not pay the outstanding amount. Appling told his attorneys that he was expecting a tax refund of approximately $100,000.00 and the law firm continued to represent him. However, Appling requested and received a refund of only $60,000.00, which he used on his business—not his legal bills. After Appling filed for Chapter 7 bankruptcy, the firm initiated an adversary

proceeding and argued that its debt was nondischargeable because of Appling's fraudulent statement. The Bankruptcy Code prohibits debtors from discharging debts arising from "false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's . . . financial condition*." 11 U.S.C. § 523(a)(2)(A) (emphasis added). Appling argued his statement was dischargeable as a statement respecting his financial condition, but the Bankruptcy Court disagreed. The Eighth Circuit reversed.

The Supreme Court held that a statement about a single asset can be a "statement regarding the debtor's financial condition" for purposes of the bankruptcy discharge statute.

The Supreme Court affirmed in an opinion by Justice Sotomayor, joined in full by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan, and in part by Justices Thomas, Alito, and Gorsuch. The Court agreed that a statement about a single asset can be a statement "respecting" the debtor's financial condition because individual assets bear on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. The Court looked to the statute's text, history, and purpose to support this result.

Class Action Litigation

China Agritech, Inc. v. Resh, 138 S.Ct. 1800 (2018)

Michael Resh filed this class action lawsuit alleging violations of the Securities Exchange Act of 1934. This was the third attempt at such a class action lawsuit; two previous suits settled after the district court denied class certification. The district court dismissed the Resh suit as time-barred under the applicable statute of limitations. The Ninth Circuit reversed, holding that the earlier class-action lawsuits tolled the statute of limitations for Resh's suit under the Supreme Court's

decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

The Supreme Court reversed in an opinion by Justice Ginsburg. The Court identified critical differences in the *American Pipe* decision that warranted application of the statute of limitations. *American Pipe* furthers efficient litigation by encouraging individual plaintiffs to delay their claims until after class certification issues are resolved. By contrast, here, efficiency is best served by a rule that encourages potential class action plaintiffs to join early so the district court can choose the best situated class representative and so that the class certification decision is litigated one time for all potential class participants. These efficiency concerns are reflected in both Federal Rule of Civil Procedure 23, which instructs that class certification should be decided early in the litigation, and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides specific procedures for providing notice to potential class participants and designating a lead plaintiff. In reaching this holding, the Supreme Court rejected arguments that such an approach would lead to duplicative class action lawsuits, pointing to the experience in the Circuits that have reached the same result.

The Supreme Court held that the filing of a class action lawsuit does not toll the statute of limitations for any subsequent class action lawsuit that alleges the same claims.

Justice Sotomayor wrote a concurring opinion. While she agreed with the Court that cases governed by the PSLRA may not rely on *American Pipe* tolling to evade applicable limitations periods, she wrote to express her opinion that the same rule should not apply to classes not governed by the PSLRA. In the absence of the PSLRA's mandated, pre-certification notice, there is no reason to expect potential class participants to know of a pending class action lawsuit, undermining key assumptions in the Court's reasoning.

Constitutional Law

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719 (2018)

In 2012, a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to order a wedding cake. The shop's owner, Jack Phillips, refused to make their wedding cake because of his religious opposition to same-sex marriages. The couple filed a charge with the Colorado Civil Rights Commission (the "Commission") and alleged a violation of the Colorado Anti-Discrimination Act (the "Act"), which prohibits discrimination in places of public accommodation on the basis of sexual orientation. The Colorado Civil Rights Division found probable cause that Phillips violated the Act. The Commission sent the case to an administrative law judge ("ALJ"), who ruled in favor of the couple. The ALJ held that the Act, which is a valid and neutral law of general applicability, did not interfere with Phillips' freedom of speech and its application in this case did not violate the Free Exercise Clause. The Commission affirmed, ordering Phillips to cease and desist from discriminating against same-sex couples by refusing to sell them wedding cakes and to comply with certain remedial measures. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court declined to hear the case.

In an opinion delivered by Justice Kennedy, the Court held that the Commission's failure to consider Phillips' case with religious neutrality violated the First Amendment. The general rule is that religious objections, though protected, do not allow business owners to deny persons equal access to goods and services under a neutral and generally applicable public accommodations law. Phillips, however, argued that using his artistic talents to make an expressive statement in support

The Supreme Court held that the Colorado Civil Rights Commission's actions violated the First Amendment because it did not consider the case before it with the religious neutrality required by the Constitution.

of same-sex marriage implicates First Amendment concerns and his sincerely held religious beliefs. The Court determined that Phillips was entitled to the neutral consideration of his claims. The Court held that the Commission's treatment of this case showed hostility toward Phillips' sincerely held religious beliefs and was inconsistent with the State's obligation of religious neutrality. The Commission treated Phillips' case differently than the cases of three other bakers who objected to a requested cake based on conscience and prevailed before the Commission. While the Commission determined that any message the couple's requested cake would carry would be attributed to the couple, not Phillips, the Commission did not address this point in the other bakers' cases. The Commission dismissed Phillips' offer to sell other products to the couple as irrelevant, despite considering this factor in the other bakers' cases. Therefore, the Court held that the Commission failed to consider Phillips' case with religious neutrality as required by the First Amendment.

Justice Kagan, joined by Justice Breyer, filed a concurring opinion. Though Justice Kagan agreed that the Commission did not consider Phillips' case with religious neutrality as required by the Constitution, she opined that the other bakers' cases were distinguishable from Phillips' case because the other bakers refused to make a cake that they would not have made for any other customer without regards to religion.

Justice Gorsuch, joined by Justice Alito, also filed a concurring opinion and stated that while the facts of the other bakers' cases and Phillips' case shared similar features, the Commission failed to apply a consistent legal rule and act neutrally.

Justice Thomas, joined by Justice Gorsuch, filed an opinion concurring in part and concurring in the judgment. Justice Thomas opined that because Phillips' conduct of creating wedding cakes was expressive, the Act alters the expressive content of his message by forcing him to create a wedding cake for a same-sex marriage.

Justice Ginsburg, joined by Justice Sotomayor, filed a

dissenting opinion. Justice Ginsburg opined that the other bakers' cases were not comparable because they would have refused to make a cake with the requested message for any customer, regardless of religion. Phillips, however, refused to sell the couple a cake he regularly sold to others based solely on sexual orientation. Additionally, the comments made by the commissioners should not overcome Phillips' refusal because the Commission's decision was only one decision in several layers of independent decision-making.

Sause v. Bauer, 138 S.Ct. 2561 (2018)

Mary Ann Sause, acting *pro se*, filed an action against past and present members of the Louisburg, Kansas police department and the town's current and former mayors (collectively, the "Defendants"). Sause asserted violations of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search of seizure. Sause alleged that police officers visited her apartment in response to a noise complaint, entered her apartment, and engaged in strange and abusive conduct before citing her for disorderly conduct and interfering with law enforcement. Sause asserted that one of the officers told her to stop when she knelt to pray and that another officer, who refused to investigate her assault complaint, threatened to issue a citation if she reported the incident to another police department. Sause also alleged that the police chief failed to investigate the officers' conduct and that the current and former mayors were aware of the officers' unlawful conduct. The District Court granted Defendants' motion to dismiss for failure to state a claim upon which relief may be granted due to Defendants' qualified immunity. Sause hired counsel for her appeal. The Court of Appeals for the Tenth Circuit affirmed.

In a per curiam opinion, the Supreme Court noted that though the First Amendment protects the right to pray, there are clearly circumstances where a police officer may lawfully prevent a person from praying. The Court determined that it

was impossible to resolve Sause's free exercise claim, which is inextricably connected to her Fourth Amendment claim, or the officers' entitlement to qualified immunity without considering why the officers were present in her apartment and whether any legitimate law enforcement interests might justify an order to stop praying. Interpreted liberally, the Court held that Sause's *pro se* petition raised a Fourth Amendment claim that could not be properly dismissed for failure to state a claim. Therefore, the Court reversed and remanded to the Tenth Circuit.

Contracts Clause

Sveen v. Melin, 138 S.Ct. 1815 (2018)

Like many other states, Minnesota has a statute establishing a default rule for divorces—if one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation. This law assumes that the policyholder would want that result, but if not, the law also allows the policyholder to rename the ex-spouse as beneficiary. This case arises from a probate proceeding in which the deceased's ex-wife challenged this law on grounds that it did not exist when her ex-husband bought his insurance policy and named her as the primary beneficiary. Thus, she argued, applying the later-enacted law to revoke his designation violates the Constitution's Contract Clause, which prohibits any state "Law impairing the Obligation of Contracts." Art. I, § 10, cl. 1. The district court rejected this argument, but the Eighth Circuit reversed.

The Supreme Court held that a Minnesota statute setting a default rule of revocation-on-divorce for beneficiary designations does not violate the Contracts Clause of the Constitution.

The Supreme Court reversed in an opinion by Justice Kagan, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, and Sotomayor. The Court noted that not all laws affecting pre-existing contracts

violate the Contracts Clause. Instead, the Court's precedents consider first whether the state law has operated as a substantial impairment of a contractual relationship and second whether the state law advances a significant and legitimate public purpose. The Court here stopped after step one, concluding the Minnesota statute does not substantially impair pre-existing contractual relationships. The Court focused on the fact that the statute is designed to reflect the policyholder's presumed intent, and so to support, rather than impair, the contractual scheme. Even if the policyholder has a different intent, the Court found he or she could re-designate the ex-spouse with minimal burdens.

Justice Gorsuch dissented, concluding that the Minnesota statute makes a significant change to the most important term of a life insurance policy, and thereby substantially impairs pre-existing contracts.

Criminal Law

Chavez-Meza v. United States, 138 S.Ct. 1959 (2018)

Adaucto Chavez-Meza pleaded guilty to possession of methamphetamines with intent to distribute. At sentencing, the district court applied the Guidelines to reach a range of 135 to 168 months and sentenced Chavez-Meza to 135 months in prison. The Sentencing Commission later lowered the range to 108 to 135 months. Chavez-Mesa moved for a reduction of his sentence to 108 months, but the district court reduced his sentence to 114 months instead. In doing so, the district court entered the order on a form certifying that the court had taken into account the relevant statutory guidelines and Guidelines policy statement. The Tenth Circuit affirmed, rejecting Chavez-Meza's argument that the district court's order was not adequately explained.

The Supreme Court affirmed in an opinion by Justice Breyer. As an initial matter, the Court refused to decide the

Government's argument that the statute governing sentence modifications does not require an explanation for a district court's modification decision. Instead, the Court held that the district court's order was sufficient. The same judge handled both the original and the modified sentencing. During the original sentencing phase, the judge refused Chavez-Meza's request for a sentence below the range because of the destructive nature of methamphetamine and the amount of the drug involved. The judge's decision on modification was consistent with his original view of the appropriate sentence and fell within the scope of judgment conferred upon sentencing judges by the law.

The Supreme Court held that the district court's use of a form order noting that the court considered the relevant statutory factors and Sentencing Guidelines policies was sufficient to explain its decision to modify an original sentence downward by less than the amount suggested by the reduced Sentencing Guidelines range.

Justice Kennedy dissented in an opinion joined by Justices Sotomayor and Kagan. The dissenting justices concluded that the information contained in the District Court's form order was insufficient to permit meaningful appellate review, which would be furthered by including specific reference to the statutory factors considered. Justice Gorsuch took no part in the consideration or decision of the case.

Dahda v. United States, 138 S.Ct. 1491 (2018)

Los and Roosevelt Dahda were indicted for participation in a conspiracy to buy and sell illegal drugs based on evidence obtained through wiretaps authorized by the District Court of Kansas. They moved to suppress evidence obtained through the wiretaps, arguing that the orders authorizing the wiretaps were facially insufficient because they permitted interception of communications outside of Kansas, in violation of the territorial limitations of the wiretap statute. The district court denied the suppression motion, and the Tenth Circuit affirmed, concluding that the territorial limitation violated by the orders

did not implicate the "core concerns" of the wiretapping statute.

The Supreme Court affirmed in an opinion by Justice Breyer. The Court first disapproved the Tenth Circuit's use of the "core concerns" test to assess the facial insufficiency prong of the wiretap statute. The "core concerns" test was developed by the Court to assess the unlawful interception prong of the wiretap statute and distinguish that prong from the other two prongs of the statute, including the facial insufficiency prong at issue here. But the Court went on to hold that the facial insufficiency prong of the statute did not apply to suppress an order based on any defect that might infect a wiretap order. Here, the sentence authorizing interceptions outside of Kansas was surplus and did not impact any other part of the orders. In the absence of the sentence, the orders properly authorized the wiretaps that produced the evidence introduced against the Dahdas. Accordingly, the Court upheld the orders.

The Supreme Court held that orders authorizing wiretaps were not facially insufficient merely because they contained a sentence purporting to authorize wiretaps outside the territorial reach of the issuing court where the offending sentence was surplus to the orders, which otherwise properly authorized the wiretaps at issue.

Justice Gorsuch took no part in the consideration or decision of this case.

Hughes v. United States, 138 S.Ct. 1765 (2018)

Erik Hughes entered a plea agreement on drug- and gun-related charges and agreed to a 180-month sentence pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) (a "Type-C" agreement) without referring to the Sentencing Guidelines. The district court calculated Hughes' Guidelines range as 188 to 235 months and accepted the plea agreement as consistent with the Guidelines and other statutory factors. A short time later, the Sentencing Commission adopted a retroactive amendment to the Guidelines that reduced the range applicable to Hughes to 151 to 188 months. Hughes moved for a reduced sentence

under 18 U.S.C. § 3582(c)(2), which permits courts to reduce sentences that were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The District Court denied the motion and the Eleventh Circuit affirmed, holding that Hughes was ineligible for sentence reduction because his plea agreement did not rely on the Guidelines.

The Supreme Court reversed in an opinion by Justice Kennedy. The Court previously addressed this issue in *Freeman v. United States* but fractured in a 4-1-4 decision with no single rationale commanding a majority. As a result, the lower courts have been similarly divided on whether to permit reduction under § 3582 of Type-C plea agreement sentences. Revisiting the issue, the Court concluded that Type-C agreements, including Hughes' agreement, are generally subject to reduction under § 3582(c)(2). A district court presented with a Type-C agreement must evaluate the agreed-upon sentence in light of the Guidelines. Because the Guidelines are a starting point in the analysis, they are also a basis for a Type-C sentence and are eligible for reduction under§ 3582(c)(2) unless there is a clear demonstration that the district court would have entered the same sentence regardless of the Guidelines. That was not the case here, where the district court calculated a sentence range under the Guidelines and found that Hughes' plea agreement was compatible with the Guidelines.

The Supreme Court held that a plea agreement approved by a district court after reference to the Sentencing Guidelines was based on the Guidelines and thus eligible for reduction in light of a retroactive downward adjustment of the relevant Guidelines.

Justice Sotomayor wrote a concurring opinion to explain that although she reached a different result in *Freeman*, she joined the majority opinion in full here to avoid the confusion in the lower courts resulting from the fractured opinions in *Freeman* and because the majority opinion most closely matched her view of the issue.

Chief Justice Roberts dissented in an opinion joined by Justices Thomas and Alito. According to the dissenting justices,

the Court's decision misapprehends the process of Type-C plea agreements. Under the applicable rule, when the government and the defendant reach such a plea agreement, the district court has no discretion to change the length of the sentence. The court may either accept the plea agreement and enter the parties' sentencing agreement or reject the agreement. Thus, although the district court consults the Guidelines, the sentence itself is based solely on the parties' agreement and accordingly does not qualify for reduction under §3852.

Koons v. United States, 138 S.Ct. 1783 (2018)

Petitioners were convicted of methamphetamine conspiracy offenses. During the sentencing phase of each defendant's trial, the government moved to reduce the sentence for assisting in prosecuting other drug offenders. The district court subsequently reduced the sentences to below the statutory mandatory minimum. After they were sentenced, the Sentencing Commission amended the Guidelines and reduced the base offense levels for certain drug offenses. Petitioners sought sentence reductions under § 3582(c)(2), which makes defendants eligible if they were sentenced "based on a sentencing range" that was later lowered by the Sentencing Commission. The Eighth Circuit held that they were not eligible because they could not show that their sentences were "based on" the now-lowered Guidelines ranges.

At issue was whether a defendant, whose sentence is based on a mandatory minimum sentence statute and reduced due to providing substantial assistance to the government, is eligible for a further reduction under §3582(c)(2), when the Sentencing Commission retroactively lowers the advisory sentencing guidelines range that would have applied in the absence of the statutory mandatory minimum. The Supreme Court held that petitioners do not qualify for sentence reductions under § 3582(c)(2) because their sentences were not "based on" their lowered Guidelines ranges but, instead, on their mandatory minimums and substantial assistance to the government.

In a unanimous decision by Justice Alito, the Court affirmed, explaining that for a sentence to be "based on" a lowered Guidelines range, the range needed to have played at least a relevant part in a defendant's sentencing. In this case, the district court did not consider the Guidelines ranges in its ultimate sentencing decisions, but instead relied on the applicable mandatory minimums.

Lagos v. United States, 138 S.Ct. 1684 (2018)

Sergio Lagos pleaded guilty to wire fraud charges for using a company he controlled to fraudulently obtain millions of dollars from a lender. When the scheme came to light, the lender spent $5 million in professional fees investigating the fraud and participating in bankruptcy proceedings for Lagos' company. As part of Lagos' sentencing, the district court ordered him to repay the lender's fees under the Mandatory Victims Restitution Act of 1996 (the "Act"). The Fifth Circuit affirmed.

The Supreme Court reversed in an opinion by Justice Breyer. The Act requires defendants convicted of certain federal crimes, including wire fraud, to "reimburse the victims" for "lost income, child care, and other expenses" sustained "during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." The Court construed the Act to apply only to reimbursement for involvement in a government investigation. Looking to the language of the reimbursement provision, the Court noted that both "investigations" and "proceedings" are related to "prosecution of the offense"—a purely governmental act. Similarly, references to "participation" in an "investigation" and "attendance" at "proceedings" make the most sense when referring to a government, rather than

The Supreme Court held that the Mandatory Victims Restitution Act of 1996 requires restitution of expenses incurred participating in government, but not private, investigations.

one's own, investigation. Finally, the types of expenses listed by the provision (lost income, child care) are consistent with involvement in a government proceeding whereas the kinds of expenses consistent with a private investigation (hiring investigators, accountants, or attorneys) are not listed. The Court also rejected the lender's argument that information derived from its investigation and shared with the government fall within the scope of the Act because they are not "incurred during" the government's investigation as required by the Act. The fact that some victims will not receive full compensation is consistent with the Act, which has a narrower scope than other federal restitution statutes.

McCoy v. Louisiana, 138 S.Ct. 1500 (2018)

In 2008, police arrested Robert McCoy for the murders of his estranged wife's mother, stepfather, and son. McCoy, who was found competent to stand trial, pleaded not guilty to three counts of first-degree murder. McCoy's alibi was that he was out of the State at the time of the killings and corrupt police had killed the victims when a drug deal went wrong. Larry English, McCoy's counsel, concluded that the evidence against McCoy was overwhelming and that, without admitting guilt, a death sentence would be impossible to avoid at the penalty phase. McCoy adamantly opposed admitting guilt. Two days before trial, McCoy sought to terminate English's representation, but the trial court refused. At trial, English conceded McCoy killed the three victims. McCoy, who continually protested these concessions, testified in his own defense to present his alibi and maintain his innocence. The jury returned a unanimous verdict of guilty on all three counts. At the penalty phase, English again conceded McCoy's guilt but urged mercy. The jury returned three death verdicts.

The Court held that a defendant has a right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

McCoy hired new counsel and unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede his guilt over his objection. The Louisiana Supreme Court affirmed.

In an opinion delivered by Justice Ginsburg, the Court held that counsel may not admit his or her client's guilt of a charged crime over the client's objection. The Sixth Amendment guarantees a defendant the right to have the assistance of counsel in his or her defense. However, by choosing assistance, a defendant does not entirely surrender control to counsel. Counsel's role is trial management and providing assistance by deciding which arguments to set forth and what evidence to admit or object to. The decisions of whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, or forgo an appeal are reserved for the client. In *Florida v. Nixon*, 543 U.S. 175 (2004), the Court held that when a defendant remains silent and fails to either approve or protest counsel's proposed concession strategy, there is no rule demanding the defendant's explicit consent to conceding guilt. However, in this case, McCoy continually objected to any admission of guilt. While Louisiana ethical rules might have stopped English from presenting McCoy's alibi if English knew McCoy would commit perjury, McCoy did not tell English he planned to commit perjury and English stated that he did not doubt that McCoy believed his alibi. English simply disbelieved McCoy's account in light of the evidence. The Court also clarified that this was not an ineffective assistance of counsel claim but rather an issue of a client's autonomy. Lastly, the Court held that the violation of McCoy's right was a structural error, and McCoy did not have to show prejudice to gain a new trial.

Justice Alito, joined by Justices Thomas and Gorsuch, filed a dissenting opinion, asserting that English did not admit McCoy's guilt. Rather, English admitted that McCoy committed one element—he killed the victims—and argued that McCoy was not guilty of first-degree murder because he lacked the requisite intent. Even if English had presented McCoy's defense, Justice Alito opined that there was no chance

of winning acquittal and English's credibility would have been destroyed in front of the jury. Justice Alito also suggested that the Court erred by concluding that the violation of McCoy's right was a structural error and that McCoy did not have to prove prejudice for a new trial because the Court did not grant certiorari on that question and the Louisiana Supreme Court did not decide the issue.

Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018)

Petitioner Florencio Rosales-Mireles pleaded guilty to reentry into the United States. His criminal-history score was calculated by a federal district court according to the US Sentencing Guidelines Manual, but a probation officer erroneously counted a state misdemeanor conviction twice. As a result, the report yielded a Guidelines range of 77 to 96 months, when the correctly calculated range would have been 70 to 87 months. Although sentenced to 78 months of imprisonment, Rosales-Mireles challenged the incorrect Guidelines range on appeal for the first time. However, the Fifth Circuit declined to remand the case, concluding that the error was not one which "seriously affects the fairness, integrity or public reputation of judicial proceedings" because neither the error nor the resulting sentence "would shock the conscience."

At issue was whether the Fifth Circuit applied the appropriate standard for plain error review when it required the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." The Supreme Court held that a miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case.

In a 7-2 opinion authored by Justice Sotomayor, the Court reversed and remanded, explaining that the Fifth Circuit's shock-the-conscience standard too narrowly confined the courts

of appeals' discretion. The risk of unnecessary deprivation of liberty from the narrow approach undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because it is ultimately the district court that is responsible for ensuring the Guidelines range is calculated correctly. Also, the Court added that resentencing remands are inexpensive compared to retrials, ensuring the accuracy of Guidelines determinations and furthering the goals of the Sentencing Commission of achieving uniformity and proportionality in sentencing.

Sessions v. Dimaya, 138 S.Ct. 1204 (2018)

James Dimaya, a lawful permanent resident of the United States, faced deportation after receiving a second conviction for first-degree burglary under California law. The immigration court ruled that the burglary qualified as a "crime of violence" as defined in 18 U.S.C. § 16(b) and therefore ordered deportation under the Immigration and Nationality Act. The Board of Immigration Appeals affirmed, but the Ninth Circuit reversed, holding that § 16(b) was unconstitutionally vague based on a recent decision by the Supreme Court interpreting a similar statute in *Johnson v. United States*.

The Supreme Court held that a federal statute defining a "crime of violence" was unconstitutionally vague because it required courts to assess whether a hypothetical "ordinary case" of the charged crime at issue involved a "substantial risk" of physical force without guiding courts as to what qualifies as an "ordinary" case and when risk becomes "substantial."

The Supreme Court affirmed in an opinion by Justice Kagan. Section 16(b) defines a "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force . . . may be used." Courts look to the hypothetical "ordinary case" of the crime at issue to determine whether the statute applies. The Court held that this formulation suffered the same problems identified in *Johnson*. First, the provision requires courts to determine whether the crime at issue

"involves a substantial risk" of force by looking to the ordinary case of the crime without providing any guidance as to what the "ordinary case" looks like. Second, the provision requires a "substantial" risk of force without providing guidance for how much risk qualifies as "substantial." Combining these problems results in an unconstitutionally vague statute. In reaching this result, the Court rejected the Government's arguments that wording differences in § 16(b) warranted a different result than in *Johnson* and that the courts' experience with § 16(b) showed that it could be applied successfully.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, went on to conclude that although removal is a civil rather than a criminal case, it is subject to exacting vagueness standards because of its grave nature. The plurality also stated its opinion that § 16(b) should be applied based on "ordinary case" analysis rather than by assessing the actual facts of the crime at issue.

Justice Gorsuch concurred in the judgment, writing separately to express his opinion that removal proceedings are subject to strict vagueness review because the void for vagueness doctrine arises out of due process and separation of powers principles in the Constitution. The fact that removal results in severe consequences is no different than many other civil laws that impose similarly severe sanctions. Justice Gorsuch also stated that the question of whether ordinary case or actual case analysis applies should be addressed in another case where the parties raise the issue.

Chief Justice Roberts dissented in an opinion joined by Justices Kennedy, Thomas, and Alito. The dissenting justices disagreed that *Johnson* controlled the outcome of this case because the Court itself successfully applied § 16(b) in the past and because § 16(b) contained more precise language defining the risk, the use of force, and the relevant time period than did the statute at issue in *Johnson*.

Justice Thomas wrote a separate dissenting opinion joined in part by Justices Kennedy and Alito. Justice Thomas made two additional points in dissent: (1) he questions whether the void

for vagueness doctrine is consistent with the original meaning of the due process clause; and (2) if the Court determines, as it did here, that "ordinary case" analysis results in a vague statute, it should stop reading that standard into statutes.

United States v. Sanchez-Gomez, 138 S.Ct. 1532 (2018)

The US District Court for the Southern District of California adopted a districtwide policy requiring defendants to appear for pretrial non-jury proceedings in full physical restraints. The policy which was proposed by the US Marshals Service applied to most in-custody defendants for such proceedings. The district court denied defendants' challenges of the restraints and the policy as a whole. The underlying criminal cases ended before the Ninth Circuit could issue a decision on appeal. However, the court – viewing the case as a "functional class action" involving "class-like claims" seeking "class-like relief" – held that the Supreme Court's civil class action precedents saved the case from mootness. On the merits, the Ninth Circuit held the policy unconstitutional.

At issue was whether the Ninth Circuit erred in ruling on the challenge to the use of pretrial physical restraints despite recognizing that the defendants' individual claims were moot. The Supreme Court held that the case is moot.

In a unanimous decision by Chief Justice Roberts, the court vacated and remanded the case, explaining that the Ninth Circuit's reliance on *Gerstein v. Pugh* was misplaced. *Gerstein* was a class action brought under Federal Rule of Civil Procedure 23 where the class representatives' individual claims became moot before the class certification; it does not support a freestanding exception to mootness outside of the class action context. The court also rejected the claim that defendants fall within an exception to mootness for a controversy that is capable of repetition because the possibility that a person will be criminally prosecuted is insufficient to establish judicial standing.

Double Jeopardy

Currier v. Virginia, 138 S.Ct. 2144 (2018)

Petitioner Michael Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. The latter charge related to Currier's previous convictions for burglary and larceny. Because the prosecution could introduce evidence of the prior convictions to prove the felon-in-possession charge, Currier agreed to sever the felon-in-possession charge from the others, which were ultimately tried first. After Currier was acquitted, he argued that the second trial on the felon-in-possession charge would amount to double jeopardy. Alternatively, he asked the court to forbid the government from relitigating any issue resolved in his favor in the first trial, including by excluding any evidence about the alleged burglary and larceny. The trial court disagreed and allowed the second trial unfettered. Currier was convicted and the Virginia appellate court affirmed.

The Supreme Court held that Double Jeopardy does not protect a criminal defendant who agrees to have related charges against him considered in separate trials.

The Supreme Court affirmed in an opinion by Justice Gorsuch joined in part by Justice Kennedy and in full by Chief Justice Roberts and Justices Thomas and Alito. The Court found that the Double Jeopardy Clause would not prevent the second trial because, if the defendant has consented to separate trials, the concerns about prosecutorial oppression underlying the Double Jeopardy Clause are simply not implicated. On the question about what evidence could be considered in the second trial, Justice Kennedy's concurrence cast the deciding vote. While Justice Gorsuch 's plurality held broadly that the Double Jeopardy Clause does not apply issue preclusion principles, Justice Kennedy held only that Currier's consent to a second trial prevented him from arguing against the relitigation of issues.

Justice Ginsburg dissented, joined by Justices Breyer,

Sotomayor, and Kagan. The dissenters believed that Currier's acquiescence to a separate trial on the felon-in-possession charge did not prevent him from raising a plea of issue preclusion.

Federal Courts

Azar v. Garza, 138 S.Ct. 1790 (2018)

Jane Doe, a minor, unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement ("ORR"), who then placed her in a federally funded shelter in Texas. Doe, who was eight weeks pregnant, asked for an abortion. ORR did not allow her to go to an abortion clinic based on a policy prohibiting shelter personnel from taking any action, absent a medical emergency, that facilitates an abortion without the approval from the Director of ORR. Rochelle Garza, Doe's guardian ad litem, filed a putative class action challenging the constitutionality of ORR's policy on behalf of Doe and all other pregnant unaccompanied minors in ORR custody. The District Court issued a temporary restraining order ("TRO") and allowed Doe to obtain an abortion. Doe attended pre-abortion counseling as required by Texas law. The next day, the Court of Appeals for the District of Columbia Circuit vacated portions of the TRO and concluded that ORR's policy was not an undue burden. Four days later, in an en banc order, the D.C. Circuit vacated its previous order and remanded to the District Court. That same day, Garza sought and was granted an amended TRO that required the Government to make Doe available to obtain the required counseling and the abortion. Doe's representatives scheduled her appointment for October 25 at 7:30 a.m. The Government planned to ask the Supreme Court for emergency review of the D.C. Circuit's order early on October 25 based on its belief that the abortion would not take place until October 26 after Doe had repeated the state-required counseling with a new doctor. However, the doctor who performed Doe's earlier

counseling was available to perform her abortion. At 10 a.m. on October 25, Garza's lawyers informed the Government that Doe had the abortion. The Government filed a petition for certiorari with the Supreme Court.

In a per curiam opinion, the Supreme Court granted the Government's petition, vacated the D.C. Circuit's en banc order, and remanded to the D.C. Circuit with instructions to direct the District Court to dismiss the relevant individual claim as moot. The Court declined to consider the Government's claim that opposing counsel made material misrepresentations and omissions designed to prevent the Court's review.

First Amendment

Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018)

The Minnesota Voters Alliance joined with other plaintiffs to file a federal lawsuit challenging a Minnesota law prohibiting individuals from wearing political insignia inside a polling place on election day. The district court dismissed the facial challenge, and the Eighth Circuit affirmed.

The Supreme Court reversed in an opinion by Chief Justice Roberts. Because the law applies only to polling places and is viewpoint-neutral, the Court looked to whether the ban on expression was reasonable in light of the purpose of the forum—in this case, voting. Under the Court's precedent, the law serves a permissible objective of preserving a space free of campaigning in which voters can contemplate their choices. But the Court held that the law failed to draw a reasonable line between what is and is not permissible. The statute itself refers to "political" insignia, without defining "political." Minnesota's

The Supreme Court held that a state statute banning individuals from wearing political apparel inside polling places on election day violated First Amendment free speech protections because it failed to draw a reasonable line between acceptable and unacceptable apparel.

official guidance for applying the statute draws a similarly vague line, referring to open-ended categories such as "issue oriented material designed to influence . . . voting" and items "promoting a group with recognizable political views." The Court concluded that these indeterminate categories failed to provide the objective, workable standards required by the First Amendment for restricting speech.

Justice Sotomayor filed a dissenting opinion joined by Justice Breyer. The dissenting justices would have certified the case to the Minnesota Supreme Court for the purpose of obtaining a definitive interpretation of the Minnesota statute at issue.

Fourth Amendment

Byrd v. United States, 138 S.Ct. 1518 (2018)

In September 2014, Pennsylvania state troopers pulled over a car driven by Petitioner Terrance Byrd. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car. That search uncovered body armor and 49 bricks of heroin. Byrd moved to suppress the evidence as the fruit of an unlawful search. The trial court denied his motion and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

The Supreme Court held that the driver of a rental car does not necessarily lack a reasonable expectation of privacy in the car simply because his or her name is not listed on the rental agreement.

The Supreme Court reversed in a unanimous opinion by Justice Kennedy. The Court held that, as a general rule, a driver in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy even if the rental agreement does not list him or her as an authorized driver. However, the

Court remanded for further proceedings on whether Byrd was in "lawful possession" of the rental vehicle. The Court acknowledged that a car thief would not have a reasonable expectation of privacy in a rental car, and the government had argued Byrd was no better than a thief because he intentionally used a strawman to rent the car and mislead the rental company, knowing full well that he would not have been able to rent the car based on his criminal record. The Court remanded for fuller development of these issues because the government had relied solely on the fact that Byrd was not on the rental agreement to defeat the motion below.

Justice Thomas concurred, joined by Justice Gorsuch, writing separately to note his doubts about the "reasonable expectation of privacy" test and to welcome briefing in an appropriate case on the original meaning of the Fourth Amendment.

Justice Alito also wrote separately to note some specific factors he believed the courts could consider on remand.

Carpenter v. United States, 138 S.Ct. 2206 (2018)

Police officers arrested four men suspected of robbing a series of stores in Detroit. One of the suspects confessed and gave the FBI his accomplices' phone numbers. The FBI identified additional phone numbers the suspect had called around the time of the robberies. Prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for Timothy Carpenter ("Carpenter"). Federal magistrate judges issued two court orders directing Carpenter's wireless carriers to disclose cell-site location information ("CSLI") during the four-month period when the robberies occurred. The Government obtained 12,898 location points detailing Carpenter's movements.

The Court held that the Government's access of historical cell phone records detailing a person's past movements constitutes a search under the Fourth Amendment that requires a warrant supported by probable cause.

Carpenter was charged with six counts of robbery and six counts of carrying a firearm during a federal crime of violence. Carpenter unsuccessfully moved to suppress the CSLI on Fourth Amendment grounds. Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison. The Court of Appeals for the Sixth Circuit affirmed.

In an opinion delivered by Chief Justice Roberts, the Supreme Court reversed and held that the Government's acquisition of CSLI was a search under the Fourth Amendment that required a warrant supported by probable cause. In prior cases, the Court has held that attaching a beeper to a car and tracking it during a single journey was not a Fourth Amendment search but using a GPS to monitor a car over a one-month period constituted a search. The Court has also held that a person does not have a legitimate expectation of privacy in information he or she voluntarily shares with third parties. However, the Court declined to extend its precedent to cover the circumstances of this case and concluded that an individual maintains an expectation of privacy in his or her physical movements as captured through CSLI and the resulting business records. Cell-site records present a heightened privacy concern because of a cell phone's ability to essentially track its owners every movement, as well as the Government's ability to retrospectively obtain intimate details of a person's life. Because CSLI is obtained without any affirmative action on the part of a cell phone user, a user cannot be said to voluntarily turn over CSLI. Thus, the Government conducted a Fourth Amendment search when it obtained CSLI from Carpenter's wireless carriers and was required to obtain a warrant supported by probable cause absent an ongoing emergency. Lastly, the Act's requirement that the Government offer "specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation," does not satisfy the probable cause standard. 18 U.S.C. § 2703(d).

Several Justices dissented. Justice Kennedy, joined by

Justices Thomas and Alito, opined that the Court's holding went against its prior holdings that individuals do not have Fourth Amendment interests in business records possessed, owned, and controlled by third parties. Justice Thomas asserted that the Government did not search Carpenter's property because the records were created, maintained, and controlled by the wireless carriers. Justice Alito, joined by Justice Thomas, argued that the Court ignored the basic distinction between an actual search, which requires probable cause, and an order requiring a third-party to produce certain documents, which does not require probable cause. Justice Gorsuch stated that the Court should have rejected its third-party precedent instead of adding a new and multilayered inquiry to the reasonable expectation of privacy standard.

Collins v. Virginia, 138 S.Ct. 1663 (2018)

After the investigation of two traffic incidents involving a unique-looking motorcycle which evaded police, one officer learned that the vehicle was likely stolen and located at the house of the suspected driver. Upon reaching the house without a search warrant, the officer walked to the top of the driveway, removed a tarp covering the motorcycle, and confirmed that it was the stolen motorcycle that had eluded detainment. When the suspect returned home, he was questioned and subsequently arrested for knowingly buying stolen property. The trial court convicted the defendant, holding that the search was based on probable cause and justified under the exigent circumstances and automobile exceptions to the Fourth Amendment's warrant requirement. The court of appeals affirmed the decision, as did the Virginia Supreme Court, although on the grounds that the automobile exception applies even when the vehicle is not "immediately mobile" and it applies to vehicles parked on private property.

At issue was whether the Fourth Amendment's automobile exception permits a police officer without a warrant to enter private property to search a vehicle parked near the house. The

Supreme Court held that the exception does not permit the warrantless entry of a home or its curtilage to search a vehicle therein.

In an 8-1 decision by Justice Sotomayor, the Court reversed and remanded, explaining that the area of the driveway searched by the officer was curtilage of the defendant's home, and thus the Fourth Amendment's highest degree of protection applies there. Justice Alito wrote a dissenting opinion arguing that the automobile exception should apply in this case and that the search was in no way "unreasonable."

Immigration

Pereira v. Sessions, 138 SCt. 2105 (2018)

Wescley Pereira entered the United States on a visa from Brazil in 2000 and remained in the country once his visa expired. In 2006, he was arrested for driving under the influence of alcohol, and the Department of Homeland Security served him with a notice to appear at a date and time to be set in the future. The Immigration Court later sent a more specific notice, but it was sent to the wrong address and never received. In 2013, Pereira was arrested again for driving without headlights. The Immigration Court reopened the removal proceedings, and Pereira applied for cancellation of removal. The Immigration Court denied Pereira's application and ordered him removed. The Board of Immigration Appeals affirmed, rejecting Pereira's argument that the initial notice failed to stop the ten-year statutory period for cancellation of removal. The First Circuit denied Pereira's petition for review.

The Supreme Court reversed in an opinion by Justice Sotomayor. To obtain cancellation of removal, a nonpermanent resident must show, among other things, continuous presence in the United States for ten years. The statute governing removal ends the ten-year period if the Government serves a notice to appear on the nonresident. The statute governing the

required notice describes it as a "written notice" that specifies several pieces of information, including "[t]he time and place at which the proceedings will be held." The Court held that this description qualified as a statutory definition requiring the notice to contain the date and time. The Court found support for its reading in neighboring provisions of the statute, which presume that the notice includes the time and place of the hearing.

Justice Kennedy concurred in the judgment. He joined the Court's opinion in full but wrote separately to express his concern that courts, like some of the courts to have addressed the question at issue in this case, are deferring too readily to administrative interpretations of statutes without engaging in independent statutory interpretation.

Justice Alito dissented, reasoning that an equally plausible reading of the statute would treat the notice to appear as a document issued by the Government to a nonpermanent resident, even if the document does not contain all of the necessary information. Because either interpretation is reasonable, Justice Alito contended that the Court should have deferred to the Government's interpretation.

Trump v. Hawaii, 138 S.Ct. 2392 (2018)

In Presidential Proclamation No. 9645 (the "Proclamation"), President Trump placed entry restrictions on the nationals of eight foreign states after he determined that their systems for managing and sharing information about their nationals were inadequate. The State of Hawaii, three individuals, and the Muslim Association of Hawaii (collectively, "Plaintiffs") challenged the Proclamation. The District Court granted a nationwide preliminary injunction barring enforcement of the Proclamation. The Court of Appeals for the Ninth Circuit initially granted a partial stay and permitted enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the U.S. The Supreme Court then stayed the injunction in full, pending disposition of the Government's

appeal. The Ninth Circuit held that the Proclamation exceeded the President's authority under § 1182(f) of the Immigration and Nationality Act ("INA"), conflicted with the INA's regulatory scheme by addressing matters of immigration already passed upon by Congress, and contravened the prohibition on nationality-based discrimination in the issuance of immigrant visas.

In an opinion delivered by Chief Justice Roberts, the Supreme Court assumed, without deciding, that it had authority to review Plaintiffs' challenges to the Proclamation. The Court determined that § 1182(f) gives the President broad discretion to suspend the entry of aliens into the U.S. and that the President lawfully exercised that discretion based on his findings—after a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to national security. The Court then held that Plaintiffs had standing to pursue their claim that the Proclamation violates the Establishment Clause by singling out Muslims for disfavored treatment and that the primary purpose of the Proclamation was religious animus. Plaintiffs relied on statements made by the President and his advisers during his campaign and while he was in office. The Court determined that it would apply a rational basis review and that it would uphold the Proclamation so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds. The Court held that the Proclamation has nothing to do with religion and is premised on legitimate purposes of preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. Thus, the Court held that the Proclamation was a facially neutral policy, reversed the grant of the preliminary injunction as an abuse of discretion, and remanded.

The Court held that the President did not exceed his authority by issuing a proclamation imposing entry restrictions on nationals of certain foreign states and that the proclamation did not violate the Establishment Clause.

Justice Kennedy filed a concurring opinion and observed

that while there are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention, officials are not free to disregard the Constitution. Justice Thomas also filed a concurring opinion, noting that he was skeptical that district courts have the authority to enter nationwide or universal injunctions and asserted that the Court must address the legality of such injunctions.

Justice Breyer, joined by Justice Kagan, filed a dissenting opinion and opined that there is evidence supporting the proposition that the Government is not applying the Proclamation as written. Justice Breyer would have sent this case back to the District Court, leaving the injunction in effect while the matter is litigated. Justice Sotomayor, joined by Justice Ginsburg, also filed a dissenting opinion and stated that the proper test to determine whether Plaintiffs proved an Establishment Clause violation is whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. Based on the evidence in the record, Justice Sotomayor opined that a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus and that the Proclamation failed even under the rational basis standard.

Indian Treaties

Washington v. United States, 138 S.Ct. 1832 (2018)

Pursuant to the Stevens Treaties (the "Treaties"), Indian tribes in the Pacific Northwest relinquished certain land in the State of Washington in exchange for a guaranteed right to off-reservation fishing. In 2001, twenty-one Indian tribes (the "Tribes"), joined by the U.S., filed a request for determination in federal district court, arguing that the State had violated, and was continuing to violate, the Treaties by building and maintaining culverts that degrade fish habitats. The Tribes requested a permanent injunction requiring the State to

identify and open culverts that obstruct fish passage. The State argued that there was no treaty-based duty to protect fish habitats and that it believed its culverts complied with the Treaties because some culverts passed under federally funded and approved highways. The District Court denied the State's cross-request for a declaration that the U.S. violated its duty to the Tribes under the Treaties and an injunction requiring the U.S. to modify or replace the culverts. Because the State had caused the size of salmon runs to diminish, the District Court determined that it violated its obligations under the Treaties and granted the Tribes' injunction.

The Ninth Circuit affirmed. Treaties between the U.S. and Indian tribes are to be construed in favor of the Indian tribes, and courts are to look to the larger context that frames the treaties, such as the history, negotiations, and practical construction adopted by the parties. Here, the State mistakenly characterized the principal purpose of the Treaties as opening the region to settlement. The Tribes' principal purpose was to secure a way to support themselves once the Treaties took effect. The Tribes reasonably understood the promise that they would have access to their usual and accustomed fishing places as also including a promise of enough fish to sustain them. Because of the reduced amount of salmon, the Ninth Circuit concluded that the State had violated, and was continuing to violate, its obligation to the Tribes by building and maintaining culverts. The Ninth Circuit dismissed the State's argument that the U.S. led it to believe its culverts did not violate the Treaties. Furthermore, the State's cross-request was barred by sovereign immunity, and the State lacked standing to assert the Tribes' treaty rights. Lastly, the Ninth Circuit held that the State failed to appeal the District Court's denial of its request that the U.S. pay part of the costs to repair or replace the culverts and that the District Court did not abuse its

Without issuing an opinion, an equally divided Court affirmed the Ninth Circuit's judgment, which held that State of Washington had violated, and was continuing to violate, its obligation to Indian tribes under the Stevens Treaties.

discretion in granting the Tribes' injunction.

An equally divided Supreme Court affirmed but did not issue a written opinion. Justice Kennedy took no part in the decision of this case.

International Law

Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S.Ct. 1865 (2018)

Petitioners, US vitamin C purchasers, commenced a class action lawsuit against business entities incorporated under Chinese law, alleging violations of U.S. antitrust laws. The Chinese companies did not deny coordinating to fix the price and quantity of vitamin C exports, but argued that Chinese law required them to do so. The Chinese Ministry of Commerce filed an amicus brief supporting the motion. The district court denied the Chinese sellers' motion in relevant part, concluding that it did not regard the Ministry's statements as "conclusive." The Second Circuit reversed, holding that federal courts are "bound to defer" to foreign government's construction of its own law when those laws are in contention and the interpretation is "reasonable."

At issue was whether a court may exercise independent review of an appearing foreign country's explanation of its law (as held by the US Courts of Appeals for the 5th, 6th, 7th, 11th, and DC Circuits), or must it defer to a foreign government's legal statement, based on principles of international comity, if that foreign government appears before the court (as held by the 9th Circuit). The Supreme Court held that when foreign law is relevant to a case instituted in a federal court, and the foreign government submits an official statement on the meaning and interpretation of its domestic law, the federal court should accord respectful consideration to the foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements.

In a unanimous decision by Justice Ginsburg, the Court reversed and remanded, explaining that Federal Rule of Civil Procedure 44.1 specifies that a court's determination of foreign law "must be treated as ruling on a question of law." While courts are not limited to materials submitted by the parties, neither Rule 44.1 nor any other rule or statute addresses the weight a federal court determining foreign law should give to the views presented by a foreign government. In the spirit of "international comity," a federal court should carefully consider a foreign state's views about the meaning of its own laws. The Court concluded that when viewed in the context of these considerations, the Second Circuit's ruling was inconsistent with both Rule 44.1 and the Court's treatment of analogous state government submissions.

Interstate Commerce

South Dakota v. Wayfair, Inc., 138 S.Ct. 2080 (2018)

South Dakota (the "State") taxes the sales of goods and services in the State. Sellers with a physical presence in the State are required to collect and remit sales tax. If a seller does not remit sales tax, the consumer is responsible for paying a use tax. Due to lost revenue from consumers not paying the use tax, the State passed an Act requiring out-of-state sellers to collect and remit sales tax. The Act applies only to sellers that deliver more than $100,000.00 of goods or services into the State annually or engage in more than 200 or more separate transactions for the delivery of goods and services into the State. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. (collectively, the "Merchants") have no employees or physical presence in the State but meet the Act's minimum requirements. The State filed a declaratory judgment action, seeking a declaration

The Court held that an out-of-state seller can be required to collect and remit state sales tax.

that the requirements of the Act are valid and applicable to the Merchants and an injunction requiring the Merchants to register for licenses to collect and remit sales tax. The district court found that the Act was unconstitutional and granted the Merchants' motion for summary judgment. The South Dakota Supreme Court affirmed.

In an opinion delivered by Justice Kennedy, the Supreme Court reversed and held that the State could require out-of-state sellers to collect and remit sales tax. A state may regulate interstate commerce if the state does not discriminate against or impose undue burdens on interstate commerce. In this case, there was no question that the State has the authority to tax these types of transactions. The only issue was whether the State can require out-of-state sellers without a physical presence in the State to collect and remit sales tax. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court held that a seller must have a physical presence in a state beyond the mere shipment of goods and services into the state before the seller can be required to collect and remit sales tax. The physical presence rule was derived from the requirement that a state's taxes must apply to an activity that has a substantial nexus with the taxing state. The Court noted that while the substantial nexus requirement is closely related to due process, it is well settled that a business does not need to have a physical presence in a state to satisfy due process. The Court determined that *Quill* has become a judicially created tax shelter for businesses that limit their physical presence and still sell their goods and services to a state's consumers. Because the Court must avoid creating inequitable exceptions, the Court held that *stare decisis* could no longer support the Court's prohibition of a state's power to tax and overruled *Quill* and *Hess*. The Court further held that the Act satisfied the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because the Act was designed to prevent discrimination and only applied to sellers that deliver a certain dollar amount of goods and services or engage in a certain number of transactions in the State.

Justice Thomas filed a concurring opinion, reiterating his support for the Court's decision to overrule *Quill* and *Bellas Hess* despite his prior vote against overruling *Bellas Hess* when *Quill* was first decided. Justice Gorsuch also filed a concurring opinion to emphasize the discriminatory effect of the tax break *Bellas Hess* and *Quill* created.

Chief Justice Roberts, joined by Justices Breyer, Sotomayor, and Kagan, dissented. He stated that though he agrees *Bellas Hess* was wrongly decided, he opposes discarding the physical presence rule simply because the Internet has changed our nation's economy. Questions of economic policy are for Congress, not the Court.

Labor Law

Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018)

In three consolidated cases, employees challenged provisions in their employment agreements requiring them to arbitrate any claims against their employers on an individual basis. The National Labor Relations Board ("NLRB") has held that such provisions are barred by the NLRA. Some circuit courts have rejected that position, finding that the Federal Arbitration Act ("FAA") requires such agreements to be enforced according to their terms. But other circuit courts have agreed with the NLRB or deferred to its interpretation. The Court granted certiorari to resolve this split.

The Supreme Court held that agreements requiring employees to arbitrate claims against their employers on an individual basis are enforceable under the National Labor Relations Act ("NLRA").

The Supreme Court held, in an opinion authored by Justice Gorsuch and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, that such individualized arbitration agreements are enforceable. The Court held simply that the FAA requires courts to enforce arbitration agreements according to their

terms and that these agreements are no different. The Court rejected arguments that the NLRA overrides this command—or that the FAA itself carves out an exception for these kind of agreements—on the theory that class and collective actions are the sort of "concerted activity" protected by the NLRA. The Court held that the NLRA reflects no such intent and that *Chevron*-deference did not require it to defer to the NLRB's interpretation.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters believed that class and collective actions are sometimes the only way for employees to effectively seek redress for their employer's misconduct—and are therefore the kind of "concerted activity" protected by the NLRA.

Military Justice

Dalmazzi v. United States, 138 S.Ct. 2273 (2018)

A military judge convicted Nicole A. Dalmazzi, Second Lieutenant, U.S. Air Force ("Dalmazzi") of wrongfully using ecstasy and sentenced her to a dismissal and confinement for one month. The U.S. Air Force Court of Criminal Appeals ("CCA") affirmed. Dalmazzi asked the CCA to vacate its decision because of the participation of U.S. Court of Military Commission Review ("CMCR") Judge Martin T. Mitchell ("Colonel Mitchell") on the panel. Dalmazzi argued that: (1) Colonel Mitchell was statutorily prohibited from sitting on the CCA because he was a CMCR judge; and (2) his service on both courts violated the Appointments Clause of the Constitution. The U.S. Court of Appeals for the Armed Forces held that the case was moot because Colonel Mitchell had not yet been appointed as a CMCR judge at the time Dalmazzi's judgment was released.

The Court issued a per curiam opinion dismissing the writ of certiorari as improvidently granted.

The Supreme Court initially granted certiorari but later issued a per curiam opinion dismissing the writ of certiorari as improvidently granted.

Ortiz v. United States, 138 S.Ct. 2165 (2018)

Petitioner, an Airman First Class, was convicted by a court-martial of possessing and distributing child pornography. The Air Force Court of Criminal Appeals ("CCA") affirmed the judgment. On petition, the Court of Appeals for the Armed Forces ("CAAF") granted review to consider whether the CCA judge was disqualified from serving on the CCA because he had also been appointed to the Court of Military Commission Review ("CMCR"). Petitioner argued that the appointment violated § 973(b)(2)(A), which provides that unless "otherwise authorized by law," an active-duty military officer "may not hold, or exercise the functions of," certain "civil office[s]" in the federal government, and the Appointments Clause prohibits simultaneous service on the CMCR and the CCA. However, the CAAF rejected both arguments.

At issue was whether (1) the Court has jurisdiction over the CAAF, and (2) the judge's simultaneous appointment to the CMCR and CCA violates the Appointments Clause or § 973(b)(2)(A). The Supreme Court held that it does have jurisdiction over CAAF cases, and the judge's simultaneous service on the CMCR and CCA does not violate the Appointments Clause or § 973(b)(2)(A).

In a 7-2 decision by Justice Kagan, the Court held that it had jurisdiction because the judicial character and constitutional history of the court-martial system enabled the Court to review the appellate decisions. The dissent argued that the CAAF is a military tribunal and part of the Executive Branch.

However, in a unanimous decision by Justice Kagan, the Court held that the judge's simultaneous service on the CCA and the CMCR did not violate § 973(b)(2)(A) because his express authorization to serve, under § 950f(b)(2), exempted him from the § 973(b)(2)(A) prohibition. Also, with respect

to the constitutional claim, the Court held that it has never interpreted the Appointments Clause to impose rules about dual service.

Patents

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S.Ct. 1365 (2018)

Oil States and Energy Services, LLC ("Oil States") and Greene's Energy Group, LLC ("Greene's Energy") are both oilfield services companies. Oil States, who had obtained a patent relating to hydraulic fracturing, sued Greene's Energy in federal district court for patent infringement. Greene's Energy responded by challenging the patent's validity. At the close of discovery, Greene's Energy petitioned the Patent Trial and Appeal Board (the "Board") of the United States Patent and Trademark Office (the "PTO") to institute inter partes review and requested cancellation of two of the patent's claims because the claims were anticipated by prior art. Oil States filed a response opposing review. The Board found that Greene's Energy had established a reasonable likelihood that the two claims were unpatentable and instituted inter partes review. The district court issued an order construing the challenged claims in a way that foreclosed Greene's Energy's prior art arguments. Subsequently, the Board issued a final written decision concluding that the claims were unpatentable. Though the Board acknowledged the district court's decision, the Board concluded that the claims were anticipated by prior art. Oil States sought judicial review of the Board's final decision in the Federal Circuit, challenging the constitutionality of inter partes review on the grounds that actions to revoke a patent must be tried in an Article III court before a jury rather

The Court held that inter partes review of patent claims does not violate Article III or the Seventh Amendment of the Constitution.

than through an administrative process. While this appeal was pending, the Federal Circuit issued an opinion rejecting the same constitutionality arguments. As a result, the Federal Circuit summarily affirmed the Board's decision in this case.

In an opinion delivered by Justice Thomas, the Court held that inter partes review does not violate Article III or the Seventh Amendment of the Constitution. When determining whether a proceeding involves the exercise of Article III judicial power, the Court must determine whether the proceeding involves public or private rights. Inter partes review falls within the public-rights doctrine because the decision to grant a patent is a matter involving public rights that is dictated by statute. Inter partes review is a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration. However, the Court emphasized the narrowness of its holding and that it only addressed the issue of the constitutionality of inter partes review. It did not address whether other patent matters can be heard in a non-Article III forum. Lastly, the Court's decision should not be misinterpreted as suggesting that patents are not property under the Due Process Clause or the Takings Clause.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, filed a concurring opinion and reiterated that the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts.

Justice Gorsuch, joined by Chief Justice Roberts, filed a dissenting opinion and asserted that the Court's decision allows a political appointee and his administrative agents, instead of an independent judge, to resolve patent claims disputes. The Court incorrectly determined that because the job of issuing patents belongs to the executive branch, the job of revoking them also belongs to the executive branch.

SAS Institute Inc. v. Iancu, 138 S.Ct. 1348 (2018)

SAS Institute Inc. ("SAS") sought inter partes review of all sixteen claims in a patent issued to its competitor,

ComplementSoft, LLC. The Patent Trial and Appeal Board (the "Board") exercised its discretion under a Patent Office regulation to review only nine of the claims, finding eight of them unpatentable. SAS appealed, arguing that the Board was required by statute to review all of the challenged claims, but the Federal Circuit upheld the Board's decision.

The Supreme Court reversed in an opinion by Justice Gorsuch. The Court held that the language and structure of the inter partes review statute barred the partial review power enabled by the Patent Office regulation. Under the statute, the review process begins with a petition filed by a private party. Once a petition is filed, the Board determines whether to institute review, which occurs if the Board finds that the petitioner is reasonably likely to prevail with respect to at least one of the challenged claims. Should the Board institute review, the statute requires the Board to issue a written decision regarding the patentability "of any patent claim challenged by the petitioner." Construing this statutory language to require a decision on every claim challenged by a petitioner, the Court rejected the Board's arguments for deference to the Board regulation and for permitting a different result based on policy grounds.

The Supreme Court held that the inter partes review statute requires the Patent Trial and Appeal Board to decide every claim challenged by a petitioner if the petition qualifies for inter partes review.

Justice Ginsburg issued a dissent joined by Justices Breyer, Sotomayor, and Kagan. The dissenters noted that under the Court's opinion, the Board could simply deny a petition while noting claims that might warrant review. A petitioner could then file a clean petition targeting only those claims. The dissenters reasoned that the Board's current practice is more efficient.

Justice Breyer wrote a dissent joined by Justices Ginsburg and Sotomayor and joined in part by Justice Kagan. The dissenters read the statute to contain an ambiguity, namely, whether the statutory language requiring an opinion on claims "challenged by the petitioner" refer to the initial petition or

claims that survive to Board review. In light of this ambiguity, the dissenters would uphold the Patent Office regulation as a reasonable interpretation of the ambiguous statute.

Public Employment

Lucia v. S.E.C., 138 S.Ct. 2044 (2018)

The SEC commenced an administrative action against an investment company and its owner for misleadingly presenting how the company's investment strategy would have performed under historical conditions, in violation of the antifraud provision of the Investment Advisers Act and the rule against misleading advertising. An administrative law judge (ALJ) imposed sanctions which were upheld by the SEC on petition. On appeal, defendants argued that the ALJ who made the administrative ruling was a not a constitutional Officer appointed in accordance with the Appointments Clause. The D.C. Circuit rejected the argument, holding that SEC ALJs are not "Officers of the United States" required to be appointed in accordance with the Appointments Clause, but are instead employees — officials with lesser responsibilities who are not subject to the Appointments Clause.

At issue was whether an SEC ALJ is considered an Officer of the United States within the meaning of the Appointments Clause. The Supreme Court held that ALJs are Officers subject to the Appointments Clause.

In a 7-2 decision by Justice Kagan, the Court reversed and remanded, explaining that under *Germaine*, 99 U.S. 508 (1879), and *Buckley*, 424 U.S. 1 (1976), officers must have a continuing position established by law and exercise significant authority pursuant to laws of the US. Like in *Freytag*, 501 U.S. 868 (1991), where the Court ruled that US Tax Court special trial judges (STJs) were officers because they met the elements of *Germaine* and *Buckley*, here the SEC's ALJs held a continuing office established by law, and exercised the same degree of discretion

as did the STJs. As such, the ALJs were officers subject to the Appointments Clause and the defendant was entitled to a new hearing before a properly appointed official.

Sovereign Immunity

Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649 (2018)

In 2013, the Upper Skagit Indian Tribe (the "Tribe") bought approximately forty acres where it asserted that tribal members were buried. The Tribe commissioned a survey and intended to ask the Government to add the land to its existing reservation. According to the survey, the Tribe believed that a barbed wire fence was in the wrong place and that an acre of its land was on the Lundgrens' side of the fence. The Tribe informed the Lundgrens that it intended to tear down and rebuild the fence in the right spot. The Lundgrens filed a suit to quiet title and asserted the doctrines of adverse possession and mutual acquiescence. The Tribe claimed sovereign immunity from suit. The Supreme Court of Washington ruled for the Lundgrens, holding that tribal sovereign immunity does not apply to cases where a judge exercises *in rem* jurisdiction to quiet title and only applies to cases where a judge seeks to exercise *in personam* jurisdiction based on its reading of *Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992).

The Court held that the issue of whether the immoveable property exception applied to tribal sovereign immunity should be addressed in the first instance by the Supreme Court of Washington.

In an opinion delivered by Justice Gorsuch, the Court held that *Yakima*, which held that states could collect *in rem* taxes on fee-patented land within a reservation, only addressed an issue of statutory interpretation and did not address tribal sovereign immunity. The Lundgrens acknowledged this at oral argument and asserted, for the first time, that sovereigns enjoy no

immunity from actions involving immovable property located in the territory of another sovereign. The Lundgrens argued that the Tribe could not assert sovereign immunity because this suit relates to immovable property located in Washington that the Tribe purchased as if it were a private individual. The Court determined that the Supreme Court of Washington should address this argument in the first instance.

Chief Justice Roberts, joined by Justice Kennedy, filed a concurring opinion. Chief Justice Roberts suggested that the Court might need to address the immovable property exception in a future case if the Supreme Court of Washington holds that the exception is inapplicable to tribal sovereign immunity.

Justice Thomas, joined by Justice Alito, filed a dissenting opinion and asserted that the Court could have resolved this case by addressing the immovable property exception because it is well-settled and clearly applies to tribal sovereign immunity.

States

Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461 (2018)

The Professional and Amateur Sports Protection Act (PASPA) prohibits state-sanctioned sports gambling, although it does not make sports gambling itself a federal crime. Instead, it allows the Attorney General or sports leagues to bring an action to enjoin the gambling. In 2011, New Jersey voters approved a state constitutional amendment legalizing sports gambling. The NCAA and three major professional sports leagues sued claiming that it violated PASPA, but New Jersey argued that the Act violated the Constitution's anticommandeering principle by preventing the State from modifying or repealing its law. The Third Circuit affirmed that there was no anticommandeering violation, and the Supreme Court denied review.

In 2014, the New Jersey Legislature enacted the law at issue, but instead of affirmatively authorizing sports gambling

schemes, it repealed state-law provisions prohibiting them. The leagues again sued to enjoin the 2014 law, were granted summary judgement in the district court, and had the decision affirmed by the Third Circuit, holding that the prohibition does not "commandeer" the States in violation of the Constitution.

At issue was whether a federal statute, which prohibits modification or repeal of state-law prohibitions on private conduct, impermissibly commandeered the regulatory power of states? The Supreme Court held that the PASPA provisions prohibiting state authorization and licensing of sports gambling schemes did violate the anticommandeering rule.

In a 6-3 decision by Justice Alito, the court reversed in favor of New Jersey, explaining that when a state completely or partially repeals old laws banning sports gambling schemes, it "authorizes" those schemes under the PASPA; thus, there was no meaningful difference between directing a state legislature to enact a new law or prohibiting the state from doing so. The Court continued that the legislative power to authorize and license sports gambling schemes is reserved for the States, under the Tenth Amendment and other constitutional principles, and the PASPA provisions at issue unequivocally dictated what a state legislature may and may not do. The Court also held that no PASPA provision is severable from the provisions directly at issue.

Tax Law

Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067 (2018)

In the midst of the Great Depression, Congress adopted the Railroad Retirement Tax Act to federalize struggling railroad pension plans. The Act remains in force today and requires private railroads and their employees to pay a tax in return for a pension that is often more generous than social security. *See* 26 U.S.C. §§ 3201(a)(b), 3221(a)-(b). Specifically, the Act imposes

a tax on employee "compensation," defined to capture "any form of money remuneration." *Id.* § 3231(e)(1). The question in this case is whether that definition encompasses stock options granted to railroad employees. The Seventh Circuit held it did.

The Supreme Court reversed in an opinion by Justice Gorsuch, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. In holding that the term "money remuneration" does not include stock options, the Court looked to the ordinary meaning of those terms at the time the statute was passed. It held that "money" was understood to mean currency issue by a recognized authority as a medium of exchange—which did not include stock options. Although the term "remuneration" is broader, the Court held that it was limited by the adjective "money" to coins, paper currency, checks, wire transfers, etc.—not things, like stock, that aren't money at all. The Court found this reading consistent with the statutory context and that there was no ambiguity requiring *Chevron* deference to the IRS.

The Supreme Court held that stock options granted to railroad employees do not qualify as taxable "money remuneration" under the Railroad Retirement Tax Act.

Justice Breyer dissented, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan. The dissenters believed this term is ambiguous and that other tools of statutory interpretation—including the statute's purpose, history, and structure—indicate the term "money remuneration" includes stock options.

Voting Rights

Abbott v. Perez, 138 S.Ct. 2305 (2018)

In 2011, the Texas Legislature adopted new federal and state legislative districts. These plans were immediately tied up in litigation and never used. With the 2012 primaries rapidly

approaching, the three-judge district court assigned to this litigation drew up its own interim plans that would comply with all relevant legal requirements. These plans were used in the 2012 election, but the Supreme Court reversed with instructions for the district court to give greater deference to the Legislature's plan. In 2013, the Texas Legislature repealed the 2011 plans and adopted the district court's plans with minor modifications. After determining that the 2011 plans had been tainted by discriminatory intent, the district court declared invalid a number of districts that reappeared in the 2013 plans. The district court found the 2013 Legislature had failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."

The Supreme Court held that, with one exception, Texas's 2013 legislative redistricting plan was constitutional and that the district court had improperly applied the burden of proving discriminatory intent.

The Supreme Court reversed in an opinion by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch. It held that the district court erred when it required the state to show that the 2013 Legislature purged the "taint" attributed to the never-used 2011 plans. Whenever a challenger claims a state law was enacted with discriminatory intent, the burden of proof lies with the challenger and the good faith of the state is presumed. These burdens are not changed by a finding of past discrimination. Nor was this a case where a law originally enacted with discriminatory intent was reenacted. Instead, the 2013 Legislature enacted, with only very small changes, plans that had been enacted by the district court. Under these circumstances, only the intent of the 2013 Legislature mattered—and the Court held the evidence was plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination. Without that intent finding, only four districts had been invalidated on alternative grounds—the Court reversed as to three, but affirmed the district court's holding that one particular district was a racial gerrymander.

Justice Sotomayor dissented, joined by Justices Ginsberg,

Breyer, and Kagan, to state her view that the Court lacked jurisdiction to review the district court's decision and that, in any event, affirmance was required under the proper standard of review.

Gill v. Whitford, 138 S.Ct. 1916 (2018)

After the Wisconsin Legislature redrew the boundaries of the State's legislative districts in 2011, a group of Wisconsin Democratic voters filed suit, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. The Plaintiffs argued that such "partisan gerrymandering" affected them on a statewide level because Democratic voters were not given the same opportunity as Republican voters to elect representatives of their choice. The Defendants moved to dismiss for lack of standing, among other things, arguing that the Plaintiffs' legally-protected interests only extended to the districts in which they vote, and that they could not assert a statewide injury. The District Court denied the motion and ultimately found for the Plaintiffs. The Defendants appealed directly to the Supreme Court.

The Supreme Court reversed in an opinion by Chief Justice Roberts, joined in full by Justices Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, and in part by Justices Thomas and Gorsuch. The Court initially detailed its historical efforts to resolve claims of partisan gerrymandering, noting that its opinions have left unresolved what is necessary to show standing in a case of this sort and whether these cases are justiciable in the first place. The Court did not reach the latter question because it found that the Plaintiffs had not demonstrated a sufficiently personal injury to have standing. The Court held that, to the extent a plaintiff's alleged harm is the dilution of his or her vote, that injury is district specific. Thus, the

The Supreme Court held that the Plaintiffs did not have—or at least did not properly establish—standing to raise claims of partisan gerrymandering.

Plaintiffs' allegations of "statewide harm" were not the type of injury recognized for Article III standing. In short, the Court held that it "is not responsible for vindicating generalized partisan preferences" and that its "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." However, the Court remanded for some of the Plaintiffs—who did allege individual injuries relative to their districts—to prove standing.

Justice Kagan concurred, joined by Justices Ginsburg, Breyer, and Sotomayor, to note that, if the Plaintiffs can establish individualized standing, they may nevertheless be permitted to use statewide evidence and seek a statewide remedy.

Justice Thomas also concurred, joined by Justice Gorsuch, to state his view that the Plaintiffs' claims should have been dismissed outright.

Benisek v. Lamone, 138 S.Ct. 1942 (2018)

In a per curiam opinion, the Court found that the Plaintiffs had not been diligent in seeking injunctive relief, as their request for an injunction was filed six years—and three general elections—after the 2011 map was adopted. The Court further found that the district court was within its discretion in waiting for the Court's opinion in *Gill* before adjudicating Plaintiffs' claims and in concluding that an injunction in the interim might have worked a needlessly chaotic effect upon the electoral process.

The Supreme Court held that the district court did not abuse its discretion in denying a preliminary injunction to the plaintiffs, who claimed that a congressional district in Maryland was gerrymandered in 2011 for the purpose of retaliating against them and their political views as Republicans.

Husted v. A. Philip Randolph Inst., 138 S.Ct. 1833 (2018)

Plaintiffs challenged the Ohio process for removing inactive registrants from its registered voter rolls. The National Voter

Registration Act (NVRA) prohibits states from removing names from its registered voter rolls by reason of failure to vote, although the Help America Vote Act (HAVA) makes clear that nonvoting may be part of a test for removal. Under the Ohio process, voters who have not voted for two years are sent notices to confirm their registration. If the state receives no response and these individuals do not vote over the next four years, they are ultimately removed from the rolls. The Sixth Circuit struck down the laws because it used an individual's failure to vote as a "trigger" for sending out a confirmation notice to that person.

At issue was whether Ohio's list-maintenance process violates the Failure-to-Vote Clause of the NVRA given that it relies on the inactivity of a registered voter as a "trigger" to send a confirmation notice to that voter under the NVRA and HAVA. The Supreme Court held that a failure-to-vote clause in the National Voter Registration Act (NVRA) does not prohibit Ohio's supplemental process for identifying and removing from registered voter rolls those voters who have lost their residency qualification.

In a 5-4 opinion authored by Justice Alito, the Court reversed, explaining that Ohio's law does not violate the Failure-to-Vote Clause or any other NVRA provision. By the plain language of the statute, NVRA forbids the use of nonvoting as *the sole* criterion for removing a registrant, and Ohio did not use it that way. Any other reading is inconsistent with the text and clarification in HAVA.

Justice Thomas concurred in full, but wrote separately. Justice Breyer wrote a dissenting opinion in which Justices Sotomayor, Kagan, and Ginsburg joined. The dissent argued that the Ohio process does rely on failure to vote and the additional requirement of responding to a mail notice does not mitigate the violation of the statute. Justice Sotomayor wrote a separate dissenting opinion arguing that the majority ignored the purpose behind the NVRA in addressing voter suppression.

North Carolina v. Covington, 137 S.Ct. 1624 (2018)

After the North Carolina General Assembly enacted new state legislative districts in 2011, a three-judge district court invalidated multiple districts as racial gerrymanders, ordered the General Assembly to adopt new redistricting plans, and called for special elections in the gerrymandered districts. The Supreme Court summarily affirmed the judgment on liability but vacated the district court's remedial order. *See Covington v. North Carolina*, 137 S. Ct. 1624 (2017) (per curiam).

On remand, the General Assembly enacted new plans, which were drawn with instructions not to consider racial data. Plaintiffs nevertheless challenged four districts as racial gerrymanders. They also maintained that the General Assembly's redrawing of five state house districts in Wake and Mecklenburg Counties, which had not been found unconstitutional, violated the State constitution's ban on mid-decade redistricting. The district court sustained Plaintiffs' claims against all of the challenged districts, appointed a special master to devise a replacement plan, and later adopted the special master's plan. The State appealed.

The Supreme Court summarily affirmed the district court's adoption of the special master's remedial plan with respect to the four state legislative seats previously found to constitute racial gerrymanders. The Court held that the Plaintiffs' claims were not moot; it explained that the repeal of the previous statute did not moot the Plaintiffs' claims because they continued to allege that the districts separated voters on the basis of race. Further, even though the General Assembly had instructed its map drawers not to rely on racial data, the circumstantial evidence supported the plaintiffs' racial-gerrymandering claims. Finally, the Court rejected the State's argument that the court-ordered replacement plans were themselves racial gerrymanders, holding that the State failed to counter the district court's finding that the special master did not pursue or achieve any racial targets in drawing remedial districts.

But the Supreme Court summarily reversed the district

court's order redrawing state house districts in Wake and Mecklenburg Counties, which was based on the North Carolina Constitution's prohibition on mid-decade redistricting. The Court held that the district court's decision was clear error, because the district court's authority to interfere with legislative redistricting efforts was limited to enforcing the "clear commands" of federal law. Here, that role extended no further than providing a remedy for districts that had been racially gerrymandered in violation of the U.S. Constitution.

Water Law

Florida v. Georgia, 138 S.Ct. 2502 (2018)

Florida brought an original action claiming that Georgia denied it an equitable share of the waters in the Apalachicola-Chattahoochee-Flint River Basin. Florida alleged that Georgia's excessive consumption of water from the Flint River reduced the flow of water through the Apalachicola River and into the Apalachicola Bay, resulting in damage to Florida's oyster industry. The Supreme Court granted Florida's motion for leave to file a complaint and appointed a special master to conduct discovery and evidentiary proceedings.

The special master submitted a report recommending dismissal of the complaint, holding that "Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin." The main shortcoming, in the master's view, was the unresolved question whether reducing Georgia's consumption of water in the Flint River would sufficiently increase the flow through the Apalachicola River, the answer to which depended on the Army Corps of Engineers' operation of dams and reservoirs in the river basin. And since the United States declined to waive sovereign immunity, the Corps was not a party to the suit. Florida filed exceptions to the report arguing that the special master applied the wrong legal standard in determining

redressability and that Florida's showing of redressability was sufficient, in any event.

Justice Breyer's opinion for the majority began by noting the Court's unique role in disputes between sovereign states, which present "quasi-international" controversies and often require a delicate balancing of competing interests. Indeed, because of the "equal dignity" of the States, a complaining State bears a heavier burden than a private party seeking injunctive relief. As a result, the Court has applied a clear-and-convincing standard to a State's initial showing of injury. But the majority held that the Court's cases do not require the same showing on the threshold showing of redressability, which is informed by the need for "approximation" and "flexibility." And the majority held, in the light of evidence that a limitation on Georgia's water use would likely result in an increased flow of water to Florida, that Florida made a sufficient threshold showing that its injuries could be effectively redressed by limiting Georgia's use of water without a decree binding the Corps. But the finding that Florida made a sufficient showing "as to the possibility of fashioning an effective remedial decree" left several evidentiary questions for remand, including whether the benefits of an equitable apportionment of water from the Basin would substantially outweigh any resulting harm.

Justice Thomas, in a dissent joined by Justices Alito, Kagan, and Gorsuch, would have held that Florida failed to present clear and convincing evidence that limiting Georgia's water usage "would benefit Florida more than it harms Georgia." In the dissent's view, the special master properly applied the balance-of-harms standard, and the majority improperly transformed the Court's equitable-apportionment jurisprudence by departing from precedent.

Fifth Circuit Update

Kelli B. Bills, Natasha Breaux, & Ryan Gardner
Haynes and Boone, LLP

Arbitration

***Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Servs., L.L.C.*, 898 F.3d 629 (5th Cir. 2018)**

Plaintiff Lone Star sold its assets, customer lists, and customer contracts to a competitor, Defendant Sunbelt. The sales price included three future contingent payments, called "earnouts," which were dependent on the amount of revenue Sunbelt received from Lone Star's customer base. The sales contract provided a mechanism for Sunbelt to calculate revenue and for Lone Star to propose an adjustment. The arbitration provision of the parties' contract provided that an arbitrator would resolve any "dispute[s] over [Lone Star's] proposed adjustments to [the] Revenue Calculation." After a dispute arose and an arbitrator was appointed, the arbitrator agreed with Lone Star's upward adjustment to the revenue calculation but also reformed the contract, concluding the parties had made a mutual mistake when listing the revenue target for former Lone Star customers in the agreement. The district court vacated the portion of the arbitration award reforming the contract.

The Fifth Circuit affirmed. The Court reasoned that the arbitration provision empowering the arbitrator was narrow as it authorized the arbitrator only to resolve the parties' dispute over Lone Star's proposed adjustments to the revenue calculation. Had the provision extended to any dispute "regarding" or "arising out of" the revenue calculation, the outcome might have been different. By straying beyond the contractual language, the arbitrator

An arbitrator exceeded his powers in reforming a contract based on mutual mistake when the arbitration clause only empowered him to resolve a certain dispute.

exceeded his power and thus, the order reforming the contract for mutual mistake was properly vacated.

***Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir. 2018)**

Kimberly Huckaba filed suit in federal court against Ref-Chem, L.P., her former employer. Ref-Chem responded by filing a motion to dismiss and compel arbitration pursuant to an arbitration agreement that Ref-Chem alleged the parties had entered into. The agreement in question was signed by Huckaba, but not by Ref-Chem. Ref-Chem claimed Huckaba was bound by the agreement because she signed it and that it had voluntarily agreed to arbitrate pursuant to the agreement. Huckaba countered that she had signed with the expectation that Ref-Chem would also sign. The district court granted Ref-Chem's motion to compel and dismissed the case, but the Fifth Circuit reversed.

Applying Texas law, the Court observed that Texas requires execution and delivery of a contract with the intent that it be mutually binding on all parties. Whether a signature is required is based on the parties' intent, and a signature is not required as long as both parties give their consent and there is no evidence of intent to require both parties to sign to execute the contract. Turning to the language in the contract, the Court observed that the contract referred to both parties signing the agreement multiple times, including: (1) a clause stating the signing parties were giving up their right to sue; (2) a clause prohibiting modifications unless they were in a writing signed by both parties; and (3) a signature block for Ref-Chem. Additionally, in the first line of the the agreement it stated that it would include Ref-Chem's signature. Based on this evidence, the Court concluded the parties' intention was for Ref-Chem to sign the agreement. It reached this conclusion even though Ref-Chem's conduct, such as keeping the agreement in Huckaba's file and moving to compel arbitration when she

An arbitration agreement that is not signed by an employer is not binding on an employee even though the employee signed the agreement.

sued, provided some evidence that Ref-Chem had intended to be bound by the agreement. Thus, because Ref-Chem did not sign the agreement, neither party was bound by it.

Constitutional Law

Collins v. Mnuchin, 896 F.3d 640 (5th Cir.), *reh'g en banc granted*, 908 F.3d 151 (5th Cir. 2018)

In 2008, the Housing and Economic Recovery Act ("HERA") was passed, creating a new independent federal entity—the Federal Housing Finance Agency ("FHFA"). The FHFA oversees the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). In 2012, the United States Treasury Department and the FHFA, as conservator to Fannie Mae and Freddie Mac, entered into an agreement whereby the Treasury provided billions of taxpayer dollars in capital to Fannie Mae and Freddie Mac and, in exchange, they were required to pay the Treasury quarterly dividends equal to their entire net worth. Aggrieved Shareholders of Fannie Mae and Freddie Mac bought suit against the Treasury and the FHFA (collectively, the "Agencies"). Specifically, shareholders brought a statutory claim for violation of HERA, alleging that the agencies exceeded their statutory authority under HERA by agreeing to the exchange. Shareholders also brought a constitutional claim, alleging that the FHFA was unconstitutionally structured in violation of the separation of powers doctrine because it was headed by a single director removable only for cause, did not depend on congressional appropriations, and evaded meaningful judicial review. The district court ruled in favor of the agencies, and the shareholders appealed.

The Federal Housing Finance Agency was unconstitutionally structured because it was too insulated from executive branch control.

The Fifth Circuit affirmed in part and reversed in part. The Court affirmed dismissal of the statutory claim, holding it

was barred by the section of HERA that bars courts from taking any action to restrain or affect the exercise of powers or functions of the FHFA as a conservator or receiver. However, the Court reversed the dismissal of the constitutional claim, holding the FHFA was unconstitutionally structured in violation of the separation of powers doctrine because it was insulated to the point where the executive branch could not control it or hold it accountable. The Court reached this conclusion after assessing the combined effect of: (1) the for-cause director removal restriction; (2) the single-director leadership structure; (3) the lack of a bipartisan leadership composition requirement; (4) the funding stream outside the normal appropriations process; and (5) the Federal Housing Finance Oversight Board's purely advisory oversight role. The appropriate remedy was to sever and strike the language of HERA providing that the executive branch could remove the FHFA's director only for cause (so that the executive branch can now remove the director at will), and to leave the remainder of HERA undisturbed.

***Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018)**

In 2011, the Texas legislature enacted a law that required voters to present government-issued identification in order to vote at the polls ("SB 14"). The law was challenged, and the district court held the law unconstitutional, and that it violated section 2 of the Voting Rights Act because of its discriminatory purpose and effect. After the an en banc Fifth Circuit held the law unconstitutional based on its disparate impact on minorities in 2016, the legislature worked with the challengers to fashion an interim remedy for the 2016 election whereby voters could cast a ballot upon swearing or affirming that they had a reasonable impediment and completing a Declaration of Reasonable Impediment ("DRI") that listed various impediments that might prevent a voter from having an ID.

The Texas voter ID law did not violate the Constitution or the Voting Rights Act.

In 2017, the legislature passed a new law codifying a substantial portion of the interim remedy crafted for the 2016 election ("SB

5"). Besides extending the time period for which expired ID's will be accepted and adding new forms of acceptable ID, the most substantial difference between SB 5 and the interim remedy was to remove the category of "other" from the DRI where voters had the option to fill in any reason they wished, an option Texas claims was abused during the 2016 election. Despite these changes, the district court held that SB 5 was also unconstitutional and entered a permanent injunction against the law.

The Fifth Circuit began its analysis by holding that the passage of SB 5 did not moot the case. Turning then to the district court's remedial order, the Court emphasized that federal courts are to defer to legislation designed to address voting rights violations unless the law is infected with a discriminatory purpose. The Court then admonished the district court for failing to show such deference and instead issuing an injunction that far exceeded the scope of violations found by the Court. It also found the district court committed numerous errors, including concluding that SB 5 was the tainted fruit of SB 14 despite the Court's prior holding limiting the problems with SB 14 to a subset of indigent minority voters and presuming without proof that the invidious intent behind SB 14 carried over to SB 5 while also overlooking the improvements made to SB 5. The Court also faulted the district court for placing the burden of proof on the state to prove that SB 5 was not unconstitutional and for not considering less stringent relief.

Also significant was the fact that Plaintiffs never actually challenged SB 5. The Court observed that SB 5 largely replicated the interim terms to which the parties agreed. While Plaintiffs did criticize the removal of the "other" box and the requirement of submitting the DRI under penalty of perjury, the Court found these critiques to be speculative. While noting that its opinion did not prevent future challenges to SB 5, it held that for now it was an effective remedy to the deficiencies the Court previously found in SB 14. Therefore, the Court reversed the district court's permanent injunction.

Judge Higginbotham wrote a concurring opinion. He stated that he would hold the case moot because the new law supplied

the relief sought by Plaintiffs. He also criticized the district court's reliance on segregation cases and stated they had no role in the discrete state rules at issue in the case. Finally, he discussed the tension between disentangling partisan advantage from racial purpose when the minority voters are heavily invested in the party not in power and suggested that a confessed purpose of gaining a partisan advantage might violate the Equal Protection Clause.

Judge Graves wrote a dissenting opinion. While agreeing that the case was not moot, he stated SB 5 was merely an alter ego of the unconstitutional SB 14. He stated the district court correctly followed the en banc court's order to reexamine the evidence of discriminatory purpose and that it correctly disregarded evidence it was instructed not to consider by the Court. Absent a clearly erroneous finding of fact, the district court's conclusion should have been affirmed, and Judge Graves said there were no clearly erroneous findings of fact. Turing then to the district court's injunction, he stated that SB 5 changed very little from SB 14, and even if it lessened the discriminatory effects of the law, it did little to address the discriminatory reason for enacting the law in the first place. He stated Texas had the burden to prove SB 5 did not violate the Constitution, and the district court's thorough opinion did not error in concluding that it did not meet this burden. Thus, he would affirm the district court's invalidation of both SB 14 and SB 5.

Employment Law

***In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (5th Cir. 2018)**

In April 2017, two employees of In-N-Out Burger wore buttons advocating for a $15-per-hour minimum wage and the right to form a union at one of the company's fast food restaurants in Austin, Texas. Managers of the restaurant confronted the employees and eventually asked one employee to remove the button based on the company's strict dress code that forbade employees from wearing any pins or stickers

while working. The employee complied but then filed unfair labor practice charges against In-N-Out. An administrative law judge held a hearing and ultimately found In-N-Out's "no-pins rule" violated the National Labor Relations Act. The National Labor Relations Board affirmed the ALJ's decision and ordered InN-Out to cease and desist from maintaining or enforcing its "no-pins rule" in a manner that prevented its employees from engaging in protected activity. In-N-Out sought review of the Board's decision from the Fifth Circuit, and the Board cross-applied for enforcement of its decision.

The Fifth Circuit began its analysis by discussing the deferential nature of its review, which required the Court to affirm the Board's decision so long as its legal conclusions had a reasonable basis in the law and its factual conclusions were supported by substantial evidence. The Court then observed that the National Labor Relations Act protects the right of employees to wear items relating to the terms and conditions of their employment and unionization. The only exception is when an employer can show that special circumstances outweigh the employees' interests in wearing such items. These special exceptions include when displaying protected items would: (1) jeopardize employee safety; (2) damage products; (3) aggravate employee dissension; and (4) interfere with the employer's established public image. Even when such a special circumstance exists, the employer's policy must also be narrowly tailored to fit that special circumstance.

Fast food restaurant violated federal labor law barring workers from wearing buttons supporting a higher minimum wage and stronger unions.

In-N-Out argued its strict dress code was necessary to maintain its public image, which sought to provide customers with a consistent experience in all stores, and to assure food safety. Rejecting these arguments, the Court held In-N-Out could not establish a special circumstance based on the longstanding nature of its uniform, its strict enforcement of its dress code, or the fact that customers were likely to see the pins.

It also stated the fact that In-N-Out required its employees to wear pins wishing customers a "Merry Christmas" and pins supporting In-N-Out's charitable foundation—both of which were larger than the pins at issue—undercut its arguments. Further, In-N-Out's arguments failed because it did not present any specific, non-speculative evidence to support its arguments. Finally, the Court found that In-N-Out's ban on pins was not narrowly tailored to address any concerns it might have for food safety. Thus, the Court upheld the Board's decision and granted its cross-application for enforcement.

Evidentiary Issues

In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., 888 F.3d 753 (5th Cir. 2018)

The case involves multidistrict litigation against DePuy Orthopaedics, Incorporated ("DePuy") and Johnson & Johnson ("J&J"), DePuy's parent company, involving metal-on-metal hip implants sold and manufactured by DePuy. At trial, Plaintiffs claimed DePut defectively designed and marketed its hip implants and J&J was liable as a "nonmanufacturer seller," for aiding and abetting DePuy, and for negligent undertaking. After a trial prominently featuring expert witness testimony from both sides, the jury returned a $502 million verdict in favor of the Plaintiffs. Defendants brought motions for judgment as a matter of law ("JMOL") and a new trial, but all were denied except for the reduction in the verdict to $151 million pursuant to Texas's statutory cap on exemplary damages. Defendants appealed on numerous grounds.

First, DePuy appealed the denial of its JMOL motion. It sought JMOL on the design defect claims for three reasons: (1) the metal-on-plastic product Plaintiffs relied upon was a different product, not an alternative design; (2) the design-defect claim was preempted by Food and Drug Administration regulations; and (3) liability was foreclosed by the Restatement of Torts. The Fifth Circuit rejected each of these claims.

Regarding the alternative design argument, the Court held the difference between DePuy's product and the one proposed by Plaintiffs was merely a matter of degree—not function—and that the degree of difference did not impair the hip implant's overall utility enough to constitute a different product. The Court also found the FDA regulations did not preempt the lawsuit. As to the Restatement argument, the Court rejected the argument because Texas courts had not applied the rule in question to medical implants.

DePuy also appealed the denial of its JMOL motion on Plaintiffs' marketing defect claims for three reasons: (1) the warnings in place were adequate; (2) Plaintiffs failed to properly designate a warning expert; and (3) Plaintiffs failed to prove causation. Rejecting the first argument, the Court held DePuy's warning lacked the specificity required by Texas law. As to the second argument, the Court held Plaintiffs had presented sufficient expert testimony. Addressing causation, the Court stated causation for marketing defects requires Plaintiffs to prove a doctor read or encountered the adequate warning and that he would have altered his treatment because of the adequate warning. While most of the Plaintiffs did produce such evidence, two of them did not, so the Court granted the JMOL motion as to them.

Defendants were entitled to a new trial when the district court erroneously admitted highly inflammatory evidence and Plaintiffs' counsel misled the jury into believing that key experts were testifying without compensation.

Turning next to J&J's appeal, the Court considered J&J's arguments regarding personal jurisdiction, the aiding and abetting claim, the nonmanufacturer seller claim, and the negligent undertaking claim. The Court first found J&J was amenable to suit in Texas under a stream of commerce theory because J&J played a significant role in placing its products into Texas's stream of commerce with the expectation that they would be purchased there. The Court also affirmed the nonmanufacturer seller and negligent undertaking claims. However, the Court threw out the aiding and abetting claim

because no such claim exists in Texas.

Finally, the Court held Defendants were entitled to a new trial based on numerous egregious and prejudicial evidentiary errors. Its ruling was based in part on the inclusion of character evidence that J&J subsidiaries paid bribes to the Saddam Hussein regime. The Court found that Plaintiffs' attorney improperly invited the jury to infer guilt based on these prior bad acts and that his repeated references to Hussein were highly prejudicial. The Court also found that the attorney impermissibly introduced hearsay evidence of racial discrimination. It stated such evidence was introduced only to prove that racism infected DePuy's workplace, which made the evidence impermissible hearsay. Finally, the Court considered a Federal Rule of Civil Procedure 60(b)(3) motion on the grounds that the attorney concealed the payments of his two key experts. The Court concluded the attorney had impermissibly concealed these payments. Compounding this lack of candor was the attorney's repeated references during the trial that his experts—unlike Defendants' experts—were not paid to testify. The Court stated the attorney had created a false choice between his experts and the "bought" testimony of Defendants' experts. Because these deceptions prevented Defendants from fairly defending themselves, a new trial was needed. Thus, the Court ordered that a new trial take place.

Intellectual Property

Viacom Int'l v. IJR Capital Investments, L.L.C., 891 F.3d 178 (5th Cir. 2018)

In 2014, the owner of IJR Capital Investments, LLC ("IJR") decided to open seafood restaurants in California and Texas called "The Krusty Krab." After failing to discover any actual restaurants with names similar to the Krusty Krab, IJR filed a trademark application and developed a business plan for its restaurants. In November 2015, Viacom International, Inc. ("Viacom"), the owner of the SpongeBob SquarePants

animated television series, sent a cease-and-desist letter to IJR claiming its use of the Krusty Krab name infringed upon its trademark of The Krusty Krab, a fictional restaurant with a prominent role in the SpongeBob television show. IJR refused Viacom's demands, so Viacom filed suit in 2016. The district court ultimately granted summary judgment to Viacom on its common law trademark infringement and unfair competition claims. IJR appealed to the Fifth Circuit.

The Court began its analysis of Viacom's trademark infringement claim by examining an issue of first impression: whether specific elements of a television show receive trademark protection. Concluding that they can, the Court looked to holdings from other circuits protecting elements prominently featured in other fictional franchises, such as the General Lee car from The Dukes of Hazzard and The Daily Planet from Superman. The Court held the Krusty Krab was a central element of SpongeBob because it appears in over 80% of episodes and featured extensively in SpongeBob films and merchandise.

The Court also held the Krusty Krab mark was distinctive because it has acquired distinctiveness through secondary meaning. To support its conclusion, the Court highlighted the prominence of the fictional restaurant in the SpongeBob show along with the millions Viacom had earned on licensed products displaying the Krusty Krab mark. Further, the Court pointed to the numerous ads featuring the Krusty Krab and Viacom's use of the Krusty Krab mark on the SpongeBob website and mobile app. Because of its prominent presence on the show and its use in the sale of products, the Court found that consumers would associate the Krusty Krab with Viacom, the creator of SpongeBob.

Company's plan to open seafood restaurant under the name "The Krusty Krab" infringed upon Viacom's common law trademark.

Turning next to whether Viacom successfully proved IJR's use of the Krusty Krab name would create a likelihood of confusion, the Court examined the seven so called "digits of confusion." While finding

the district court erred in holding that every digit weighed in favor of Viacom, the Court nonetheless concluded Viacom established as a matter of law that there was a likelihood of confusion. Specifically, the Court found that Viacom's mark was strong based on its distinctiveness, that the two marks were identical, and that the products and services were similar because both involved a restaurant. The Court also found there was a danger of affiliation with Viacom in part based on the possibility that Viacom could open a Krusty Krab restaurant, as its subsidiary did with the Bubba Gump Shrimp Co., which was based on the Forrest Gump movie. As to the identity of purchasers, the Court stated that while there was likely some overlap, the record was inconclusive on this factor, so it did not favor Viacom. Likewise, it found advertising media did not favor Viacom because it did not advertise, and the factor of the defendant's intent was neutral because it was unclear whether IJR sought to capitalize on Viacom's reputation. Finally, for actual confusion, the court relied on a consumer survey showing that 30% of respondents would associate a Krusty Krab restaurant with Viacom to support the existence of actual confusion. Thus, the Court concluded a likelihood of confusion existed and affirmed the district court.

Jurisdiction/Procedure

***Nester v. Textron, Inc.*, 888 F.3d 151 (5th Cir. 2018)**

Plaintiff suffered permanent injuries when she was harmed by an unmanned utility vehicle. At trial, she prevailed against the vehicle's manufacturer on a design defect claim. The broad-form jury question on "safer alternative design," an element of a design defect claim, tracked the language from the Texas Pattern Jury Charge ("PJC").

Defendant appealed on four grounds. First, Defendant contended the definition of "safer alternative design" in the jury instructions was not expansive enough because it did not include a certain undisputed correct statement of the law.

Second, Defendant contended that two of the four alternative designs proposed by Plaintiff were factually unsupported and should not be commingled into a single broad-form question. Third, Defendant contended the district court incorrectly admitted two key pieces of evidence. Finally, Defendant contended the district court should have bifurcated liability and punitive damages into separate phases of trial. The Fifth Circuit affirmed.

First, the Court held the district court did not abuse its discretion in submitting the "safer alternative design" question from the PJC without Defendant's additional requested instruction. This decision hinged on whether the requested instruction was substantially covered in the charge as a whole, and the Court found it was. The Court explained that for twenty years, Texas courts have been using the "safer alternative design" PJC without Defendant's requested language, and the Court has not once held that reliance on a Texas PJC was an abuse of discretion. The Court further explained that a "commonly administered PJC is often a sensible place to draw the line" on how much law to include in the jury charge.

There is no presumption of harm if a broad-form jury question commingles factually valid and factually invalid theories.

Second, the Court rejected Defendant's argument that it should presume harm from the submission of a broad-form question when Plaintiff commingled *factually* valid and invalid theories. Instead, the Court held that it will presume harm only when a charge commingles *legally* valid and invalid theories. Because Defendant conceded there was sufficient evidence to support two of the four designs, the Fifth Circuit would "trust the jury to have sorted the factually supported from the unsupported."

Third, the Court held that the district court did not abuse its discretion in admitting as relevant a video depicting a similar accident because the video was probative of the existence of a defect. Also, the district court did not abuse its

discretion in admitting as relevant a letter from Defendant's officer recommending an alternative design, when the letter contradicted Defendant's argument.

Finally, the Court held that the Texas statute requiring bifurcation of the liability and punitive damages phases did not apply in federal court. Bifurcation in federal court is a case-specific determination made in the sole discretion of the trial judge, and that discretion was not abused.

***Nogess v. Poydras Ctr., L.L.C.*, 728 F. App'x 303 (5th Cir. 2018)**

After defense counsel removed this case to federal court and made related misrepresentations, a magistrate judge imposed Rule 11 sanctions on the attorney and the district court affirmed. On defense counsel's motion to certify the sanctions order for an interlocutory appeal, the district court entered a final judgment on sanctions under Federal Rule of Civil Procedure 54(b). Defense counsel appealed.

The Fifth Circuit sua sponte determined that it lacked appellate jurisdiction. First, the Court explained that Rule 54(b) authorizes a final judgment "as to one or more, but fewer than all, claims." The term "claims" means the plaintiff's causes of action, and does not encompass sanctions. Second, even though the district court stated that it "granted" counsel's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b), it entered a final judgment under Rule 54(b) instead. The district court did not certify in accordance with 28 U.S.C. § 1292(b) that the issue was "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Therefore, the Fifth Circuit could not review the sanctions judgment by treating it as an interlocutory order. Third, an appeal was not allowable under the collateral order doctrine, because

A district court may not authorize an immediate appeal of a sanctions order by entering a final judgment on sanctions under Rule 54(b).

the sanctions would be reviewable in an appeal from a final judgment on the merits of the case. Fourth, the Court declined to address an open question regarding whether an appeal may be considered where the sanctioned attorneys have withdrawn, as here the sanctioned attorneys remained counsel of record at the time the appeal was filed.

***Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018)**

The Texas Department of State Health Services proposed regulations that would prohibit disposing of fetal remains in a landfill or sewer. Several health care providers licensed to perform abortions sued the Department challenging the regulations. The executive director of the Texas Conference of Catholic Bishops testified at the preliminary injunction hearing in favor of the Department and was scheduled to appear as a trial witness. The executive director testified about the Bishops' moral views and willingness to absorb some costs associated with burying fetal remains. Then Plaintiffs subpoenaed the Bishops for all documents concerning fetal remains and abortions, among others. The Bishops moved to quash the subpoena, contending it violated the First Amendment, the Religious Freedom Restoration Act, and the unduly burdensome rule of Federal Rule of Civil Procedure 45(d). The district court denied the motion to quash, and the Bishops appealed.

Preliminarily, the Fifth Circuit held it had appellate jurisdiction over the interlocutory third-party discovery order and then reversed on the merits.

As to the jurisdictional issue, the Court found the standards of the collateral order doctrine were met, which permits appeals of interlocutory decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment. The Court reasoned that the order was conclusive as to the Bishops, the order resolved important and very novel issues, and any new trial

Appellate jurisdiction existed over an interlocutory third-party discovery order under the collateral order doctrine.

ordered on later appeal would not directly benefit a third-party witness. The Court further explained that courts have limited ability to assess the strength of religious groups' claims about their deliberations for purposes of monitoring discovery, and that Fifth Circuit precedent holds that interlocutory court orders bearing on First Amendment rights are subject to appeal pursuant to the collateral order doctrine.

As to the merits, the Court strongly criticized the district court's rejection of the Bishop's First Amendment claim. The Court also said the district court erred in finding that the Bishop's waived their Religious Freedom Restoration Act claim. Nonetheless, the Court did not rule based on these issues because the dearth of guiding case law and exigent time frame to make a decision counseled in favor of the doctrine of constitutional avoidance. Instead, the Court turned to Rule 45(d), which provides that a court must quash a subpoena to avoid subjecting the person to undue burden. Under that rule, the Court held that the district court abused its discretion in denying the Bishop's motion to quash because the district court discounted the Bishop's burdens of production and failed to require more than a minimal rationale for discovery of their internal communications.

The dissent would hold differently on both the jurisdictional issue and the merits. The dissent recognized that appellate jurisdiction would have been a close question if the discovery dispute was limited to a First Amendment claim. However, because the majority opinion ultimately reverses based on violation of the Federal Rules of Civil Procedure and not the First Amendment, the dissent would have found no appellate jurisdiction. The dissent also noted that a mandamus petition, rather than an interlocutory appeal, is the typical way to protect against the discovery of privileged documents.

Texas Supreme Court Cases

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

Administrative Law

Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC, 546 S.W.3d 133 (Tex. 2018)

Chaparral Energy, LLC, requested that Oncor Electric Delivery Company provide electricity to two recently drilled wells. Oncor would have to construct new facilities for the delivery of power to the wells. Oncor agreed to build the new facilities and allegedly represented that it could complete the work in about 90 days. Oncor delivered a written Service Agreement to Chaparral, which required Chaparral to pay $22,327 as its share of the cost to construct the new facilities. The Service Agreement stated that Oncor would provide a "more definitive installation schedule" upon Chaparral's delivery of the executed agreement and required payment. Chaparral provided Oncor with the executed agreement and payment by the end of November 2007. But Oncor never provided the "more definitive installation schedule," and when Chaparral inquired about the status of the project several weeks later, Oncor explained that it was having difficulty obtaining easements needed to complete the construction. Chaparral alleged that these representations were false. Although Oncor eventually completed the construction, Chaparral allegedly spent over $300,000 to rent generators and purchase fuel to provide necessary power to the wells in the meantime.

Public Utility Commission had exclusive jurisdiction to resolve issues underlying a customer's claim that a PUC-regulated utility breached a contract with the customer.

Chaparral sued Oncor in district court for breach of contract. Based on a jury's findings, the district court awarded Chaparral $186,000 in actual damages

for breach of contract, plus interest and attorneys' fees. Oncor appealed, and while its appeal was pending, the Fort Worth Court of Appeals held in a different case involving Oncor that the PUC had exclusive jurisdiction over breach-of-contract claims against Oncor. Based on this new authority, Oncor moved to dismiss Chaparral's claim for lack of jurisdiction, contending that the PUC has exclusive jurisdiction to resolve Chaparral's allegations. The court of appeals denied Oncor's jurisdictional motion and affirmed the trial court's judgment.

The Texas Supreme Court reversed the court of appeals' judgment in a unanimous opinion written by Justice Boyd. The Court explained that the Public Utility Regulatory Act expressly grants the PUC "exclusive original jurisdiction over the rates, operations, and services of an electric utility." PURA also defines the term "service" to have "its broadest and most inclusive meaning," including "any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utilities duties." Under these broad definitions, Chaparral's claim against Oncor involved Oncor's "services," and PURA grants the PUC exclusive jurisdiction over those services. Therefore, Chaparral was required to exhaust its administrative remedies before the PUC as a prerequisite to seeking any relief in district court. The Court further held that the "inadequate-remedy exception" to the exhaustion-of-remedies requirement did not apply because PURA does not prevent Chaparral from obtaining the damages it seeks in district court *after* the PUC has exercised its exclusive jurisdiction. In addition, Chaparral could not show that exhausting its administrative remedies would cause it to suffer irreparable harm. Finally, requiring Chaparral to obtain initial underlying findings by the PUC did not violate Chaparral's right to a jury trial nor the constitutional guarantee of open courts.

Affidavits

Lujan v. Navistar, Inc., 555 S.W.3d 79 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)

Albert Lujan purchased Texas Wholesale Flower Company in 2005. Lujan purchased five new trucks manufactured by Navistar for the business. Lujan testified in his deposition that in June 2006, he incorporated the business as a corporation. Later in 2006 Lujan transferred assets of his business to the corporation in exchange for 100% of the corporation's stock. The document reflecting these transfers indicated that five of the trucks were transferred to the corporation, and the corporation's income tax returns from 2006 and 2007 listed five trucks as corporate assets. Later, in 2009, Lujan sued Navistar over his dissatisfaction with the trucks. Lujan brought the suit in his individual capacity and claimed individual ownership of the trucks. Whether Lujan or the corporation owned the trucks became a disputed issue, and the corporation intervened in the lawsuit, represented by the same attorney representing Lujan. Navistar moved to strike the intervention, and the corporation responded by stating that Lujan made a transfer of all assets of the company to the corporation pursuant to an Internal Revenue Code provision, but "title" to the trucks remained with Lujan. At the hearing on the motion to strike, the attorney representing Lujan and the corporation stated that all of the assets "lock, stock, and barrel" were transferred to the corporation. The trial court struck the corporation's intervention as untimely.

Navistar later filed a motion for summary judgment against Lujan, arguing that Lujan did not have standing in his individual capacity to assert claims for injury arising from trucks that were transferred to the corporation. In response to the motion, Lujan submitted an affidavit stating that he did not transfer his assets, including the trucks, to the corporation at any time. At the summary judgment hearing, the trial court pointed out the inconsistencies between the prior statements, the tax returns for the corporation that listed the trucks, and the affidavit Lujan submitted in response to the summary judgment motion. The trial court then struck the affidavit as a

Trial courts' authority to distinguish between genuine and non-genuine fact issues at the summary judgment stage includes the authority to apply the "sham affidavit rule."

"sham" and granted summary judgment to Navistar. A divided court of appeals affirmed the trial court's judgment, expressly adopting the "sham affidavit doctrine."

Justice Blacklock authored the Texas Supreme Court's unanimous opinion affirming the court of appeals' judgment and adopting the "sham affidavit" doctrine. Although a trial court may not weigh evidence at the summary judgment stage, the court must determine whether a proffered fact issue is "genuine." This inquiry encompasses consideration of whether sworn testimony materially conflicts with the same witness's prior sworn testimony, and it empower a court to strike contradictory testimony absent a sufficient explanation for the conflict. The sham affidavit rule is a tool the trial court may use to distinguish genuine fact issues from non-genuine fact issues. Applied here, the sham affidavit rule permitted the trial court to strike Lujan's affidavit in opposition to the summary judgment motion because it materially conflicted with Lujan's prior sworn testimony and the contradiction was not sufficiently explained.

Anti-SLAPP

Youngkin v. Hines, 546 S.W.3d 675 (Tex. 2018)

The Scott family sought a declaratory judgment against Billy Hines that they were rightful owners to 45 acres of a 285-acre tract in Brazos County. Both parties claimed to be descendants of Alex Scott, a prior owner of the disputed property. At trial, the Scotts' attorney, Bill Youngkin, negotiated a settlement agreement with Hines's attorney, which he then recited into the record under Texas Rule of Civil Procedure 11. Hines's attorney then formalized the agreement in a letter, which Hines, Hines's attorney, and Youngkin all signed. The Scotts did not sign the letter. Pursuant to the agreement, Hines conveyed his surface interest in the 285-acre tract to the Scotts, who recorded the deed. The Scotts—with Youngkin's assistance—then allegedly deeded their interest in the 45-acre subsection to Curtis Capps, also Youngkin's client, as "trustee." Capps, in turn, conveyed

to Hines a partial interest in the 45-acre subsection—less than the full ownership interest Hines apparently expected under the Rule 11 agreement.

Hines sued the Scotts and Capps for common-law and statutory fraud, alleging they used the Rule 11 agreement to obtain interest in the contested property with no intention of complying with the agreement. Hines later added Youngkin, claiming he, among other things, knowingly participated in the fraud by entering the Rule 11 agreement with no intention to comply. Youngkin moved to dismiss under the Texas Citizens Participation Act, or TCPA. He argued the TCPA applied and that he was entitled to attorney immunity. The trial court denied the motion, and the court of appeals affirmed. The court of appeals held the TCPA applied, Hines made a prima facie case, and Youngkin failed to prove his attorney-immunity defense.

TCPA applies to fraud claim based on in-court dictation of Rule 11 agreement.

The Supreme Court, in a unanimous opinion by Justice Lehrmann, reversed. The Court first held that the TCPA applied, because the claim related to Youngkin's "exercise of the right to . . . petition" under the TCPA. The statutory definition of that phrase includes "a communication in or pertaining to . . . a judicial proceeding," and "communication" is broadly defined as "the making or submitting of a statement or document in any form or medium." Youngkin's alleged liability stems from his dictation of the Rule 11 agreement into the court record during trial. He made a statement in a judicial proceeding, so the TCPA applies. That the First Amendment right to petition does not encompass Youngkin's statements does not change the result. It does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should *only* apply to constitutionally guaranteed activities.

Without deciding whether Hines met his burden to establish by clear and specific evidence a prima facie case, the Court concluded Youngkin was entitled to dismissal because he established the affirmative defense of attorney immunity.

An attorney is immune from liability to non-clients for conduct within the scope of his representation of his clients. The focus is on the *kind* of conduct rather than the *alleged wrongfulness* of that conduct. Youngkin's conduct was directly within the scope of his representation of his clients. The Court therefore reversed and remanded for a fee award under the TCPA.

***Castleman v. Internet Money Ltd.*, 546 S.W.3d 684 (Tex. 2018) (per curiam)**

Timothy Castleman and Castleman Consulting, LLC (collectively, "Castleman") run an online platform that serves as a middleman between consumers and product suppliers. Castleman hired O'Connor to receive and fulfill customer orders placed through its website and provided O'Connor with instructions on how to fill orders. Castleman later accused O'Connor of failing to follow the instructions and demanded compensation for lost profits from O'Connor. When O'Connor refused to pay, Castleman published statements about the dispute on various online platforms including a personal blog, YouTube, and social media. Castleman's posts included statements that O'Connor did not fulfill his obligations, had an 80-85% error rate, was unable to follow instructions, "practically stole" from Castleman, and provided terrible service. O'Connor sent a cease-and-desist letter demanding that Castleman erase and retract all the statements, publish apologies, and pay O'Connor $315,000. When Castleman refused, O'Connor sued Castleman for defamation. Castleman moved to dismiss the suit under the TCPA, asserting that the action relates to and is in response to Castleman's exercise of his right to free speech. O'Connor countered that the TCPA does not apply because the action is not based on Castleman's exercise of his free-speech right, and even if it was, the commercial-speech exemption applies. The trial court denied Castleman's motion to dismiss, expressly agreeing with

TCPA's commercial-speech exemption did not apply to statements that did not arise out of the sale of goods or services or the speaker's status as a seller of goods and services.

O'Connor's arguments, including the applicability of the commercial-speech exemption. The court of appeals affirmed, agreeing that the commercial-speech exemption applies.

The Texas Supreme Court reversed the court of appeals' judgment in a per curiam opinion. The Court acknowledged that the TCPA's commercial-speech exemption is "no model of clarity," but it held that the provision was not ambiguous as applied to the facts here. The Court construed the exemption to apply when "(1) the defendant was primarily engaged in the business of selling or leasing goods, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides."

Here, although Castleman was primarily engaged in the business of selling goods, his allegedly defamatory statements did not arise out of his sale of goods or services or his status as a seller of those goods and services. Rather, Castleman made the statements as a customer or consumer of O'Connor's services. Moreover, the intended audience of Castleman's statements was not an actual or potential buyer or customer of the goods he sells. Instead, Castleman intended his statements to reach O'Connor's actual or potential customers. And neither Castleman nor his business stood to profit from the statements at issue. Thus, the statements did not fall within the TCPA's commercial-speech exemption.

Adams v. Starside Custom Builders, LLC, 547 S.W.3d 890 (Tex. 2018)

John Adams and his wife own a home in the Normandy Estates subdivision in Plano, which was developed by Bentley Premier Builders, LLC. After bankruptcy, Bentley became Starside Customer Builders. A dispute developed between

Starside and Adams over a common area in the subdivision, and Starside eventually filed a lawsuit against Adams and his wife. Starside alleged that it worked with the Normandy Estates Homeowners Association ("HOA") to improve common areas in the subdivision, but Adams opposed the work done in the common areas. Adams accused the HOA of clear cutting trees in violation of Plano city ordinances, and he claimed he owned a portion of the common area. Starside contended that Adams defamed Starside in a blog post and e-mail. The blog post showed a handcuffed man with a tab stating "undisclosed felony conviction"; it listed the names of the prior owners of Bentley; it had a large image of the Bentley logo; and it had tabs for "unpaid creditors," "commingled funds," and "contract fraud/felony investigation." The e-mail stated that the HOA "clear cut" land and did not follow city ordinances. It also stated the prior owners of Bentley were in complete control of the HOA.

Statements related to neighborhood developer and homeowners' association involved a "matter of public concern" under the TCPA.

Adams moved to dismiss Starside's lawsuit under the Texas Citizens Participation Act, but his motion was denied by operation of law. Adams then appealed. The court of appeals concluded that Adams failed to meet his burden under the TCPA to show that Starside's defamation claim "is based on, relates to, or is in response to [his] exercise of . . . the right of free speech." The court of appeals rejected Adams's argument that the statements in the blog post and e-mail relate to Starside's services in the marketplace, and it did not reach Adams's argument that his statements related to community wellbeing because it concluded Adams had waived that issue by failing to make the argument in the trial court.

In a unanimous opinion written by Justice Blacklock, the Texas Supreme Court reversed the court of appeals' judgment. The Court disagreed with the court of appeals' conclusion that the defamation claim was not based on or related to Adams's exercise of the right of free speech as defined by the TCPA. The

Court emphasized that the TCPA "casts a wide net," and it reasoned that the allegedly defamatory communications made by Adams raise issues related to Starside's products or services in the marketplace as a homebuilder and neighborhood developer. Adams's allegedly defamatory statements also involved a "matter of public concern" related to "environmental, economic, or community well-being" in that he asserted Starside and the HOA were violating the law in caring for land that is open to the public. The Court also disagreed with the court of appeals that Adams had waived his ability to make arguments based on community or environmental well-being. Adams expressly mentioned those issues at the hearing on the motion to dismiss, and he "was not required on appeal or at trial to rely on precisely the same case law or statutory subpart" that the Court now found persuasive. Because the court of appeals erroneously held that Adams failed to meet his burden to show the TCPA's applicability, it did not reach the issue of whether Starside established a prima facie case of each element of its defamation claim or whether Adams established a valid defense; thus, the Court remanded the case for the court of appeals to address those issues in the first instance.

Arbitration

Jody James Farms, JV v. Altman Group, Inc., 547 S.W.3d 624 (Tex. 2018)

Jody James Farms, JV purchased a Crop Revenue Coverage Insurance Policy from Rain and Hail, LLC, through the Altman Group, an independent insurance agency. The insurance policy included an arbitration clause, which stated that if Jody James and Rain & Hail could not resolve a disagreement through mediation, then their disagreement "must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA)[.]" Neither the Altman Group nor any of its employees was expressly named in the policy or signed the agreement.

Jody James submitted a claim for the loss of a grain sorghum crop, but Rain & Hail denied coverage. Although Jody James asserted that it promptly notified an Altman Group agent about the loss, Rain & Hail denied the claim, in part, based on Jody James's failure to provide timely notice of the damage. Jody James disagreed with Rain & Hail's denial of coverage, and Jody James and Rain & Hail arbitrated their dispute as required by the insurance policy. Jody James lost. The arbitrator agreed with Rain & Hail that Jody James did not timely present notice of its claim.

Based on the adverse arbitration ruling, Jody James sued the Altman Group and the agent to which Jody James reported the loss of its sorghum crop (collectively, the "Agency"). The Agency moved to compel arbitration based on the arbitration clause in the insurance policy. Jody James opposed the Agency's motion to compel arbitration, but the trial court granted the Agency's motion and the dispute proceeded to arbitration where Jody James continued to assert its right to proceed in court against the Agency. The arbitrator ruled in favor of the Agency and issued a take-nothing award. Jody James moved to vacate the arbitration award, contending that no valid arbitration agreement exists between Jody James and the Agency. The trial court rejected Jody James's argument and confirmed the arbitration award. The court of appeals affirmed.

Non-signatories were not required to arbitrate non-contractual claims with a signatory to an arbitration agreement.

The Texas Supreme Court, in a unanimous opinion written by Justice Guzman, held that the lower courts erred by requiring Jody James to arbitrate its claims against the Agency, a non-signatory to the arbitration agreement. The parties disagreed about whether a court or arbitrator should decide the arbitrability question, and the Court turned to that issue first because it is material to the standard of review—a trial court's arbitrability determinations are reviewed de novo while an arbitrator's determinations are entitled to significant deference. The Court held that the trial court was charged with deciding arbitrability here, so the Court applied a de novo

standard of review. The Court acknowledged that other courts have held the incorporation of the AAA rules into an arbitration agreement constitutes clear and unmistakable evidence that the parties intended to have an arbitrator decide arbitrability. But the Court did not reach that issue because it held that the incorporation of the AAA rules does not show clear intent to arbitrate arbitrability when, as here, the dispute arises between a party to the arbitration agreement and a non-signatory.

On the merits, the Court held that although a valid arbitration agreement existed between Rain & Hail and Jody James, the insurance policy could not be reasonably read to encompass disagreements between signatories and other parties such as the Agency. The Court further held that Jody James was not required to arbitrate its claims under the Agency's alternative theories. The record did not support a conclusion that Rain & Hail had control over the Agency's actions in relaying a claim from Jody James to Rain & Hail, so arbitration could not be compelled under an agency theory. The Agency's third-party beneficiary theory was also unavailing because the contract between Rain & Hail and Jody James did not express an intent to make the Agency a direct beneficiary. Direct-benefits estoppel was not shown because Jody James was not seeking to enforce expectations created by the contract. Rather than relying on the insurance policy, Jody James's complaint premised the Agency's liability on tort and DTPA duties that are general, non-contractual obligations. Finally, the Agency sought to rely on an "alternative estoppel theory" recognized by the U.S. Court of Appeals for the Second Circuit, but the Court concluded that it need not consider the viability of such a theory because the Agency could not show that it would apply in any event.

Civil Commitment

In re State, 556 S.W.3d 821 (Tex. 2018), *reh'g denied* (Oct. 19, 2018)

In 1999, the Legislature enacted the Civil Commitment

of Sexually Violent Predators Act ("Act"), which details a "civil commitment procedure for the long-term supervision and treatment of sexually violent predators" ("SVPs") upon completion of their criminal sentence. In 2015, the Legislature amended the Act by authorizing total confinement of an SVP, whereas the earlier version of the Act contemplated only significant limitations on an SVP's housing and movements. These amendments, however, did not affect the three scenarios under which a court can appoint counsel for indigent persons: (1) the proceeding to determine if a person is an SVP, (2) the SVP's biennial review to decide a change of status, and (3) the proceeding initiated by an SVP's petition for release from civil commitment.

In 2010, a jury unanimously found that Clarence Brown was an SVP and he was placed in supervised housing. Biennial reviews in 2013 and 2015 determined that Brown should remain a committed person under the Act. However, following the Act's 2015 amendment, Brown was notified that the State intended to seek modification of Brown's final judgment and commitment order to conform to the language of the amended Act. In the trial court, Brown moved for appointment of counsel, which the court denied. The proceeding went forward, and the court ultimately entered an amended order that, tracking the language of the amended Act, placed Brown in a tiered treatment program facility to be determined by the State.

Brown sought mandamus relief, arguing that he had a statutory right to outpatient treatment and a constitutional right to appointed counsel. A divided Beaumont Court of Appeals granted mandamus relief, but not for the reasons argued by Brown. Instead, the appellate court relied on its own precedent and held the trial court's proceeding was a continuation of Brown's 2015 biennial

Under the Civil Commitment of Sexually Violent Predators Act, a person who is committed as a "sexually violent predator" is not entitled to appointment of counsel in a proceeding to modify a commitment order entered before the effective date of the 2015 amendments to the Act.

review, for which he was appointed counsel. Based on this continuation theory, the trial court abused its discretion by refusing to appoint counsel for Brown.

The Supreme Court granted the State's request for mandamus relief and held that Brown was not statutorily entitled to appointed counsel. The Act clearly sets out the circumstances under which a court may appoint counsel; a proceeding to amend a civil commitment order to conform to the Act's 2015 amendments is not one of them. In addition, the appellate court's reliance on the timing of Brown's biennial review in relation to the hearing on the State's motion to amend was misplaced because it read a requirement into the statute that was not there and emphasized timing as opposed to the Act's express language.

The Supreme Court also rejected Brown's due process argument, holding that the proceeding and the amended order did not result in a substantive reduction of liberty. Under his 2010 order, Brown was required to "reside in supervised housing at a Texas residential facility," which resulted in a significant loss of liberty. The amended order only modified the language to comply with the 2015 amendments; it did not place Brown in inpatient treatment or otherwise further reduce his liberty. Under these circumstances, the impact on Brown's due process rights did not rise to the level of requiring appointed counsel. The Supreme Court conditionally granted the State's petition for writ of mandamus and ordered the court of appeals to vacate its order conditionally granting mandamus relief.

Construction Law

Dudley Constr. Ltd v. ACT Pipe & Supply Inc., 545 S.W.3d 532 (Tex. 2018)

Dudley Construction, Ltd., the general contractor, enlisted ACT Pipe and Supply, Inc., as a supplier for two municipal water and sewer improvement projects: the Reclaimed Water Project in College Station and the Tabor Project in Bryan. A

dispute arose between Dudley and ACT regarding the price of certain piping used in both projects. Although Dudley installed the pipe supplied by ACT and was paid by the cities for the piping, it never paid ACT because of the ongoing price dispute. ACT then sued Dudley on a sworn account for $143,714.19—the total it claimed Dudley owed for both projects. In addition, because Dudley did not pay ACT after the cities paid Dudley, ACT alleged misapplication of trust funds under the Construction Trust Fund Act ("CTFA"). The case went to trial and the jury returned a mixed verdict. As to the sworn-account claims, the jury found that the prices ACT charged were "in accordance with the agreement" for the Reclaimed Water Project and awarded ACT $14,214.20. But as to the Tabor Project, the jury answered that the prices ACT charged were not "in accordance with the agreement," but still awarded ACT $110,629.70 for "reasonable compensation." The jury also found ACT perfected a bond-payment claim and awarded the same damages. Finally, the jury found that Dudley misapplied trust funds under the CTFA but awarded no damages for either project.

In response to ACT's JNOV motion, the trial court entered a final judgment that changed the jury's verdict in three ways: (1) it set aside the jury's liability finding on ACT's sworn-account claim for the Tabor Project, instead concluding it was "conclusively proven" that the prices charged by ACT were in accordance with the parties' agreement; (2) it found that ACT's damages were uncontroverted and conclusively proven, and substituted the jury's $110,629.50 award for the Tabor Project and $14,214.20 for the Reclaimed Water Project under the sworn-account and bond-payment claims in place of the jury's zero-damages findings for CTFA damages; and (3) it awarded ACT $131,823.99 in attorney's fees under the CTFA. The Texarkana Court of Appeals affirmed in part and reversed in part, though only its reversals were salient to this appeal. First, the appellate court reversed the trial court's judgment that it was "conclusively proven" the prices charged by ACT were in accordance with the parties' agreement, and rendered

judgment that ACT take nothing on its sworn-account claim for the Tabor Project. Second, it reversed the trial court's award of $110,629.70 in CTFA damages, though the appellate court held that "it was conclusively proven … that there was some sum of money, more than nothing, that constituted a trust fund under the statute." The appellate court remanded this issue to the trial court to determine the appropriate amount of recovery. In light of its CTFA damages ruling, the appellate court also reversed and remanded the attorneys' fees issue to the trial court.

Addressing two issues on appeal, the Supreme Court affirmed in part, reversed and rendered in part, and remanded. First, the Court held ACT did not waive its argument that the court of appeals should not enter judgment on the jury's original verdict after concluding the trial court erroneously rendered judgment notwithstanding the verdict. Dudley argued that ACT waived its argument by not filing "cross-points," so the court of appeals should have reinstated the jury's zero-damages finding after it concluded the evidence did not support the trust-fund-act damages award the trial court substituted. But the Supreme Court held there was no waiver because ACT's argument, in substance, constituted a cross-point: "If an appellee makes a substantive argument that would, if accepted, vitiate the jury's original verdict or prevent an affirmance of the judgment had one been rendered in harmony with the jury's verdict, it has presented a cross-point sufficient to avoid waiver." While ACT did not formally label as cross-points any of its arguments to the court of appeals, it did argue in defense of the trial court's judgment notwithstanding the verdict overriding the jury's zero-damages finding for its trust-fund-act claim. Therefore, the Supreme Court affirmed the court of appeals' decision on this issue and agreed the case should be remanded to the trial court for further proceedings. Second, the Court held that attorney's fees were not allowed on a successful CTFA claim. Although the court of appeals

Attorneys' fees are not allowed for a successful claim under the Construction Trust Fund Act.

remanded this issue for reconsideration, the Supreme Court held that, "Without question, the trust-fund act says nothing about attorney's fees." Concluding that neither the CTFA nor Civil Practice and Remedies Code section 38.001 allow for attorney's fees for a successful trust-fund-act claim, the Court reversed the remand of this issue and rendered judgment that such fees are unavailable.

Contract Law

***URI Inc. v. Kleberg County*, 543 S.W.3d 755 (Tex. 2018)**

The Texas Commission on Environmental Quality ("TCEQ") authorized a mining company, URI, Inc., to start uranium mining operations in the third production area ("PAA 3") of the Kingsville Dome Mine in Kleberg County. However, after Kleberg County ("County") and local activists protested, URI suspended operations. Negotiations between URI and the County resulted in a settlement agreement ("Agreement"), but the parties still ended up in court after the County claimed URI was violating the Agreement. All matters were resolved in URI's favor except questions about its compliance with section 11.1 of the Agreement. That provision—the only one at issue in this appeal—allowed URI to resume mining operations in PAA 3 upon URI's certification that the wells in a previously mined area, PAA 1, had been restored to pre-mining water quality if the water had been suitable for specified uses before URI began mining that area in 1988. The crux of the dispute was whether any of the PAA 1 wells described in subsection 11.1(1)(ii) had water suitable for drinking, livestock, or irrigation uses before URI started mining there. If they did, then URI breached the Agreement when it began mining PAA 3 before restoring 90% of the subject wells to prior water quality. URI argued that, applying data points from 1985 and 1987, the water was not suitable for any of the contractually specified uses before URI began mining PAA 1 in 1988; therefore, URI had no obligation to restore the PAA 1 well water before it started mining operation

in PAA 3. The County argued that URI was not allowed to use 1987 data because it was not available at the time the parties executed the Agreement and the parties contemplated using only the 1985 data, as confirmed by the transcript of a Kleberg County Commissioners' Court meeting which concluded with a vote in favor of executing the Agreement.

After a lengthy bench trial, the trial court found that URI breached its obligation to restore the PAA 1 water to its pre-mining use. It also determined the URI's use of 1987 data changed the restoration requirements—essentially changing the suitability from agricultural irrigation to no use at all—and as a result, breached the Agreement. The Corpus Christi Court of Appeals agreed with the trial court decision on the use of 1987 data but reversed and remanded the issue of awarding attorneys' fees to the Court as the prevailing party (the trial court awarded none) and the trial court's allowing URI to mine PAA 3 without first restoring the PAA 1 wells.

The Supreme Court reversed the court of appeals' judgment and rendered judgment for URI, holding the court of appeals impermissibly relied on extrinsic evidence of the County's subjective intent to construe section 11.1's unambiguous language. While evidence of the commercial setting necessarily contextualizes and informs the meaning of some of the contract terms, the court of appeals went too far in looking beyond the Agreement's unambiguous language to interlineate limitations and specific results not expressed in the instrument itself. Construing the contract in light of the surrounding circumstances does not support the conclusion that section 11.1 precluded URI's reliance on 1987 data; in fact, this conclusion engrafted limitations that were entirely external to the instrument and directed to fulfill the County's unexpressed subjective intent. If the parties intended to obligate URI to restore the water quality in the PAA 1 wells to use for irrigation purposes (or higher) or

Extrinsic evidence of a party's subjective intent was inadmissible to construe an unambiguous settlement agreement.

guarantee a minimum number of wells would be made suitable, the parties could have articulated so. But rather than agreeing to a particular *result*, the parties adopted a *process* that would be irrelevant under the County's construction of the contract. The Supreme Court held that under a plain and grammatical reading of section 11.1, URI did not breach the Agreement when it resumed mining operations in PAA 3. Moreover, the County is not entitled to attorneys' fees or a specific-performance remedy on its breach-of-contract claim. Thus, the Court reversed and rendered judgment that the County take nothing.

***Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724 (Tex. 2018)**

Albert G. Hill, Jr. ("Hill") hired Shamoun & Norman, LLP ("S&N") to assist with various matters relating to a contentious web of litigation with his son Albert Hill, III ("Hill III") and others. Hill and Gregory Shamoun initially signed two limited-engagement agreements for two matters in which S&N was to represent Hill. Beyond these cases, Hill was also facing a federal RICO lawsuit, which carried with it $1 billion in potential exposure. With settlement negotiations in that case at an effective standstill, Hill asked Shamoun to attend a settlement meeting. Shamoun supposedly "reenergized" the settlement discussions, actively engaging in settlement negotiations throughout March 2010. During these negotiations, Shamoun requested a potential discretionary bonus to be paid if the case settled; Hill told Shamoun he would consider it. In late March, Hill's personal attorney, Frances Wright, asked Shamoun to continue helping the entire web of litigation toward settlement before the RICO trial in May. Wright also told Shamoun that Hill had offered a bonus: 50% of the savings between the $73 million settlement ceiling and any cash settlement reached before the May RICO trial. Shamoun claims he accepted this offer, and that he later discussed the bonus with Hill on multiple occasions. This agreement was never reduced to writing.

On the eve of trial, the parties in the RICO case were ordered to a settlement conference. During the first day of the conference, Shamoun was actively involved. Later that day,

however, Shamoun and Hill spoke, and Hill told Shamoun that two other attorneys would take the lead the next day. Hill testified that, through this call, he fired Shamoun; however, Shamoun did not think he was fired. Ultimately, the web of litigation was settled.

In August, S&N sent Hill a demand letter claiming over $11 million for legal services. Hill declined to pay, though he satisfied all other fee obligations relating to the written fee agreements between the parties. S&N then sued for quantum meruit, among other things. S&N conceded its oral contingent-fee agreement was not enforceable under the statute of frauds. Still, at trial, S&N's expert calculated the reasonable value of S&N's services as $15,912,500.00—the same amount to which S&N would be entitled had the oral contract been enforceable. Shamoun testified that he worked between 150-400 hours on the global settlement issue, but he did not keep records of his time. The jury found in S&N's favor, awarding $7,250,000.00 for its services in connection with the settlement. But the trial court set aside the findings and entered a take-nothing judgment. The court of appeals reversed and reinstated the jury's findings and verdict.

Statute of frauds governing contingent-fee contracts for legal services does not prohibit quantum-meruit claim.

The Supreme Court, in an opinion by Justice Green, reversed in part and remanded. The Court first held that the statute of frauds does not bar recovery of quantum meruit damages as a matter of law. To hold otherwise, the Court noted, would allow some clients to be unjustly enriched by retaining the benefits of an attorney's performance without paying anything in return. But the Court then concluded that, though there was some evidence to support S&N's award, there was insufficient evidence to support the entire amount. The unenforceable agreement could not be given weight under the statute of frauds, but there was nevertheless evidence that Shamoun provided valuable, compensable services in connection with the settlement. There was not sufficient

evidence, however, to support the $7,250,000.00 award. The award must be "reasonable"; here, the jury would have to find the fee for Shamoun's 150-400 hours of work is "reasonable" under the *Arthur Anderson* factors. Accordingly, the Court reversed and remanded to the trial court for a new trial on the amount of S&N's recovery.

***JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648 (Tex. 2018)**

JPMorgan Chase Bank ("Chase") represents a trust that owns about 40,000 acres of non-contiguous mineral interests throughout the Eagle Ford Shale in the southwestern part of Texas. In 2010, Chase's agent, Phillip Mettham, leased about 1,800 acres of the tract to GeoSouthern Energy Corporation ("GeoSouthern"). Also in 2010, Mettham began negotiations with the officers and landmen of Orca Assets, G.P., L.L.C. (collectively "Orca") who wanted to lease the trust's acreage. When asked by Orca about other leases on the desired acreage, Mettham gave equivocal responses that he would "have to check." Later, Mettham told Orca that any lease Chase entered would require a new warranty clause expressly shifting the risk of title failure to Orca. Although this clause "raised a red flag" and was "a curveball" to the Orca team, the parties signed a letter of intent that made no representation about the trust's title or the availability of the intended acreage but did contain the new negation-of-warranty clause on which the parties had agreed. The letter also contained a 30-day option period. Three days into the option period, GeoSouthern finally recorded its leases in the counties' property records, which included much of the acreage in Orca's letter of intent. But Orca conducted no further title searches and it wasn't until two weeks after the option period expired that Orca was told about GeoSouthern's leases. Chase subsequently paid Orca $3.2 million in bonus payments, though it maintained it was not obligated to do so under the negation-of-warranty provision. Regardless, Orca rejected the tender and sued Chase and Mettham for $400 million in lost profits.

The trial court disposed all of Orca's claims, which included breach of contract, fraud, and negligent misrepresentation, concluding that the unambiguous terms of the letter of intent and the leases precluded Orca's contract claim. The court also ruled as a matter of law that Orca could not establish the justifiable-reliance element of its fraud and negligent-misrepresentation claims. The Dallas Court of Appeals affirmed the trial court's contract ruling, but reversed on fraud and negligent misrepresentation, concluding the warranty clause did not unequivocally disclaim reliance on Mettham's prior representations.

The Supreme Court reversed, holding as a matter of law that Orca could not justifiably rely on extracontractual representations by Mettham despite "red flags" and a negation-of-warranty clause in the sales documents explicitly placing the risk of title failure on Orca. The representation upon which both the alleged fraud and negligent misrepresentation turn was Mettham's statement that the acreage Orca sought to lease was "open." But even though Chase and Mettham conceded that Mettham made that representation and that it was false, that representation insufficient. After examining the parties' levels of sophistication and the circumstances of the transaction in their entirety, the Court noted that "world-savvy participants entering into a complicated, multi-million-dollar transaction should be expected to recognize 'red flags.'" Those "red flags" included Mettham's equivocal statements during the parties' initial meeting and Orca's lingering doubts at the closing that culminated in its request for Mettham to confirm the tracts were "open." These red flags, the express language of the letter of intent that contained no assurances about the tracts' status, the negation-of-warranty provision that expressly provided no recourse and that contradicted the representation

A lessee to an oil and gas contract could not justifiably rely on extra-contractual representations made by lessor's agent because the parties' negotiations raised "red flags" and the contract expressly placed the risk of title failure on the lessee.

on which Orca claims to have relied, and Orca's decision to stop checking the title records during the option period, all negate Orca's justifiable reliance as a matter of law. Because it determined, as a matter of law, that Orca could not show justifiable reliance, the Supreme Court reversed the court of appeals and reinstated the trial court's judgment.

Discovery

***In re N. Cypress Med. Ctr. Operating Co., Ltd.*, No. 16-0851, 2018 WL 1974376 (Tex. Apr. 27, 2018), *reh'g denied* (Nov. 16, 2018)**

Crystal Roberts was injured in a car accident and taken by ambulance to the emergency room at North Cypress Medical Center ("North Cypress" or "hospital") in Houston. Three hours and various x-rays, scans, and tests later, North Cypress released Roberts. Because she was uninsured, North Cypress billed her at its full "chargemaster" prices, which totaled $11,037.35. North Cypress also filed a hospital lien for this amount. The liability insurer of the driver at fault offered to settle the case for $17,380.00, attributing $9,404.00 to past medical expenses. Roberts negotiated to reduce North Cypress's bill, but the hospital refused to go lower than $8,278.31. Roberts then filed a declaratory judgment action asserting that North Cypress's charges were unreasonable and its lien invalid to the extent it exceeded a reasonable and regular rate for services rendered. In response, North Cypress counterclaimed on a sworn account for $8,278.31. In discovery, Roberts requested information and documents on North Cypress's negotiated or reduced rates paid by insurance carriers, Medicare, and Medicaid for the hospital and lab services provided to Roberts. The trial court granted her motion to compel production of this information and denied North Cypress's motion for protective order and subsequent motion for reconsideration. The Fourteenth Court of Appeals denied North Cypress's petition for mandamus relief.

The Supreme Court also denied the hospital's mandamus petition and held the discovery was relevant. Texas procedure encompasses the discovery of unprivileged information that is "relevant to the subject matter of the pending action." This includes information that may ultimately be inadmissible at trial so long as it "appears reasonably calculated to lead to the discovery of admissible evidence." The "subject matter" of this case involves the enforceability of a hospital lien securing payment of charges for services rendered to an uninsured patient, as well as the reasonableness of those charges. North Cypress argued that because Roberts had neither private health insurance nor Medicare or Medicaid coverage, she was not entitled to the benefit of those negotiated rates. In response, Roberts argued that the insurance contracts were needed to establish whether the amount North Cypress charged her for emergency services was excessive in comparison to the rates for the same services provided to other patients in the same hospital. The contracts would further show that North Cypress was customarily and regularly paid significantly less for those services, making the contracts relevant to the reasonableness of the amount the hospital was charging her. The Court held that the information Roberts sought—information regarding North Cypress's reimbursement rates from private insurers and public payers for the same services it provided to her—reflected the amounts the hospital was willing to accept from most its patients as payment in full for such services. While not dispositive, such amounts were at least relevant to what constituted a reasonable charge. Accordingly, the Supreme Court denied the hospital's petition for writ of mandamus.

A medical provider's reimbursement rates from private insurers and public payers are relevant to what constitutes a reasonable charge and therefore discoverable.

Chief Justice Hecht, joined by Justices Green and Guzman, filed a dissenting opinion arguing that the majority's opinion used circular reasoning that "defies logic" because it failed to fully explain the relationship between reimbursement rates to

insurance carriers and public payers and reasonable charges to self-payers. In addition, the majority failed to distinguish this case from *In re National Lloyds Insurance Company*, 532 S.W.3d 794, 812-13 (Tex. 2017) (orig. proceeding), in which the Court held that one party's attorney fees in a case were generally irrelevant in determining whether an opposing party's attorney fees were reasonable. Finally, the majority failed to adequately address the potential abuses and jury confusion that can result from its holding when applied to other cases. For these reasons, the dissent would grant the relief sought by North Cypress.

***In re Garza*, 544 S.W.3d 836 (Tex. 2018) (per curiam) (orig. proceeding)**

After a car collision with a truck owned by UV Logistics, Carolina Garza sought medical treatment from Dr. Michael Leonard at his privately-owned practice. Dr. Leonard thereafter performed a spinal-fusion procedure on Garza at a hospital where he was an investor and part owner. Garza sued UV Logistics in Jim Wells County, seeking damages for past medical expenses premised on her treatment with Dr. Leonard. UV Logistics sought various medical and billing records from Dr. Leonard, along with previous deposition and trial testimony he had given on behalf of patients represented by the law firm representing Garza. Dr. Leonard did not produce the documents. UV Logistics then noticed the depositions of and sought subpoenas *duces tecum* issued to the custodians of records for Dr. Leonard's practice and the hospital in which he had an interest, both of whom were in Bexar County. The custodians, who were not parties to the underlying suit, sought protective orders in Bexar County because the documents contained private, confidential, and privileged business and patient information. The Bexar County district court judge granted relief.

UV Logistics responded by moving in Jim Wells County to exclude Dr. Leonard as an expert and to exclude recovery of medical expenses from Dr. Leonard, his practice, and the hospital where he performed Garza's spinal fusion. The district

court granted the motion. Garza then sought mandamus relief but was denied in a non-substantive opinion from the court of appeals.

The Supreme Court, in a per curiam opinion, conditionally granted relief. The Bexar County-based custodians had an independent right to seek protection under the rules of procedure. The Jim Wells court's order imposed no hardship on the custodians, none of whom were parties to or appears in that suit. And there is no evidence that Garza orchestrated or aided Dr. Leonard's failure to produce records at his deposition or induced the custodians to seek relief in Bexar County. Thus, the trial court acted arbitrarily and bused its discretions by imposing sanctions on Garza in the absence of evidence that she was an offender. Because the exclusion of records ordered by the trial court could significantly compromise Garza's claims, an appeal does not provide an adequate remedy. Mandamus is therefore appropriate.

Trial court acted arbitrarily in imposing discovery sanctions of plaintiff in absence of evidence that plaintiff was offender.

Employment Law

Texas Workforce Comm'n v. Wichita County, 548 S.W.3d 489 (Tex. 2018)

Julia White worked for Wichita County. She went on leave under the Family Medical Leave Act in August 2011, and she switched to unpaid leave after her accrued paid leave ran out. In late September, White informed the County of certain medical restrictions placed on her return to work. The County initially concluded that it lacked an open position meeting White's medical restrictions, but it later identified an accommodating position and White returned to work for the County in November 2011. In the meantime, White had filed an initial claim for unemployment benefits with the Texas Workforce Commission in October. The County contested the claim on the ground that White remained

a County employee during her leave. The Commission issued a decision in which it determined that White was "unemployed" while she was on unpaid leave for a medically verifiable illness; thus, White could be eligible for unemployment benefits if she met all other requirements. The County appealed, and the district court reversed the Commission's decision that White could qualify for unemployment benefits. The court of appeals affirmed the district court's judgment, concluding that it would be "absurd" for an individual to be entitled to unemployment benefits during FMLA leave.

Justice Lehrmann delivered the Texas Supreme Court's unanimous decision reversing the court of appeals' judgment and holding that an individual may qualify as "unemployed" under the Unemployment Compensation Act while taking unpaid leave from a job under the FMLA. The Court began its analysis with the plain language of the Unemployment Compensation Act, which states that an individual is considered unemployed if he or she is "totally unemployed" or "partially unemployed" and which specifically defines total unemployment and partial unemployment. Tex. Lab. Code § 201.091. Under the express statutory definitions, a person is unemployed if his or her wages are low enough, regardless of whether there has been a formal severance of the employee-employer relationship. And the express statutory definitions control over the general, ordinary meaning of the term "unemployed." The Court further concluded that the court of appeals' absurdity analysis was premature because categorizing White as "unemployed" did not entitle her to unemployment benefits unless she could also satisfy several additional criteria, which had not yet been determined. Holding that White qualified as "unemployed" merely gives her and others in a similar situation the opportunity to demonstrate eligibility under the Unemployment Compensation Act.

An employee may qualify as "unemployed" under the Texas Unemployment Compensation Act while taking unpaid leave under the Family Medical Leave Act.

***Painter v. Amerimex Drilling I, Ltd.*, No. 16-0120, 2018 WL 2749862 (Tex. Apr. 13, 2018)**

Sandridge Energy hired Amerimex Drilling to drill oil-and-gas wells on a ranch in West Texas. Amerimex's usual practice was to provide mobile bunkhouses for its crews at the drilling site, but Sandridge did not allow bunkhouses on the ranch, instead requiring them to be moved about 30 miles away in Fort Stockton. To account for this, the parties' contract required a bonus payment of $50/day to drive the crew to the well location on the ranch. J.C. Burchett was an Amerimex driller who was paid the daily bonus to drive his crew (which included Steven Painter) between the bunkhouses and the ranch in his truck. In February 2007, Burchett struck another car while driving his crew from the ranch to the bunkhouses. Two of his crew members were killed; Burchett and Painter were injured. Burchett sought and received workers' compensation after the Workers' Compensation Division concluded that Burchett was acting in the course and scope of his employment.

Painter sued Amerimex, among others, arguing that Amerimex was vicariously liable for Burchett's negligence. Amerimex filed a motion for summary judgment arguing that Painter's vicarious-liability claim failed because there was no evidence that Amerimex controlled the details of Burchett's work at the time of the accident. The trial court granted summary judgment, and the court of appeals affirmed.

Employer-employee relationship for vicarious-liability purposes should not be evaluated on a task-by-task basis but instead depends on whether employer retains the degree of overall control that would subject it to liability as a master.

The Supreme Court, in an opinion by Justice Lehrmann, reversed. The Court evaluated two elements for vicarious liability: (1) whether the worker was an employee (2) who was acting in the course and scope of his employment. On the first element, the Court rejected Amerimex's argument that Burchett was not an employee while driving his crew to the bunkhouses from the job site after his shift had ended. Though control over an independent contractor's conduct

for supervisory-liability purposes is necessarily task-specific, the Court observed, that is not the case when the complained-of conduct is that of an admitted employee. Amerimex was in the position to exert control over Burchett's manner of driving the workers to and from the drilling site; thus, Burchett was acting as Amerimex's employee at the time of the accident.

The Court then concluded that Amerimex was not entitled to summary judgment because there was a fact issue about the second element of vicarious liability, namely, whether Burchett was acting within the course and scope of his employment. The scope-and-course inquiry asks whether the employee acted with the employer's authority and for the employer's benefit. Typically, therefore, an employer is not vicariously liable for its employees' torts when driving to and from their place of employment. But employers are nevertheless liable for an employee's torts when the employee's coming-and-going involves the performance of regular or specifically assigned duties for the benefit of the employer. That exception applies here, at least at the summary-judgment stage, because some evidence indicates that one of Burchett's job duties was to drive his crew to and from the work site. The Court thus reversed and remanded.

Justice Green, joined by Justice Brown, dissented. The dissenting justices argued that the Court skipped the critical inquiry: whether Amerimex had the right to control the progress, details, and methods of Burchett's work at the time of the negligent conduct. The record did not support either a contractual right of control or an actual exercise of control over Burchett's work transporting crew members. Additionally, Justice Green would find that the coming-and-going rule applies, therefore precluding Amerimex's vicarious liability.

***Jefferson County v. Jefferson County Constables Ass'n*, 546 S.W.3d 661 (Tex. 2018)**

Jefferson County, Texas, and the Jefferson County Constables Association entered into a collective-bargaining agreement ("CBA"). The CBA established standards governing various

terms and conditions of employment. Pertinently, it vested with the County the exclusive "right to lay off for lack of work or funds" and "the right to abolish positions," but it limited that right by providing that "[s]eniority shall be the sole factor in layoff and recall, with layoff being accomplished beginning with the least senior deputy, and recall beginning with the most senior deputy in the highest job classification." The CBA also contained a dispute-resolution procedure, which culminated in submission of the dispute to final, binding arbitration.

In 2010, the County implemented budget cuts and eliminated eight deputy-constable positions. The Constables Association alleged this action violated the CBA's seniority restrictions, and the dispute was ultimately submitted to arbitration. The arbitrator concluded that the County "violated the CBA by laying off or failing to budget for specific deputy constables without regard to seniority," and he awarded reinstatement and back pay.

The County filed a petition to vacate the award in the trial court, and both parties sought summary judgment. The trial court granted summary judgment for the County. But the court of appeals reversed. It first considered a new argument raised for the first time in the County's supplemental brief, in which the County argued that the CBA was invalid because deputy constables are not "police officers" under the Chapter 174 of the Local Government Code, known as the Collective Bargaining Act. It noted the argument was not waivable because it went to standing; and thus, implicated the court's subject-matter jurisdiction, but it nevertheless concluded that deputy constables were "police officers." The court then concluded that the arbitrator's award did not usurp the County's authority concerning the appointment of deputy constables and that the arbitrator did not exceed his authority in awarding reinstatement.

In an opinion by Justice Lehrmann, the Supreme Court affirmed. The Court first disagreed with the court of appeals' conclusion that whether deputy constables were "police officers" was an issue of standing and hence subject-matter

jurisdiction, instead concluding that the issue went to the enforceability of the CBA. Even so, because the issue was important and neither party argued waiver, the Court decided to address it. After engaging in a statutory-construction analysis where the Court looked to various statutory and dictionary definitions, the Court concluded that deputy constables "regularly serve[] in a professional law enforcement capacity in the police department of a political subdivision" and are therefore "police officers" under the Collective Bargaining Act. Thus, the CBA between the County and the Constables Association is valid and enforceable. Then, addressing the arbitrator's authority, the Court concluded the arbitrator acted within his authority in analyzing the CBA's provisions regarding layoffs and abolishing positions. Whether correct or not, such an analysis was precisely within his contractual authority to resolve "[a]ll disputes concerning the proper interpretation and application of" the CBA.

Deputy constables are "police officers" entitled to enter into collective-bargaining agreements with their public employers under Chapter 174 of the Local Government Code.

Justice Boyd, joined by Justice Johnson, dissented. Texas law "unfailingly distinguish[es]" between deputy constables and police officers, so the Court errs by equating them. Because the Collective Bargaining Act applies only to fire fighters and police officers, it does not apply to deputy constables.

***Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018)**

In this alleged discrimination and retaliation suit involving claims of same-sex harassment and bullying by female coaches, the ultimate issue—whether a school district was immune from suit—was subsumed in two predicate evidentiary matters concerning governmental-immunity waiver under the Commission on Human Rights Act ("Act"): (1) whether the evidence raised an inference of gender-motivated discrimination, and (2) whether the complainant must produce evidence to support her retaliation claim when no presumption of unlawful

retaliation exists under the *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) burden-shifting framework. The Supreme Court held the district's jurisdictional evidence negated the presumption afforded by the claimant's prima facie case because the claimant lacked evidence sufficient to raise a fact issue on retaliatory intent.

In the summer of 2007, Alamo Heights Independent School District ("District") hired Catherine Clark as a coach and physical education teacher in the girls' athletic department at Alamo Heights Junior School. From the start of the 2007-08 school year, Clark had conflicts with fellow coach, Ann Monterrubio. According to the litany of complaints that Clark lodged against her, Monterrubio made inappropriate comments about female body parts (including Clark's breasts and buttocks), frequently used vulgar language (often with sexual connotations that were sometimes directed at Clark), and engaged in other degrading behavior that was not sexual in nature, all of which Monterrubio directed at Clark and other coaches. At the end of that school year, Clark finally made these complaints known to her principal. The situation worsened the following school year despite periodic meetings among Clark, Monterrubio, and other school administrators.

Eventually, Clark filed a charge of discrimination with the EEOC, alleging Monterrubio and the school's athletic department coordinator, Michelle Boyer, sexually harassed her and, after she complained, the school district and her supervisors retaliated against her. Months later, the district school board issued a notice of proposed termination that included nineteen specific instances of conduct supporting good cause for Clark's termination. Clark never contested the grounds for termination or requested an evidentiary hearing, and was fired. Eventually, Clark sued the District, asserting sexual harassment and retaliation claims under the Act. After discovery, the District filed a plea to the jurisdiction, arguing the Act's governmental-immunity waiver did not apply because Clark lacked evidence of a statutory violation. In its plea, the District provided evidence of Clark's unsatisfactory job performance, noncompliance

with her employment plan, and policy violations as legitimate nondiscriminatory reasons for her dismissal. The District also argued that Clark had: (1) no evidence the objectionable behavior was gender-based, which was required to state a prima facie case of sexual harassment, and (2) no evidence of a causal link between statutorily protected anti-discrimination activities and a materially adverse employment action. The trial court denied the District's plea, and on interlocutory appeal, the San Antonio Court of Appeals affirmed.

The Supreme Court reversed and dismissed Clark's suit. As to her sexual harassment claim, the Court held Clark failed to raise a fact issue that the offending conduct was based on her gender based on the standard set forth in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Viewing the record in the light most favorable to Clark, her working environment was undoubtedly harassing: "Taking all of her evidence as true, Clark experienced misery at work that no employee should endure." However, based on Clark's own version of events—which provided vital context that could not be ignored in a legal-sufficiency review—a jury could not reasonably conclude the alleged harassment was motivated by her gender. Methods of proving gender-based animus in same-sex cases include evidence of sexual attraction or desire, evidence of general hostility to a particular gender in the workplace, and direct comparative evidence of the harasser's treatment of both sexes. Here, Clark never claimed she was sexually propositioned, and she presented no evidence from which an invitation to engage in sexual activity could be reasonably inferred. In addition, Clark could not show general hostility toward women because her allegations and evidence showed that Monterrubio mistreated both male and female coaches. And even though Clark's evidence showed she was targeted by Monterrubio's behavior, it did not raise an inference of gender-based discrimination under the comparative-based evidentiary route.

In holding that Clark failed to raise a fact issue on her sexual harassment claim, the Court also noted that Monterrubio's statements about gender-specific anatomy and characteristics

did not alone raise an inference that Clark's harassment was gender-based. A court errs, as the court of appeals did, if it focuses only on gender-specific anatomy and ignores the harasser's motivation. Although *Oncale* mentioned "sex-specific and derogatory" behavior, it expressly tied that language to proving general hostility to one gender in the workplace under the second evidentiary route. Importantly, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases.

As to Clark's retaliation claim, the Court likewise held she failed to raise a fact issue to overcome the District's plea to the jurisdiction. The Court applied the three-part *McDonnell Douglas* burden-shifting framework that enables an employee to establish discrimination with circumstantial evidence. Under this test, the District's evidence rebutted Clark's presumption of discrimination: it showed nonretaliatory reasons for the adverse employment actions, namely Clark's performance issues. Moreover, the record contained no evidence that Clark was placed on an employment plan or terminated for engaging in a protected activity. Although some evidence showed the District did not follow all its policies in dealing with Clark's complaints, the remaining causation factors weighed heavily in its favor. The Court concluded there was no fact issue that Clark would not have been terminated but for her EEOC charge. As a result, the District's immunity was not waived and its jurisdictional plea should have been granted. In so holding, the Court, in a matter of first impression, announced that all three parts of the *McDonnell Douglas* burden-shifting framework were relevant to the jurisdictional inquiry, not just the prima facie case.

To decide a plea to the jurisdiction for a retaliation claim under the Commission on Human Rights Act, a court must review all phases of the burden-shifting framework for proving discriminatory intent absent direct evidence; reviewing just the prima facie case is error.

Justice Boyd, joined by Justice Lehrmann, dissented, asserting that the Court's decision might be different if Clark

were harassed by a male rather than female colleague. Moreover, at least some evidence established that Monterrubio's efforts to humiliate Clark—regardless of Monterrubio's motivation for doing so—were effective because she used the all-too-common tactics that have historically been used to degrade and deter women in the workplace. Because a reasonable juror could conclude from this evidence that Clark suffered harassment because of sexual desire or because of her gender-specific anatomy and characteristics, the dissent would hold that the evidence was sufficient to create a fact issue on whether Clark suffered discrimination "because of sex" under the Act.

Indeed, as to both claims, the evidence created a fact issue that a jury—not the Supreme Court—must decide. While a jury might not believe Clark's testimony or might conclude that it did not prove her claims, the trial court and the unanimous court of appeals held Clark's evidence was at least sufficient to permit a reasonable juror to hear the case.

Environmental Law

AC Interests L.P. v. Tex. Comm'n on Envtl. Quality, 543 S.W.3d 703 (Tex. 2018)

The Clean Air Act establishes a regulatory scheme to "safeguard the state's air resources from pollution." Part of this scheme authorizes the Texas Commission on Environmental Quality ("TCEQ") to grant and certify Emission Reduction Credits ("ERCs") when certain authorized emissions are reduced or eliminated under an emissions banking and trading program. If the TCEQ certifies an emissions reduction, a company may trade its ERCs or use them within a designated area to offset emissions from a new source.

In 2013, AC Interests L.P. asked the TCEQ to certify ERCs, but its application was denied. AC Interests then sought judicial review by filing its petition in Travis County District Court on December 10, 2014. Although it hand-delivered a copy to the TCEQ a couple of days later, AC Interests did not

formally serve the TCEQ until 58 days after filing the petition. In the meantime, the TCEQ moved to dismiss under Health and Safety Code § 382.032(c), which requires service within 30 days of the petition's filing. The trial court dismissed the petition. The First Court of Appeals affirmed, concluding that the service deadline was mandatory.

The Supreme Court reversed and remanded, holding the statute did not require dismissal under the circumstances of this case. As an initial matter, the Court agreed with the court of appeals that the Clean Air Act, as opposed to Water Code § 5.351, controlled AC Interests' request for judicial review because the Clean Air Act authorized the particular TCEQ decision and specifically provided for its judicial review. Therefore, the 30-day service requirement under § 382.032 applied.

As to whether the 30-day service requirement under § 382.032 was mandatory or directory, the Court held it was directory. The statute states that "service of citation must be accomplished within 30 days." Although the parties agreed that the filing deadline was a mandatory, jurisdictional requirement and that the service deadline was not jurisdictional, they disagreed about whether the service deadline was mandatory and whether dismissal was the consequence of failing to meet the service deadline. The Court recognized that the words "shall" and "must" in a statute are generally understood as mandatory terms that create a duty or condition. Likewise, the TCEQ argued that the statute's use of the word "must" was significant given that under the Code Construction Act, "must" indicates a condition precedent "unless the context ... necessarily requires a different construction." As a condition precedent, the TCEQ argued, the statutory provision was mandatory. But the Court disagreed, noting that § 382.032 did not state a consequence for failing to comply and, importantly, no consequence was logically necessary because service within 30 days did not affect jurisdiction; as a result, the service requirement was not a condition precedent. Ultimately, because the Legislature expressed no particular consequence for failing

to meet the 30-day service deadline and none is logically necessary, the Court presumed that the Legislature intended the requirement to be directory rather than mandatory and that the Legislature did not intend for late service to result in the automatic dismissal of AC Interests' appeal. Because the court of appeals erred in upholding the dismissal, the Supreme Court reversed its judgment and remanded the case to the district court for further proceedings.

The Clean Air Act's 30-day service requirement for judicial review of a Texas Commission on Environmental Quality ruling is directory rather than mandatory; thus, the failure to comply with the provision does not result in automatic dismissal.

Justice Boyd, joined by Justice Johnson, dissented, arguing the statute's 30-day service requirement was mandatory. By the statute's express language, the petition "must" be filed within 30 days after the TCEQ's decision and service of citation "must" be accomplished within 30 days after filing. The filing and service requirements, therefore, are conditions precedent to the right to pursue the appeal. Because the statute's plain language compels this result, and the statute's effects likewise support this conclusion, the dissent would hold that because AC Interests failed to serve citation within 30 days, as the statute says it "must" do, it cannot pursue the appeal.

Expert Qualifications

***Benge v. Williams*, 548 S.W.3d 466 (Tex. 2018)**

With the assistance of a resident, Dr. Jim Benge performed a hysterectomy on Lauren Williams. Dr. Benge explained that to Williams that he would be doing the surgery with an assistant—a third-year resident—but he did not tell Williams about the resident's lack of experience in the particular surgery or the extent of her involvement. After the surgery, Williams experienced significant complications, and it turned out that Williams had a perforated bowel. She required, among other things, multiple additional surgeries and a three-

week medically induced coma. Williams sued Dr. Benge for negligence. Her expert, Dr. Bruce Patsner, testified about the cause of the perforation; he believed the error was likely caused by the resident. Williams also offered evidence that Dr. Benge failed to disclose the resident's lack of experience. Ultimately, however, the jury was asked a single question on liability: Did Dr. Benge's negligence proximately cause Williams' injuries? Dr. Benge objected to the question because it allowed the jury to base its finding on a violation of informed consent that Williams did not claim, and he requested the jury be instructed not to consider the informed-consent issue. The trial court overruled the objection.

The trial court rendered judgment on the verdict for Williams for almost $2 million. On appeal Dr. Benge argued (1) Dr. Patsner was not qualified to testify under the Texas Medical Liability Act ("TMLA"), leaving Williams with no evidence that Dr. Benge violated the standard of care, and (2) the jury was allowed to find Dr. Benge negligence for failing to disclose his resident's experience and involvement in the surgery, a basis for liability Williams had disclaimed, thus requiring a new trial. The court of appeals agreed on the second issue but not the first and remanded the case for a new trial.

Harmful error is presumed when a jury is asked about single liability theory, but plaintiff advances multiple claims through the evidence.

The Supreme Court, in a unanimous opinion by the Chief Justice, affirmed. Dr. Patsner was qualified to testify. The TMLA requires an expert testifying on whether a physician departed from accepted standards of medical care must have been practicing medicine when the claim arose or when testimony was give. Under this standard, the expert need not be engaged in patient care. Absent evidence to the contrary, the trial court could fairly infer that Dr. Patsner's teaching position in South Korea was with an accredited institution and the physicians with whom he was consulting on hysterectomies, including an MD Anderson oncologist, were licensed in the United States and providing

patient care. The trial court was within its discretion to allow Dr. Patsner, with his extensive experience in practicing and teaching obstetrics and gynecology, to testify under the TMLA.

However, the Court found that the trial court reversibly erred by denying Dr. Benge's proposed jury instruction. Williams' argument that Dr. Benge failed to disclose the resident's inexperience was front and center for the entire trial. Williams' counsel stressed the point to the jury, and Dr. Patsner testified repeatedly that Dr. Benge's nondisclosure violated the standard of care. This claim is nothing other than a claim of lack of informed consent. But that issue is completely different from whether Dr. Benge was negligent in involving the resident and supervising her in the surgery. Williams' arguments confused these two issues. Based on the evidence, the jury could have found that Dr. Benge was negligent in failing to disclose the resident's inexperience and involvement in the surgery, but she did not assert that claim. Under this Court's precedent, when the jury question allows a finding of liability based on evidence that cannot support recovery, the error is presumed harmful and requires a new trial. Here, while the jury was asked about a single liability theory, the plaintiff advanced multiple claims in the evidence. Because the trial court refused Dr. Benge's limiting instruction, the Court cannot determine whether the nondisclosure was the basis for the jury's finding. Thus, the trial court's error in refusing the instruction is presumed harmful, and a new trial is required.

Expunction

State v. T.S.N., 547 S.W.3d 617 (Tex. 2018)

T.S.N. was charged by information for the misdemeanor offense of theft by check and a warrant was issued for her arrest. She was not arrested until nearly three years later, at which time she was arrested for the felony offense of aggravated assault with a deadly weapon. The theft and assault charges were filed in different courts with different cause numbers.

T.S.N. pleaded guilty to the theft charge but not guilty to the assault charge. The assault charge was tried to a jury and she was acquitted. T.S.N. then filed a petition under article 55.01 of the Texas Code of Criminal Procedure seeking expunction of the records and files related to the assault charge. The State opposed T.S.N.'s petition, asserting that she was not entitled to expunction because she was convicted of the theft charge for which she was simultaneously arrested. In the State's view, article 55.01 makes expunction an all-or-nothing proposition relating to the *arrest* and all matters involved in it. The trial court rejected the State's position and granted T.S.N.'s petition. The court of appeal affirmed.

Individual who pleaded guilty to one charge but was acquitted of another could obtain expungement of the records and files related to the charge for which she was acquitted.

In a unanimous opinion written by Justice Johnson, the Texas Supreme Court affirmed the court of appeals' judgment. The Court agreed with T.S.N. that using an arrest-based approach to article 55.01(a)(1)'s application, as the State urged, would impermissibly render exceptions in article 55.01(c) superfluous. But the Court noted that article 55.01 is neither entirely arrest-based nor entirely offense-based. Here, the Court addressed only article 55.01(a)(1) and concluded that T.S.N. was entitled to expunction of all records and files relating to her arrest for the assault charge of which she was tried and acquitted.

Governmental Immunity

City of San Antonio v. Tenorio, 543 S.W.3d 772 (Tex. 2018)

Pedro and Roxana Tenorio were riding a motorcycle in a northbound lane of San Antonio's SW Loop 410 when they were hit head-on by a southbound vehicle driven by Benito Garza. The crash killed Pedro and severely injured Roxana. Until shortly before the collision, officers of the San Antonio Police Department ("SAPD") were pursuing Garza in a high-

speed chase. When Garza entered the Loop going the wrong way, the officers discontinued the pursuit. Tenorio, on behalf of herself and Pedro, sued Garza and the City of San Antonio ("City"), alleging the police officers were negligent in initiating, continuing, and failing to terminate the high-speed chase; the City had actual notice of her claims; and the City's immunity was waived by the Tort Claims Act ("Act"). The City responded to Tenorio's suit, in part, with a plea to the jurisdiction, asserting that Tenorio failed to give notice of claim as required by the Act and the City's Charter, and that the City did not have actual notice it was at fault in causing the collision. The City supported its plea with multiple documents, including sworn witness statements and police reports regarding the collision. Tenorio replied and attached various SAPD documents. The trial court denied the City's plea. The San Antonio Court of Appeals affirmed, concluding a fact issue existed as to whether the City had actual notice of Tenorio's claims. The evidence, the SAPD's crash report stating a factor that contributed to the crash was Garza's "Fleeing or Evading Police," created a fact issue as to whether the City was subjectively aware it was at fault.

In a 5-4 decision, the Supreme Court sided with the City, reversed the court of appeals' judgment, and dismissed the case for lack of jurisdiction. At issue was whether the City had subjective awareness that its fault produced or contributed to the Tenorios' injuries. The SAPD's investigation of the accident yielded the crash report, witness statements, and a case report that, according to Tenorio, showed the City had subjective awareness its officers were at fault in several ways regarding their pursuit of Garza and that their fault was related to the collision and resulting injuries. There was the crash report on which the court of appeals relied in its decision. In addition, the report stated Garza "drove onto the main lanes of the [highway] against oncoming traffic and collided with" the Tenorios' motorcycle, a statement echoed in the case report, which added that Garza "was fleeing the police [when] he jumped onto the main lanes and struck" the Tenorios.

But according to the Supreme Court, evidence that a vehicle being pursued by the police was involved in a collision was not, by itself, sufficient to raise a fact question about whether the City, for purposes of the Act, had subjective awareness that it was in some manner at fault in connection with the collision. Although the crash report listed a factor and condition contributing to the crash as "Fleeing or Evading Police," this was not an express statement or even an implication that the officers or the City were at fault as to the collision. If it were, actual notice under the Act would be meaningless in evading police situations: it would exist every time a collision with injuries or property damage occurred when a driver was fleeing or evading police, regardless of the other facts. None of the reports or statements cited by Tenorio indicated, either expressly or impliedly, that the SAPD subjectively believed its officers acted in error by initiating or continuing the pursuit such that they were in some manner responsible for the injuries. As a result, the City did not have actual notice that it was at fault in connection with the collision, as is required by the Act for the City's immunity to have been waived. For these reasons, the Court reversed and dismissed the case for lack of jurisdiction.

Evidence that a vehicle being pursued by the police is involved in a collision is not, by itself, sufficient to raise a fact question about whether a governmental entity, for purposes of the Tort Claims Act, had subjective awareness that it was in some manner at fault in connection with the collision.

Justice Guzman issued a dissenting opinion that faulted the majority for failing to correctly interpret the Court's precedent, specifically *Cathey v. Booth* and its progeny. 900 S.W.2d 339 (Tex. 1995) (per curiam). In *Cathey*, the Court explained that "[t]he purpose of the [Tort Claims Act's] notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Cathey*'s reading of the statutory notice requirement struck a fair balance between providing injured parties a remedy while

allowing governmental defendants a fair opportunity to prepare a defense. But the majority's holding skews this balance. The record before the Court showed that the City knew enough about its role in the accident to incentivize it to protect its own interests. An ever narrower construction of the Act's actual-notice exception is discordant with legislative intent plainly expressed in the statute and the Court's precedent construing the statute.

Justice Boyd, Lehrmann, and Blacklock also dissented and discussed *Cathey* from a different perspective, stating that the Court misconstrued and poorly rewrote the requirements of subparts (a) and (c) of Civil Practices and Remedies Code § 101.101, addressing notice requirements, compounding the misreading in the *Cathey* opinion. They also characterized the majority's holding here as "just one more exertion in the Court's ongoing effort to figure out what it believes the law should require." These justices asserted that the evidence conclusively established the City had actual notice of the death, injuries, and property damage on which Tenorio's claims were based. Rather than summarily decide the case without oral argument, as the majority did, these justices would invite the parties to submit additional briefing on § 101.101(c) and *Cathey*, and then schedule the case for oral argument.

***Harris County v. Annab*, 547 S.W.3d 609 (Tex. 2018)**

Kenneth Caplan shot Lori Annab in a fit of road rage. Caplan was a Harris County deputy constable, but he was off duty when he shot Annab with his personal firearm from his personal vehicle. Caplan is now serving a prison sentence for his crime. Annab sued Harris County— Caplan's employer— and sought to overcome the County's governmental immunity by claiming that the County used tangible personal property when Caplan shot Annab. Specifically, Annab claimed that the County decided to hire Caplan and repeatedly authorized Caplan to carry a firearm. The trial court granted the County's plea to the jurisdiction and dismissed the case. The court of appeals concluded that Annab had not established a waiver

of immunity but remanded to permit repleading and more discovery. One justice dissented, concluding that Annab's claims were excluded from the Tort Claims Act regardless of whether she sufficiently alleged use of tangible personal property because her claims arose from an intentional tort.

The Supreme Court, in a unanimous opinion by Justice Blacklock, affirmed in part and reversed in part. The County was entitled to governmental immunity. It did not "use" tangible personal property; and thus, the Tort Claims Act's waiver of immunity did not apply. To "use" something, the governmental unit must put it or bring it into action, or service or employ it for, or apply it to a given purpose. The governmental unit, moreover, must itself be the user. Annab's allegation that the county enable, authorized, or approved Caplan's use of the firearm does not satisfy this standard. Nor can the County's failure to use information when it hired Caplan, retained Caplan as an employee, and declined to revoke the authorization for his *on-duty* possession of a firearm be the "use of tangible personal property." Finally, Annab has failed to show how Caplan's constitutional right to carry a personal firearm on his personal time depends on the County's approval. It did not.

County did not "use" off-duty deputy constable's personal firearm for purposes of the Tort Claims Act's waiver of immunity.

Next, the Court concluded that remand was improper. Though repleading is typically appropriate when a defendant raises a jurisdictional argument for the first time on appeal, it is not appropriate when the party who raised the jurisdictional defense can show that the pleadings or record conclusively negate jurisdiction. Further, even if the County raised new arguments on appeal, new arguments alone do not entitle a plaintiff to replead and conduct further discovery. Here, Annab will be unable to show jurisdiction on remand. No amount of future discovery or rephrasing of the allegations could properly invoke the Tort Claims Act's limited waiver of the County's immunity here, so remand serves no purpose.

Insurance

USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d 479 (Tex. 2018)

After Hurricane Ike struck Galveston Island in September 2008, Gail Menchaca contacted her homeowner's insurance company, USAA Texas Lloyds, and reported that the storm had damaged her home. USAA sent an adjuster to investigate Menchaca's claim, and the adjuster found only minimal damage. Based on the adjuster's findings, USAA determined its policy covered some of the damage but declined to pay Menchaca any benefits because its adjuster's estimated repair costs did not exceed the policy's deductible. At Menchaca's request, USAA sent another adjuster to re-inspect the property. The second adjuster generally confirmed the first adjuster's findings, and USAA again refused to pay any policy benefits. Menchaca sued USAA for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code. For both claims, she sought only insurance benefits under the policy.

The case was tried to a jury, which was asked three questions. Question 1 asked whether USAA failed to comply with the terms of the insurance policy; the jury answered "no"; Question 2 asked whether USAA violated the Insurance Code by, among other things, failing to pay a claim without conducting a reasonable investigation; the jury answered "yes"; and Question 3 asked the jury to determine Menchaca's damages, the jury answered $11,350.00—the amount of policy benefits Menchaca sought.

Both parties moved for judgment in their favor. USAA argued that because the jury failed to find that USAA breached the policy's terms, Menchaca could not recover. However, Menchaca argued she was entitled to judgment based on the jury's answers to Questions 2 and 3. The trial court ultimately disregarded the jury's answer to Question 1 and entered judgment in Menchaca's favor; the court of appeals affirmed.

In April 2017, the Texas Supreme Court reversed and remanded. The Court used the case to clarify its precedent by announcing five rules to address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code. First, an insured generally cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits. Second, an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits. Third, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose the contractual right. Fourth, if an insurer's statutory violation causes an injury independent from the loss of policy benefits, then the insured may recover damages for that injury. Finally, an insured cannot recover any damages based on an insurer's statutory violation if the insured has no right to receive benefits under the policy and sustained no injury independent from the policy benefits.

On rehearing of a 2017 opinion on the interplay between contract claims under an insurance policy and tort claims under the Insurance Code, the Texas Supreme Court addressed preservation-of-error requirements when jury answers fatally conflict.

In its 2017 decision, the Court concluded that, based on these rules, remand was proper because the confusing nature of its precedent precluded it from faulting either party for the arguments they made in the trial court. On rehearing, the Court unanimously reaffirmed the legal principles announced in the first decision, as well as its conclusion that the trial court erred by disregarding the jury's answer to Question 1. But the Court splintered on the appropriate appellate remedy, with multiple opinions addressing error-preservation requirements when jury answers are fatally conflicting. Justice Green, Justice Guzman, and Justice Brown concluded that the jury's answer

to Question 1 was dispositive to the plaintiff's ability to recover damages for the Insurance Code violation the jury found in answer to Question 2 and would have rendered judgment for the insurer. They would require the party relying on the conflicting answers to object to the receipt of the verdict on that ground before the jury is discharged or else waive the complaint. Chief Justice Hecht, Justice Lehrmann, Justice Boyd, and Justice Devine, concluded the jury's answer to Question 1 created a fatal conflict with its answers to Questions 2 and 3, though Chief Justice Hecht concluded that no objection is necessary when both parties argue there is no fatal conflict. Though no one opinion commanded a majority of the Court, five justices voted to remand for a new trial.

JUDGMENTS

***In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) (per curiam) (orig. proceeding)**

Paul Elizondo, Cynthia Elizondo, and Eagle Fabricators, Inc. (collectively, "Elizondo") hired M & O Homebuilders, Inc., Orlando Cuello, Maria De Jesus Gamez, and Texas Homebuilders, LLC (collectively "the Builders") to build a home. After a cost dispute arose, Elizondo sued the Builders and placed a lien on the Builders' property under the theory that the Builders had improved it using funds intended for his home. The Builders filed a motion to remove the lien, arguing that it was invalid. The Builders drafted and submitted an order titled "Order on Defendants' Summary Motion to Remove Invalid Lien." The trial court signed the order, which included at the bottom of its first and only page the following finality phrase: "This judgment is final, disposes of all claims and all parties, and is appealable. All relief not granted herein is denied." Thirty days went by, so the trial court's plenary power expired. Several weeks later, Elizondo noticed the original order had disposed of the entire case. Elizondo then requested an amended order omitting the finality phrase, which the trial court issued. The

Builders sought mandamus relief, requesting a writ directing the trial court to vacate the amended order. The Builders argued that the original order was final and the amended order was void because the trial court issued the amended order after its plenary power expired. A divided court of appeals conditionally granted mandamus relief to the Builders. Elizondo then sought a writ of mandamus directing the court of appeals to vacate its opinion.

The record of the case is irrelevant to determining an order's finality when the order contains clear and unambiguous language of finality.

The Texas Supreme Court denied mandamus relief in a per curiam opinion. The Court explained that the court of appeals had correctly applied the *Lehmann* rule. The trial court's order contained clear and unequivocal language of finality, and Elizondo had 30 days to examine the one-page order and challenge the finality phrase. "Though jarring for Elizondo, this outcome reflects *Lehmann*'s reasoning and comports with this Court's subsequent application of *Lehmann*'s finality tests." When an order includes clear finality language, a reviewing court must take the order "at face value" and "cannot look at the record." Because the amended order here sought to correct judicial error after the trial court's plenary power had expired, the amended order was void and the court of appeals was correct to grant mandamus relief to the Builders.

Libel

***Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)**

High-school student Paul Tatum was in a violent car accident, after which he wandered home and unexpectedly committed suicide. In the wake of Paul's death, his parents discovered medical literature linking traumatic brain injury and suicide. They concluded that the car accident caused irrational and suicidal ideations in Paul, which led to his death.

The Tatums sought to memorialize Paul by writing an obituary, which they published in The Dallas Morning News. The obituary stated that Paul died as a result of injuries sustained in an automobile action, wording intentionally meant to reflect the Tatums' conviction that Paul's death stemmed from his brain injury rather than mental illness. The next month, Steve Blow, a columnist for The Dallas Morning News, wrote an article called "Shrouding Suicide Leaves its Danger Unaddressed." In the article, Blow quoted from Paul's obituary and revealed that Paul's death turned out to have been a suicide. Blow's column then went on to lament that society allows suicide to remain cloaked in secrecy, and he speculated that the reason for such secrecy was a hesitation to talk about the illness often underlying suicide: mental illness. Blow never contacted the Tatums before publishing the article.

The Tatums sued for libel and libel per se, alleging the column defamed them by its gist. Without specifying why, the trial court granted the newspaper's motion for summary judgment. The court of appeals reversed and remanded the Tatums' libel and libel per se claims. The court concluded that a person of ordinary intelligence could construe the column to suggest that Paul suffered from mental illness and his parents failed to confront it honestly and timely, perhaps missing a chance to save his life. The court also concluded the column's gist regarding the Tatums wrote a deceptive obituary to keep Paul's suicide a secret and protect themselves from being seen as missing a chance to intervene.

Newspaper column implied that parents acted deceptively in publishing obituary claiming son died from car accident when he in fact committed suicide but did not give rise to actionable defamation claim because implied accusation was an opinion.

The Supreme Court, in an opinion by Justice Brown, held that the newspaper was not liable because the column, expressing an opinion, is true. The Court first concluded that the column was reasonably capable of meaning that the Tatums acted deceptively and that the accusation of deception is reasonably capable of defaming the Tatums.

Regardless, though, Blow's column is a non-actionable opinion because it does not, in context, defame the Tatums by accusing them of perpetrating a morally blameworthy deception. But even to the extent the column states the Tatums acted deceptively, it is true. Implicit defamatory meanings are not actionable if they are either true or substantially true. Paul's obituary leads readers to believe something that is not true, so the Tatums were literally deceptive. It states that Paul died from a car accident when in fact he committed suicide. The Tatums believe the car accident and suicide are related, but the obituary does not convey that belief. Rather, the obituary purports to convey that the car accident was both the proximate and immediate cause of Paul's death. Often pointing out an intentional deception implies wrongdoing, but not always. Blow's column does not do so; he expressly stated that "the last thing I want to do is put guilt on the family of suicide victims."

Justice Boyd, joined by Justices Lehrmann and Blacklock, concurred. Justice Boyd's main disagreement with the Court was in its relabeling of terms in an already confusing area of the law. He agreed, however, that the Tatums provided some evidence that Blow's column was reasonably capable of conveying a defamatory meaning that the Tatums published a deceptive obituary, and he agreed that the column was opinion, not fact. Because of that, he would not address truth or substantial truth.

Limitations

Schlumberger Tech. Corp. v. Pasko, 544 S.W.3d 830 (Tex. 2018) (per curiam)

Michael Pasko was employed by JC Fodale Energy Services, LLC, a contractor on the location where an oil well was being drilled. Schlumberger Technology Corporation ("Schlumberger") was also a contractor at the well site. Pasko alleges he was injured when he was exposed to and burned by caustic chemicals while working at the site. He claims that a

Schlumberger employee instructed him to clean up a spill of toxic fracking chemicals but did not provide him with protective equipment. A little over four months after his exposure, Pasko was diagnosed with squamous cell carcinoma cancer. He timely sued several entities and individuals for causing his injuries. However, Pasko did not name Schlumberger as a defendant until more than two years after he was injured, but less than two years after he was diagnosed with cancer that he attributed to the chemical exposure. In the trial court, Schlumberger moved for summary judgment based on limitations, and Pasko countered that the discovery rule applied because his cancer was inherently undiscoverable; therefore, his cause of action did not accrue until he discovered the cancer. The trial court granted Schlumberger's motion for summary judgment, but the Corpus Christi Court of Appeals reversed, concluding that Pasko raised a fact issue about whether he knew or should have known the nature of his injury before his cancer diagnosis.

Application of the discovery rule turns on whether the injured person is aware that she has an injury and that it was likely caused by the wrongful acts of another.

The Supreme Court reversed, holding the court of appeals erred in applying the discovery rule. The discovery rule delays accrual until the plaintiff "knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury." In other words, whether the discovery rule applies turns on whether the injured person is aware that she has an injury and that it was likely caused by the wrongful acts of another. Here, Schlumberger's summary judgment evidence and the pleadings established that (1) Pasko sustained severe burn injuries to his body when he came into contact with backflow liquids on the day he was exposed; (2) he knew immediately that he had been burned by the liquids and sought medical treatment; and (3) he knew that Schlumberger's employees assigned him to the cleanup job without providing protective equipment. Schlumberger established conclusively that pursuant to the legal injury rule, Pasko's cause of action

accrued that day. Further, because Pasko knew he was injured by the fluids and that he had not been provided safety equipment, it did not matter, for purposes of when his cause of action accrued, that he did not develop, or learn that he had developed, cancer until four months later. For these reasons, the Supreme Court reversed the court of appeals' judgment and reinstated that of the trial court.

Oil & Gas

***XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship*, 554 S.W.3d 607 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)**

By a term assignment, XOG Operating, LLC, conveyed to Chesapeake Exploration Limited its rights as lessee under four oil-and-gas leases covering approximately 1,625 acres in Wheeler County. The assignment's primary term was two years and "as long thereafter as operations" were conducted with no cessation for more than 60 consecutive days. Under the retained-acreage provision, the assigned interest would revert to XOG after the primary term:

> **save and except that portion** of [the leased acreage] **included within the proration** or pooled **unit of each well** drilled under this Assignment and producing or capable of producing oil and/or gas in paying quantities. **The term "proration unit"** as used herein, **shall mean the area within the surface boundaries of the proration unit then** established or **prescribed by field rules** or special order of the appropriate regulatory authority for the reservoir in which each well is completed. **In the absence of such field rules** or special order, **each proration unit shall be deemed to be 320 acres** of land in the form of a square as near as practicable surrounding[ ] a well completed as a gas well producing or capable of production in paying quantities . . . .

(Emphasis added.) The acreage not retained by Chesapeake under this language would revert to XOG on termination of the assignment. Chesapeake completed six wells during the primary term. Five of the wells are in a field for which the Railroad Commission had promulgated field rules, which prescribe a proration unit of 320 acres. One of the wells is in a field for which there are no field rules established.

Chesapeake filed a Form P-15 for each well with the Railroad Commission, assigning a proration unit. XOG asserted that these forms filed by Chesapeake determine the acreage it continues to hold under the retained-acreage provision. This would result in the reversion of 821.80 acres to XOG. But Chesapeake asserted that its retained acreage is that "prescribed by field rules," or 320 acres for each well, which amounts to all of the assigned acreage. Because Chesapeake refused to release or reassign to XOG any acreage covered by the assignment, XOG sued Chesapeake. The trial court granted summary judgment to Chesapeake, and a divided court of appeals affirmed the trial court's judgment.

The Texas Supreme Court affirmed the court of appeals' judgment in a unanimous opinion written by Chief Justice Hecht. The Court explained that retained-acreage provisions are contractual and impose a special limitation on a general grant of a mineral interest when the language is so clear, precise, and unequivocal that it can reasonably be given no other meaning. Here, XOG's assignment to Chesapeake plainly states that at the end of the primary term, all land reverts to XOG except acreage "included within the proration . . . unit of each well," meaning "the area within the surface boundaries of the proration unit then . . . prescribed by field rules . . . . In the absence of such field rules . . . each proration unit shall be deemed to be 320 acres." The field rules applicable to five of the wells state that "[f]or allowable assignment purposes, the prescribed proration unit shall be a [320]

Acreage "included within the proration unit for each well prescribed by field rules" referred to acreage set by field rules, not acreage assigned by the operator.

acre unit." And because no field rules apply to the sixth well, the "deemed" proration unit is 320 acres. The acreage in the total proration units exceeds the assigned acreage, so none reverted to XOG. The Court concluded that even if XOG's reading of the provisions was reasonable, the Court could not construe them to restrict the interest XOG assigned to Chesapeake absent language that is so clear, precise, and unequivocal that it could be given no other reasonable meaning.

***Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)**

Endeavor acquired mineral leases for two adjoining tracts referred to as "section 4" and "section 9." Endeavor completed well #1 and well #2 in the northeastern quarter section 9, but did not drill in or develop section 9's northwestern quarter. Endeavor also completed well #3 and well #4 in section 4's southeastern quarter, but did not drill wells in section 4's southwestern quarter. After completing these wells, Endeavor filed certified proration plats with the Texas Railroad Commission. For well #1, the plat designated a proration unit of 81.21 acres, and for well #2, the plat designated 81.21 acres; the designated proration units did not include any of section 9's northwestern quarter. For well #3, the plat designated 81.0 acres, and for well #4, the plat designated 81.0 acres; the designated proration units did not include any of section 4's southwestern quarter.

Endeavor's leases included two clauses that could permit Endeavor to retain certain interests after the leases' primary terms ended: a continuous-development clause and a retained-acreage clause. The retained-acreage clause was at the center of this case, and it stated as follows:

> [the] lease shall automatically terminate as to all lands and depths covered herein, save and except those lands and depths located within a governmental proration unit assigned to a well producing oil or gas in paying quantities and

> the depths down to and including one hundred feet (100') below the deepest productive perforation(s), with each such governmental proration unit to contain the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for obtaining the maximum producing allowable for the particular well.

After the primary terms of Endeavor's leases expired, Patriot Royalty and Land, LLC, reviewed the leases and the proration plats Endeavor had filed with the Commission. Patriot determined that Endeavor's leases had terminated as to section 4's southwestern quarter and section 9's northwestern quarter—i.e., the lands Endeavor did not include in the proration units designated in its filed plats. Thereafter, Patriot approached the owners of section 4 and section 9, obtained leases covering both of those quarters, and assigned those leases to Discovery. Discovery successfully drilled two wells in each quarter.

Endeavor objected to Discovery's assertion of any leasehold interest in section 4 and section 9. Endeavor asserted that it had mistakenly failed to assign 160 acres to each well it drilled, as allowed under the applicable "governmental proration unit" for the area in which section 4 and section 9 are located. Discovery asserted, however, that the proration units Endeavor actually assigned to each well (i.e., approximately 80 acres per well) was controlling. Discovery filed a trespass-to-try title action against Endeavor, and on competing motions for summary judgment, the trial court granted judgment to Discovery. The court of appeals affirmed the trial court's judgment, holding that Endeavor's leasehold interests survived the expiration of the primary term only as to the acreage in the proration units Endeavor assigned to its wells in the plats it filed with the Commission.

The Texas Supreme Court affirmed the court of appeals' judgment in a unanimous opinion written by Justice Boyd.

The Court's analysis started with a general discussion of the regulatory context for oil-and-gas leases, including proration units, and common mineral-lease terms, including continuous-development clauses and retained-acreage clauses. The Court then turned from this legal background to the particular terms in Endeavor's leases. Endeavor contended that the retained-acreage clauses were ambiguous because they did not identify whose assignment of a proration unit would control—Endeavor's or the Commission's—but the Court rejected this argument. It held that the leases' reference to "assigned" proration units was unambiguous and that Endeavor's position was unreasonable "because the Commission does not 'assign' acreage to proration units—it merely quantifies the amount of acreage an operator assigns." Endeavor's leases designated the acreage retained as the amount in the proration unit assigned to the wells per the Commission's rules. And consistent with the Commission's rules, Endeavor assigned a specific amount of acreage to the proration units for the wells by filing certified proration plats. The Court held that under the leases' unambiguous language, those assignments governed the leasehold interests Endeavor retained.

Retained-acreage clauses in oil-and-gas leases permitted the operator to retain the amount of acreage it had "assigned to" each well in plats it filed with the Railroad Commission.

The Court also rejected Endeavor's argument that the leases' reference to "maximum producing allowable" meant that each proration unit automatically consisted of the greatest amount of acreage the Commission's rules would permit an operator to assign. The Court determined that if Endeavor's regulatory filings included an amount sufficient to obtain the maximum producing allowable, "then that amount—no matter how small it might be—would be excepted from termination under the retained acreage clauses." Finally, the Court rejected Endeavor's attempts to rely on rules of contract construction related to forfeiture and construing contracts as a whole.

***TRO-X, L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458 (Tex. 2018)**

TRO-X, L.P., as lessee, executed mineral leases with the Coopers in 2007 (the "2007 Leases"), which contained identical terms including a clause requiring TRO-X to drill an offset well if an off-lease well was completed within 660 feet of the lease boundaries and produced oil in paying quantities. TRO-X later entered into a participation agreement transferring its interest in the 2007 Leases, with the exception of a contingent reversionary interest, to Eagle Oil & Gas Co. The participation agreement allowed TRO-X to exercise a "back-in" option if Eagle Oil produced minerals from the leases and reached "project payout" as that term was defined in the participation agreement. The participation agreement included an "anti-washout" clause designed to protect TRO-X's back-in option from being "washed out" by means of the lessee surrendering the lease or allowing it to lapse and then reacquiring the lease without the interest's burden. The anti-washout clause stated that the back-in option "shall extend to and be binding upon any renewal(s), extension(s), or top lease(s) taken within one (1) year of termination of the underlying interest."

Eagle Oil assigned its interest in the 2007 Leases to Anadarko. A year later, Anadarko completed a well within 550 feet from the perimeter of the tract covered by the 2007 Leases. There was no dispute that Anadarko failed to drill an offset well within one year. Thereafter, the Coopers sent Anadarko a demand letter asserting that Anadarko had breached the offset-well clause in the 2007 Leases and demanding that Anadarko surrender 320 acres of the property. Anadarko concluded that it had breached the offset-well clause and negotiated new leases with the Coopers (the "2011 Leases"). The 2011 Leases (1) are between the same parties as the 2007 Leases, (2) cover the same mineral interests that were the subject of the 2007 Leases, (3) contain several terms that vary materially from the 2007 Leases, (4) do not mention either the 2007 Leases or TRO-X's interest under those leases, and (5) do not include language releasing the 2007 Leases. When TRO-X later approached Anadarko to

confirm that its back-in interest in the 2011 Leases was valid, Anadarko denied that it was.

TRO-X sued Anadarko, seeking a declaratory judgment that the 2011 Leases were top leases and therefore subject to TRO-X's back-in interest. The trial court determined that the 2007 Leases remained in effect, making the 2011 Leases top leases subject to the back-in interest. The court of appeals reversed the trial court's judgment, finding nothing to show that the parties intended for the 2011 Leases to be top leases.

In a unanimous opinion written by Justice Johnson, the Texas Supreme Court affirmed the court of appeals' judgment. The Court disagreed with TRO-X that a new lease must contain specific language showing that parties to an existing lease intend for the execution of a new lease to terminate the prior lease. Rather, "an existing lease between the parties as to an interest terminates when the parties enter into a new lease covering that interest *unless* the new lease objectively demonstrates that both parties intended for the new lease not to terminate the prior lease between them." "In sum, when a lessor and lessee under an existing lease execute a new lease of the same mineral interests subject to the existing lease, the existing lease is terminated unless the new lease objectively demonstrates both parties' intent otherwise—for example, by language in the new lease making it subject or subordinate to the prior lease, or restricting the new lease's grant or limiting the grant to a different interest from that conveyed by the prior lease." The burden is on a party contending that a new lease did not terminate a previous lease to establish that the parties intended for the prior lease to survive execution of the new lease. "The proof must be either specific language in the new lease objectively demonstrating that intent, or an ambiguity in the new lease as to termination of the previous lease together with evidence that the parties did

When a lessor and lessee under an existing mineral lease execute a new lease of the same mineral interests subject to the existing lease, the existing lease is terminated unless the new lease objectively shows otherwise.

not intend the new lease to terminate the prior lease." Here, the 2011 Leases did not contain language evidencing an intent to convey anything less to Anadarko than was conveyed in the 2007 Leases. And TRO-X did not point to language in the 2011 Leases that showed Anadarko and the Coopers intended for the 2007 Leases to survive the execution of the 2011 Leases. Therefore, the 2007 Leases were terminated by the execution of the 2011 Leases.

Property Law

Lance v. Robinson, 543 S.W.3d 723 (Tex. 2018)

Judith and Terry Robinson, Gary and Brenda Fest, and Virginia Gray (collectively "Robinsons") own Lots 1, 2, and 3, respectively, in the Redus Point Addition Subdivision located on a narrow peninsula at Medina Lake known as Redus Point. Since the 1970's, they and other property owners in the area accessed Medina Lake using an open space on the east side of the peninsula, east of Fauries Road. The open space is a dry area lying within the "contour zone" between two lake elevations, Elevation 1084 and Elevation 1072, that were noted in the original deeds conveying the properties underlying Medina Lake (created in the early 1900's through the Medina Dam Project) and its surrounding lots. Over the years, the Robinsons and others made improvements to the open space, including walkways, a dock, a boat ramp, and a deck. But in October 2011, John and Debra Lance purchased Lot 8 on Redus Point, which sits across Fauries

Road from the open space. Within a few months, the Lances took control of the area, erected a fence and "No Trespassing" signs, and told the Robinsons that they'd bought the open space from Lot 8's prior owners, F.D. and Helen Franks, through a "Deed Without Warranty." Eventually, the Robinsons sued the Lances and Franks, asserting claims for declaratory judgment, nuisance, use of a fraudulent deed, and claims to quiet title, among others. After the trial court granted a temporary

restraining order and temporary injunction finding that the Lances failed to establish that the Franks had any interest in the open space, the Bandera-Medina-Atascosa Counties Water Improvement District No. 1 ("Water District") intervened with its own claims that it owned the property. Ultimately, the trial court granted the Robinsons' motion for partial summary judgment, holding in pertinent part that (1) the Deed Without Warranty did not convey any ownership interest in the open space because the Franks had no such interest to convey; (2) the Robinsons and the Lances have easements to use and construct improvements in the open space, (3) the Deed Without Warranty is an "invalid cloud and burden" on the Robinsons' easement rights, and (4) the Robinsons own an "express easement" in the disputed area and have standing under Chapter 12 of the Civil Practice and Remedies Code, which the Lances and Franks violated. However, the trial court's order did not declare who owned the open space. The Lances appealed, but the San Antonio Court of Appeals affirmed.

A claimant who seeks to establish an easement is not required to file a trespass-to-try-title action.

The Supreme Court affirmed in part and reversed in part. First, the Court upheld the trial court's declarations that the Lances did not own the disputed area described in the Deed Without Warranty. In so holding, the Court rejected the Lances' argument the Declaratory Judgments Act was the wrong vehicle to determine title to the disputed area and that the Robinsons had to plead and prove claims for trespass to try title. Because the Robinsons were not claiming any ownership or possessory rights to the disputed area, and instead were seeking only to protect their alleged easement, they were not required to file a trespass-to-try-title action and could properly pursue that relief under the Declaratory Judgments Act. The Court also rejected the Lances' argument that the Robinsons lacked standing. The Court held that the Robinsons had standing to challenge the Deed Without Warranty's effect on their alleged easement because they alleged harm to their own interests, not those of

the parties to the deed. Moreover, the evidence sufficiently established that the Deed Without Warranty conveyed no ownership interest to the Lances and that the Robinsons enjoy an easement over the disputed area regardless of who owned it.

In light of this holding, the Court did not decide whether the Deed Without Warranty created a cloud on the Robinsons' alleged easement over the disputed area because the record before the Court was incomplete. The Court also declined to address the Chapter 12 claims, as they remained pending before the trial court and should be addressed there. Finally, the Court affirmed the award of attorneys' fees to the Robinsons but reversed and remanded the attorneys' fees award to the Water District. Because the Water District did not assert a trespass-to-try title action in seeking ownership of the disputed area, the Court concluded that the trial court should reconsider the fee award. Thus, the Supreme Court affirmed in part and reversed in part and remanded the case to the trial court for reconsideration of this award.

***Perryman v. Spartan Tex. Six Capital Partners Ltd.*, 546 S.W.3d 110 (Tex. 2018)**

This case involved a chain of eight real-property deeds addressed only one contract-interpretation question: What is the function of a clause that "saves and excepts" half of "all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises *which are now owned by Grantor*," when the deed does not disclose that the grantor does not own all of the royalty interests and does not except any other royalty interests from the conveyance? The trial court construed the clause to reserve for the grantor half of all of the "royalties ... which [were then] owned by Grantor," and thus the deeds did not create a so-called *Duhig* problem, where the grantor owns less than he purports to convey. The court of appeals disagreed and held that the clause reserved for the grantor half of all royalties produced from the "above described premises which [were then] owned by Grantor," and thus created a *Duhig* problem.

In 1977, Ben Perryman conveyed property to his son and daughter-in-law, Gary and Nancy Perryman, "LESS, SAVE AND EXCEPT an undivided one-half (½) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor." Because Ben owned all the royalties, minerals, and premises at the time of the conveyance, the deed transferred all the surface and mineral interests and half of the royalty interests Gary and Nancy, and Ben kept the other half of the royalty interests. Ben later died intestate and his half-royalty interest passed to his brother, Wade, and to Gary, in equal parts. When Wade died, his interest passed to his daughter, Leasha Perryman Bowden. The result of these events was that Gary and Nancy owned all the surface and minerals and ¾ of the royalties, and Leasha owned the remaining ¼ of the royalties.

While Leasha kept her ¼ royalty interest, Gary and Nancy entered several conveyances that led to confusion and ambiguity as to the ownership interest they retained and what they conveyed. Starting in 1983, the second, third, and fourth deeds contained the same "less, save and except" clause used in Ben's initial conveyance, but those deeds did not define Gary and Nancy's ownership interest or disclose Leana's interest. Later, a new survey of the property revealed that it comprised 206 acres, not the 178 acres originally thought. After that, deeds five through eight conveyed the property and royalties to other parties and divided the property into two tracts (28 acres and 178 acres). Upon entry of the eighth deed, Spartan Texas Six Capital Partners, Ltd. and Spartan Texas Six-Celina, Ltd. (collectively "Spartan") owned 178 acres, Dion Menser owned a half royalty interest in the 206-acre tract, and James and Mildred Wright (who were not parties to this appeal) owned the remaining 28 acres.

Spartan and Menser, as lessors, entered oil-and-gas leases that the lessee later assigned to EOG Resources, Inc. ("EOG"). Eventually, Spartan and Menser sued EOG for wrongful pooling. But after Spartan disclosed that a dispute existed

over who owned what portions of the royalty interests, EOG counterclaimed and filed third-party claims against Gary, Nancy, and Leasha (collectively "Perrymans"), seeking a declaratory judgment resolving that dispute. The Perrymans cross- and counter-claimed for a declaration of their royalty interests. After the trial court severed the wrongful-pooling claims from the royalty-interest claims, the parties filed cross-motions for summary judgment. Ultimately, the trial court granted a final summary judgment declaring that Menser and Spartan each own $^{3}/_{32}$ of the royalty interest, Gary and Nancy own $^{9}/_{16}$ of the royalty interest, and Leasha owns ¼ of the royalty interest. Disagreeing with the trial court, the Fourteenth Court of Appeals modified the trial court's judgment to declare that Menser, Spartan, Gary and Nancy, and Leasha each own ¼ of the royalty interest of the 178-acre tract. As to the royalty interests in the 28-acre tract, the appellate court held that Menser owned $^{3}/_{32}$, Gary and Nancy owned $^{9}/_{16}$, and Leasha owned ¼, with the remaining $^{3}/_{32}$ presumably belonging to the Wrights. All parties appealed.

In a real-property deed containing a clause that "saves and excepts" half of a royalty interest being conveyed, the grantor is *conveying half and excepting half* of the royalty interest she owns at the time of the conveyance.

The Supreme Court affirmed in part and modified in part the court of appeals' judgment. The Court agreed with the court of appeals that the phrase "which are now owned by Grantor" modified "the above described premises" and did not put the grantee on notice that the grantor may not then own all the royalties. Each deed using this language purported on its face to convey to the grantee all of interests in the 178-acre tract's surface, minerals, and royalties, "less, save and except" half of all the royalties from the minerals produced from the "described premises which [were then] owned by Grantor." As a result, the deeds purported to convey half and except half of all the 178-acre tract's royalty interests, not just one half of the royalty interest the grantors then owned. But the Supreme Court disagreed with the court of appeals that

the deeds created a *Duhig* problem, by which they purported to convey all the interests in the 178-acre tract but reserve half the royalty interests for the grantors, without mentioning or excepting the fractional royalty interests that prior grantors had already reserved for themselves. *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940). Instead, the Court concluded that the deeds did not create a *Duhig* problem because the "less, save and except" clause created an *exception* from the grant, not a *reservation* for the grantor. Thus, the Court reached the same basic outcome as the court of appeals but did not rely on *Duhig* estoppel to reach it. Applying its analysis to both the 178-acre and 28-acre tracts, the Court held that the royalty interests were divided equally among the parties: Leasha, Gary and Nancy, and Menser each own a ¼ royalty interest in both tracts, Spartan owns a ¼ royalty interest in the 178-acre tract, and third parties (presumably, the Wrights) own a ¼ royalty interest in the 28-acre tract.

***ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018)**

In a fee-simple warranty deed dated December 27, 1996, Lois Strieber conveyed a 120-acre tract of land to Lorene Koopman and her late husband. The deed included two provisions at issue in this appeal. First, it reserved to Strieber a 15-year, one-half nonparticipating royalty interest ("NPRI") in the 120 acres. Second, Strieber's NPRI could be extended "as long thereafter as there is production in paying or commercial quantities" under an oil and gas lease. The deed's specific language stated:

> There is EXCEPTED from this conveyance and RESERVED to the Grantor and her heirs and assigns for the term hereinafter set forth one-half (½) of the royalties from the production of oil, gas ... and all other minerals ... which reserved royalty interest is a nonparticipating interest and is reserved for the limited term of 15 years from the date of this Deed and as long thereafter as there is production in paying or commercial

> quantities of oil, gas, or said other minerals from said land or lands pooled therewith….

Although Koopman later conveyed part of her mineral interest to her two children, no drilling occurred on the tract. Four months before the 15-year term ended, Strieber conveyed 60% of her remaining interest to ConocoPhillips Company subsidiary, Burlington Resources Oil & Gas Company, LP ("Burlington"), presumably to motivate the company to begin drilling. Soon thereafter, Burlington identified a well site and paid shut-in royalties to maintain Strieber's interest per the savings clause of the warranty deed. But actual production did not begin until February 2012, two months after the 15-year term ended. Later, the parties disagreed as to their specific royalty interest and Burlington notified them that it was suspending payments until their dispute was resolved.

After returning the shut-in payments they received, the Koopmans filed a declaratory judgment action against Burlington and Strieber to construe the deed, claiming that they were the sole owners of the NPRI as of December 27, 2011. They also asserted non-declaratory claims against Burlington for breach of contract, unjust enrichment (money had and received), conversion, negligence, and negligence per se. In response, Burlington moved to dismiss the non-declaratory claims under Rule of Civil Procedure 91a, asserting that Natural Resources Code section 91.402(b) barred them. The trial court denied the motion as to the negligence and negligence per se claims and awarded attorneys' fees to the Koopmans, though the court later granted summary motion dismissing all the non-declaratory claims. The parties filed competing summary judgment motions for the declaratory action and the trial court granted the Koopmanns' motion, concluding: (1) on December 27, 2011, there was no well that was actually producing in paying or commercial quantities on Lackey Unit A; (2) accordingly, Burlington's and Strieber's NPRI expired at that time; and (3) the Koopmanns, as sole owners of the royalty interest, were due royalty payments under their lease with Burlington. Both

parties appealed, and the Corpus Christi Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings, holding that (1) the Rule Against Perpetuities did not bar the Koopmanns' future interest in the NPRI; (2) the reservation's savings clause was ambiguous, which required remand; (3) summary judgment dismissal of the non-declaratory claims was correct; (4) the award of attorneys' fees against Burlington was proper; and (5) section 91.402 did not bar a claim for breach of contract, reversing this issue.

The Supreme Court affirmed on all issues, but as to the first issue, it affirmed on grounds different from those expressed by the court of appeals. Addressing the rule against perpetuities, the Court rejected Burlington's argument that the "as long thereafter" language used in Strieber's reservation created in the Koopmanns a springing executory interest, which was not certain to vest, if at all, within the period required by the Rule. Instead, the Court held that in the oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest. The future oil and gas interest at issue here did not restrain alienability indefinitely and instead gave effect to a future interest that was certain to vest in a known grantee, and actually promoted alienability. The Court limited this holding to future interests in the oil and gas context in which the holder of the interest is ascertainable and the preceding estate is certain to terminate.

The Rule Against Perpetuities does not invalidate future oil and gas interests in which the holder of the interest is ascertainable and the preceding estate is certain to terminate.

Next, the Court affirmed the court of appeals' judgment that a fact issue existed concerning ownership of the NPRI because the savings-clause language regarding "other similar payments" was ambiguous as a matter of law. The parties agreed that no well was actually producing on December 27, 2011, meaning that Strieber's interest in the NPRI continued beyond that date only if the savings clause was satisfied. But

the parties disagreed as to the characterization of Burlington's shut in payment and whether it qualified as an "other similar payment" under the deed. Because the savings clause was ambiguous and thus created a fact issue as to the parties' intent, the Court remanded this issue to the trial court.

As to the remaining issues, the Court affirmed the court of appeals' holding that section 91.402 did not precluded the Koopmanns' breach-of-contract claim. Section 91.404(c) provides a cause of action for a payee if the payor does not comply with the requirements set out in section 91.402. But this does not mean that the statute abrogated a common law breach-of-contract claim. The Court also affirmed the court of appeals' judgment as to the award of attorney's fees to the Koopmans under Rule of Civil Procedure 91a. Rule 91a provides that a party who files a motion to dismiss is due attorney's fees when it prevails "on the motion"—not on a later summary judgment motion asserting there is no genuine issue as to any material fact. Reversing on this issue would require the Court to vacate or overrule the trial court's summary judgment in Burlington's favor, which the Court could not do because the court of appeals' affirmance of the summary judgment was final and not before the Court.

***Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018), *reh'g denied* (Oct. 5, 2018)**

Kenneth Tarr purchased a single-family home in San Antonio's Timberwalk Park subdivision. Two years later, he moved to Houston, but he kept the house in San Antonio and began advertising the home for rent on websites such as VRBO. Tarr entered into numerous short-term rental agreements, which leased the entire house, not individual rooms, and permitted various-sized rental parties of no more than ten people. The Timberwalk Park Owners Association notified Tarr that the rental of his home violated two deed restrictions: (1) a residential-purpose covenant, and (2) a single-family-residence covenant. The residential-purpose covenant provides, in part, as follows:

> All tracts shall be used solely for residential purposes, except tracts designated . . . for business purposes, provided, however, no business shall be conducted on any of these tracts which is noxious or harmful by reason of odor, dust, smoke, gas, fumes, noise or vibration . . . .

There was no dispute that Tarr's tract was not designated for business purposes. A separate paragraph set forth the single-family-residence restriction, which provides as follows:

> No building, other than a single family residence containing not less than 1,750 square feet, exclusive of open porches, breezeways, carports and garages, and having not less than 75% of its exterior ground floor walls constructed of masonry, i.e., brick, rock, concrete, or concrete products shall be erected or constructed on any residential tract in Timberwood Park Unit III and no garage may be erected except simultaneously with or subsequent to erection of residence . . . . All buildings must be completed not later than six (6) months after laying foundations and no structures or house trailers of any kind may be moved on to the property.

Because the leases of Tarr's home were temporary, the Association determined the short-term rentals did not adhere to the "single family residence" restriction. Tarr did not heed the Association's warnings and the Association imposed fines of $25.00 per day. Tarr sued for a declaratory judgment and breach of the restrictive covenants.

The trial court held that Tarr operated a business on his residential lot and engaged in "multi-family," short-term rentals in violation of the deed restrictions. The court of appeals affirmed the trial court's judgment, holding that the

deed restrictions prevent Tarr from leasing the home for short periods to individuals who do not intend to remain in the house.

Single-family residence and residential-purpose limitations in a deed did not preclude use of a home for short-term vacation rentals.

Justice Brown wrote the Texas Supreme Court's unanimous opinion reversing the court of appeals' judgment. The Court concluded that the covenants were silent as to the use of property for short-term residential rentals, and it refused to construe a property restriction into existence. Although the Association was correct that the deeds mention both single-family residences and mandate a residential purpose, the Court would not combine those provisions into one "mega-restriction." Tarr is not violating the single-family residence restriction because it merely limits the type of structure that can be erected on the tract, not the activities that can take place in a single-family structure. Nor is Tarr violating the plain terms of the residential-purpose restriction because it focuses on the conduct taking place on the physical property, not how the owner is using the property. The Court expressly disapproved of cases that imposed an intent or physical-presence requirement when a covenant's language omits any such specification. Under the deed restrictions, so long as the occupants to whom Tarr rents the single-family residence use the home for a "residential purpose," no matter how short-lived, there is no violation of the restrictive covenants.

School Law

***Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)**

American YouthWorks ("AWY") and Honors Academy ("Honors") are private, nonprofit corporations and early charter applicants under chapter 12 of the Texas Education Code, which created and governs charter schools. AWY obtained its charter in 1996; Honors obtained its charter in

1998. Effective September 2013, the Legislature amended chapter 12, as relevant here, to require the Commissioner of Education to revoke an open-enrollment charter if the school's academic or financial performance fell below acceptable standards over a three-year period. The Commissioner was directed to begin with the three-year period immediately preceding the legislation. Just three months later, in December 2013, the Commissioner notified AWY and Honors that their schools had been identified as charters that met the criteria for mandatory revocation. These revocations, he noted, were final and not appealable—aside from an informal review process.

Both AWY and Honors pursued this process. For each, the Commissioner determined he would proceed with the revocation. Thus, both AWY and Honors sued, claiming deprivation of property without due process, an unconstitutional impairment of contract, and ultra vires claims. Both sought temporary injunctions to stop the revocation from occurring. The Commissioner filed a plea to the jurisdiction. The trial court temporarily enjoined the Commissioner from revoking either charter, and it denied the Commissioner's plea to the jurisdiction. But the court of appeals vacated the injunctions and dismissed AWY's and Honors' underlying claims, concluding all claims were barred by sovereign immunity.

Commissioner of Education's open-enrollment charter revocation did not give rise to due-process or *ultra vires* claims.

The Supreme Court, in an opinion by Justice Devine, affirmed. A charter school's charter is not a vested property right to which the due course of law or prohibition on retrospective laws applies. Rather, the charter is in the nature of a license or permit to operate a charter school subject to applicable laws and regulations. The Legislature has not bargained away its discretion over this aspect of public education. AWY's status as a public school and governmental entity, moreover, implicates a line of U.S. Supreme Court cases holding that neither the Constitution's due-process nor contracts clause protects subordinate units of government from the acts of their creators.

Nor do AWY and Honors have viable *ultra vires* claims. Chapter 12 makes the Commissioner's revocation decision final and unappealable. So, absent a conspicuous and irreconcilable conflict with Chapter 12, any review of the Commissioner's revocation decision encroaches on the Commissioner's authority and the finality the statute affords his decisions. The disagreement here is about the interpretation of Chapter 12; there is no irreconcilable conflict. Thus, the Court concludes that the Commissioner's interpretation of Chapter 12 was within his authority and not *ultra vires*. Moreover, the Commissioner has broad authority over the creation and regulation of open-enrollment charters. The authority exercised over AYW's charter here complies with that granted to him by the Legislature.

Justice Johnson concurred. Noting the Court's extensive references to *LTTS Charter School, Inc. v. C2 Construction, Inc.*, 342 S.W.3d 73 (Tex. 2011), he wrote to clarify that the Court did not address whether the Texas Constitution authorizes the Legislature to grant sovereign immunity.

Taxation

***Willacy Cty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29 (Tex. 2018), *opinion corrected on reh'g* (Sept. 28, 2018)**

Sebastian Cotton & Grain Ltd. represented it owned grain stored on its property, and so Willacy County Appraisal District ("WCAD") listed Sebastian as the owner of the grain on the 2009 appraisal roll. After receiving the tax bill, however, Sebastian requested a correction to the appraisal roll and produced to WCAD documents showing it had sold the grain to DeBruce Grain. WCAD corrected the appraisal roll to reflect Sebastian's request. However, DeBruce protested, asserting it was not the owner because it was not in possession as of the assessment date. WCAD ultimately changed the 2009 appraisal roll back to again reflect Sebastian as the grain's owner.

Sebastian protested the correction, asserting the WCAD lacked authority to make that change to the appraisal roll.

Sebastian first had a hearing before the Willacy County Appraisal Review Board ("WCARB"), arguing that the Property Tax Code did not allow WCAD to change a determination of ownership if doing so would increase the tax liability of an individual property owner. The WCARB determined that DeBruce's representation of non-ownership was correct. Sebastian appealed to the district court, which upheld the WCARB's determination and made findings of fact. The district court concluded that Sebastian obtained the § 1.111(e) agreement (with the WCAD) through fraudulent misrepresentations about the ownership of the grain, and the agreement was void as a result. The court of appeals reversed and rendered in part, concluding the WCAD lacked authority to change the ownership determination under the Property Tax Code without reaching the issue of whether the agreement was void.

In a unanimous opinion by Justice Green, the Supreme Court reversed. The Court first held that when an ownership correction to the appraisal roll does not increase the amount of property taxes owned for subject property in the year of the correction, an appraisal district's chief appraiser has statutory authority under § 25.25(b) to make such a correction. Here, the chief appraiser's correction did not change the value of the grain; it merely attributed ownership of that same-valued grain back to Sebastian. But it did not affect tax liability for the property. Thus WCAD acted within its authority to correct the ownership of the grain.

When an ownership correction to the appraisal roll does not increase the amount of property taxes owned for subject property in the year of the correction, an appraisal district's chief appraiser has statutory authority under § 25.25(b) of the Property Tax Code to make such a correction.

The Court also held that a § 1.111(e) agreement may be rendered voidable if fraud is proven. Nothing in § 1.111(e) holds that the "finality" of legislatively authorized actions binds an appraisal district to a fraudulently procured agreement. When, as here, the

Legislature has made an agreement between a taxpayer and the appraisal district final, the validity of such an agreement may be subject to attack for fraud, even if not otherwise subject to review or rejection.

***Bosque Disposal Sys., LLC v. Parker Cty. Appraisal Dist.*, 555 S.W.3d 92 (Tex. 2018), *reh'g denied* (Sept. 28, 2018)**

This case concerns taxpayers who own land in Parker County on which saltwater disposal wells are located. The disposal wells allow for wastewater from oil and gas operations to be injected and permanently stored underground. The Parker County Appraisal District appraised the wells separately from the surface land. Based on the income generated from the wells' operations, the District appraised the wells at approximately $7 million total. The tracts of surface land were appraised at approximately $700,000.00 total. After the taxpayers unsuccessfully challenged the appraisals, they sought review in district court. The district court granted summary judgment to the taxpayers, and the District appealed. The court of appeals, sitting en banc, reversed the district court's judgment and rendered judgment in favor of the District, upholding the separate assessment of the land and saltwater disposal wells.

The Texas Supreme Court affirmed the court of appeals' judgment in a unanimous opinion written by Justice Blacklock. The Court reasoned that the disposition of this case was largely controlled by its decision in *Matagorda County Appraisal District v. Coastal Liquids Partners, L.P.*, 165 S.W.3d 329 (Tex. 2005). As the Court recognized in *Coastal Liquids*, there is no bright-line rule that dictates when the law permits separate appraisal of a valuable aspect of real property. The saltwater wells in this case, much like the caverns in *Coastal Liquids*, "are part of the real property and contribute significantly to the properties' overall market value, which the District must appraise." To ignore the economic

Appraising taxpayers' saltwater disposal wells separate from the land on which the wells are located did not constitute double taxation.

value the wells bring to the properties would violate the constitutional requirement that taxation must be equal and uniform because "two properties of similar location, acreage, and other surface attributes would have the same appraised value even if one contains a disposal well and one does not." Having determined that the disposal wells are part of the real property and contribute to the value of the property, the Court found "nothing legally improper in the District's decision to separately assign and appraise the surface and the disposal wells." The "Tax Code does not prohibit the use of different appraisal methods for different components of property," and "the District did not employ a facially unlawful means of appraising the taxpayers' property."

Tort Claims Act

Fort Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830 (Tex. 2018)

Judith Peterson was crossing the street in downtown Fort Worth when she was struck and killed by a public bus driven by Leshawn Vaughn. Vaughn was an employee of MTI, a subsidiary of MTA. Both MTI and MTA are independent contractors that operate Fort Worth's bus transportation system. Peterson's daughter, Michele Rodriguez, sued MTI, MTA, and the Fort Worth Transit Authority, of FWTA, collectively for negligence. FWTA is a regional transportation authority under Chapter 452 of the Texas Transportation Authority. It performs "essential governmental functions," and its exercise of power under chapter 452 is a "matter of public necessity." Under chapter 452, FWTA is authorized to contract for the operation of the transportation system; FWTA did so and engaged MTI and MTA as independent contractors. Chapter 452 limits the liability of private contractors like MTI and MTA when performing the functions of an authority under chapter 452 to the extent that the authority or entity would be liable if the authority itself performed the function.

The trial court granted summary judgment in favor of the transit defendants, ruling that FWTA, MTI, and MTA should be treated as a single governmental unit under the Texas Tort Claims Act, or TTCA, which limits recovery for injury arising from the operation or use of a motor vehicle to $100,000.00 and includes an election-of-remedies provision that protects government employees from suit. But the court of appeals reversed in part, holding that FWTA, MTI, and MTA were separate entities under the TTCA, each of which was subject to a separate $100,000.00 damages cap, and that Vaughn was not a governmental employee and thus should not have been dismissed.

The Supreme Court, in an opinion by Justice Green, reversed. First, the Court concluded that the damages cap provision of the TTCA does not allow imposition of liability above $100,000.00, even when there are multiple defendants. If FWTA operated its bus transportation system without private contractors, its liability would be limited to $100,000.00 per accident, and any claim against the driver would be dismissed under the TTCA's election-of-remedies provision. That the FWTA delegated its transportation-related governmental functions to independent contractors, as it is statutorily authorized to do, does not somehow expand the potential liability arising from those governmental functions. So the Court held that the liability of any number of independent contractors performing essential governmental functions for an authority under chapter 452 is limited to a single damages cap under the TTCA.

The liability of any number of independent contractors performing essential governmental functions for an authority under Chapter 452 of the Transportation Code is limited to a single damages cap under the Tort Claims Act, and an employee of such a contractor acting within the scope of her employment is afforded protection under the Tort Claims Act's election-of-remedies provision as if she were an employee of the government.

Next, the Court held that the TTCA's election-of-remedies provision barred Rodriguez from recovering from the bus driver, a private employee. The election-of-remedies

provision is meant to prevent plaintiffs from circumventing the TTCA's damages cap by suing government employees. Under chapter 452, the independent contractors here are liable only to the extent FWTA would be liable if it operated its own bus transportation system. So, for the purpose of liability, an independent contractor performing a function of the transit authority under chapter 452 should be treated as if it were the governmental unit performing that function. Here, the bus driver was an employee of an entity acting as the government. Rodriguez sought to impose vicarious liability against FWTA and independent contractors acting as the government. This is the type of legal maneuvering the election-of-remedies provision is designed to prevent. Rodriguez's claims against the bus driver are therefore barred.

Justice Johnson, joined by Justices Lehrmann and Boyd, dissented. The dissenting justices would have concluded: (1) that Rodriguez's damages were not cumulative, so her potential recovery was not limited to $100,000.00; and (2) her suit against Vaughn was not barred. The plain language of chapter 452 does not support the Court's contrary conclusion. Nothing in chapter 452 indicates the Legislature intended to extend full governmental status on private contractors. Similarly, the TTCA's election-of-remedies provision specifically excludes employees of independent contractors from the definition of "employee." Justice Johnson would affirm the court of appeals.

Whistleblower Act

Neighborhood Ctrs. Inc. v. Walker, 544 S.W.3d 744 (Tex. 2018)

Neighborhood Centers is a private, nonprofit corporation that provides charitable services to low-income communities in Houston. It also operates Promise Community School (the "School"), an open-enrollment charter school that provides tuition-free education to students on multiple campuses. The School hired Doreatha Walker as a third-grade teacher.

During her first year, Walker complained that something in the classroom, perhaps mold, was making her and the children sick. When the School refused to move Walker to another room, she requested workers' compensation paperwork. Walker alleges that the School instructed her not to file a claim because a "workable solution" could be found. That weekend, however, Walker emailed the Houston Health Department. She also wrote to the Texas Education Agency, asserting serious allegations about the School's test scores and treatment of special-education students. The next week, the School terminated Walker.

Walker sued the School under the Texas Whistleblower Act ("WBA"). The trial court denied the School's plea to the jurisdiction asserting immunity, and the School appealed. The court of appeals concluded that the WBA's waiver of immunity for local governmental entities, including school districts, covers open-enrollment charter schools, and that the Texas Charter Schools Act ("CSA") waives immunity from suit for WBA violations. Thus, the court of appeals affirmed.

The Supreme Court, in an opinion by the Chief Justice, reversed and rendered a take-nothing judgment in favor of the School. The WBA does not apply to open-enrollment charter schools because they are not local governmental entities under the CSA. The CSA treats open-enrollment charter schools as local governmental entities and school districts for many purposes, but not for the WBA. In 2015, moreover, the Legislature amended the CSA to provide that an open-enrollment charter school operated by a tax-exempt entity is not considered a political subdivision, local government, or local government entity unless specifically designated by the applicable statute. So a blanket identification of open-enrollment charter schools as school districts or governmental entities would be inconsistent with the legislative scheme. Instead, pertinent sections of the CSA provide that, under a statute specifically applicable to charter schools, an

The Texas Whistleblower Act does not apply to open-enrollment charter schools.

open-enrollment charter school is as immune from liability and suit as a school district. Given that the WBA does not specifically apply to open-enrollment charter schools and is not listed in the CBA, it does not apply to open-enrollment charter schools.

Justice Johnson concurred, stating that the Court's opinion contained language about immunity that he considered unnecessary. Justice Johnson wrote to clarify that whether the Legislature has authority to grant immunity was neither presented, nor resolved in this case.

Wills & Estates

***Knopf v. Gray*, 545 S.W.3d 542 (Tex. 2018) (per curiam)**

Vada Wallace Allen died. Her will disposed of her entire estate, including 316 acres of land in Robertson County, which she devised to her son William "Bobby" Gray as follows:

> NOW BOBBY I leave the rest to you, everything, certificates of deposit, land, cattle and machinery, Understand the land is not to be sold but passed on down to your children, ANNETTE KNOPF, ALLISON KILWAY, AND STANLEY GRAY. TAKE CARE OF IT AND TRY TO BE HAPPY.

Annette Knopf and Stanley Gray (collectively "Knopf") sued Bobby, his wife Karen, and Polasek Farms, LLC ("Polasek"), after the land was conveyed in fee simple to Polasek. Knopf sought a declaratory judgment that Vada devised only a life estate to Bobby; thus, precluding him from delivering a greater interest to Polasek. On cross motions for summary judgment, the trial court rendered final judgment for Bobby, Karen, and Polasek, finding that the provision contained an invalid disabling restraint, the will vested Bobby with a fee-simple interest in the property, and Knopf received no remainder interest. A divided Waco Court of Appeals affirmed, agreeing with the trial court's

findings and concluding that the will's language that passed the land "on down to [the] children" was merely an instruction to Bobby, not a remainder interest to the children.

The Supreme Court reversed, holding that the bequest gave Bobby a life estate in the land and the remainder interest to Knopf. The parties disputed whether Vada intended to devise to Bobby a fee-simple interest in the land at issue or only a life estate. A will creates a life estate "where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life." Reading the provision as a whole to see a layperson's clearly expressed intent to create what the law calls a life estate, Vada granted the land to Bobby subject to the limitations that he not sell it, that he take care of it, and that it be passed down to his children. Vada's words unambiguously refer to elements of a life estate and designate her grandchildren, the petitioners, as the remaindermen. Therefore, the language clearly demonstrates that the phrase "passed on down," as used here, encompasses a transfer upon Bobby's death. Moreover, the words "the land is not to be sold" was not an invalid disabling restraint on sale, as the trial court and court of appeals held. Not only did that interpretation construe the words in isolation, but it also ignored that a restraint on alienation of the remainder interest is inherent in a life estate. The phrase "the land is not to be sold" was an integral part of Vada's expression of intent to create a life estate. Therefore, the Supreme Court reversed the court of appeals' judgment and rendered judgment that the will granted Bobby a life estate and Knopf the remainder interest in the property at issue. The Court also remanded the case to the trial court for further proceedings consistent with its opinion.

A will provision leaving land that "is not to be sold but passed on down to your children" gives a life estate in the land; it is not a fee-simple bequest.

Texas Courts of Appeals Update

Andrew B. Bender, The Bender Law Firm PLLC

Forcible Detainer Action • Subject-Matter Jurisdiction • Appellate Jurisdiction

***Most Worshipful Prince Hall Grand Lodge of Texas v. True Level Masonic Lodge 226 501(c)(3)*, No. 01–17–00157–CV, 2018 WL 1597646 (Tex. App.—Houston [1st Dist.] Apr. 3, 2018, pet. denied) (mem. op.)**

The First Court of Appeals held that a county court at law lacks jurisdiction to render a judgment in a forcible-entry-and-detainer action that requires a determination about which party has title to the property.

This case involved a property dispute between a Masonic grand lodge and former members of one of its constituent lodges. The Most Worshipful Prince Hall Grand Lodge of Texas and Jurisdictions Free and Accepted Masons (the "Grand Lodge") and True Level Lodge # 226 (the "constituent lodge") acquired title to real property ("Property") by warranty deed in 1952. Officers of the constituent lodge tried to surrender its charter to the Grand Lodge before forming a new lodge called True Level Masonic Lodge 226 501(c)(3) (the "independent lodge") and purporting to convey the Property, which had been in the possession of the constituent lodge, to the independent lodge by special warranty deed.

Upon learning of what the officers had done, the Grand Lodge voided the attempted surrender of the constituent lodge's charter and expelled the officers from the organization. Then it filed suit in Harris County district court, seeking a declaratory judgment confirming ownership of the Property. The independent lodge filed a counterclaim asserting a trespass-to-try-title action relating to the Property.

Following a jury trial, the district court entered a take-nothing judgment on the independent lodge's trespass-to-try-title action, and it declared the constituent lodge was

entitled to "possession of all property, both real and personal, of every kind or nature wherever situated, acquired by [the constituent lodge.]" The district court further declared that the independent lodge and its members "have no interest in any of the property." The independent lodge and the expelled members appealed.

About four months later, the independent lodge filed a forcible-entry-and-detainer action in the justice court seeking possession of the Property. In its pleading, the independent lodge asserted that it "is the true title owner" of the Property and therefore had the right to possession of the Property. The independent lodge attached to its petition a copy of the special warranty deed. The Grand Lodge generally denied the allegations, raised several affirmative defenses, and attached a copy of the district-court judgment. The Grand Lodge filed a plea to the jurisdiction, which was sustained by the justice court. The independent lodge appealed to the county court at law for a de novo review.

The county court at law concluded that the independent lodge held "the last deed in time" for the Property. The court also noted that the district court judgment did not identify the Property or include a description of it. Thus, the county court at law found that the Grand Lodge did not have a deed that effectively transferred the Property back to the Grand Lodge after the district court judgment. The Grand Lodge appealed, arguing that the county court at law lacked jurisdiction over the forcible-entry-and-detainer suit because the issue of possession was intertwined with issues of title.

The First Court of Appeals began its analysis by recognizing that the only issue to be determined in a forcible-entry-and-detainer case is the right to actual possession of the premises. From this it follows that the justice court, and the county court on appeal, have no jurisdiction to resolve any questions of title beyond the immediate right to possession. The court recognized that this limitation is implicated when a issue of title is so intertwined with the issue of possession that the court cannot determine which party is entitled to possession without

first resolving the issue of title.

At the county court at law, the independent lodge based its argument for possession on the allegation that it was the "true" title owner. On appeal, it argued that the justice court and the county court at law had jurisdiction because the Grand Lodge failed to produce specific evidence of a title dispute. The court of appeals disagreed, finding that

> [t]he issue of proper title was placed in controversy by the conflict between the independent lodge's petition alleging superior title and the Grand Lodge and its constituent lodge's general denial based on the district-court judgment that declared the independent lodge had "no interest in any of the property." As such the county court at law could not determine which party was entitled to possession without first resolving the question of title. In its final judgment, the county court at law found that the Grand Lodge and its constituent lodge did not have a deed that was subsequent in time to the independent lodge's deed. It disregarded the substance of the March 28, 2016 final judgment that ruled to the contrary.

Thus, the First Court of Appeals reversed and vacated the county court at law's judgment awarding possession of the property to the independent lodge, holding that the county court at law lacked jurisdiction because its decision required a determination of which party had superior title.

Personal Jurisdiction • Minimum Contacts • Alter Ego

***Momentum Engineering, LLC v. Tabler*, No. 14-18-00002-CV, 2018 WL 4037411 (Tex. App.—Houston [14th Dist.] Aug. 23, 2018, pet. filed).**

The Fourteenth Court of Appeals held that a foreign limited liability company is not subject to general jurisdiction in a Texas court based on the company's history of buying supplies from Texas vendors for shipment overseas or on the Texas residency of a member of the company.

Momentum Engineering, L.L.C. ("Momentum") signed a $1.5M promissory note and addendum, which was assigned to Lee Laverne Tabler. Claiming that the debt had gone unpaid, Tabler sued Momentum, its managing director James Larsen, and Larsen's wife. To support the exercise of personal jurisdiction over Momentum, Tabler alleged that the Larsens are Houston residents and that they used Momentum as a sham to perpetrate fraud or Momentum was the Larsens' alter ego.

Momentum filed a special appearance and attached an affidavit from Larsen attesting that Momentum is not a resident of Texas but was organized in Dubai. The trial court sustained the special appearance and dismissed the claims against Momentum.

Months later, Tabler amended his pleadings and again asserted claims against Momentum predicated on the same jurisdictional bases. Tabler also filed a motion for reconsideration of the special appearance in which Tabler alleged that Larsen had concealed evidence of Momentum's Texas contacts and had falsely represented that the company is a corporation rather than a limited liability company. It worked. The trial court granted the motion, vacated its order sustaining Momentum's special appearance, and denied the special appearance.

Momentum filed an interlocutory appeal challenging the denial of its special appearance. Tabler did not dispute that Momentum was organized in Dubai or that its headquarters and principal place of business are located in Dubai. Tabler instead argued that two categories of contacts that Momentum had with Texas are sufficient to support the trial court's exercise of general jurisdiction, and alleged several bases for imputing the Larsens' contacts to the company.

First, Tabler argued that Momentum's history of buying parts, supplies, and equipment from Texas companies, and

Larsen's attendance at a meeting in Houston to find out whether a Texas company was interested in selling assets abroad, are so continuous and systematic as to render Momentum "at home" in Texas. Finding that these contacts did not support the trial court's ruling, the Fourteenth Court of Appeals noted that merely buying material from a forum state for use elsewhere does not provide a sufficient basis to support general personal jurisdiction, while the meeting in Texas about purchasing assets located abroad did not even rise to the level of a purchase.

Second, Tabler argued that the trial court has personal jurisdiction over Momentum because it is a limited liability company with a member who resides in Texas. For support, Tabler relied on a decision in which the Supreme Court of the United States held that, for the purpose of federal diversity jurisdiction, an unincorporated association is a citizen of every place in which a member is a citizen. But, as the court of appeals explained, that principle applies to a limited liability company only when identifying its citizenship for the purpose of diversity jurisdiction in federal court. In other words, a federal court can have diversity jurisdiction over a case and yet lack personal jurisdiction over the foreign defendant.

Third, Tabler tried to impute the Larsens' Texas contacts to Momentum by arguing that Momentum was the Larsens' alter ego, which they used as a sham to perpetrate a fraud. In addressing this argument, the court of appeals observed that this type of allegation falls within an exception to the general rule that the party contesting jurisdiction bears the burden to negate the jurisdictional allegations against it. The court then turned to the pleadings and proof provided by Tabler.

As a factual basis to support disregarding the company's separate nature, Tabler alleged that the company's property and the Larsens' individual property were not kept separate; that the Larsens exercised financial control over Momentum; that they commingled funds; that they diverted company profits for their personal use; that they represented they would provide financial backing to the company; that the company was inadequately capitalized; and that the money Momentum

borrowed was used to pay the Larsens' personal debts. Tabler did not, however, produce any evidence to support any of these allegations. Accordingly, the court of appeals found that Tabler failed to meet his burden, and refused to impute to Momentum the Larsens' contacts with Texas.

After addressing each one of Tabler's arguments, the Fourteenth Court of Appeals concluded that Momentum's contacts were insufficient as a matter of law to support the exercise of general personal jurisdiction. As a result, the court reversed the denial of Momentum's special appearance, and rendered judgment granting the special appearance, dismissing Tabler's claims against Momentum, and severing those claims from the remainder of the case. On November 6, 2018, Tabler filed a petition for review with the Supreme Court of Texas.

Texas Court of Criminal Appeals Update

John R. Messinger, Assistant State Prosecuting Attorney
Austin, Texas

Jury Charges and Elements

***Niles v. State*, __ S.W.3d __, PD-0234-17, PD-0235-17 (Tex. Crim. App. 2018)**

Niles was charged with two counts of terroristic threat against fellow firefighters. *See* Tex. Penal Code § 22.07(a)(2). Terroristic threat, usually a Class B misdemeanor, is classified as a Class A misdemeanor if it is committed against a public servant. Tex. Penal Code § 22.07(c)(2). Although the State alleged the enhancement and covered it in *voir dire*, the jury charge did not include it. There was also no indication that the State intended to abandon it. Despite its omission, the judgments reflected Class A convictions and the trial court sentenced Niles to Class A punishments. No one objected that either was incorrect, but Niles argued on appeal that the judgments and sentences were illegal because they exceeded what the jury findings authorized, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). An *Apprendi* error occurs whenever the jury fails to make all findings (other than the existence of prior convictions) that increases the punishment. The State, represented by the District Attorney's office, conceded an *Apprendi* error and the Court of Appeals agreed. It reformed the judgments to reflect Class B convictions and remanded for a new punishment hearing.

The omission of an element from the jury charge is subject to harmless error review.

The State Prosecuting Attorney filed a motion for rehearing in the Court of Appeals, arguing that Appellant's claim should have been viewed as one of charge error rather than an illegal sentence, as the United States Supreme Court did in *Johnson v. United States*, 520 U.S. 461 (1997), *Neder v. United States*, 527

U.S. 1 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006). Summarizing this line of cases, the Court of Criminal Appeals held in *Olivas v. State*, 202 S.W.3d 137 (Tex. Crim. App. 2006), that "a failure to instruct the jury on one element of an offense or a failure to submit a sentencing issue to the jury under *Apprendi* is not structural error; it is subject to a harmless-error analysis." The court of appeals denied the motion. The Court of Criminal Appeals denied the State's petition but granted review of a substantively similar question on its own motion. It reversed.

The Court first addressed Niles's argument that the State had procedurally defaulted on its argument—both at trial and on appeal. But the State was not the appealing party below, and so it need not have raised any argument as a prerequisite for raising it in response to the Court's ground for review. Moreover, the State Prosecuting Attorney, by virtue of her statutory authority, is not bound by the arguments made on appeal by the district attorney. Finally, the State's argument that a harm analysis was appropriate for *Apprendi* error was responsive to both the Court's ground for review and the parties' agreement below that there was an *Apprendi* error.

Following the above-cited cases, the Court concluded that a harm analysis was appropriate because this was a case of a "missing element," not of an illegal sentence. "Susceptibility of the errors in *Recuenco* and *Neder* to a harm analysis did not turn on the fact that the district judges made the formal findings on the missing elements or sentencing factors in those cases." "Rather, it rested on the following legal principles: constitutional error at trial alone does not entitle a defendant to automatic reversal; most constitutional errors can be harmless; and where defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." Such error is harmless if a court determines that the missing element was "logically encompassed by the guilty verdict and was not in fact contested." Or, as the Supreme Court put it, "where a reviewing court concludes beyond a reasonable

doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 527 U.S. at 17. The Court reversed and remanded for a harm analysis.

Judge Yeary dissented on three grounds. First, he distinguished the cited Supreme Court precedent by framing the errors therein as one of the *wrong* fact-finder—trial judge rather than jury—not an absent finding, as in this case. This was Niles's claim, he said, and it should not have been "reformulated" by the State or the Court. Second, Judge Yeary expressed concern that the State is benefiting on appeal from an error "*that the State did nothing within its power at trial to prevent*." (emphasis added). Third, because he views the prevailing argument as an unexpected reformulation, Judge Yeary would allow supplemental argument and briefing, on remand, about whether the Texas Constitution does not allow harmless charge error of this sort.

***Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018)**

Oliva was charged with driving while intoxicated (DWI). *see* TEX. PENAL CODE § 49.04(a). The information alleged a prior DWI conviction, the result of which made the offense level a Class A misdemeanor instead of a Class B misdemeanor. The operative statute is TEX. PENAL CODE § 49.09(a), which states that the offense is a Class A misdemeanor: "if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated." The prior-conviction allegation was not read to the jury at the guilt stage, no evidence of the prior conviction was offered at the guilt stage, and there was no mention of a prior conviction in the guilt-stage jury instructions. Instead, the allegation was read at the punishment phase, evidence was offered, and the jury found it to be true. Oliva was sentenced accordingly.

The Court of Appeals reversed. It held that the existence of a prior DWI conviction is an element of Class A DWI because

it elevated the offense level and lacked the "shall be punished" language present in many mere punishment enhancements. Because no evidence of the prior conviction was introduced at the guilt-stage, the court remanded with instructions to reform to Class B DWI and conduct a new punishment hearing. The State agreed with this conclusion but petitioned the Court of Criminal Appeals to settle a split in authority.

The Court of Criminal Appeals disagreed in a thorough analysis of cases where it had determined whether a statutory provision was an element (guilt issue) or an enhancement provision (punishment issue). After making the initial determination that the applicable statutory scheme—Penal Code sections 49.04(a), 49.04(b), 49.09(a), and TEX. CODE CRIM. PROC. art. 36.01, which dictates when prior-conviction allegations may be read to the jury—is ambiguous, the Court identified numerous factors which can affect the analysis in a given case.

First, does the statute explicitly state at which phase the issue should be litigated? That makes things easy.

Second, does the issue fall within a list of facts predicated with the phrase, "A person commits an offense if . . .," which is "the Penal Code's most obvious and common method of prescribing elements of an offense"?

Third, does the statute state that finding a certain fact means that the offense "*is* a [certain level of offense]"? The Court had suggested that such language "could unambiguously prescribe an element of an offense," and reaffirmed that "[t]here is a practical difference between an enhancing provision saying that an offense 'is' a certain degree and one saying that an offense is 'punished as' a certain degree—the former creates an offense level that can serve as the base offense level for further enhancement under general enhancement statutes such as Penal Code § 12.42, while the latter does not." However, it concluded that "there is nothing inherently illogical about having a punishment issue that increases the grade of the offense."

Fourth, is the issue prefaced with the phrase, "if it is shown

on the trial of . . .”? This phrase “is strongly associated with punishment enhancements.” “On the other hand,” said the Court, “it is not always true that this phrase . . . causes a statute to prescribe a punishment issue.”

Fifth, is the issue jurisdictional? It would be anomalous to vest a court with jurisdiction that will not be established until the punishment phase, if ever; that defendant could be acquitted before jurisdiction even becomes an issue.

Sixth, is the issue one of prior conviction? Article 36.01(a)(1) says that allegations of prior convictions that “are alleged for purposes of enhancement only and are not jurisdictional . . . shall not be read until the hearing on punishment.” This reflects the policy determination that the prejudice that accompanies a prior conviction should be prevented from impacting the guilt phase if possible. “If, on the other hand, the statutory aggravating fact would be part of the circumstances of the offense on trial, that would be a factor in favor of construing the statutory aggravating fact as an element of the offense.” However, the Court cautioned that this dichotomy “is by no means conclusive and can be outweighed by other considerations.”

Seventh, is the enhancing provision separated from the provision that prescribes the offense? The farther removed, the more likely it is to be a punishment issue rather than an element.

Eighth, is there any other language in the provision that has been historically associated with either guilt or punishment issues? For example, “the words ‘punished for,’ ‘punishable by,’ or similar language ordinarily mark an enhancing provision as a punishment issue.”

Ninth, does the title of the provision shed any light on the issue?

Applying these factors, the Court determined that the prior conviction that makes a DWI conviction a Class A is a punishment issue rather than an element. Neither of the easy factors apply; the statute in this case does not label the prior conviction a guilt or punishment issue and, although the

phrase "A person commits an offense if . . . " appears in section 49.04(a), it does not appear in the enhancement section, 49.09(a). Looking to the other factors, the provision at issue does not contain "punished for" or similar language, but it is a prior-conviction provision. It also uses the prefacing phrase "if it is shown on the trial of," which weighs strongly in favor of it prescribing a punishment issue. Moreover, "the DWI enhancing provision is in a separate statutory section, albeit within the same chapter, as the provision that more obviously prescribes the elements of the offense of DWI (§ 49.04)—which further strengthens the inference that a punishment issue is being prescribed."

At this point, the analysis is the same as that of section 49.09(b), which had been construed to make its requisite twoprior DWI convictions an element of felony DWI. The Court turned to article 36.01. Although article 36.01 does not unambiguously direct how section 49.09(a) should be treated, the article's "jurisdictional" language justifies treating section 49.09(a) differently from section 49.09(b). "[T]he jurisdictional nature of the two-prior-conviction provision for felony DWI converts what would otherwise be a punishment issue into an element of the offense." "Because the single-prior-conviction provision for misdemeanor DWI [at issue in this case] is not jurisdictional, that conversion effect does not occur, so the provision retains its character as prescribing a punishment issue."

Judge Richardson concurred. He was willing to overlook the inconsistencies in the majority's opinion pointed out by the dissent, below, because the statute is ambiguous and policy favors preventing revelation of the prior conviction before a finding of guilt.

Judge Keasler, joined by Judge Yeary, dissented. They did not find persuasive any of the majority's justifications for treating one prior DWI conviction as an enhancement but two DWI convictions as an element. They drew attention to the majority's dismissal of the "instructive language" in *Calton v. State*, 176 S.W.3d 231 (Tex. Crim. App. 2005), which informed

this discussion for years and adherence would simplify the analysis in this case. "Absent clearly expressed legislative intent to the contrary, when a penal provision states that proof of a particular fact affects the degree of offense (*e.g.*, 'is a Class A misdemeanor'), rather than just the applicable punishment range ('is punishable as a Class A misdemeanor'), that fact must be proven in the guilt phase of trial."

Appealable Orders

***State v. Hanson*, __ S.W.3d __, PD-0948-17 (Tex. Crim. App. 2018) (reh'g denied)**

The State is entitled to appeal an order of a court in a criminal case if it "arrests or modifies a judgment." Tex. Code Crim. Proc. art. 44.01(a)(2). On June 15, 2015, the trial court signed an order suspending execution of Hanson's sentence and granting his request for shock probation. The State did not appeal this order. On June 25, the Trial Court signed an "Amended Order" that was styled differently and contained additional findings of fact in support of its grant of shock probation. The State appealed this order on July 13, 2018, which was within 20 days of the amended order but not of the original order. *See* Tex. R. App. P. 26.2(b) ("The [State's] notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.").

The Court of Appeals dismissed the State's appeal for want of jurisdiction. "While the trial court signed an amended order on June 25, 2015 for the ostensible purpose of adding additional findings of fact, the amended order did not include any substantive changes to the initial order placing Hanson on community supervision for eight years." Because the amendments related only to the first order, the Court of Appeals concluded that it was not appealable.

The Court of Criminal Appeals reversed. Under the circumstances, the amended order "modified a judgment" under art. 44.01(a)(2). As the Court of Appeals conceded, there

were differences between the original order and the amended one; this was sufficient to constitute a modification. The Court warned that the result might be different if the only difference were a signature signed at a later date, or if the amended order were different but had "no independent legal significance." It gave as an example an amended order that did nothing but explain why a previous motion to quash was granted.

***Smith v. State*, __ S.W.3d __, PD-0514-17 (Tex. Crim. App. 2018)**

Smith pleaded guilty and was placed on deferred adjudication supervision with no restitution. He was later adjudicated and sentenced to five years in prison. Smith timely filed his notice of appeal. Five months later, but before a brief was filed, the Trial Court granted his motion for shock probation. A new judgment was signed that included restitution as a condition of supervision. Smith did not file a second notice of appeal. Instead, he briefed the restitution issue under his original notice of appeal.

When the Court of Appeals asked Smith to address whether it had jurisdiction to consider the issue, Smith argued that his original notice should be treated as a premature notice of appeal under TEX. R. APP. P. 27.1(b). It reads, in full:

> In a criminal case, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court. But a notice of appeal is not effective if filed before the trial court makes a finding of guilt or receives a jury verdict.

The Court of Appeals rejected this argument because the rule contemplates a notice filed between the jury's verdict and the imposition of sentence—when the clock begins to run in criminal cases. In this case, it held, the trial court effectively held a new sentencing hearing and issued a new and complete judgment, rendering the original judgment moot.

The Court of Criminal Appeals agreed with the lower court's outcome but not the entirety of its reasoning. The Court rejected the suggestion that there was a new judgment. A trial judge has no authority to issue a new judgment and sentence five months after adjudication. Moreover, a shock probation hearing is not a new trial on punishment—it is an order suspending the execution of a previously-pronounced sentence. Regardless of labels, the granting of Smith's motion was an order that was appealable by either party.

But the Court agreed that Rule 27.1(b) did not apply. Reviewing the reason for the rule, it said that "[p]remature notice rules ensure that a party will not be denied its appeal just because it mistakenly files its notice too quickly." In practice, "Rule 27.1(b) rarely comes into play given that the appellate timetable for an appeal from a conviction and sentence begins to run from the pronouncement of sentence in open court." In other words, there is usually no time to "jump the gun." Further, while there are circumstances where the rule serves its purpose, it does not lend itself to issues the trial court has not yet decided. In this case, Smith filed his notice of appeal before he even filed for shock probation. The rule cannot stretch that far.

Additionally, the Court' holding that Rule 27.1(b) applies to appeals of conviction and sentence but not separate orders brings it in line with Rule 21.4, which governs motions for new trial. As discussed above, Smith's issue on appeal was not his conviction or sentence. Instead, he took issue with a stand-alone, appealable order, and primarily about the order of restitution therein. Requiring a separate notice of appeal is consistent with treatment of other appealable orders that do not "arise in the 'ordinary' appellate context," such as orders setting bail while on appeal and orders denying motions for post-conviction DNA testing.

***Beham v. State*, __ S.W.3d __, PD-0638-17 (Tex. Crim. App. 2018)**

Beham was convicted of aggravated robbery. At punishment, the State offered five photographs taken from his Facebook

profile to prove his character. Beham appeared to display gang-related hand signs in each of them. One picture has the phrase, "Money, Power, Respect," featured in large, Gothic font, one shows Beham posing with stacks of money and individually packaged bags of marijuana, and another shows him posing with two other men while pointing a gun at the camera. The color red was prominently featured in the photgraphs. An experienced detective specializing in gang activity testified that, although he had no proof Beham was part of a gang, the photos show someone who is "holding himself out as" a gang member. The Trial Court admitted the testimony.

The Court of Appeals reversed. It held the evidence was not relevant to punishment because the State failed to show to which gang Beham was purporting to belong or the character and reputation of that gang.

The Court of Criminal Appeals reversed in an opinion that re-examined relevance in the context of punishment. Whereas TEX. R. EVID. 401 says evidence is relevant if it has any tendency to make a "fact . . . of consequence" more or less probable than it would be without the evidence, there are no distinct facts of consequence in the punishment context. As the Court has said, "deciding what punishment to assess is a normative process, not intrinsically factbound." Yet TEX. CODE CRIM. PROC. art. 37.07 § 3(a)(1) sets a standard for what evidence may be offered at punishment. The Court has repeatedly said that evidence is "relevant to sentencing," within the meaning of the statute, if it is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."

Importantly, that an isolated piece of evidence might not have a direct impact on the jury's normative decision does not make it irrelevant. "Even in punishment, a brick need not be a wall." To this end, the Court employed a model suggested by then-Judge Keller nearly 20 years ago: categorizing punishment evidence as either a normative fact or a subsidiary fact.

"Normative facts are those that directly impact 'the factfinder's normative response to the defendant.'" Whether a normative fact is admissible turns upon policy as defined

or limited by the Legislature or Constitution, such as the prohibition on consideration of race. Within these bounds, a trial court has discretion to admit any evidence that "reasonable perception of common experience" says "inform[s] a legitimate area of normative inquiry." One example of a normative fact is proof of an extraneous offense beyond a reasonable doubt. This is as close to a "fact of consequence" as one gets at punishment.

The admissibility of subsidiary facts, on the other hand, is "a question purely of logical relevancy." "[A] reviewing court need only ask whether 'it has any tendency to make more or less probable the existence of a normative fact' properly at issue in the case." Using the above example, subsidiary facts could be the evidence used to prove the commission of the extraneous offense.

The Court declined to hold that reviewing courts should always categorize facts in this manner, but it found the framework clarifying in Beham's case. A trial court could find it "normatively relevant" that Beham held himself out as a member of gang since it shows he glorifies a lifestyle of crime and violence. A trial judge might further reasonably conclude that the fact that a person idolizes a violent gang lifestyle contributes, at least incrementally, to the jury's legitimate normative response to the defendant—even if the evidence fails to show that he is a member of any specific gang. "The normative impact of this kind of evidence comes not in the form of the arbitrary label the gang attaches to itself, but rather in the kinds of gang-related activities the defendant thinks worthy of praise and emulation." Further, based on the expert's testimony, Beham's Facebook photos allowed a rational factfinder to conclude that he was holding himself out as a gang member. Although none, or even all, of the photos conclusively established that fact, that objection goes to weight rather than admissibility.

The Court cautioned that there is a distinction between (1) actively promoting the gang lifestyle and depicting oneself as a participant in it, and (2) merely "holding," in a more abstract sense, the belief that gang membership is laudable. The former is more probative, especially when the offense of conviction

aligns with the gang lifestyle as in Beham's case. The Court also clarified that evidence of actual membership in a group is still irrelevant to sentencing unless the State makes some showing of the group's violent or illegal activities. casein sum, this case found that evidence that a person portrays himself as a member of a criminal association may, in some cases, be relevant to the person's character in sentencing—even if the State cannot show that he is actually a member of any such association.