TEXAS SUPREME COURT UPDATE

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CHAPTER 1

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PROFESSIONAL ACTIVITIES

Board Certified:	Personal Injury Trial Law (since 1992)
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Planning Committees:	State Bar College: Summer School, 2017 State Bar of Texas: Advanced Personal Injury Law Course, 2016 State Bar of Texas: Advanced Personal Injury Law Course, 2015 State Bar of Texas: Handling Your First (or Next) Auto Collision Case, 2014 State Bar of Texas: Advanced Personal Injury Law Course, 2014 State Bar of Texas: Evidence and Discovery Course, 2014 State Bar of Texas: Evidence and Discovery Course, 2013 State Bar of Texas: Advanced Personal Injury Law Course, 2012 State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case 2010, 2008, and 2007
Standing Committees:	Member, Court Rules Committee: State Bar of Texas Past-Chair, Federal Practice Committee: Houston Bar Association
Texas Super Lawyers:	Selected 2016, 2015, 2014, 2013, 2012
Awards:	2014 Franklin Jones, Jr. CLE Article Award: "Texas Supreme Court Update" 2011 Standing Ovation Award; State Bar of Texas Oustanding Volunteer
Court Admissions:	United States Fifth Circuit Court of Appeals United States District Court: All Texas Districts
Adjunct Instructor:	University of Houston Law Center, 2015
Commissioner:	Police Officers' Civil Service Commission, City of Houston (2006 – 2009)

PUBLICATIONS AND PRESENTATIONS

Discovery Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2017
Supreme Court Cases Important to Trial Lawyers
State Bar of Texas: Texas Bar College Summer School, 2016
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2016
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2016
Supreme Court Cases Important to Trial Lawyers—Panel Presentation
State Bar of Texas: Advanced Trial Strategies, 2016
Gettting the Charge Right & Charge Error Preservation
State Bar of Texas: Advanced Civil Trial Course, 2015
Supreme Court Update
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2015
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2015
What Trial Lawyers Can Learn from Supreme Court Opinions
State Bar of Texas: History of Texas & Supreme Court Jurisprudence, 2015
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2015

Evidence 101
State Bar of Texas: Handling Your First (or Next) Auto Collision Case, 2014
How to Avoid being Sued, or What to Do When It's Too Late
Houston Bar Association: Animal Law Section, 2014
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2014
Supreme Court Update
Harris County Democratic Lawyers' Association, 2014
Enforcing Settlement Agreements
Harris County Judicial Education Conference, 2014
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2014
Real Estate and the Law—Plaintiff's Perspective
Jones Graduate School of Business, Rice University, 2014
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2013
Liability Issues for Rescue Organizations
Houston Bar Association: Animal Law Section, 2013
Experts, Daubert, and the Texas Supreme Court
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2013
Getting the Charge Right & Charge Error Preservation
University of Texas, Page Keeton Civil Litigation Conference, 2013
Getting the Charge Right & Charge Error Preservation
State Bar of Texas: Advanced Civil Appellate Practice Course, 2013
Getting the Charge Right
State Bar of Texas: Webinar, 2013
Presenting and Defending a Trucking Case
State Bar of Texas: Webinar, 2013
Jury Charge: Demonstration of a Charge Conference
State Bar of Texas: Advanced Civil Trial Course, 2013
Real Estate and the Law—Plaintiff's Perspective
Jones Graduate School of Business, Rice University, 2013
Civil Liability Exposure for the Nonprofit
Houston Bar Association: Animal Law Section, 2012
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2012
Legal Risk: Real Estate and the Law—Plaintiff's Perspective
Management 660: Jones Graduate School of Business, Rice University, 2012
Liability Issues and Civil / Criminal Exposure
Houston Bar Association: Animal Law Section, 2011
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2011
Supreme Court Update
Houston Bar Association: Litigation Section, 2010
Supreme Court Update
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2010
Supreme Court Update—Procedure
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2008
Supreme Court Update—Procedure
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2007
Earning, Collecting & Keeping Attorney's Fees
Harris County Criminal Lawyers' Association, 2007
DWI in the Twenty-First Century—Prosecution View
Houston Bar Association, 2003
Procedure Update—State
South Texas College of Law: Advanced Civil Trial Law, 1995
Procedure Update—State
South Texas College of Law: Advanced Civil Trial Law, 1994

EDUCATION

University of Texas, School of Law; J.D. (1980)
University of Texas at Austin; B.A., with Honors (1977)

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CURRICULUM VITAE

PROFESSIONAL EMPLOYMENT

Abraham, Watkins, Nichols, Sorrels, Agosto & Aziz
Attorney: 2012–present

Hon. Lawrence "Larry" Weiman, 80th District Court, Harris County, Texas
Law Clerk/Briefing Attorney: 2011-2012

Hon. Ann Marie Calabria, North Carolina Court of Appeals
Intern/Law Clerk: 2008-2010

PROFESSIONAL ACTIVITIES

Admitted:	State Bar of Texas, 2010
Court Admissions:	United States Court of Appeals, Fifth Circuit, 2016 United States District Court, Southern District of Texas, 2013 United States District Court, Eastern District of Texas, 2016 United States District Court, Eastern District of Texas, 2017 United States District Court, Eastern District of Texas, 2017 United States Bankruptcy Court, Southern District of Texas, 2013
Memberships:	Texas Trial Lawyers Association Houston Trial Lawyers Association Houston Bar Association Houston Young Lawyers Association
Chair:	Harris County Law Library Committee Houston Bar Association
State Bar of Texas CLE:	Planning Committee; How to Handle Your First (or Next) Wrongful Death Case, 2015.
Texas Super Lawyers:	Rising Star 2016

PUBLICATIONS AND PRESENTATIONS

Real Estate Law
Guest Speaker: Memorial High School, 2017
Supreme Court Update
2016 End of Year Update (with Jay Jackson)
Supreme Court Cases Important to Trial Lawyers
State Bar of Texas: Texas Bar College Summer School, 2016 (with Jay Jackson)
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2016 (with Jay Jackson)
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery, 2016 (with Jay Jackson)
§ 1983 Actions and other Civil Claims by Criminal Defendants
Earl Carl Institute: 5th Annual Washington-Ellis Excellence in Indigent Defense Seminar, 2016
Supreme Court Update
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Collision Case, 2015 (with Jay Jackson)

How (Not) to Lose your Wrongful Death Case: Statutory Defenses and other Bars to Recovery
State Bar of Texas: Handling your First (or Next) Wrongful Death Case, 2015
What Trial Lawyers Can Learn from Supreme Court Opinions
State Bar of Texas: History of Texas & Supreme Court Jurisprudence, 2015 (with Jay Jackson)
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2015 (with Jay Jackson)
Panel: Pre-Trial Motions
Harris County Civil and Appellate Bench-Bar Conference, 2015 (with Hon. Erin Lunceford and Hon. Michael Gomez)
Texas Personal Injury Law
HalfMoon Seminars: Understanding Personal Injury Law for Paralegals, 2015
Evidence 101
State Bar of Texas: How to Handle your First (or Next) Auto Accident Case, 2014 (with Jay Jackson)
Liability Issues for Rescue Organizations
Houston Bar Association: Animal Law Section, 2014 (with Jay Jackson)
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State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2013 (with Jay Jackson)

EDUCATION

Campbell University, School of Law; J.D., *cum laude* (2010)
North Carolina State University, B.A. (2002)

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I. INTRODUCTION

It is an honor and privilege to present the "Texas Supreme Court Update" to the State Bar of Texas' *Advanced Personal Injury Law Course 2017*.

A. Abstract

This article provides you with analysis of every opinion issued by the Texas Supreme Court from January 1, 2016 up to December 31, 2017. This includes, for instance, substantive law, discovery, pleadings, and evidentiary points.

B. Form

Quotations and Italics. In each section, cases are listed from latest to earliest. To preserve space, footnotes and most internal citations have been omitted; a few were retained to provide precision or controlling references. Also, within quotations, the paragraph structure from the original opinion has occasionally been eliminated. Further, to promote clarity, in some instances I have quoted passages in a sequence different from how they appear in the opinions. Additionally, sometimes quoted material has included quotations of quotations: in that event, I have used double quotation marks initially, followed by single quotation marks, but I have provided no further indication of embedded quotations. Finally, all italics are original. References to *Black's Law Dictionary* have been italicized.

Citations. Standard citations of the cases were given when the information was available. However, at the time this paper was submitted, volume and page numbers in the Southwestern Reporter for many of the opinions had not yet been assigned.

C. Acknowledgements

I first want to thank Mary McDonald, Program Planner; Sheena N. Taylor, Program Coordinator; Liz Salazar, Written Materials Coordinator; and Tiffany Clay, Meeting Planner with the State Bar of Texas for guiding this course through its planning and presentation.

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II. ATTORNEYS' ISSUES

A. Attorney's Fees

1. *In re Dean Davenport*, 522 S.W.3d 452 (Tex. 2017)

Attorneys had contingency fee agreement with client concerning his monetary recovery. However, when client purchased opponent's interest in business after a trial, attorneys sought to receive interest in business. A suit with client ensued in which trial court granted new trial. The Supreme Court ruled that the trial court's finding that the fee agreement permitted attorneys an interest in business "was an abuse of discretion because the agreement unambiguously states that the lawyers were only entitled to attorney fees from a monetary recovery. Accordingly, we conditionally grant [client's] petition for writ of mandamus. . . ."

Here, the fee agreement "unambiguously allows for [attorneys] to only recover money in exchange for their legal services."

"The term 'sums' in the contract is the crux of the dispute. . . . Black's Law Dictionary defines 'sum' as '[a] quantity of money.'"

The attorneys had agreed not to take a fee interest in different entities. That "clause, which explicitly prohibits the lawyers from taking a fee out of two specified companies, [does not] . . . mean the lawyers

are entitled to take a fee out of other ownership interests as a matter of law."

Moreover, because "'a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.' A lawyer has a duty to 'appreciate the importance of words' and 'detect and repair omissions in client-lawyer contracts.' The goal of an attorney-client fee agreement is to ensure that the client is informed of the terms. . . . [W]hether the lawyer was reasonably clear is determined from the client's perspective. Placing the burden on the lawyers to be 'clear' in fee agreements is warranted, given a lawyer's sophistication, the trusting relationship between a lawyer and his client, and a lawyer's responsibility to notify the client of the fee's basis or rate at the outset. Specifically to a contingent-fee agreement applied to interests other than money, we have held that the 'burden' is on the lawyer 'to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages.'"

Here, the attorneys could easily have explicitly provided for non-cash compensation. Thus, "we find that the Agreement only permits recovery from monetary awards."

2. *In re National Lloyds Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a mandamus proceeding involving a discovery dispute in a hail storm homeowners' insurance MDL, homeowner-plaintiffs sought production of insurer-defendants' attorney billing records and answers to interrogatories regarding insurer's attorney fees, arguing that this information was relevant to the reasonableness and necessity of homeowners' own attorney fees in support of their attorney fee claim. Insurers had not made a claim for attorney fees, but have made an offer of settlement under TEX. R. CIV. P. 167 that could give rise to an attorney fee claim. Insurer's counsel has been designated as an attorney fee expert to challenge the reasonableness and necessity of homeowners' fees.

The Supreme Court holds that, where a party "challenges an opposing party's attorney-fee request as unreasonable or unnecessary but neither uses its own attorney fees as a comparator nor seeks to recover any portion of its own attorney fees . . . , (1) compelling en masse production of a party's billing records invades the attorney work-product privilege; (2) the privilege is not waived merely because the party resisting discovery has challenged the opponent's attorney-fee request; and (3) such information is ordinarily not discoverable." Also, "[t]o the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish to tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred."

"[A] request to produce all billing records invades a party's work-product privilege because, cumulatively, billing records constitute a mechanical compilation of information that, at least incidentally, reveals an attorney's strategy and thought processes." "Billing records constitute 'communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives." Also, "[t]he attorney's entire litigation file is privileged per se, regardless of whether unprivileged information is included in the file."

Also, "redacting privileged information—such as the specific topics researched or the descriptions of the subject of phone calls—would be insufficient as a matter of law to mask the attorney's thought processes and strategies" and "would be inadequate to protect the work-product nature of the total billing information."

Thus, "requests for production of all billing invoices, payment logs, payment ledgers, payment summaries, documents showing flat rates, and audits invade the zone of work-product protection." This "does not prevent a more narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes." This also does not "preclude a party from seeking noncore work product" on a showing of "substantial need," and "an opposing party waive its work-product privilege through offensive use—perhaps by relying on its own billing records to contest the reasonableness of opposing counsel's attorney fees or to recover its own attorney fees."

"[S]ome or all of the information [contained in billing records] may also be protected from compelled disclosure by the attorney-client privilege," but insurer failed to establish that privilege through evidence.

Even though the billing records are privileged work product, "factual information is not exempt from discovery by mere inclusion within protected documents," and so information on "hourly rates, total amount billed, and total reimbursable expenses" contained in the records may not be privileged when sought by interrogatory. However, "even unprivileged information is not discoverable unless the information is relevant."

Information on a party's attorney's fees is "generally not relevant" to an opposing party's attorney fee claim. "However, when a party uses its 'own hours and rates as yardsticks by which to assess the reasonableness of those sought by [the requesting party]' or seeks to shift responsibility for those expenditures, the party places its own attorney-billing information at issue, making the information discoverable."

The Court summarized the "discovery guideposts . . . as follows: only relevant evidence is discoverable; relevant evidence that is privileged is not discoverable; relevant evidence that is not privileged is discoverable when (i) it is admissible or (ii) it is inadmissible by reasonably calculated to lead to the discovery of admissible evidence; and failing under either of those admissibility criteria, the request for discovery may be denied even if the requested information is relevant and unprivileged."

Here, considering the *Arthur Andersen* factors, "an opposing party's hourly rates, total amount billed, and total reimbursable expenses do not, in and of themselves, make it any more probable that a requesting party's attorney fees are reasonable and necessary, or not, which are the only facts 'of consequence.'" "Evidence of an opposing party's fees lacks genuine probative value as a comparator for a requesting party's fees and, at best, would be merely cumulative or duplicative of other evidence directed to that inquiry." "A party can challenge another party's fee request as not 'customary' even though that party also paid a fee that was not 'customary,' as long as the challenger does not rely on its own fees to prove the point." Thus, information regarding fees paid by a party challenging an opposing party's fees "is generally not discoverable and, in the ordinary case, 'patently irrelevant.'"

Here, insurer designated its own attorney as an attorney fee expert, which, because of the discoverability of information on experts, "provides the opposing party with the means to access information and attorney work product not otherwise available under the general scope of discovery." However, "the requesting party must follow the discovery rules applicable to testifying experts," and TEX. R. CIV. P. 195 "does not provide for interrogatories or requests for production like the discovery requests at issue here."

3. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company leave and join a competitor. Company sues former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury finds for company and awards actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

Individual defendants argue that there was insufficient evidence of malice to support the award of exemplary damages against them. The Supreme Court disagrees. A party seeking to "recover exemplary damages based on malice" must "prove actual damages and submit clear and convincing evidence of outrageous, malicious, or otherwise reprehensible conduct," and "prove that the defendants specifically intended for [the plaintiff] to suffer substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action" Importantly, "circumstantial evidence is legally sufficient to support a finding of malice." Here, the Supreme Court analyzes the evidence against each defendant and holds that there was sufficient evidence to find malice as to each.

However, after the reversal of most of the actual damages awarded, the exemplary damages award is unconstitutionally excessive. Here, the jury awarded $4,253,049 in actual damages (of which $4,198,000 is the reversed lost profits award) and $1,750,00 in exemplary damages. The court of appeals held (as the Supreme Court does) insufficient evidence of lost profits, leaving only $55,049 in actual damages awarded jointly-and-severally against each defendant, held that the exemplary damages award was unconstitutionally excessive based on the reduced actual damages award, and remands with a suggested remittitur of the exemplary damages award to $220,196.96 for each individual defendant.

The Supreme Court holds that even the suggested remitter "results in an award that violates due process because a 4:1 ratio of compensatory to exemplary damages is not appropriate in this case." exemplary

damages are unconstitutionally excessive even with the suggested remittitur of the court of appeals. The court of appeals came to the remittitur amount by comparing the exemplary damages award to the actual damages awarded jointly and severally against the individual defendants.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" "Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court holds that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-and-several liability for actual damages, the Supreme Court holds "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

The trial court improperly assessed exemplary damages jointly and severally against competitors for the individual employee defendants' conduct, where there was no jury finding against the competitors. Under TEX. CIV. PRAC. & REM. CODE § 41.006, "'an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.'" Because the plaintiff failed to obtain a finding of exemplary damages specifically against as the competitors, the Supreme Court reversed the award against them and rendered a take-nothing judgment as to their liability for exemplary damages.

The reversal of the lost profits damages award mandated reversal of the award of attorney's fees for company because they were the only damages for breach of contract, and the attorney's fee evidence did not segregate the fees incurred pursuing the breach of contract claim from those incurred pursuing the Texas Theft Liability Act claim. The Court remanded the case for a new trial on attorney's fees.

4. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance." The Court also found that the attorneys for the other ranch sellers failed to segregate their attorney's fees, and that issue of fees should be remanded.

Plaintiffs "could only recover attorneys [sic] fees under the Uniform Declaratory Judgments Act, which permits a trial court to 'award costs and reasonable and necessary attorney's fees as are equitable and just.' TEX. CIV. PRAC. & REM. CODE § 37.009. The determination of reasonable and necessary attorneys [sic] fees is an issue generally left to the trier of fact. A reviewing court may not simply substitute its judgment for a jury's. The party seeking recovery bears the burden of proof to support the award."

Attorneys for plaintiffs "testified regarding legal services rendered and various work performed through trial, each attorney's related experience, and what

factors each considered to determine a reasonable fee. Although [this was] . . . 'lacking in specifics,' it was 'at the very least, the quantum of evidence found sufficient.'" Even when "contemporaneous records are unavailable, we have allowed for reconstruction of an attorney's work and consideration of any evidentiary support of the time spent and tasks performed."

A "claimant must segregate legal fees accrued for those claims for which attorneys [sic] fees are recoverable from those that are not. Here, the reversal of the [plaintiffs'] fraud and tortious-interference-with-an-inheritance recoveries negates an award for attorneys [sic] fees in pursuit of those claims. Accordingly, to recover attorneys [sic] fees, the [plaintiffs] were required to segregate work relating to recoverable and non-recoverable claims. An exception exists only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible. But 'it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." Here, the causes of action here were distinct.

"A failure to segregate attorneys [sic] fees does not preclude an attorneys-fees [sic] recovery. The issue may be remanded to the trial court for reconsideration with sufficiently detailed information for a meaningful review of the fees sought."

Finally, the jury here had a sufficient basis to refuse to award appellate attorney's fees.

5. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Footnote 8: Attorney's fees are "recoverable as authorized by statute or contract."

6. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen." The trial court denied a motion to dismiss under the TCPA, but dismissed other statutory claims. The Supreme Court ruled that the court of appeals did have "jurisdiction to consider the magazine's appeal of the trial court's denial of its request for attorney's fees in connection with the partially granted motion to dismiss. . . ." The "trial court erred in awarding no fees."

The TCPA requires awarding attorney's fees if the court dismisses a "legal action," which is not confined to a defamation action and can include, as here, other statutory causes of action.

7. *In re National Lloyds Insurance Company*, 507 S.W.3d 219 (Tex. 2016)

During storm damage suit transferred to the MDL, the pretrial court granted plaintiffs filed a motion to compel "six categories of information" and ordered sanctions. The Supreme Court ruled that one category was "overbroad." It then remanded to the pretrial court to determine the amount of sanctions attributable to the five items that were appropriately compelled.

"If a motion to compel is granted, the trial court '*shall* . . . [order] reasonable expenses'" unless the objection was "'substantially justified.'" TEX. R. CIV. P. 215.1(d). A discovery sanctions "order 'shall be subject to review on appeal from the final judgment.' 'A trial court's ruling on a motion for sanctions is reviewed under an abuse of discretion standard.' The test for abuse of discretion is 'whether the court acted without reference to any guiding rules and principles.' To determine whether the sanctions imposed are just, we consider: 'First, . . . whether there is a direct relationship between the offensive conduct and the sanctions. . . . Second, . . . whether the sanctions are excessive.'" Here, the pretrial court's order compelling production of one category was overbroad, but the carrier failed to produce "five other categories." "The sanctions order does not specify the amount of attorney's fees attributed to each category of information compelled, and we cannot assume that reversal of one-sixth of the categories of information requires a one-sixth reduction of the sanctions." Thus, the pretrial court was directed to determine "whether the attorney's fees award remains appropriate in light of" this decision.

8. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448 (Tex. 2016)

Contractor sues municipally-owned electric and gas utility for breach of a construction contract, seeking damages and attorney's fees. Following *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016), the Supreme Court held that utility "was performing a proprietary function and [was] therefore not immune from suit based on governmental immunity . . . even in the contract-claims context." The Court additionally held that contractor's "claim for attorney's fees does not implicate immunity."

"Just as the nature of governmental immunity

does not 'inherently limit[] the [proprietary-governmental] dichotomy's application to tort claims,' it likewise does not inherently preclude a claim for attorney's fees from a breach-of-contract claim arising from a proprietary function."

9. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Trial court dismissed defamation suit under Ch. 27. Defendant appealed, asserting the court's award of attorney's fees was inadequate. The Supreme Court ruled the lower courts "used the wrong standard in determining the attorney's fees. . . ."

Ch. 27 "provides for the expedited dismissal of a legal action that implicates a defendant's right of free speech or other First Amendment right when the party filing the action cannot establish the Act's threshold requirement of a prima facie case. A successful motion to dismiss . . . entitles the moving party to an award of court costs, reasonable attorney's fees, and other expenses. . . ." The court can also award "sanctions 'sufficient to deter' future 'similar actions.'"

Under Ch. 27, an award of attorney's fees is mandatory.

An award of attorney's fees in a declaratory judgment "is permissive and subject to four express limitations—that it be 'reasonable and necessary' and also 'equitable and just.'" This requires "a multi-faceted appellate review because the limitations involved both evidentiary and discretionary matters."

Here, "the statute does not include a comma after 'other expenses' or after 'legal action,' and their absence indicates an intent to limit the justice-and-equity modifier [for the award of attorney's fees] to the last item in the series."

Ch. 27 requires an award of "'reasonable attorney's fees' to the successful movant [to dismiss]. A 'reasonable' attorney's fee 'is one that is not excessive or extreme, but rather moderate or fair.' That determination rests within the court's sound discretion, but that discretion, under [Ch. 27], does not also specifically include considerations of justice and equity."

The "lodestar" approach was used here. "In *El Apple*, we said that '[t]he starting point for determining a lodestar fee award is the number of hours 'reasonably expended on the litigation.'' We further said that the party applying for the award bears the burden of proof, which 'includes, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.' The proof must be sufficient to permit a court 'to perform a meaningful review of their fee application.' We have subsequently condemned 'generalities about tasks performed' and specifically said that, 'without any evidence of the time spent on specific tasks,' the trial court does not have sufficient information to meaningfully review the fee application."

10. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Supreme Court affirmed mandamus because the trial court granted a new trial on three facially invalid reasons and one that was not supported by the record.

The trial court failed to provide a facially sufficient explanation to grant a new trial due to the jury's failure to award appellate attorney's fees. That a party "may obtain" attorney's fees under TEX. INS. CODE § 541.152(a)(1) can render such an award "mandatory." But, they still must be proven as "reasonable and necessary." Here, the trial court failed to discuss evidence that showed that the attorney's fees were proven. Calling the evidence "overwhelming" is insufficient.

B. Attorney Ad Litem and Guardian Ad Litem

No cases to report.

C. Right to Attorney

1. *In the Interest of M.N., V.W., and Z.W., Children*, 505 S.W.3d 618 (Tex. 2016)

In suit to terminate parental rights, father's lawyer withdrew while the case was on appeal and filed an *Anders* brief. Following *In re P.M.*, contemporaneously decided, the Supreme Court abated and "refer[ed] this case to the trial court for the appointment of counsel."

2. *In re J.R., a Child*, 505 S.W.3d 620 (Tex. 2016)

In suit to terminate parental rights, father's lawyer withdrew while the case was on appeal and filed an *Anders* brief. Following *In re P.M.*, contemporaneously decided, the Supreme Court abated and "refer[ed] this case to the trial court for the appointment of counsel."

3. C*.S.F. v. Texas Department of Family and Protective Services*, 505 S.W.3d 618 (Tex. 2016)

Parent appealed a termination of his rights, and untimely filed papers with the Supreme Court pro se, including an indigence affidavit. The Supreme Court abated the suit and directed the trial court to appoint counsel.

Following the contemporaneously decided *In re P.M.* (see below), the Court ruled that "in government-initiated parental rights termination proceedings, the statutory right of indigent parents to counsel endures until all appeals are exhausted, including appellate proceedings in this Court."

The Court has held that the "statutory right to counsel in parental-rights termination cases included, as a matter of due process, the right to effective counsel. And we have extended this holding to effective assistance of counsel in pursuing an appeal; procedural requirements, in some cases, may have to yield to constitutional guarantees of due process. . . . Not every failure to preserve error or take timely action, however, will rise to level of ineffective assistance of counsel."

4. *In re P.M., a Child*, 520 S.W.3d 24 (Tex. 2016)

In a suit to terminate the parent-child relationship, the trial court granted an appointed attorney's motion to withdraw during an appeal after a second trial. The Supreme Court ruled that there was no abuse of discretion in granting that motion, and that mother was entitled to appointed counsel on appeal.

"Section 107.013(a) of the Texas Family Code provides that '[i]n a suit filed by a governmental entity . . . in which termination of the parent-child relationship . . . is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent . . . .' The issue: . . . whether this right to appointed counsel extends to proceedings in this Court, including the filing of a petition for review. We hold that it does. . . ."

The provisions of the Family Code "establish[es] the right of an indigent parent to appointed counsel in the trial court and court of appeals." Since "the right to counsel is as important in petitioning this Court for review . . . as in appealing to the court of appeals," the "right to counsel under [TEX. FAM. CODE §] 107.013(a)(1) through the exhaustion of appeals under [TEX. FAM. CODE §] 107.016(2)(B) includes all proceedings in this Court. . . . Once appointed by the trial court, counsel should be permitted to withdraw only for good cause and on appropriate terms and conditions. Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California*, and its progeny. . . . [A]n *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review."

A lawyer's motion to withdraw may be decided by the court of appeals, or the court may "refer the motion to the trial court for evidence and a hearing. An appellate court must ordinarily refer the matter of appointment of replacement counsel to the trial court."

D. Withdrawal of Attorney

1. *In re Carolyn Frost Keenan*, 501 S.W.3d 74 (Tex. 2016)

In a deed restrictions suit, an issue arose over the validity of a vote of amendment. The trial court allowed only the homeowner's attorney to see the ballot results. The Supreme Court granted mandamus directing the trial court to permit the homeowner to have greater access to and use of the ballots.

"Under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct, 'A lawyer shall not . . . continue employment . . . if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client.'" "'Rule 3.08 is grounded principally on the belief that the finder of fact may become confused when one person acts as both advocate and witness.'" "[The homeowner's] lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue." "Rule 3.08 "should not be used as a tactical weapon. . . ."

2. *In the Interest of P.M., a Child*, ___ S.W.3d ___ (Tex. 2016)(4/1/16)

In a suit to terminate the parent-child relationship, the trial court granted an appointed attorney's motion to withdraw during an appeal after a second trial. The

Supreme Court ruled that there was no abuse of discretion in granting that motion, and that mother was entitled to appointed counsel on appeal.

"Section 107.013(a) of the Texas Family Code provides that '[i]n a suit filed by a governmental entity . . . in which termination of the parent-child relationship . . . is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent . . . .' The issue: . . . whether this right to appointed counsel extends to proceedings in this Court, including the filing of a petition for review. We hold that it does. . . ."

The provisions of the Family Code "establish[es] the right of an indigent parent to appointed counsel in the trial court and court of appeals." Since "the right to counsel is as important in petitioning this Court for review . . . as in appealing to the court of appeals," the "right to counsel under [TEX. FAM. CODE §] 107.013(a)(1) through the exhaustion of appeals under [TEX. FAM. CODE §] 107.016(2)(B) includes all proceedings in this Court. . . . Once appointed by the trial court, counsel should be permitted to withdraw only for good cause and on appropriate terms and conditions. Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California*, and its progeny. . . . [A]n *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review."

A lawyer's motion to withdraw may be decided by the court of appeals, or the court may "refer the motion to the trial court for evidence and a hearing. An appellate court must ordinarily refer the matter of appointment of replacement counsel to the trial court."

E. Indemnity of Attorney's Fees

1. *Centerpoint Builders GP LLC v. Trussway, Ltd*., 496 S.W.3d 33 (Tex. 2016)

General contractor was sued after worker was injured when a truss broke. General contractor sought indemnity from maker under Ch. 82, claiming it was a seller. The Supreme Court ruled that, applying "chapter 82's definition of 'seller,' . . . the general contractor is not a seller" because it was not "'engaged in the business of' commercially distributing or placing trusses in the stream of commerce."

"[C]hapter 82 entitles the 'seller' of a defective product to indemnity from the product manufacturer for certain losses." It "gives the innocent seller of an allegedly defective product a statutory right to indemnity from the product's manufacturer for losses arising out of a products liability action." This is in addition to any indemnification created "by law, contract, or otherwise."

The "'purpose of section 82.002 is to protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers.'" The "duty to indemnify is triggered by allegations in the injured claimant's pleadings of a defect in the manufacturer's product, regardless of any adjudication of the manufacturer's liability to the claimant." "The manufacturer may 'escape this duty to indemnify' by proving that the seller's 'acts or omissions independent of any defect in the manufactured product cause[d] injury.'"

"While the scope of a manufacturer's duty to indemnify is often described as broad, it is owed only to sellers, and an indemnity claimant's seller status is a necessary prerequisite to maintaining a claim."

A "general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a 'seller' of every material incorporated into its construction projects for statutory-indemnity purposes."

F. Attorney-Client Privilege

1. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Plaintiffs were sued for usury in prior suit. Defendants served as their lawyers. They argued that no agency existed and asserted a counterclaim. The trial court denied the claim of lack of agency, and a jury awarded about $4M against plaintiffs and about $150K for plaintiffs on their counterclaim. Plaintiffs fired defendants, and appealed the judgment with new counsel, incurring about $140K of appellate costs. The court of appeals reversed the trial court's ruling on agency, so the judgment against plaintiffs for $4M was reversed, but they continued to prevail on their counterclaim of $150K. Then, plaintiffs sued defendants for attorney malpractice at trial seeking to recover their costs for the appeal. The Supreme Court ruled that the legal error by the trial court constituted a

new and independent cause, breaking causation. "Because the unfavorable usury judgment was reversed on the basis of a trial-court error and the record bears no evidence the Attorneys contributed to the error or that the error was reasonably foreseeable under the circumstances, any unrelated negligence of the Attorneys, as alleged, is not the proximate cause of the [plaintiffs'] appellate litigation costs as a matter of law."

"Although we do not hold judicial error is always a superseding cause that would preclude a subsequent malpractice action, proximate-cause principles support our conclusion that judicial error can constitute a new and independent cause depending on the circumstances. Here, the trial court's adverse judgment was reversed on the basis of a judicial error that the trial attorneys did not cause and which could not reasonably be anticipated at the time. We therefore hold that, as a matter of law, any unrelated negligence by the trial attorneys was too attenuated from the remedial appellate attorney fees to be a proximate cause of those expenses."

A "'legal malpractice action sounds in tort and is governed by negligence principles.'" "To prevail on a legal malpractice claim, 'the plaintiff must prove the defendant owed the plaintiff a duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff suffered damages.' A defendant may obtain summary judgment by negating one of these elements or conclusively proving all of the elements of an affirmative defense." Footnote 3: "Usually, '[w]hen a legal malpractice case arises from prior litigation, the plaintiff has the burden to prove that, 'but for' the attorney's breach of duty, he or she would have prevailed on the underlying cause of action and would have been entitled to judgment.' [Here, plaintiffs] cannot satisfy this 'suit within a suit' requirement because they did prevail in the underlying action on appeal."

"Breach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable."

"When a judicial error intervenes between an attorney's negligence and the plaintiff's injury, the error can constitute a new and independent cause that relieves the attorney of liability. To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable. Theoretically, it is always foreseeable that a judge might err in some manner. . . . But if the judicial error alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant's alleged negligence, the error is a concurring cause as opposed to a new and independent, or superseding, cause."

"The question . . . [is] whether the trial court's error is a reasonably foreseeable *result* of the attorney's negligence in light *of all existing circumstances*. A judicial error is a reasonably foreseeable result of an attorney's negligence if 'an unbroken connection' exists between the attorney's negligence and the judicial error, such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of 'a continuous succession of events' that foreseeably resulted in the harm."

"If an attorney does not contribute to the judicial error itself and the judicial error is not otherwise reasonably foreseeable in the particular circumstances of the case, the error is a new and independent cause of the plaintiff's injury if it 'alters the natural sequence of events' and 'produces results that would not otherwise have occurred.'"

Here, "the adverse usury judgment, which required [plaintiffs] to incur appellate litigation costs to correct, resulted from the trial court's error of law regarding March's agency authority. [Plainitiffs] do not allege the Attorneys negligently presented, argued, or failed to preserve the issue, nor do they allege the Attorneys otherwise contributed to the trial court's error." Rather, the alleged negligence involved other issues. "In other words, [plaintiffs] contend the Attorneys may have provided a belt, but they were nevertheless harmed by the Attorneys' failure to employ suspenders."

The "cause-in-fact element of proximate cause requires proof that negligence was a 'substantial factor' and 'but for' cause."

Here, there was "no evidence that the judicial error was reasonably foreseeable. . . ." Once "a defendant presents evidence of a superseding cause, '[t]he burden then shifts to the plaintiff to raise a fact issue by presenting controverting evidence' that the intervening conduct was foreseeable." The "foreseeability analysis requires looking at all the circumstances in existence 'at the time.'"

The "appellate court's reversal of the adverse usury judgment conclusively establishes that, taking all the Attorneys' negligent and non-negligent acts, omissions, and strategic decisions together, no adverse judgment would have occurred if judicial error had not intervened. The trial court's error thus 'alter[ed] the natural sequence of events' and 'produce[d] results that would not otherwise have occurred.'"

Because the "the trial court's error of law on the agency issue was a new and independent cause . . . no expert testimony is necessary."

2. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

"[The] crime–fraud exception to the attorney–client privilege applies only if a prima facie case of contemplated fraud is made by the party seeking discovery. . . ."

G. Attorneys' Liability and Malpractice

1. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate tort suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus.

"[N]othing in the proportionate-responsibility statute precludes a party from designating an attorney as a responsible third party."

Neither "a section 33.004 designation nor a finding of fault against the person 'impose[s] liability on the person.'" And "neither can 'be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.'"

2. *Starwood Management, LLC v. Swaim*, ___ S.W.3d ___ (Tex. 2017)(9/29/17)

In a *per curiam* opinion, the Texas Supreme Court reversed a summary judgment in a legal malpractice case, disagreeing with the trial court's and court of appeals' conclusions that the affidavit of the plaintiff's expert was conclusory.

"To prove a legal malpractice claim, the former client must show (1) the existence of a duty of care owed to the client, (2) that the duty was breached, and (3) that the breach proximately caused damage to the client." In legal malpractice cases based on litigation, the causation inquiry "is a suit-within-a-suit inquiry—the actual result with the alleged misconduct or omission is compared to a hypothetical result the plaintiff claims would have occurred absent the misconduct or omission." "Generally, in a legal malpractice case, expert testimony is required to rebut a defendant's motion for summary judgment challenging the causation element." "Conclusory affidavits are not probative," and an expert's "affidavit must explain 'how and why the negligence caused the injury.'"

"[T]he relevant question when addressing the adequacy of expert opinion affidavits in legal malpractice cases is '"Why;' Why did the expert reach that particular opinion?'" "To demonstrate 'why,' the affidavit must explain the link between the facts the expert relied upon and the opinion reached."

Here, the "affidavit could have set out a more detailed basis for his opinion. But the extent of the detail into which the affidavit delved goes to quality, not adequacy." "The relevant inquiry regarding the question of whether an affidavit is an *ipse dixit*," and, thus, not probative, "turns on the inferences, if any, required to bridge the gap between the underlying data and the expert's rationale and conclusion," where the "testimony fails" if there is "'simply too great an analytical gap[.]'"

"Here, the gap is not great" because the expert explains the link between his opinion and other, similar cases. "It is unnecessary for an expert in a" legal malpractice case "to provide a legal analysis of every possible exigency, no matter how remote."

3. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

Generally, as noted in *Cantey Hanger*, "'attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation.'"

4. *Chavez v. Kansas City Southern Railway Company*, 520 S.W.3d 898 (Tex. 2017)

After a defense verdict, plaintiffs' attorney entered a settlement agreement with defendants. One plaintiff objected. Defendants moved for summary judgment, proving that the attorney represented plaintiff at trial; the court of appeals indulged a presumption that supported "'a settlement agreement made by an attorney hired by a client.'" The Supreme Court, however, ruled that, at "trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings."

"To obtain summary judgment, the 'movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.' If the movant meets this burden, 'the burden then shifts to the non-movant to disprove or raise an issue of

fact as to at least one of those elements.' However, if the movant does not meet this burden, 'the burden does not shift and the non-movant need not respond or present any evidence.'"

Even if a lawyer hired for litigation is presumed to be authorized to enter a settlement, the "presumption may be rebutted. . . ."

A "summary judgment movant may not use a presumption to shift to the non-movant the burden of raising a fact issue of rebuttal. . . . [A] presumption cannot shift the burden to a non-movant in a summary judgment proceeding."

Accordingly, here, defendants failed to prove that plaintiff's attorney was actually authorized "to enter into a settlement agreement on her behalf."

5. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

Rogers purchased interest in business and promised to perform certain functions. He did not, and transferred funds from business to himself. Jury found he committed fraud and awarded damages to sellers. Rogers then sued lawyer who drafted purchase agreement, and also lawyer who represented him through much of the pre-trial litigation for not designating a rebuttal damages expert and communicating a settlement offer. The Supreme Court affirmed a no-evidence summary judgment for lawyers, holding that "no summary-judgment evidence existed to raise a fact issue as to causation, an essential element of the clients' malpractice claim."

"To prove a legal-malpractice claim, the client must establish that: (1) the lawyer owed a duty of care to the client; (2) the lawyer breached that duty; and (3) the lawyer's breach proximately caused damage to the client. A lawyer can be negligent and yet cause no harm. And, if the breach of a duty of care does not cause harm, no valid claim for legal-malpractice exists."

"[A]lthough causation is typically a question of fact, it may be determined as a matter of law when reasonable minds could not arrive at a different conclusion."

"When a legal-malpractice case arises from prior litigation, the plaintiff must prove that the client would have obtained a more favorable result in the underlying litigation had the attorney conformed to the proper standard of care. . . . This re-creation is typically referred to as the 'case-within-a-case[.]' . . . Where the injury claimed does not depend on the merits of the underlying action, however, the case-within-a-case methodology does not apply."

A "legal-malpractice plaintiff must prove that his or her lawyer's negligence was the proximate cause of cognizable damage. []'The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence case.'[] The components of proximate cause consist of cause in fact and foreseeability. Cause in fact (sometimes referred to as substantial factor) requires a showing that the act or omission was a substantial factor in bringing about the injury and without which harm would not have occurred. . . . 'Substantial' here is used in its popular sense 'to denote that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' On the other hand, foreseeability or legal cause addresses the proper scope of a defendant's legal responsibility for negligent conduct that in fact caused harm. The legal-cause component asks whether the harm incurred should have been anticipated and whether policy considerations should limit the consequences of a defendant's conduct." "[O]ur cause-in-fact standard already incorporates the substantial factor test." "[O]ur cause-in-fact standard requires not only that the act or omission be a substantial factor but also that it be a but-for cause of the injury or occurrence."

Here, the omission of Rogers' litigation counsel to name Zanetti and firm as responsible third parties "fails because Rogers' antecedent fraud supports the liability ultimately imposed and likewise renders this malpractice allegation causally irrelevant."

"Whether a negligent lawyer's conduct is the cause in fact of the client's claimed injury requires an examination of the hypothetical alternative: What should have happened if the lawyer had not been negligent?" That could be losing the underlying suit outright when it should have been won, or it could be losing with a greater amount of damages awarded. "[W]e defined the case's 'true value' as 'the recovery [the underlying plaintiff] would have obtained following a trial in which [the underlying defendant] had a reasonably competent, malpractice free defense.'" The measure of damages is the "'difference between the result obtained for the client and the result that would have been obtained with competent counsel.'" So, Rogers had to show that "allegedly inflated verdict was more likely than not caused by the lack of a rebuttal expert."

The "standard for causation here is cause-in-fact, or but-for causation, not 'significant contributing factor.'"

Every "trial malpractice action therefore involves a comparison of two cases—the case containing

imprudent attorney conduct and the case the plaintiff claims should have unfolded with competent representation." When "the alleged mistake involves omitted evidence, the hypothetical, mistake-free case must necessarily be one that includes the relevant evidence."

In legal malpractice suits, plaintiffs need "expert testimony to satisfy the causation requirement."

"To avoid summary judgment Rogers needed to show that (1) alternative expert valuation testimony was available and (2) the testimony would have probably altered the verdict."

Here, the experts failed to provide probative evidence of cause-in-fact. They failed to establish the comparison of the actual trial with the hypothetical one containing the omitted evidence. Rogers' experts' evidence "contains no predictive factual basis about what a reasonable jury would do with competing evidence" that was not offered at trial.

In addition, there was no proof of causation concerning the failure to communicate a settlement offer. The record did not show that "Rogers could have paid either the $450,000 actually demanded or any lesser sum that the [opponents] would have accepted."

6. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. Despite a lack of evidence of causation, the Supreme Court reversed in part a summary judgment for attorney.

"Generally, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages."

"In *Kinzbach*, we held that the client was not required to prove damages when he established that a defendant breached a fiduciary duty and obtained a 'secret gain or benefit.'" An "agent should not escape liability for, and retain the profits from, breaching the duty of loyalty to a principal simply because the principal might not be able to prove that the breach caused damages."

"In *Burrow v. Arce*, we . . . held that in the attorney-client context, 'a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.'"

"'A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter.'"

"'It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for [the agent's] compensation.' Pragmatically, fee forfeiture also serves as a deterrent. The central purpose . . . 'of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.'"

In "*Kinzbach* evidence of causation was not necessary because the remedy sought was equitable forfeiture of an improper benefit received by the agent."

For "the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. . . . On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought."

A "party cannot be a co-conspirator without knowledge of the wrong intended to be committed."

Even "assuming that Parker's failure to immediately disclose that the money was gone was unlawful . . . the church did not provide evidence that Parker's failure caused actual damages to the church."

"The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed."

Courts of appeals have "determined that [an aiding and abetting] claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff."

"While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place."

No joint enterprise existed because "there is no

evidence that Parker agreed with Lamb to either steal the church's money or share that money." Parker's paychecks do "not comprise evidence that Parker had a mutual right to control and manage the stolen money, entered into a joint venture to steal the church's money, or had an agreement with Lamb to share profits and losses from the theft of the church's money." There was no express or implied agreement for a joint venture.

7. *Linegar v DLA Piper LLP (US)*, 495 S.W.3d 276 (Tex. 2016)

During merger of companies merged, individual owner loaned money through a controlled entity that managed his personal retirement. Lawyer failed to file UCC-1, and individual lost most of the loan. He sued lawyer and firm; jury found attorney-client relationship and malpractice. The Supreme Court ruled individual had no standing.

The general rule is that a "'corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong.' . . . [But that] does not preclude a stockholder from recovering damages for wrongs done to the stockholder individually, provided the wrongdoer violated a duty ''owing directly by [the wrongdoer] to the stockholder.'' 'However, to recover individually, a stockholder must prove a personal cause of action and personal injury.'"

In *Wingate*, "because Touche Ross counseled the individual stockholders directly and the tax consequences of the IRS ruling fell directly on them, they suffered a direct loss and had standing to assert a cause of action against Touche Ross. . . ."

"To have standing to bring such claims, [plaintiff] was required to allege and prove that [firm] owed him a duty individually and that he was personally and concretely aggrieved by the firm's breach of that duty." And, here, plaintiff alleged and the jury found, that the firm "wrongfully advised him in his individual capacity. . . ." The loss of the loan "fell substantively and directly on" plaintiff.

As a general rule, "ordinarily—but not always—the trustee is the proper plaintiff to bring suit for losses the trust suffers. However, . . . here . . . the case was not tried on claims that [firm] violated duties it owed to [entity] as trustee, nor on a claim that the trust assets for which [entity] was trustee suffered a loss." The case was tried on a breach of duties owed to plaintiff individually.

8. *In the Interest of P.M., a Child*, ___ S.W.3d ___ (Tex. 2016)(4/1/16)

Footnote 5: "'When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded.'"

H. Attorney Ethics, Disqualification, Ineffectiveness

1. *In re Bertram Turner and Regulatory Licensing & Compliance, L.L.C.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

One law firm hired a paralegal who had, unknown to the hiring firm, worked for the firm representing the opponent of one of its clients in a suit, and had worked on that case. When it learned of her involvement, the hiring firm removed her from the case and instructed her not to discuss the case. Granting mandamus, the Supreme Court ruled that the hiring firm had to be disqualified. The hiring firm failed to rebut the "shared-confidences" presumption because it "did not instruct [the paralegal] to refrain from working on the [client's] matter until after learning of her conflict."

"We review a trial court's refusal to disqualify a law firm under an abuse of discretion standard."

"*Phoenix Founders* . . . set forth several factors as guidance in determining the effectiveness of a firm's screening measures."

"Deciding whether to disqualify counsel based on a nonlawyer employee's conduct involves a two-step process, and different presumptions apply at each step. A trial court must grant a motion to disqualify a firm whose nonlawyer employee previously worked for opposing counsel if the nonlawyer (1) obtained confidential information about the matter while working at the opposing firm and (2) then shared that information with her current firm."

For the first step, "the law presumes that the nonlawyer employee obtained confidential information about the matter if she actually worked on the matter at her former firm. To 'prevent the moving party from being forced to reveal the very confidences sought to be protected,' this presumption is irrebuttable." Here, the paralegal had actually worked on the matter.

For the second step, "the law presumes that a nonlawyer employee who obtained confidential

information at her former firm shared that information with her new firm. This presumption is generally rebuttable, but some circumstances will cause the presumption to become irrebuttable."

When "shared-confidences" is rebuttable, "'this second presumption can be overcome, but only by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took 'other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent.'" "Casual admonitions" are "insufficient." The measures "'must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely.'"

Six factors from *Phoenix Founders* "guide such an inquiry: '(1) the substantiality of the relationship between the former and current matters; (2) the time elapsing between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of their involvement in the former matter; and (6) the timing and features of any measures taken to reduce the danger of disclosure.'"

The second prong is not reached "if a firm fails to establish that it met the first prong by instructing the nonlawyer employee to refrain from working on any conflicted matters. . . ."

Footnote 3: "The presumption of shared confidences is irrebuttable if, inter alia, 'the nonlawyer has actually performed work, including clerical work, on the matter at the lawyer's directive if the lawyer reasonably should know about the conflict of interest.'"

To "rebut the rebuttable presumption that a nonlawyer employee imparted confidential information obtained at her previous employment, the hiring firm must demonstrate that it instructed the nonlawyer employee to refrain from working on any matters on which she worked in any previous employment."

2. *In re Carolyn Frost Keenan*, 501 S.W.3d 74 (Tex. 2016)

In a deed restrictions suit, an issue arose over the validity of a vote of amendment. The trial court allowed only the homeowner's attorney to see the ballot results. The Supreme Court granted mandamus directing the trial court to permit the homeowner to have greater access to and use of the ballots.

"Under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct, 'A lawyer shall not . . . continue employment . . . if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client.'" "'Rule 3.08 is grounded principally on the belief that the finder of fact may become confused when one person acts as both advocate and witness.'" "[The homeowner's] lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue." "Rule 3.08 "should not be used as a tactical weapon. . . ."

3. C.*S.F. v. Texas Department of Family and Protective Services*, 505 S.W.3d 618 (Tex. 2016)

Parent appealed a termination of his rights, and untimely filed papers with the Supreme Court pro se, including an indigence affidavit. The Supreme Court abated the suit and directed the trial court to appoint counsel.

Following the contemporaneously decided *In re P.M.* (see below), the Court ruled that "in government-initiated parental rights termination proceedings, the statutory right of indigent parents to counsel endures until all appeals are exhausted, including appellate proceedings in this Court."

The Court has held that the "statutory right to counsel in parental-rights termination cases included, as a matter of due process, the right to effective counsel. And we have extended this holding to effective assistance of counsel in pursuing an appeal; procedural requirements, in some cases, may have to yield to constitutional guarantees of due process. . . . Not every failure to preserve error or take timely action, however, will rise to level of ineffective assistance of counsel."

I. Authority of Attorney

1. *Chavez v. Kansas City Southern Railway Company*, 520 S.W.3d 898 (Tex. 2017)

After a defense verdict, plaintiffs' attorney entered a settlement agreement with defendants. One plaintiff objected. Defendants moved for summary judgment, proving that the attorney represented plaintiff at trial; the court of appeals indulged a presumption that supported "'a settlement agreement

made by an attorney hired by a client.'" The Supreme Court, however, ruled that, at "trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings."

Even if a lawyer hired for litigation is presumed to be authorized to enter a settlement, the "presumption may be rebutted. . . ."

Accordingly, here, defendants failed to prove that plaintiff's attorney was actually authorized "to enter into a settlement agreement on her behalf."

J. Attorney Testimony

No cases to report.

III. LAW OF THE CASE

A. Constitutional Law (State and Federal)

1. *In re M.M.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Following its ruling of the same date in *In re K.S.L.*, below, the Supreme Court ruled that a mother who had signed a statutorily-compliant affidavit terminating her parental rights had terminated her right to appeal, other than for "fraud, duress, or coercion." In particular, she could not maintain an appeal on the grounds "that the evidence of the child's best interest was factually and legally insufficient."

"As we conclude today in *K.S.L.*, holding that [TEX. FAM. CODE §] 161.211(c) means what it says does not deprive the parent of her due process rights."

2. *In re K.S.L.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Mother and father of child signed statutorily compliant affidavits relinquishing parental rights. The issue on appeal was whether the evidence established that terminating parental rights was in the child's best interest. The Supreme Court ruled that clear and convincing evidence supported the termination.

"In *Santosky*, the [U.S. Supreme] Court held, under the Due Process Clause of the Fourteenth Amendment, that when the State seeks to sever irrevocably the parent-child relationship, it must establish its grounds by clear and convincing evidence." In "the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child's best interest, would satisfy a requirement that the trial court's best-interest finding be supported under this higher standard of proof."

"The parents argue that reading [TEX. FAM. CODE §] 161.211(c) to bar them from challenging the factual and legal sufficiency of the best-interest determination would violate their federal due process rights. We disagree." As "we examine federal due process law in the area of appellate review, its requirements mainly concern the equal treatment of litigants." "Texas law does not discriminate against any class of litigants in a manner that would raise federal due process or equal protection concerns." "[P]rocedural due process concerns are addressed and preserved in [TEX. FAM. CODE §] 161.211(c), by allowing the parent to appeal on grounds that the affidavit was the product of fraud, duress, or coercion."

"Under *Matthews*, we must balance three elements: the private interests at stake, the government's interest supporting the challenged procedure, and the risk that the procedure will lead to erroneous decisions."

3. *Graphic Packaging Corporation v. Hegar*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

The Legislature's abrogation of the tax apportionment scheme in the Multistate Tax Compact did not violate the Contract Clause of the federal constitution, because the Legislature did not unmistakably intend to contractually bind future Legislatures to its terms. "When states enter into contracts, the state's sovereign power may not 'be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.'" In Texas, the Legislature's taxing power is protected from contractual incursion by TEX. CONST. art. VIII, § 4, which provides that "'[t]he power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party.'"

"The United States Supreme Court has indicated that binding regulatory compacts typically share similar features, such as: (1) the establishment of a joint regulatory body; (2) state enactments that require reciprocal action to be effective; and (3) the prohibition of unilateral repeal or modification of their terms." "The Compact does not exhibit these characteristics." Also, the Compact did not require congressional consent under the Compacts Clause of the federal Constitution, and thus "does not have the force of

federal law because it has not been ratified by Congress."

4. *Pidgeon v. Turner*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Taxpayer sued the Mayor and City of Houston claiming that the City's payment of benefits to the spouses of employees married in same-sex marriages in other jurisdiction violated the state's Defense of Marriage Act (DOMA) prohibiting the recognition of such marriages in Texas. The trial court entered a temporary injunction barring the benefit payments, and the Mayor and City filed an interlocutory appeal. During the pendency of the interlocutory appeal, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that "states may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'"

The court of appeals reversed the temporary injunction and remands the case for proceedings "'consistent with'" *Obergefell* and *De Leon v. Abbott*, a Fifth Circuit case holding the Texas DOMA unconstitutional. Taxpayer petitioned for review to the Texas Supreme Court, not seeking reinstatement of the injunction but arguing that the court of appeals' opinion and judgment placed greater restrictions than *Obergefell* and Texas Supreme Court case law had required. Taxpayer also argued that the injunction should have been vacated or dissolved, not reversed, so that taxpayer could seek the same relief again.

The court of appeals' "requirement that the trial court proceed 'consistent with' *De Leon* conflicts with our previous decisions holding that Fifth Circuit decisions are not binding on Texas courts." "[W]hile 'Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, . . . they are *obligated* to follow only higher Texas courts and the United States Supreme Court.'"

Obergefell and the court of appeals judgment do not preclude taxpayer from seeking the same relief again on remand. "'[D]issolution of a temporary injunction bars a second application for such injuctive relief,'" but not "if 'the second request is based on changed circumstances not known by the applicant at the time of the first application.'" "When conditions have changed, including a change in the law, the trial court may consider the injnction anew in light of the new law or circumstances."

The Supreme Court did not address whether the taxpayers had standing to seek "claw-back" of benefits already paid because that relief was neither sought nor granted in the temporary injunction under review. The Supreme Court declined to instruct the trial court on the application of *Obergefell*, because the issue was not yet fully developed or litigated.

The Mayor and City also asserted immunity from suit. However, the taxpayers sued the Mayor under an *ultra vires* claim, which is not barred by [g]overnmental immunity. The City is not a proper defendant on an *ultra vires* claim, but the taxpayer would have the opportunity to amend his pleadings under the Uniform Declaratory Judgments Act on remand.

5. *King Street Patriots v. Texas Democratic Party*, 521 S.W.3d 729 (Tex. 2017)

The Texas Democratic Party sued a political organization, King Street Patriots, claiming a number of violations of campaign contribution provisions of the Texas Election Code applicable to "political committees" as defined by statute. King Street Patriots argued that it was not a "political committee" and also brought a number of facial challenges to the statute. The parties agreed to sever the facial challenges, and the trial court entered summary judgment that the statute was facially valid.

The facial-overbreadth challenge was unripe here because King Street Patriots was not a "political committee" on the limited factual record before the Supreme Court. The Court would not "strike down provisions of a Texas statute with the 'strong medicine' of the 'disfavored' facial overbreadth doctrine by a party against whom those provisions likely do not apply." "'It is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.'" As a "prudential matter," the Supreme Court would not consider the facial challenge under these circumstances, and vacated "the portions of the lower courts' judgments upholding the facial constitutionality of these definitions" as "impermissible advisory opinions."

The remaining challenges did not implicate the same prudential concerns, and so the Supreme Court considered them.

The statute was not unconstitutional for allowing a private right of action, as previously upheld in the Texas Supreme Court's prior opinion in *Osterberg v. Peca*. The absence of a requirement for a predicate showing of merit prior to filing suit and conducting discovery for Election Code violations did not violate a

citizen's First Amendment association rights and Fourteenth Amendment due process rights because the Texas Rules of Civil Procedure provide "procedural safeguards" limiting discovery and vehicles providing for "claims lacking genuine merit" to "be resolved expeditiously under Rule 91a's dismissal procedures or summarily under Rule 166a."

Also, the fear of "a horde of claimants" was insufficient to warrant invalidating the statute because the potential plaintiff would have to prove it "was a political committee with an 'opposing interest in the election[.]'" "[W]e do not invalidate statutes 'for overbreadth merely because it is possible to imagine some unconstitutional applications.'"

The ban on political contributions by corporations under TEX. ELEC. CODE § 253.094 is also not unconstitutional. The U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, removing a limitation on corporate political expenditures, did not involve direct political contributions and did not overturn the U.S. Supreme Court's "earlier holding in *Federal Election Commission v. Beaumont* that laws barring corporate political contributions are 'consistent with the First Amendment' and are not subject to strict scrutiny." The Texas Supreme Court was bound to follow *Beaumont* "even if *Beaumont*'s rationale is in doubt . . . unless and until the Supreme Court overrules it."

The statute's definitions of "campaign contribution" and "political contribution" are not unconstitutionally vague. "When persons of common intelligence are compelled to guess a law's meaning and applicability, the law violates due process and is invalid." "If a 'law interferes with the right of free speech or of association, a more stringent vagueness test should apply' because '[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" Here, the challenged definitions were "not unconstitutionally vague merely because they are intent-based,"—"'the practical difficulty a factfinder may have in ascertaining intent does not render a law unconstitutionally vague.'" Also, the "indirect reference to 'campaign contribution' within the definition of 'campaign contribution' is not circular because it is used only to reference a group's 'principal purpose,' not the essence of the defined term,'" and thus did not compel "[p]ersons of common intelligence" to "guess at the meaning[.]"

6. *Kyle v. Strasburger*, 522 S.W.3d 461 (Tex. 2017)

Per curiam opinion applying the Supreme Court's recent holdings in *Garofolo v. Ocwen Loan Servicing* and *Wood v. HSBC Bank USA, N.A.* to a suit to declare an allegedly forged home equity loan void and to forfeit principal and interest.

The Supreme Court reversed the trial court's summary judgment that homeowner's claim for a declaration that the disputed deed of trust was invalid was barred by limitations. Under *Wood*, TEX. CONST. art. XVI, § 50(c) "renders liens securing constitutionally noncompliant home-equity loans invalid until cured," not merely voidable, and thus "no statute of limitations applies[.]"

The Supreme Court's holding in *Garofolo* foreclosed homeowner's "constitutional claim for forfeiture of principal and interest paid on the loan at issue" because "forfeiture is not an independent cause of action under the Texas Constitution." "[T]he Constitution itself simply serves as a defense to foreclosure when its mandates are not followed." However, the Supreme Court remanded for consideration of homeowner's claim for "an independent contractual right to compel forfeiture," because that claim had not been considered by the lower courts.

7. *Honorable Mark Henry v. Honorable Lonnie Cox*, 520 S.W.3d 28 (Tex. 2017)

Trial court granted injunction when District Judge sued County Judge to reinstate a court administrative employee at a set salary. The Supreme Court ruled that the "Government Code divides power, letting commissioners set a salary range while letting local judges decide if compensation within that range is reasonable. The judicial branch may direct the Commissioners Court to set a new range, but it cannot dictate a specific salary outside that range."

"The Texas Constitution . . . endues the judiciary with authority equal to that wielded by the so-called political branches. In our constitutional design, the judiciary is a partner, but not a junior partner. And in Texas, judicial power is conferred 'by means of express grants of jurisdiction contained in the constitution and statutes.'"

Footnote 7: "Under our Constitution, the county judge is the 'presiding officer' of a county's commissioners court."

"A core component of [commissioner courts'] legislative function is the county budget-making process."

The "Texas Constitution grants the judicial branch authority equal to that of our sister branches. Courts have the power . . . to safeguard the proper administration of justice throughout the state." Courts also have authority "born of the constitutionally mandated separation of powers and 'woven into the fabric of the constitution by virtue of their origin in the common law.'" The "Texas Constitution also vests district courts with 'general supervisory control' over the commissioners courts by which the court can mandate the performance of a ministerial or nondiscretionary statutory duty." But, a "court may not usurp legislative authority by substituting its policy judgment for that of the commissioners court acting as a legislative body. Instead, it can only set aside decisions or actions of the commissioners court that are illegal, unreasonable, or arbitrary. . . ."

8. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company left and joined a competitor. Company sued former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury found for company and awards actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" "Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court held that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-and-several liability for actual damages, the Supreme Court holds "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

9. *ETC Marketing, Ltd. v. Harris County Appraisal District*, 518 S.W.3d 371 (Tex. 2017)

Taxpayer was in the business of buying and selling gas, and transported gas through an affiliated pipeline company. Pipeline was entirely in Texas, but connected with interstate pipelines. Pipeline stores taxpayer's excess gas—gas exceeding the pipeline's capacity—in a reservoir in Texas. The gas in the reservoir may be sold in Texas, across state lines, or not at all. Appraisal district appraises and assesses taxes on the gas in the reservoir, and taxpayer protests, arguing that the gas is in interstate commerce and immune from state taxation under the "dormant Commerce Clause" of the federal Constitution.

To "withstand constitutional scrutiny" under the test set forth by the U.S. Supreme Court's in *Complete Auto Transit, Inc. v. Brady*, a state tax that "implicates interstate commerce . . . must: (1) apply to an activity with a substantial nexus with the taxing state; (2) be

fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state." While it "remains unclear" whether "the *Complete Auto* supplanted the traditional . . . 'in transit' test," the Texas Supreme Court follows a "synthesis of the frameworks" where "'the circumstances which make the goods "in transit" may inform a court's decision that the [substantial nexus and fair relation] requirements of *Complete Auto* are not met.'" The *Complete Auto* test requires "two distinct inquiries: (1) whether the tax implicates interstate commercial activity and, if so, (2) whether the tax satisfies all four prongs."

The gas was in interstate commerce under the U.S. Supreme Court's opinion in *Maryland v. Louisiana* that "'[g]as crossing a state line in any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.'"

However, the gas was properly taxable under the *Complete Auto* test. The gas "bore a substantial nexus to the state" because it was not "in transit"—it was stored and had no "precommitted destination." The tax was "fairly apportioned" because it was "'internally and externally consistent'" and did not subject taxpayer to the "risk of multiple taxation across other jurisdictions"—"Texas's tax reaches only property that is (1) located within a taxing unit of the state and (2) present on a certain day of the year; the first of January." The ad valorem tax is "facially nondiscriminatory" because it "targets all qualifying personal property; it pays no attention to the property's intended destination." The tax is "reasonably related to the services provided by the state" because the gas "enjoys the 'opportunities and protections which the state has afforded in connection with' storage," even though it was being stored by a company other than the taxpayer.

10. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Bennett sued Grant for slander after Grant had given to police photographs of Bennett selling a neighbor's cattle. Grant filed a counterclaim for malicious prosecution. The jury awarded actual and punitive damages to Grant. The Supreme Court ruled that the punitive damages cap exception applied, but it remanded because the punitive damages were unconstitutionally excessive.

Even "if the Texas cap on exemplary damages is inapplicable, there remains a federal constitutional check on the award. . . ." Footnote 26: The "Due Process Clause of the Fourteenth Amendment prevents a state from granting a 'grossly excessive' punishment."

"Reviewing the constitutionality of an exemplary-damages award is a question of law we review de novo."

There "is no bright-line rule for the ratio [of actual to punitive damages, but] . . . few awards exceeding a single-digit ratio satisfy due process standards. [A] . . . ratio above 4:1 'might be close to the line of constitutional impropriety.'"

The "'harm likely to result' [is] 'the harm to the victim that would have ensued if the tortious plan had succeeded.'" "Here, there was essentially zero likelihood of imprisonment because the statute of limitations barred the claim against Grant." Thus, the exemplary damages award was remanded.

11. *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318 (Tex. 2017)

Parent company owned 20% of brewing company, and wholly owned a company seeking to open convenience stores in Texas. The Texas Alcoholic Beverage Commission rejects the convenience store company's application for an alcohol sales permit on the basis that parent's ownership of a brewer and an alcohol retailer would violate the "tied house" statutes. These statutes prohibit businesses from owning interests in more than one "tier"—manufacturing, wholesaling, and retailing—of the alcoholic beverage industry.

Convenience store company appeals, and argues that "its equal protection and due process rights were violated by the TABC's arbitrary and discriminatory refusal to grant it a permit." It pointed to evidence of "significant and pervasive cross-tier holdings by" Texas Public Pension Funds and benefits plans of publicly traded companies.

"In administrative proceedings, the 'rudiments of fair play' must be observed." "An administrative 'licensing authority acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification.'" "To establish an equal protection claim, a deprived party must show (1) it was treated differently from other similarly situated persons, and (2) no reasonable basis exists for the disparate treatment."

Here, convenience store company failed to establish the first element, because it did not provide evidence of any similarly situated applicants. The cross-tier ownership by the pension funds and benefit

plans were "demonstrably and qualitatively different" from parent company's cross-tier ownership.

12. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen." The Supreme Court ruled that "both the U.S. Constitution and the Texas Constitution robustly protect freedom of speech. But, these safeguards are not unlimited and do not categorically deprive individuals of legal recourse when they are injured by false and defamatory speech."

"Federal constitutional protections for speech were 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' The Texas Constitution also explicitly protects freedom of expression. . . ." However, "members of the press are also 'responsible for the abuse of that privilege.' TEX. CONST. art. I, § 8."

13. *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc.*, 512 S.W.3d 878 (Tex. 2017)

Appeal of a challenge to personal jurisdiction.

"A defendant's contacts with the forum may give rise to either general or specific jurisdiction. General jurisdiction is established when a defendant's contacts 'are so 'continuous and systematic' as to render [it] essentially at home in the forum State.' 'It involves a court's ability to exercise jurisdiction over a nonresident defendant based on any claim, including claims unrelated to the defendant's contacts with the state.' However, . . . we are primarily concerned with whether the nonresident defendants' alleged minimum contacts gave rise to specific jurisdiction, which is triggered when the plaintiff's cause of action arises from or relates to those contacts. . . . Specific jurisdiction must be established on a claim-by-claim basis unless all the asserted claims arise from the same forum contacts."

14. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Brady sued newspaper and reporter for stories about his arrests and the conduct of his father, a chief deputy sheriff. The Supreme Court reversed a trial court verdict for plaintiff, holding that the charge did not properly set the burden of proof: a "private individual who sues a media defendant for defamation over statements of public concern must prove the statements were false. Further, to recover punitive damages, such a plaintiff must prove the defendant acted with 'knowledge of falsity or reckless disregard for the truth.'" The Court remanded, rather than rendered, because there was some evidence of damages.

Because the defamation occurred in a newspaper article, "the threshold question is whether the article wholly embraces matters of public concern." This, in turn, governs the charge. The "First Amendment requires private individuals to prove that statements made by media defendants on matters of public concern are false," rather than requiring the defendant to prove truthfulness.

"The First Amendment also requires that a private plaintiff prove actual malice, that is, 'knowledge of falsity or reckless disregard for the truth,' before recovering anything more than actual damages for a statement on a matter of public concern. But here 'malice' in the jury charge referred only to an intent to cause injury or conscious indifference to the risk of injury; it was not tied to the truth or falsity of the statements. Because 'the constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff,' proof of bad motive or ill will is not enough. Thus, in addition to proving the traditional malice' required to obtain exemplary damages under Texas law, one seeking exemplary damages for speech on a public matter must also prove constitutional 'actual malice.'" Footnote 2: "At times, 'actual malice' may evidence traditional malice. . . . But evidence of actual malice alone does not relieve the plaintiff of proving traditional malice also to obtain punitive damages. . . ."

A "matter of public concern" is speech that "'can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" It is determined by the "'content, form, and context.'"

Even "if 'the general subject matter of a publication may be a matter of legitimate public concern,' some of the details may not be. But if a 'logical nexus' exists between these details 'and the general subject matter' of the article, then they are reasonably included as a matter of public concern." The "truth or falsity of [various] details does not change that they are a matter of public concern and thus does not affect [plaintiff's] burden under the First Amendment."

Here, defendants objected that the charge did not require plaintiff to prove the falsity of the statements, and to prove "actual malice before obtaining punitive

damages. The media defendants objected to the charge . . . [and submitted] in writing proposed questions requiring [plaintiff] to prove falsity and actual malice. The media defendants raised the same point before the court of appeals. . . . The media defendants have preserved error, and the error is reversible."

"Damages . . . are not always an essential element of defamation. If the statement is defamatory *per se*, then nominal damages may be awarded without proof of actual injury because mental anguish and loss of reputation are presumed. . . . [I]f the plaintiff seeks actual damages for loss of reputation or mental anguish (general damages) or for economic loss (special damages), he must present evidence of the existence and amount of these damages. . . . The plaintiff can vindicate his name and obtain nominal damages without evidence of actual injury." Nominal damages can be recovered without "evidence of actual injury." They are traditionally one dollar, and pose no "threat to free expression."

If a defamatory "statement is not defamatory *per se*, then nominal damages are not recoverable, and the plaintiff must prove actual damages to prevail. Absent evidence of actual damages in a case of defamation *per quod*, judgment should be rendered for the defendant." Footnote 4: "Defamation *per quod* is '[d]efamation that either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but not a statement that is actionable per se.'"

"Compensatory damages in defamation cases must compensate for '*actual* injuries' and cannot merely be 'a disguised disapproval of the defendant.' But when the damages are for noneconomic losses, such as mental anguish or lost reputation, the jury must be given some latitude because these general damages are, by their nature, incapable of precise mathematical measure. . . . Showing that the community was aware of and discussed the defamatory statements is not enough; there must be evidence that people believed the statements and the plaintiff's reputation was actually affected."

Loss of a job "is not evidence of loss of reputation unless the evidence connects it to the defamation."

Here, because "some evidence of actual damages exists, the court of appeals properly remanded the case for a new trial instead of rendering judgment."

15. *McIntyre v. El Paso Independent School District*, 499 S.W.3d 820 (Tex. 2016)

Home-schooling family sued school district and its employee for filing unfound criminal charges of truancy. The Supreme Court ruled that they did not fail to exhaust administrative remedies by appealing to the Texas Commissioner of Education because the claims were based upon the constitution; it also ruled that the employee had qualified immunity.

Here, the plaintiffs claim to be aggrieved by the filing of criminal charges, not "by the school laws." They assert that their constitutional rights were violated. Courts, not the Commissioner, decide whether constitutional laws were violated. The "Commissioner has no jurisdiction over" their claim.

The "Fourth Amendment applies in school settings." The "First Amendment prohibits [school authorities] from silencing viewpoints that do not materially and substantially interfere with maintaining order at school."

"Under the doctrine of qualified immunity, 'courts may not award damages against a government official in his personal capacity unless 'the official violated a statutory or constitutional right,' and 'the right was 'clearly established' at the time of the challenged conduct.'" The Fifth Circuit has repeatedly held "that there is "no Fourteenth Amendment 'liberty interest' or substantive due process right to be free from criminal prosecution unsupported by probable cause. . . ." Here, the employee had qualified immunity.

16. *KBMT Operating Company, LLC v Toledo*, 492 S.W.3d 710 (Tex. 2016)

Defamation case against TV station for report concerning a doctor's discipline by the Texas Medical Board. The Supreme Court ruled that plaintiff had failed to prove falsity.

A "private individual who sues a media defendant for defamation over statements of public concern bear the burden of proving that the statements were false—that is, . . . not substantially true. . . . [T]he truth of a media report of official proceedings . . . must be measured against the proceedings themselves, not against information outside the proceedings. The media may report on the proceedings themselves without independently investigating the matters involved."

Under the constitution, courts "'long ago shifted the burden of proving the truth defense to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern.'" *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013). When a statement "is substantially true, it is not false."

"The media have a common-law privilege to

report on judicial proceedings without regard for whether the information from such proceedings is actually true." "While the defendant must still prove the applicability of the privilege—that the defendant is part of the media and that the statements complained of were an account of official proceedings of public concern—the plaintiff must prove the statements were false." Thus, "a private individual who sues a media defendant for defamation over a report on official proceedings of public concern has the burden of proving that the gist of the report was not substantially true—that is, that the report was not a fair, true, and impartial account of the proceedings. That burden is not met with proof that the report was not a substantially true account of the actual facts outside the proceedings."

Footnote 29: "Evidence of what an ordinary listener could have understood is not evidence of what the listener would have understood. The test for substantial truth and its application must be guided by the fact that 'since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive' . . . ,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."

17. *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016)

On rehearing, the Supreme Court withdrew its prior opinion in this inverse condemnation case, 485 S.W.3d 1, and substituted this one, reversing its prior ruling. See *infra*.

In this case, homeowners sued county and flood control district for compensation for damage to their property from flooding, arguing that county's approval of development and failure to adopt a flood mitigation plan while knowing that this would lead to flooding constituted a taking.

"Only affirmative conduct by the government will support a takings claim." "We have not recognized a takings claim for nonfeasance." Here, district could not be liable for a taking for failing to implement a particular flood control plan, but instead could "derive, if at all, from the County's affirmative acts of approving development."

A takings claim also requires specificity of intent. "The government must know that 'a *specific* act is causing *identifiable* harm' or know that '*specific property damage* is substantially certain to result from an authorized government action'" *(City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009)). "We have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction."

There is also a public use element to a takings claim. Here, that element was not satisfied because there is no evidence county "ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures."

The Court declined to recognize a takings claim in these circumstances "in a manner that makes the government an insurer for all manner of natural disasters and inevitable man-made accidents." "Accepting such a capacious approach to takings would endanger the ability of governments to finance and carry out their necessary functions, the basis for sovereign immunity."

18. *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016)

"'Both the Fourth Amendment to the United States Constitution and Article I, section 9 of the Texas Constitution prohibit unreasonable searches and seizures and require the exclusion of evidence obtained in violation of *criminal* trials.'" In this case, the Supreme Court holds "definitively" that the exclusionary rule does not apply in civil-forfeiture proceeding under Chapter 59 of the Code of Criminal Procedure.

19. *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016)

"Whether an expert report [in a malpractice case] served concurrently with a pre-suit notice letter is timely under section 74.351(a) is a matter of statutory construction. . . ."

"Dismissal would dispose of a potentially meritorious claim and punish [plaintiff] for demonstrating her claims had merit from the moment she asserted them—a result the Legislature did not intend and our state constitution potentially does not allow."

There are "'constitutional limitations upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of [her] cause, and those limitations constrain the

Legislature no less in requiring dismissal.'"

20. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016)

Closing fees exceeded 3% on home-equity loan, and lenders did not timely attempt to cure. Homeowners brought suit to quiet title. The Supreme Court ruled that "liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations." However, following *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016), homeowners' did not have "a cognizable claim for forfeiture."

The constitution's language proscribing a lien on a homestead for noncompliant loans is "clear, unequivocal, and binding."

"When interpreting our state Constitution, we rely heavily on its literal text and must give effect to its plain language. 'We strive to give constitutional provisions the effect their makers and adopters intended.' We construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other. And we strive to 'avoid a construction that renders any provision meaningless or inoperative.'"

"What the Constitution forbids cannot be evaded even by agreement of the parties, . . . and what is 'never valid is always void. . . .'"

"In 1997, the Constitution was amended to permit homestead liens to secure home-equity loans, but, consistent with Texas's long tradition of protecting the homestead, the amendments clearly prescribed very specific and extensive limitations on those encumbrances. Section 50 allows such loans to be secured by the homestead only if . . . they are made on the condition that forfeiture of all principal and interest is available if the loan is constitutionally noncompliant and the lender fails to cure within 60 days of being given notice by the borrower. The Constitution provides simple methods for curing specific defects. . . ."

The Court held "in *Garofolo* that section 50(a) does not create substantive rights beyond a defense to foreclosure of a home-equity lien securing a constitutionally noncompliant loan, observing that the terms and conditions in section 50(a)(6) 'are not constitutional rights and obligations unto themselves.'" The "'forfeiture remedy [is not] a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible.' . . . [B]orrowers may access the forfeiture remedy through a breach-of-contract action based on the inclusion of those terms in their loan documents, as the Constitution requires to make the home-equity lien foreclosure-eligible. . . . Section 50(c) . . . expressly addresses the validity of any homestead lien, broadly declaring the lien invalid if the underlying loan does not comply with section 50."

A "'homestead lien that may not have complied with constitutional requirements at the outset can be made valid at a later date if the power to do so exists under our constitution or statutes," and complying with a cure provision 'validate[s] a lien securing a section 50(a)(6) extension of credit.'"

A "lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. . . . [T]herefore no statute of limitations applies to an action to quiet title on an invalid home-equity lien." A "lien is made valid by the lender's compliance with a cure provision."

"Constitutional mandates need not be shoehorned into common-law concepts when those concepts conflict with the Constitution's plain text. . . . Section 50(c) starts with the premise that a lien securing a noncompliant loan is never valid. Implementing a section 50(a)(6)(Q)(x) cure provision brings the loan into constitutional compliance, thereby validating the accompanying lien. These cure provisions are the sole mechanism to bring a loan into constitutional compliance. Further, while a lender has 60 days to cure after notice, the borrower has no corresponding deadline by which it must request cure. A lien that was invalid from origination remains invalid until it is cured."

Section 50(i) protects "home-equity foreclosure purchasers without actual knowledge of a constitutional defect. This deviation from the common-law . . . evinces an understanding that home-equity liens securing constitutionally noncompliant loans do not neatly fit into a common-law category. By including a bona-fide purchaser provision, section 50(i) effectively sets its own cut-off. Once a third-party buys without actual knowledge of the invalid lien, that transaction will not be undone notwithstanding the invalid lien."

The Court ruled that "no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under section 50(c)."

A "borrower's right to quiet title under section 50(c) is not restricted by our holding in *Garofolo* that

borrowers must litigate noncompliance with section 50(a)(6)(x)'s cure provisions within the context of their loan agreement."

Even though homeowners "may pursue their quiet-title claim [that] does not extend to their declaratory-judgment claim for forfeiture of all principal and interest," which is barred by *Garofolo*. Section 50(a) "does not create substantive rights beyond a defense to a foreclosure action. . . ." "The forfeiture provision . . . does not create a constitutional cause of action . . . and must be litigated in the context of the borrower's loan agreement."

21. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus.

"The Fourteenth Amendment Due Process Clause guarantees that states shall not deprive a 'person' of 'life, liberty, or property, without due process of law.' [It] . . . does not, however, specify what process is 'due' . . . [which] depends on 'the . . . government function involved as well as of the [affected] private interest. . . .'"

The "due–process right of a party to be present at a civil trial—much less the right of a party to have a designated representative present at a temporary–injunction hearing—is not absolute."

When courts adjudicate claims between private parties, "three competing factors are balanced to determine what process is due: (1) 'the private interest that will be affected by the official action,' (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,' and (3) 'the interest of the [opposing] party . . . with . . . due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.'"

Courts balance the parties' interests with "'presumptively greater weight'" provided to participation in the process. "Because of the presumption in favor of participation, due process ordinarily will preclude courts from excluding parties or their representatives from proceedings, at least when they are able to understand the proceedings and to assist counsel in the presentation of the case. However, courts have discretion to exclude parties and their representatives in limited circumstances when countervailing interests overcome this presumption."

The trial court was required to consider "the degree to which [defendant's] defense of [plaintiff's] claims would be impaired by [the] exclusion [of its corporate representative]."

Defendant claimed excluding its representative violated the Open Courts provision, which states that courts shall be open and every person "shall have remedy by due course of law." Footnote 6: while there is some reason to believe this applies to public access to courts, it has "traditionally [been] interpreted . . . as merely requiring courts to be in operation and available for redressing injury."

"To the extent the open–courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect counter-vailing interests, such as the preservation of trade secrets."

22. *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016)

Homeowner paid off home-equity loan, but lender did not provide "a release of lien in recordable form as required by her loan's terms," despite the 60 days' notice. Homeowner sued in federal court breach of contract and violation of the constitution, seeking forfeiture of principal and interest. Answering certified questions, the Supreme Court ruled she had no constitutional cause of action. "Our constitution lays out the terms . . . a home equity loan must include if the lender wishes to foreclose on a homestead following borrower default. It does not . . . create a constitutional cause of action or remedy for a lender's subsequent breach of those terms. . . . A post-origination breach . . . may give rise to a breach-of-contract claim for which forfeiture can sometimes be an appropriate remedy." "A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower." "[W]hen forfeiture is un-available . . . the borrower must show actual damages

or seek some other remedy such as specific performance to maintain her suit."

"The Texas Constitution allows a home-equity lender to foreclose on a homestead only if the underlying loan includes specific terms and conditions. Among them is a requirement that a lender deliver a release of lien to the borrower after a loan is paid off. Another is that lenders that fail to meet their loan obligations may forfeit all principal and interest payments received from the borrower."

"We strive to give constitutional provisions the effect their makers and adopters intended. Accordingly, when interpreting our state constitution, we rely heavily on its literal text and give effect to its plain language. We presume the constitution's language was carefully selected, and we interpret words as they are generally understood. And we construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other."

"In Texas, 'the homestead has always been protected from forced sale, not merely by statute as in most states, but by the Constitution.'" "Today, section 50 of the constitution protects the homestead from foreclosure for the payment of debts subject to eight exceptions, one of which covers only those home-equity loans that contain a litany of exacting terms and conditions set forth in the constitution." These "terms and conditions [do not] amount to substantive constitutional rights and obligations. . . . [S]ection 50(a) does not directly create, allow, or regulate home-equity lending. . . . It simply describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower default."
The constitution's "terms and conditions are not constitutional rights and obligations unto themselves. They only assume constitutional significance when their absence in a loan's terms is used as a shield from foreclosure."

"From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible. . . . A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution."

The terms are not constitutional rights "nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure eligible." "The constitution prohibits foreclosure when a home-equity loan fails to include a constitutionally mandated term or condition, but it does not address post-origination enforcement of a loan's provisions." "But borrowers are not without recourse when a lender fails to meet its obligations, they are just without *constitutional* recourse."

In addition, the homeowner cannot "seek forfeiture through her breach-of contract claim absent actual damages." The homeowner "[had] not suffered any damages," and the forfeiture remedy "does not apply to a failure to deliver a release of lien."

Under the contractual terms (required by the constitution), the "harsh forfeiture penalty is triggered when, following adequate notice, a lender fails to *correct* the complained-of deficiency *by* performing one of six available corrective measures." "The obvious intent behind the forfeiture remedy as a whole is to encourage lenders to correct loan infirmities under the threat of the stiff punishment of forfeiture." The "six specific corrective measures exist to give lenders avenues to avoid forfeiture by fixing problems rather than furnishing technicalities that can be manipulated to avoid them." But, none of them applies to a release of lien.

"Moreover, the constitution invokes forfeiture when a lender 'fails to correct *the failure to comply*.'" That cannot occur here. "Accordingly, if a lender fails to meet its obligations under the loan, forfeiture is an available remedy only if one of the six corrective measures can actually correct the underlying problem and the lender nonetheless fails to timely perform. . . ." The "addition of six specific corrective measures is most reasonably understood to bookend the [forfeiture] remedy's applicability." Footnote 9: "The $1,000-refund component of subparagraph (f) is best interpreted as a liquidated-damages provision inextricably tied to the offer to refinance."
Footnote 8: It "is unnecessary to refer to any legislative history in this case. Section 50(a)(6)(Q)(x) is clear, and when text is clear, it is determinative."

The homeowner's "remedy simply lies elsewhere—for instance, in a traditional breach-of contract claim, in which a borrower seeks specific performance or other remedies contingent on a showing of actual damages."

23. *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016)

School districts, individuals, and other entities sue the State alleging that the school finance system violates the requirement of Article VII, section 1 of the

Texas Constitution that "'it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.'" Some plaintiffs also allege that the school finance system imposes a statewide ad valorem tax prohibited under Article VII, section 1 of the Texas Constitution.

Challenges under Article VII are subject to a "'very deferential'" standard of review, upholding the constitutionality of the Legislature's policy choices if they "are informed by guiding rules and principals properly related to public education—that is, if the choices are not arbitrary.'" While the Legislature's "decisions are not immune from judicial review, . . . [t]he judicial role is not to second-guess whether our [school finance] system is optimal, but whether it is constitutional." The Supreme Court held that the school funding system "satisfies minimum constitutional requirements."

The Supreme Court also held that the school finance system does not impose a statewide ad valorem tax prohibited under Article VII, section 1 of the Texas Constitution. "'An ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." However, "'if the State merely authorized a tax but left the decision whether to levy it entirely up to local authorities, *to be approved by voters if necessary*, then the tax would not be a state tax.' That is what the Legislature did here."

24. *Greer v. Abraham*, 489 S.W.3d 440 (Tex. 2016)

Former school district board member, supporting his friend for office, attended an opponent's rally. It was wrongly reported on an internet blog that he heckled and was forcibly removed, so he sued for defamation. The Supreme Court ruled that "actual malice [is] an element of the public official's defamation claim."

"A public official who sues for defamation must prove the elements of the tort and, as a constitutional requirement, that the defendant published the falsehood knowing it to be false or acting with reckless disregard for whether it was true or false."

The United States Constitution "'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" The "constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff.'" "'[O]fficial conduct . . . [does] not merely include the official's performance of official duties but also the official's fitness for office. . . .' An "express reference" to "official capacity" is unnecessary.

"'A charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule. . . .'"

The defamatory statement here was on the web. That "the offending publication may circulate beyond the public official's own community does not diminish its effect within the official's community." It merely must circulate in the community where the official is so well known that the public associates him with the office.

25. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016)

After city leased realty to a citizen, a dispute arose. The Supreme Court ruled that the governmental-proprietary function dichotomy applies to contract claims.

The will of the people "'is expressed in the Constitution and laws of the State,' and thus 'to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.'"

The "constitution authorizes the legislature to 'define . . . functions . . . that are . . . governmental and those that are proprietary. . . .'"

26. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Supreme Court affirmed mandamus because the trial court granted a new trial on three facially invalid reasons and one that was not supported by the record.

Because the constitution "guarantees that the right to trial by jury 'shall remain inviolate,' . . . trial judges cannot enjoy unfettered authority to order new trials."

The Court protects "the constitutional right to a trial by jury by requiring trial courts to provide litigants with 'an understandable, reasonably specific explanation' for setting aside a jury verdict and ordering a new trial."

27. *Hegar v. Texas Small Tobacco Coalition*, 496 S.W.3d 778 (Tex. 2016)

After the State settled its health care reimbursement claims against several of the largest tobacco manufacturers in the 1990s, the Legislature enacted a statute seeking to recover its smoking-related health care costs from the non-settling tobacco manufacturers by imposing a tax on those manufacturers. The non-settling manufacturers challenged the taxation scheme on the grounds that it violated the Equal and Uniform Clause of the Texas Constitution by taxing them while exempting the settling manufacturers.

The Equal and Uniform Clause's "succinct" mandate that "'[t]axation shall be equal and uniform, . . . generally applies only *within* classes, not *between* classes." "[A] challenged statute is entitled to a 'strong presumption' of constitutional validity" that is "particularly robust where the constitutionality of taxation statutes is challenged," and "the Legislature need only have a rational basis in constructing tax classifications." "That is, the Legislature must 'attempt to group similar things and differentiate dissimilar things' in formulating rational classifications, and must show that the classifications reasonably relate to the purpose of the tax." "[A]bove all, 'the Legislature must have discretion in structuring tax laws.'"

The Supreme Court's "settled precedent" applying the Equal and Uniform Clause does not support a "constricted approach" requiring '"focus . . . on the subject of the tax, not the entity being taxed.'" "We have made clear that, '[a]t least where non-property taxes are concerned, the Equal and Uniform Clause generally only prohibits unequal or multiform taxes that are imposed on the same class *of taxpayers*.'" "[I]n the non-property context, the nature of the taxpayer necessarily lies at the heart of any Equal and Uniform Clause inquiry."

"The Legislature's distinction between settling manufacturers and [non-settling manufacturers] is rational on at least two grounds." First, the settling manufacturers make annual payments in perpetuity as part of the settlement, a "$500-million-per-year burden that [non-settling manufacturers] do not bear." "Second, the settling manufacturers function under operating restrictions [under the terms of the settlement] to which [non-settling manufacturers] are not subject." "Those distinctions establish sufficient differences in business operations to justify the non-settling-manufacturer and settling-manufacturer tax classifications," and "the tax classifications are reasonably related to the goals of recovering health care costs and reducing underage smoking." Thus, the classification does not violate the Equal and Uniform Clause.

28. C.*S.F. v. Texas Department of Family and Protective Services*, 505 S.W.3d 618 (Tex. 2016)

Suit to terminate parental rights.

The Court has held that the "statutory right to counsel in parental-rights termination cases included, as a matter of due process, the right to effective counsel. And we have extended this holding to effective assistance of counsel in pursuing an appeal; procedural requirements, in some cases, may have to yield to constitutional guarantees of due process. . . . Not every failure to preserve error or take timely action, however, will rise to level of ineffective assistance of counsel."

29. *Clint Independent School District v. Marquez*, 487 S.W.3d 538 (Tex. 2016)

Parents sued school district seeking to enjoin what they argue is an unconstitutional distribution of funds among schools in the district. District filed a plea to the jurisdiction, arguing in part that parents failed to exhaust their administrative remedies. Parents argued that the exhaustion-of-administrative-remedies requirement does not apply.

"If the Legislature expressly or impliedly grants an agency sole authority to make an initial determination" in disputes that arise within its regulatory arena, "the agency has exclusive jurisdiction and a party 'must exhaust its administrative remedies before seeking recourse through judicial review.'" "If the party files suit before exhausting exclusive administrative remedies, the courts lack jurisdiction and must dismiss the case."

The Texas Education Code provides, with certain exceptions, that persons "'aggrieved by[] the school laws of this state; or actions or decisions of any school district board of trustees that violate[] the school laws of this state'" may "appeal in writing" to the Commissioner of Education. "However, '[a] person is not required to appeal to the commissioner before pursuing a remedy under a law outside of [the school laws] to which [the school laws] make[] reference or with which [the school laws] require[] compliance.'"

Although the word "may" is used, the Supreme Court had "interpreted the statute to *require* a person who *chooses* to appeal to first seek relief through the

administrative process." "However, we have also been clear that this exhaustion requirement applies only to complaints that the Legislature has authorized the Commissioner to resolve." Thus, parents must first exhaust their administrative remedies by an appeal to the Commissioner if their claims are within the scope of the statute, unless an exception applies.

Parents argued that because they only pled causes of action for violations of the Texas Constitution, their claims were not based on "the school laws of the state" and were thus not subject to the exhaustion-of-administrative-remedies requirement. However, while "the constitutional provisions are not 'school laws of the state,'" "[t]he nature of the claims, rather than the nomenclature, controls, and artful pleadings cannot circumvent statutory jurisdictional requirements." Parents' "petition as a whole reflects the true nature of the parents' complaint: that the district defies the Constitution's mandates *by violating the requirements of the Education Code*." Moreover, because "the school district's obligation to provide a constitutionally adequate education derives not directly from the Constitution but from the Legislature's decision to 'rely heavily on school districts to discharge its [constitutional] duty,'" parents' claims were not in pursuit of "'under a law outside of [the school laws]'" and were thus not excepted from the administrative remedy requirement.

Because parents were required to exhaust their administrative remedies by appealing to the Commissioner and failed to do so, the courts lacked jurisdiction over their suit.

30. *Matthews v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016)

Cheerleaders sued district after it prohibited "banners containing religious signs or messages at school-sponsored events." The district subsequently adopted a resolution stating that it was not required to prohibit such banners but retained "the right to restrict the content of school banners." The issue was "whether the defendant's voluntary cessation of challenged conduct rendered the plaintiffs' claims for prospective relief moot." The Supreme Court ruled it did not because "the challenged conduct might reasonably be expected to recur."

"The mootness doctrine . . . prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by Texas Constitution article II, section 1."

Here, the district claimed its prohibition of banners was constitutional and that it has "unfettered authority to restrict the content of the cheerleaders' banners." It has refused to state that it would not reinstate the policy.

"[C]ases where the defendant's voluntary conduct yielded mootness . . . generally involved conduct that could not be easily undone, and thus foreclosed a reasonable chance of recurrence." By contrast, the district's "voluntary abandonment here provides no assurance that [it] will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future." Thus, "this case is not moot."

B. Statutory Construction

1. *In re K.S.L.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Mother and father of child signed statutorily compliant affidavits relinquishing parental rights. The issue on appeal was whether the evidence established that terminating parental rights was in the child's best interest. The Supreme Court ruled that clear and convincing evidence supported the termination.

The "statute is unmistakably written in the conjunctive and requires both a statutorily-compliant affidavit *and* a finding that termination is in the child's best interest."

"We presume that lawmakers intended what they enacted and that every word in a statute should be given its natural meaning."

1. *Graphic Packaging Corporation v. Hegar*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

The Legislature's abrogation of the tax apportionment scheme in the Multistate Tax Compact did not violate the Contract Clause of the federal constitution, because the Legislature did not unmistakably intend to contractually bind future Legislatures to its terms. "When states enter into contracts, the state's sovereign power may not 'be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.'" In Texas, the Legislature's taxing power is protected from contractual incursion by TEX. CONST. art. VIII, § 4, which provides that "'[t]he power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party.'"

"The United States Supreme Court has indicated that binding regulatory compacts typically share similar features, such as: (1) the establishment of a joint regulatory body; (2) state enactments that require reciprocal action to be effective; and (3) the prohibition of unilateral repeal or modification of their terms." "The Compact does not exhibit these characteristics." Also, the Compact did not require congressional consent under the Compacts Clause of the federal Constitution, and thus "does not have the force of federal law because it has not been ratified by Congress."

2. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

County commissioner who had a concealed handgun license, carried guns into a meeting. After he was convicted of possession of weapon, the state moved to forfeit them. The Supreme Court determined that the matter was civil, and thus it had jurisdiction. But it further determined that a conviction for the possession of a weapon did not authorized "a forfeiture order under [TEX. CODE CRIM. PROC.] article 18.19(e)."

"When interpreting a statute, we presume the Legislature intended the entire statute to be effective and none of its language to be surplusage."

The Court "need not determine when possession constitutes 'use,' if ever, because of article 18.19's bifurcated design and the principle of statutory interpretation by which all the words used by the Legislature are given meaning.

3. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled the doctors were entitled to dismissal based upon the allegations in the original petition.

Plaintiff argued his amended pleading superseded his original petition. TEX. R. CIV. P. 65 "provides that when an 'instrument' is amended, 'the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause.'" But, TEX. R. CIV. P. 65's "instruction that an instrument, after it has been amended, is no longer regarded as part of the pleadings does not nullify the fact that it was filed. Amendments do not always avoid the consequences of filing. For example, filing a fictitious pleading is sanctionable under [TEX. R. CIV. P.] 13. . . . Sanctions cannot be avoided merely by amending pleadings."

Normally, "'when a rule of procedure conflicts with a statute, the statute prevails.'" Footnote 52: "An exception is when 'the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004.'"

If TEX. R. CIV. P. 65, which indicates that amended pleadings supersede prior ones, "is inconsistent with [TEX. CIV. PRAC. & REM. CODE §] 101.106(e), enacted in 2003, the statute must prevail."

4. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017)

Footnote 26: "'To the extent possible, we will construe the different [statutory] provisions in a way that harmonizes rather than conflicts.'"

5. *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corporation*, 520 S.W.3d 887 (Tex. 2017)

Statutory construction is "a legal question we review de novo. When statutory text is clear, we do not resort to rules of construction or extrinsic aids to construe the text because the truest measure of what the Legislature intended is what it enacted. And we endeavor to read statutes contextually to give effect to every word, clause, and sentence. We also typically give statutory terms their ordinary or common meaning unless context or a supplied definition indicates that a different meaning was intended."

6. *A.D. Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017)

"'Words and phrases shall be read in context and construed according to the rules of grammar and common usage.'" "'In construing a [rule,] . . . a court may consider among other matters the . . . title (caption).'"

"'May' creates discretionary authority or grants permission or a power.'"

"'In enacting a statute, it is presumed that . . . the entire statute is intended to be effective . . . .' '[W]e presume that every word of a statute has been included or excluded for a reason . . . .' . . . 'It is an elementary

rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous or inoperative.'"

7. *Harris County Appraisal District v. Texas Workforce Commission*, 519 S.W.3d 113 (Tex. 2017)

Several members of an appraisal district's appraisal review board (ARB) filed for unemployment compensation after their terms expired or after their hours were reduced. Appraisal district argued that ARB members were not the district's employees for purposes of the Texas Unemployment Compensation Act (TUCA). The Texas Workforce Commission (TWC) determined that they are employees and eligible for unemployment compensation. The Texas Supreme Court agreed.

Under TUCA, "[a] presumption of employment arises upon a showing that an individual is paid for performing services," which "is rebutted only if the alleged employer carries its burden of showing the individual's service is 'free from control or direction under the contract and in fact.'" TWC adopted regulations to assist with this interpretation, which incorporate the common law control test.

Review of an agency's construction of a statute "is de novo, although 'an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration.' Under this serious consideration inquiry, we generally uphold an agency's interpretation of a statute, 'so long as the construction is reasonable and does not conflict with the statute's plain language.'" However, "[i]f an agency does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed.'"

Here, the presumption of employment under TUCA arose because the ARB members were paid by appraisal district. While the ARB members exercised "independent judgment" in their decisions, this did not preclude them "from meeting the definition of 'employment' under TUCA[.]" Also, while the Tax Code defines the qualifications, duties, and powers of ARB members, provides for their independence, and prescribes how they are appointed, it does not define the terms "employee" or "employment," and thus it does not control over TUCA definition of the terms.

Reviewing the evidence under TWC's twenty-factor test, the Supreme Court held that "evidence falling within many of the . . . factors support the TWC's finding" that the ARB members were employees of the district.

ARB members also did not fall under TUCA's exemption for those employed "as a member of the judiciary" under TEX. LAB. CODE § 201.603(a)(1)(C). The statute does not define "judiciary," so the Court looked to the "'term's plain or ordinary meaning,'" holding that "the judiciary exemption only applies to members of the judiciary, that is, the judicial branch of government." While they may serve a judicial function, ARB members are not part of the judicial branch of government.

8. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

"[D]ictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language. . . ."

9. *University of the Incarnate Word v. Redus*, 518 S.W.3d 905 (Tex. 2017)

"Because the statute does not further define [certain] terms, we look to the terms' common meaning."

10. *BankDirect Capital Finance, LLC v. Plasma Fab, LLC*, 519 S.W.3d 76 (Tex. 2017)

Bank financed the payment of premiums of insurance policy. Policyholder was late paying bank, and bank provided nine days' notice it would cancel policy, but the statute required ten. Policyholder suffered fire that later resulted in a large judgment against policyholder. The Supreme Court ruled that the bank improperly canceled the policy: "The notice thus violated [TEX. INS. CODE § 651.161(b)] because the 'stated time' in the notice was 'earlier than the 10th day after the date the notice [was] mailed.'" The Court refused to engraft onto the statute a "substantial compliance" standard requested by bank.

The "Texas Premium Finance Act . . . prescribes certain notice-before cancellation requirements. One such requirement: The premium finance company must mail to the defaulting insured a notice of intent to cancel that states a time by which default must be cured, and '[t]he stated time may not be earlier than the 10th day after the date the notice is mailed.'" "This notice requirement is unambiguous, and '[w]here text is clear, text is determinative.'"

11. *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017)

As "a general rule of statutory construction, we give words their ordinary and plain meaning." "Legal" control, argued by resident doctor seeking immunity, "is not ordinarily used as the opposite of, or in contrast to, actual."

12. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

Statutory construction "'begins with the Legislature's words,' looking first to their plain and common meaning." The Court will "'look at the entire act, and not a single section in isolation.' Our 'text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence.' When the statute's language 'is unambiguous and does not lead to absurd results, our search . . . ends there."

13. *Pedernal Energy, LLC v. Bruington Engineering, Ltd*., ___ S.W.3d ___ (Tex. 2017)(4/28/17)

"We construe statutory language de novo. Our goal is to determine and give effect to the Legislature's intent. We look to and rely on the plain meaning of a statute's words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results. Words and phrases must be 'read in context and construed according to the rules of grammar and common usage.' "We construe statutes so that no part is surplusage, but so that each word has meaning. . . . We presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.' We also take statutes as we find them and refrain from rewriting text chosen by the Legislature."

"'May,' when used in a statute, indicates that the provision is discretionary. . . . If a statute vests trial courts with discretion as to a matter, then we review a trial court's decision as to that matter for abuse of discretion. . . . But the use of 'may' does not permit trial courts complete discretionary authority: trial courts do not have discretion to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles."

Reading the first sentence of the statute "in context with the second, it is clear that the Legislature intended the dismissal language in the first sentence to reference dismissal without prejudice. . . ." But the statute does not guide the trial court "about how to determine whether to dismiss with or without prejudice."

The Supreme Court declined to import a "good cause" requirement into the statute "when the Legislature did not place it there." The "trial court's discretion should not be measured by good faith, but by the broader purposes of the statute." Here, the "Legislature did not explicitly declare its purpose in enacting section 150.002." But the title gives a clue that "a section 150.002(e) dismissal 'is a sanction . . . to deter meritless claims and bring them quickly to an end.'"

14. *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318 (Tex. 2017)

Parent company owned 20% of brewing company, and wholly owned a company seeking to open convenience stores in Texas. The Texas Alcoholic Beverage Commission rejected the convenience store company's application for an alcohol sales permit on the basis that parent's ownership of a brewer and an alcohol retailer would violate the "tied house" statutes. Convenience store company appealed.

Statutory interpretation "involves questions of law we review de novo . . . . even when we are reviewing agency decisions." "An agency's interpretation of a statute it enforces 'is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language.'"

Texas's "tied house" statutes, TEX. ALCO. BEV. CODE §§ 102.01–.82, which are "designed to prevent certain overlapping relationships between those engaged in the alcoholic beverage industry at different levels, or tiers." The statute "provides for 'strict adherence to a general policy of prohibiting the tied house and related practices,'" and "defines 'tied house' as 'any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between'" a wholesaler, retailer, or manufacturer "'as [those] words . . . are ordinarily used and understood . . . .'" Section 102.07(a)(1) "provides that 'no person who owns or has an interest in the business of

a . . . brewer . . . may . . . own or have a direct or indirect interest in the business . . . of a retailer.'"

The Supreme Court rejected convenience store company's argument for a "control-based" test, instead construing "interest in the business of a brewer" broadly. "If an undefined word used in a statute has multiple and broad definitions, we presume—unless there is clear statutory language to the contrary—that the Legislature intended it to have equally broad applicability. When faced with a term that is so broad that it borders on being ambiguous, we look to the statutory context to limit the possible correct meanings."

Here, the context was by the Code's expression, in section 6.03(i), of "a policy of 'strict separation between the manufacturing, wholesaling, and retailing levels' of the alcoholic beverage industry in Texas to prevent 'the creation or maintenance of a "tied house,"'" section 102.01's definition of "a tied house as '*any* overlapping ownership or other prohibited relationship' among the three tiers of the alcoholic beverage industry," and section 102.01(b)'s "'general policy of prohibiting the tied house *and related practices*.'" [Emphasis added by Court.]. The Supreme Court "conclude[s] that under the statute, an interest in the business of a brewer exists when a person has a commercial or financial interest—significant or otherwise—that provides a stake in the financial performance of an entity or person engaged in brewing." This interpretation also allows TABC to "disregard the corporate separateness of entities when determining whether an entity has a cross-tier direct or indirect interest[.]"

15. *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017)

Prior opinion, dated 12/9/16 (*see below*), was reissued with some changes in phrasing, but with generally the same holding.

16. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

Waitress alleged she was sexually assaulted at work. The Supreme Court ruled the Texas Commission on Human Rights Act (TCHRA) did not preempt her claim.

"The TCHRA 'is modeled after federal law with the purpose of executing the policies set forth in Title VII of the federal Civil Rights Act of 1964.' Combating gender-based discrimination is one of those policies. Accordingly, 'Texas courts look to analogous federal law in applying the state Act.'"

"'Sexual harassment is a recognized cause of action under Title VII and the TCHRA,' and when pursuing a sexual harassment claim there are generally two types: quid pro quo and hostile work environment." Sexual "harassment is not a recognized common law tort in Texas."

"'[A]brogation of common-law claims [by statutes] is disfavored. However, we will construe the enactment of a statutory cause of action as abrogating a common-law claim if there exists 'a clear repugnance' between the two causes of action.'"

17. *Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association*, 511 S.W.3d 28 (Tex. 2017)

In a dispute over whether an agency's rule was authorized by statutes, the Court declined the parties' invitation to apply canons of construction. "We need not and will not address these construction canons unless we conclude that the statutes' language is ambiguous," and here the statutes are not ambiguous.

18. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

"We review matters of statutory construction de novo. In construing statutes, our objective is to give effect to the Legislature's intent that we glean from the text, when possible. In divining that intent, we further 'presume the Legislature chose statutory language deliberately and purposefully.' We endeavor to interpret each word, phrase, and clause in a manner that gives meaning to them all. We accordingly read statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning."

19. *Colorado County v. Staff*, 510 S.W.3d 435 (Tex. 2017)

Sheriff's office launched an internal investigation after dashcam footage showing deputy behaving unprofessionally in a traffic stop. After uncovering other incidents, deputy's supervisor delivered a signed deficiency notice to deputy and immediately terminated him. The notice provided deputy with 30 days to appeal, but rather than contest the basis for his firing, deputy claimed that under TEX. GOV'T CODE § 614.022 and 614.023, he could not be

disciplined without a written complaint "'signed by the person who was the subject of the alleged misconduct.'"

"Sheriffs hold 'virtually unbridled authority in hiring and firing their employees,' and as a general proposition, may terminate a deputy's employment for good cause, bad cause, or no cause at all." However, Chapter 614, Subchapter B of the Texas Government Code provides certain protections to peace officers from disciplinary action based on a "'complaint'" of misconduct, and requires that such a complaint "'be: (1)in writing; and (2) signed by the person making the complaint.'"

The Supreme Court rejected deputy's argument that the "person making the complaint" had to be the alleged victim of the misconduct. While other statutes define a "complainant" as a victim of misconduct, there is no such language in this statute, and the term '"complainant"' is not used." "Adhering to the precepts that '[e]nforcing the law as written in a court's safest refuge in matters of statutory construction' and that 'we should always refrain from rewriting text that lawmakers choose,' we hold the statute's plain language does not support a construction that restricts the meaning of 'the person making the complaint' to 'the victim of the alleged misconduct.'"

20. *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017)

The government missed a 10-day deadline established by the Public Information Act to request an AG decision that an exception to disclosure applied, thus creating a presumption that the requested information should be disclosed. Some documents involved attorney-client confidential communications. The Texas Supreme Court ruled that "absent waiver, the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption. . . ."

"The attorney-client privilege reflects a foundational tenet in the law: ensuring the free flow of information between attorney and client ultimately serves the broader societal interest of effective administration of justice. The Legislature's choice to exempt information protected by the attorney-client privilege embodies the fundamental understanding that, in the public sector, maintaining candid attorney-client communication directly and significantly serves the public interest by facilitating access to legal advice vital to formulation and implementation of governmental policy. Full and frank legal discourse also protects the government's interest in litigation, business transactions, and other matters affecting the public. Depriving the privilege of its force thus compromises the public's interest at both discrete and systemic levels." Failing to meet the deadline does not constitute waiver.

The attorney-client privilege is the "oldest," most "venerated," and most "sacred" of the common law privileges. "The privilege's purpose could not be more evident: 'to encourage clients to make full disclosure to their attorneys' and, in return, to allow clients to obtain full, fair, and candid counsel."

"In addition to actual disclosure, the attorney-client privilege may be waived by 'offensive use' of the privilege. Offensive use occurs when a party seeking affirmative relief 'attempts to protect outcome-determinative information from any discovery.'"

Footnote 103: "[*S*]*ee* TEX. R. EVID. 511(b)(2) ('When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).')."

Footnote 104: "The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege.'[]"

Footnote 105: "*See* TEX. R. CIV. P. 193.3(d) ('A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence.')"

21. *Laverie v. Wetherbe*, ___ S.W.3d ___ (Tex. 2016)(12/9/16)

"We presume the Legislature knew of our longstanding approach to the scope-of-employment analysis and see nothing in the Tort Claims Act compelling a different approach."

22. *Ochsner v. Oshsner*, 517 S.W.3d 717 (Tex. 2016)

Child support enforcement action.

"'Where text is clear, text is determinative.'"

Construing the child support statute, the "verb 'to confirm' means 'to give *new* assurance of the truth or validity' of some state of affairs."

"'The words of a governing text are of paramount concern, and what they convey, in their context, is

what the text means.' We look to the statutory scheme as a whole in order to establish the meaning of the arrearage provision, not to snippets taken in isolation."

Footnote 21: "Where statutes are concerned, courts must be attentive to, and give effect to, purposeful statutory distinctions."

23. *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400 (Tex. 2016)

Corrected opinion issued after denial of rehearing. One word and one sentence added to pages 10–11 of slip opinion. Holding unchanged. See *Southwest Royalties*, below.

24. *Texas Department of Insurance, Workers' Compensation Division v. Jones*, 498 S.W.3d 610 (Tex. 2016)

Worker's compensation claimant settled with carrier for "partial" eligibility for SIBs for a certain time period. TDI appealed the trial court's approval, arguing the evidence did not fit the statutory scheme. The Supreme Court reversed because the settlement did not adhere to the statutory terms.

"We construe the Workers' Compensation Act, like other statutes, by considering the plain meaning of the text, given the statute as a whole."

A settlement must "adhere" to "appropriate" provisions. "The verb 'to adhere' means 'to bind oneself to observance.'" "The adjective 'appropriate' denotes that which is 'specially suitable' with respect to the word or phrase it modifies."

25. *Union Pacific Railroad Company v. Nami*, 498 S.W.3d 890 (Tex. 2016)

Railroad worker brought case under the FELA.

Only explicit alterations in the FELA constitute a departure from the common law; so, "'although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis.'" "In applying FELA, we look to the common law, not of Texas or any particular jurisdiction, but in general."

26. *Southwest Royalties, Inc. v. Hegar*, ___ S.W.3d ___ (Tex. 2016)(6/17/16)

[Note: opinion reissued on October 21, 2016 at 500 S.W.3d 400 (Tex. 2016); *see* above.]

Sales tax exemption case. Taxpayer, an oil exploration and production company, argued that its purchases of equipment used in extracting oil and gas are exempt from sales tax as property used in "processing" under TEX. TAX CODE § 151.318, which exempted from taxation the sale of certain tangible personal property when, among other requirements, it was "'used or consumed in or during the actual manufacturing, processing, or fabrication of tangible personal property for ultimate sale[.]'" The Comptroller denied the claim.

"Tax exemptions are narrowly construed and the taxpayer has the burden to 'clearly show' that an exemption applies." "Although statutory tax exemptions are narrowly construed, construing them narrowly does not mean disregarding the words used by the Legislature."

Here, "processing" is undefined by the statute, but is defined under the Comptroller's regulations as "'[t]he physical application of the materials and labor necessary to modify or change the characteristics of tangible personal property.'" "[A]n agency's construction of a statute may be taken into consideration by courts when interpreting statutes, but deferring to an agency's construction is appropriate only when the statutory language is ambiguous." Here, the Court held that the statute is not ambiguous, but that the "common meanings of 'processing' correlate with the definition adopted by the Comptroller," and that the "Legislature intended" the same meaning.

Applying this meaning, the Court held that taxpayer's equipment was not used in processing and was not exempt from sales taxation. While "hydrocarbons undergo physical changes as they move from underground reservoirs to the surface" during the extraction process, those changes are caused "not by the application of equipment and materials to them, but by the natural pressure and temperature changes."

27. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95.

"We construe Chapter 95 de novo. In construing the statute, we rely 'on the plain meaning of the text unless a different meaning is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result.' '[W]e presume that the Legislature selected each word in the statute with a purpose in mind.'"

"Neither Chapter 95 nor the Code Construction

Act defines the term 'entity.'" According to BLACK'S LAW DICTIONARY (10th ed. 2014) "the term's ordinary meaning refers to an 'organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners.' In the absence of any authority to the contrary, we must apply the term's common meaning, which refers only to the legal organization itself."

"'[W]hen the legislature uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended.'"

"[O]ur task is to construe Chapter 95 as written, not as we may believe makes the most sense."

28. *Centerpoint Builders GP LLC v. Trussway, Ltd.*, 496 S.W.3d 33 (Tex. 2016)

General contractor was sued after worker was injured when a truss broke. General contractor sought indemnity from maker under Ch. 82, claiming it was a seller. The Supreme Court ruled that, applying "chapter 82's definition of 'seller,' . . . the general contractor is not a seller" because it was not "'engaged in the business of' commercially distributing or placing trusses in the stream of commerce."

"In construing the Act, as with any statute, we start with the 'ordinary meaning of the statutory text.' We analyze that language in context, considering the specific sections at issue as well as the statute as a whole. While we are limited to the statute's text, 'we must attempt to give effect to every word and phrase,' and we may not omit or gloss over verbiage in an attempt to reclaim clarity. We 'presume[] the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact.'"

Terms not defined in a statute "'are typically given their ordinary meaning [unless] a different or more precise definition is apparent from the term's use in the context of the statute.'" Moreover, "'[w]e must endeavor to read the statute contextually, giving effect to every word, clause, and sentence.'"

Footnote 5: "We presume the Legislature was aware of our case law when it enacted a substantially similar definition of 'seller' in the Products Liability Act. 'A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.'"

Footnote 11: "Statutes are not always clear, and interpreting them can be a difficult task. That the Court and the dissent disagree on the ultimate interpretation of a statutory provision does not mean that either has 'encroach[ed] on the Legislature's function.'"

29. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"When interpreting a statute, '[w]e look first to the 'plain and common meaning of the statute's words.''"

30. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

Tort Claims Act case. Law professor tripped on "an improperly secured extension cord." The Supreme Court ruled that the case was "a premises defect claim, and there is no evidence that UT had actual knowledge of the tripping hazard created by the cord's position over the retaining wall and across the sidewalk."

Because the Tort Claims Act "ostensibly incorporates common law principles by using the term 'premises defect,' . . . [w]e therefore look to the common law premises defect cause of action for guidance. . . ." "'In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider . . . common law or former statutory provisions, including laws on the same or similar subjects.'"

31. *First Texas Bank v. Carpenter*, 491 S.W.3d 729 (Tex. 2016)

"Chapter 95 does not define 'contractor', so we give the word its ordinary meaning unless a more precise meaning is apparent from the context of the statute."

32. *TIC Energy and Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016)

The trial court denied the subcontractor's motion for summary judgment that it was covered by general contractor's worker's compensation policy. Presented was an issue of the interplay of two sections of the Labor Code.

"The proper construction of a statute presents a question of law that we review de novo. Our objective is to ascertain and give effect to the Legislature's intent as expressed in the statute's language. In doing so, we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere

surplusage. When text is clear and unambiguous, it is determinative of intent. Applying well-established statutory-construction principles, we discern no ambiguity in the relevant statutory provisions and the parties do not assert otherwise; we therefore construe it according to its plain language as informed by the statutory context without resorting to canons of construction and extrinsic aids." Moreover, "'there are times when redundancies are precisely what the Legislature intended.'"

The Court provides a construction "of section 406.123 that 'favors blanket coverage to all workers on a site' [because that] accords with legislative intent and the 'Legislature's 'decided bias' for coverage.'"

Here, "section 406.122 precedes section 406.123, and typically, a general rule is iterated before its exceptions, not after. Further, though a statutory heading does not limit or expand a statute's meaning, the heading can inform the inquiry into the Legislature's intent. The headings here confirm a rule/exception model, rather than the opposite." The fact that section 406.122 was enacted after 406.123 and therefore provides an exception "involves a statutory canon of construction we consult only in the event of a conflict."

33. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

"'Statutory construction is a question of law we review de novo.' When construing a statute, we look to the plain language to determine the intent of the Legislature. If the statute is unambiguous, we apply the words according to their common meaning, but we may consider the objective of the law and the consequences of a particular construction."

"[W]e must give effect to the Legislature's choice of words. . . . We presume that the Legislature 'deliberately and purposefully selects [the] words and phrases it enacts.'"

"'We must not interpret the statute 'in a manner that renders any part of the statute meaningless or superfluous.'"

34. *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016)

"Whether an expert report [in a malpractice case] served concurrently with a pre-suit notice letter is timely under section 74.351(a) is a matter of statutory construction, a legal question we review de novo."

"The primary goal when interpreting a statute is to effectuate 'the Legislature's intent as expressed by the plain and common meaning of the statute's words.' 'Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result.' However, when, as here, 'the language is susceptible of two constructions, one of which will carry out and the other defeat [its] manifest object, [the statute] should receive the former construction.'"

"[T]he statute does not say that the party must be a party at the time the report is served, and none of the statute's other provisions expressly or implicitly prohibit service before the defendant is named as a party to the suit. Accordingly, . . . the best course is to adopt a construction that 'does the least damage to the statutory language, and best comports with the statute's purpose.' Dismissal would dispose of a potentially meritorious claim and punish [plaintiff] for demonstrating her claims had merit from the moment she asserted them—a result the Legislature did not intend and our state constitution potentially does not allow."

There are "'constitutional limitations upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of [her] cause, and those limitations constrain the Legislature no less in requiring dismissal.'"

35. *Hoskins v. Hoskins*, 497 S.W.3d 490 (Tex. 2016)

Family members agreed to arbitrate a dispute regarding trust property "'pursuant to the provisions of the Texas General Arbitration Act." The arbitrator granted summary judgment for respondent dismissing claimant's claims based on statute of limitations and on claimant's lack of standing. When respondent filed suit to confirm the award, claimant moved to vacate the award on the common-law ground that the arbitrator manifestly disregarded the law.

The Supreme Court addressed the "statutory-interpretation issue of first impression" on which "the courts of appeals are divided" of whether "a party seeking to vacate an arbitration award under the Texas General Arbitration Act (TAA) may invoke extra-statutory, common-law vacatur grounds," and held that a party cannot do so., and that "in proceedings governed by [the TAA], [TEX. CIV. PRAC. & REM. CODE §] 171.088 provides the exclusive grounds for vacatur of an arbitration award."

"When statutory text is clear and unambiguous, we construe that text according to its plain and common meaning unless a contrary intention is apparent from the statute's context." "'[B]ecause Texas

law favors arbitration, judicial review of an arbitration award is extraordinarily narrow.'"

"The TAA states that the court, on application of a party, 'shall confirm' an arbitration award '[u]nless grounds are offered for vacating, modifying, or correcting [it] under [TEX. CIV. PRAC. & REM. CODE §§] 171.088 or 171.091.'" Section 171.088 enumerates grounds on which "the court shall vacate an award," and section 171.091 provides for modification or correction of an award to correct clerical errors or if the award "involves 'a matter not submitted to' the arbitrators."

"The statutory text could not be plainer: the trial court 'shall confirm' an award unless vacatur is required under one of the enumerated grounds in section 171.088." "[T]he TAA leaves no room for courts to expand on those grounds, which do not include an arbitrator's manifest disregard of the law."

36. *Christus Health Gulf Coast v. Carswell,* 505 S.W.3d 528 (Tex. 2016)

"When construing a statute, our goal 'is to determine and give effect to the Legislature's intent' beginning with the 'plain and common meaning of the statute's words.'"

37. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"In interpreting a statute, we may also consider the 'object sought to be obtained' and the 'circumstances under which the statute was enacted'. Unquestionably, Chapter 41 was enacted to restrict and structure the recovery of exemplary damages. Among other things, it requires: proof by clear and convincing evidence of the elements for exemplary damages; proof that the defendant acted with certain prerequisite culpable mental states; consideration of evidence on certain prescribed factors; specific jury questions and instructions; a bifurcated trial; a unanimous verdict; and careful judicial review. Chapter 41 limits the amount of exemplary damages relative to compensatory damages, and, more importantly for our purposes here, precludes an award of exemplary damages unless other damages, besides nominal damages, are awarded." Here, "is [the] possibility [under the statute] of a wide, standardless range of permissible penalties that makes civil penalties much like exemplary damages when they were limited only by constitutional and common-law principles. This uncertainty, verging on arbitrariness, is precisely what Chapter 41 addresses."

38. *Philadelphia Indemnity Insurance Company v. White,* 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The Supreme Court ruled the lease provision did not violate the Texas Property Code.

"'Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited.'"

"We review statutory construction issues de novo, and our primary objective is to give effect to the Legislature's intent as expressed in the statute's language. We discern legislative intent from the statute as a whole, not from isolated portions. Absent an absurd result, we rely on the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context."

We presume that "'the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.'"

39. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Trial court dismissed defamation suit under Ch. 27. Defendant appealed, asserting the court's award of attorney's fees was inadequate. The Supreme Court ruled the lower courts "used the wrong standard in determining the attorney's fees" under the statute.

"The parties rely on different canons of statutory construction. . . . [Plaintiff] relies on the series-qualifier canon, which provides that '[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.'" Defendant "relies on the last-antecedent canon, which provides 'that a qualifying phrase in a statute or the constitution must be confined to the words and phrases

immediately preceding it to which it may, without impairing the meaning of the sentence, be applied.'" Either canon could reasonably apply here. But, the court adopted the latter view. "'Punctuation is a permissible indicator of meaning.'" "The Oxford or serial comma is the comma placed immediately before the coordinating conjunction in a series of three or more terms." Here, "the statute does not include a comma after 'other expenses' or after 'legal action,' and their absence indicates an intent to limit the justice-and-equity modifier to the last item in the series." Therefore, unlike fees, "'other expenses incurred in defending the legal action' are also recoverable, but only 'as justice and equity may require.'"

The Court does "not resort to extrinsic aides, such as legislative history, to interpret a statute that is clear and unambiguous . . . because the statute's plain language 'is the surest guide to the Legislature's intent.'"

40. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016)

After city leased realty to a citizen, a dispute arose. The Supreme Court ruled that the governmental-proprietary function dichotomy applies to contract claims.

The will of the people "'is expressed in the Constitution and laws of the State,' and thus 'to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.'"

Abrogation of common law is disfavored, and Chapter 271 does not abrogate the governmental-proprietary dichotomy. The "'Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact.'"

41. *Lira v. Greater Houston German Shepherd Dog Rescue*, 488 S.W.3d 300 (Tex. 2016)

Dog had escaped from owners' home with no tags and no microchip, and was picked up by city animal control. After three days, animal control scheduled dog to be euthanized because it tests a "'weak positive'" for heartworms and cannot be sold under city ordinance, but dog rescue answered animal control's request to accept and foster the dog. Owners, who had been searching for dog, had learned that the dog was with rescue, but rescue refused to return the dog. Owners sued rescue for conversion and other claims, seeking damages and return of the dog.

In a per curiam opinion, the Supreme Court rejected rescue's argument that the operation of city ordinances divested owners of ownership of the dog. "Assuming that the ordinances comport with due process and other requirements of Texas and federal law, and that cities possess police power to enact ordinances that sometimes divest an owner of property rights in his dog, nothing in [the city's] ordinances did so in this case."

The Court construed the city ordinances regarding stray dogs, which were enacted pursuant to the state rabies control statute, "under the same rules applicable to the construction of statutes." "We also consider as an aid in construction the principle that the law abhors a forfeiture of property. Private property rights are 'a foundational liberty, not a contingent privilege.'" "'A forfeiture of rights of property is not favored by the courts, and laws will be construed to prevent rather than to cause such a forfeiture.'"

The city "ordinances, whether considered individually or as a whole, did not expressly or impliedly divest [owners] of their ownership rights to [the dog]," a result "further compelled by the rule that any doubts as to their meaning should be resolved against a forfeiture of property." In particular, while the ordinances authorized euthanasia of the dog or placing the dog with a private shelter for adoption in lieu of euthanasia, and "putting down a dog is arguably so inconsistent with the rights of the original owner as to imply a divestment of property rights," the dog was not actually euthanized, and nothing in the ordinances "states or implies that a dog merely held by a private shelter, awaiting adoption, has been divested of the ownership rights of the original owner." "In short, [the dog] belonged to [owners] at the time they requested his return, and [rescue] should have honored that request."

42. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016)

On a certified question, the Supreme Court construed the Texas Uniform Fraudulent Transfer Act (TUFTA).

"Our primary objective in construing a statute is to ascertain and effectuate the Legislature's intent without unduly restricting or expanding the statute's scope. We derive intent from the plain meaning of the text construed in light of the statute as a whole. The terms of a statute bear their ordinary meaning unless

(1) the Legislature has supplied a different meaning by definition, (2) a different meaning is apparent from the context, or (3) applying the plain meaning would lead to absurd results. TUFTA further directs that it be 'applied and construed to effectuate its general purpose to make uniform the law with respect to [fraudulent transfers] among states enacting [UFTA].'"

Since TUFTA takes a definition from the Bankruptcy Code, the Court may consider it. "Though the text of our statute is ultimately determinative of legislative intent, we may consider the construction afforded the pertinent terms in cases applying section 548 of the Bankruptcy Code and similar provisions in UFTA statutes enacted by other states. We may also consult comments accompanying the model law, but we remain mindful that UFTA's comments were not adopted by our Legislature and cannot alter the plain meaning of the words enacted, which are 'the truest manifestation of what legislators intended.'"

"As the definition's use of the conditional past-perfect tense 'would have' illustrates, whether an exchange was made for reasonably equivalent value is evaluated objectively at the time of the transfer, not in retrospect."

C. Administrative Law, Administrative Agencies, and Procedure

1. *In re Accident Fund General Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

"When an agency has exclusive jurisdiction and the plaintiff has not exhausted administrative remedies, the trial court lacks subject-matter jurisdiction and must dismiss any claim within the agency's exclusive jurisdiction."

2. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

The "Railroad Commission monitors, and has rules closely controlling, the location and number of wells that may be drilled on a tract of land."

3. *Harris County Appraisal District v. Texas Workforce Commission*, 519 S.W.3d 113 (Tex. 2017)

Several members of an appraisal district's appraisal review board (ARB) filed for unemployment compensation after their terms expired or after their hours were reduced. Appraisal district argued that ARB members were not the district's employees for purposes of the Texas Unemployment Compensation Act (TUCA). The Texas Workforce Commission (TWC) determined that they are employees and eligible for unemployment compensation. The Texas Supreme Court agreed.

Under TUCA, "[a] presumption of employment arises upon a showing that an individual is paid for performing services," which "is rebutted only if the alleged employer carries its burden of showing the individual's service is 'free from control or direction under the contract and in fact.'" TWA adopted regulations to assist with this interpretation, which incorporate the common law control test.

Review of an agency's construction of a statute "is de novo, although 'an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration.' Under this serious consideration inquiry, we generally uphold an agency's interpretation of a statute, 'so long as the construction is reasonable and does not conflict with the statute's plain language.'" However, "[i]f an agency does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed.'"

Here, the presumption of employment under TUCA arose because the ARB members were paid by appraisal district. While the ARB members exercised "independent judgment" in their decisions, this did not preclude them "from meeting the definition of 'employment' under TUCA[.]" Also, while the Tax Code defines the qualifications, duties, and powers of ARB members, provides for their independence, and prescribes how they are appointed, it does not define the terms "employee" or "employment," and thus it does not control over TUCA's definition of the terms.

Reviewing the evidence under TWC's twenty-factor test, the Supreme Court held that "evidence falling within many of the . . . factors support the TWC's finding" that the ARB members were employees of the district.

4. *Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc.*, 518 S.W.3d 422 (Tex. 2017)

Rancher sued oil company for environmental contamination as well as resulting personal injury, and oil company successfully compels arbitration under the arbitration provision of a prior settlement agreement. The Railroad Commission (RRC) also investigates the

contamination. Three-member arbitration panel refuses oil company's request to abate pending final rulings by the RRC, finds for rancher, and awards damages and declaratory relief to rancher. Oil company moves to vacate the award on the grounds that the RRC has exclusive or primary jurisdiction over the claims.

The Supreme Court rejects oil company's argument that "the RRC has exclusive jurisdiction . . . foreclosing [rancher's] common-law contamination claims[.]" "Abrogation of a common-law right . . . 'is disfavored and requires a clear repugnance' between the common-law cause of action and the statutory remedy. A statute's 'express terms or necessary implications' must indicate clearly the Legislature's intent to abrogate common-law rights." Here, the statutes did not show a clear intent that the RRC's authority "is intended to be exclusive of common-law actions," so there was no exclusive jurisdiction.

The RRC also does not have primary jurisdiction, which, "[u]nlike exclusive agency jurisdiction . . . is a prudential doctrine," and requires "trial courts [to] allow an administrative agency to initially decide an issue when: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations." However, "[t]he doctrine of primary jurisdiction does not apply to claims that are 'inherently judicial in nature', such as trespass, . . . negligence, negligence per se, fraud, assault, intentional battery, and breach of contract," all claims asserted by rancher.

5. *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318 (Tex. 2017)

Parent company owned 20% of brewing company, and wholly owned a company seeking to open convenience stores in Texas. The Texas Alcoholic Beverage Commission rejects the convenience store company's application for an alcohol sales permit on the basis that parent's ownership of a brewer and an alcohol retailer would violate the "tied house" statutes. These statutes prohibit businesses from owning interests in more than one "tier"—manufacturing, wholesaling, and retailing—of the alcoholic beverage industry. Convenience store company appeals, arguing that the TABC misinterpreted the statute and that it violated company's equal protection and due process rights.

Statutory interpretation "involves questions of law we review de novo . . . even when we are reviewing agency decisions." "An agency's interpretation of a statute it enforces 'is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language.'" The Texas Supreme Court conducted a de novo review and held that the TABC correctly interpreted the statute.

Convenience store company also argued that "its equal protection and due process rights were violated by the TABC's arbitrary and discriminatory refusal to grant it a permit." It pointed to evidence of "significant and pervasive cross-tier holdings by" Texas Public Pension Funds and benefits plans of publicly traded companies.

"In administrative proceedings, the 'rudiments of fair play' must be observed." "An administrative 'licensing authority acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification.'" "To establish an equal protection claim, a deprived party must show (1) it was treated differently from other similarly situated persons, and (2) no reasonable basis exists for the disparate treatment."

Here, convenience store company failed to establish the first element, because it did not provide evidence of any similarly situated applicants. The cross-tier ownership by the pension funds and benefit plans were "demonstrably and qualitatively different" from parent company's cross-tier ownership.

6. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

"The Texas Health and Human Services Commission is responsible for administering food stamps, now called Supplemental Nutrition Assistance Program (SNAP) benefits, in Texas."

7. *Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association*, 511 S.W.3d 28 (Tex. 2017)

The Texas Medical Association sued the Texas State Board of Examiners of Marriage and Family Therapists, challenging a Therapists Board rule allowing "licensed marriage and family therapists

(MFTs) to provide 'diagnostic assessment . . . to help individuals identify their emotional, mental, and behavioral problems.'" The Medical Association argued that "the Texas Occupations Code does not authorize MFTs to provide diagnostic assessments" and that, "subject to a few exceptions that do not include MFTs, only those who are licensed to practice medicine may provide a diagnostic assessment." The Texas Supreme Court disagreed, concluding that the Texas Occupations "Code authorizes MFTs to provide the type of diagnostic assessment the rule permits."

"As a state administrative agency, the Therapists Board has only those powers that the Texas Legislature has expressly conferred upon it" and "can adopt 'only such rules as are authorized by and consistent with its statutory authority.'" However, "[c]ourts generally presume that agency rules are valid," and parties challenging the rule have the burden to show "that the rule's provisions are not 'in harmony with the general objectives of the act involved.'" "Generally then, the objecting party must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions."

Here, the Occupations Code "authorizes MFTs to engage in 'the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems.'" The Supreme Court concludes "that the term evaluate" here "encompasses an assessment that includes the determination or identification of the dysfunction to be treated," and thus the statute authorizes MFTs to make diagnoses even if it does not use the word. Likewise, the word "dysfunctions" in the statute encompasses diseases and disorders.

The Court also rejected the Medical Association's contention that the Therapists Board rule violated the Texas Medical Practice Act's general prohibition on non-physicians diagnosing diseases, because the plain language of the Occupations Code "provides a limited exception to the Medical Practice Act's prohibitions."

Finally, the Court declined the parties' invitation to apply canons of construction. "We need not and will not address these construction canons unless we conclude that the statutes' language is ambiguous," and here the statutes are not ambiguous.

8. *Oncor Electric Delivery Company, LLC v. Public Utility Commission of Texas*, 507 S.W.3d 706 (Tex. 2017)

Appeal of utility rate case. "The PUC was required to determine Oncor's projected expenses and set rates at a level that would allow Oncor a reasonable return on its investment. One expense was Oncor's future tax liability."

Footnote 28: '"We defer to agency interpretations of statutes only if they are ambiguous, provided that the agency's interpretation is reasonable and does not conflict with the plain language of the statute.' . . . [The] Court [will] uphold the Commission's interpretation if it was reasonable and in accord with the plain language of the statute."

9. *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400 (Tex. 2016)

Corrected opinion issued after denial of rehearing. One word and one sentence added to pages 10–11 of slip opinion. Holding unchanged. See *Southwest Royalties*, below.

10. *McIntyre v. El Paso Independent School District*, 499 S.W.3d 820 (Tex. 2016)

Home-schooling family sued school district and its employee for filing unfound criminal charges of truancy. The Supreme Court ruled that they did not fail to exhaust administrative remedies by appealing to the Texas Commissioner of Education because the claims were based upon the constitution; it also ruled that the employee had qualified immunity.

"The Texas Education Code permits appeals to the Texas Commissioner of Education by persons 'aggrieved by' either 'the school laws of this state' or 'actions or decisions of any school district board of trustees that violate [] the school laws of this state.' It does not permit, much less require, administrative appeals when a person is allegedly aggrieved by violations of laws other than the state's school laws. . . ." Courts, not the Commissioner, decide whether constitutional laws were violated.

Statutes exempt "children who attend private schools from compulsory school attendance" and hold "that bona-fide homeschools are 'private schools' within the meaning of the exemption."

"Where the Legislature grants the Commissioner authority to resolve a dispute, parties to such disputes must seek relief from the Commissioner through an administrative appeal before resorting to the courts. [But] exhaustion is only required for 'complaints that the Legislature has authorized the Commissioner to resolve. . . .'"

Aside "from employment-contract disputes, the Education Code limits administrative appeals to cases where a person is aggrieved by Titles 1 or 2 of the Education Code or a school board's violation of them." When "claims are predicated on a matter within the Commissioner's exclusive jurisdiction, exhaustion is required. But if claims do not challenge the school laws themselves, and neither assert nor depend on violations of the school laws or an employment contract, then exhaustion is not required."

Whether "a claimant must exhaust administrative remedies depends on the nature of the claims, not the identity of the claimant." For "administrative remedies to be available, they must be aggrieved by either (1) the school laws themselves or (2) a school board's violation of the school laws."

Here, the plaintiffs claim to be aggrieved by the filing of criminal charges, not "by the school laws." They assert that their constitutional rights were violated. The "Commissioner has no jurisdiction over" their claim.

The "Fourth Amendment applies in school settings." The "First Amendment prohibits [school authorities] from silencing viewpoints that do not materially and substantially interfere with maintaining order at school."

Here, the employee had qualified immunity.

11. *Southwest Royalties, Inc. v. Hegar*, ___ S.W.3d ___ (Tex. 2016)(6/17/16)

[Note: opinion reissued on October 21, 2016 at 500 S.W.3d 400 (Tex. 2016); see above.]

Sales tax exemption case turning on the interpretation of the term "processing" as used in the Tax Code. The term is undefined in the statute, but is defined by the Comptroller in a regulation.

"[A]n agency's construction of a statute may be taken into consideration by courts when interpreting statutes, but deferring to an agency's construction is appropriate only when the statutory language is ambiguous." Here, the term was unambiguous, but the "common meanings of 'processing' correlate with the definition adopted by the Comptroller," and reflect the intent of the Legislature.

12. *In re Steven C. Phillips*, 496 S.W.3d 769 (Tex. 2016)

After a father wrongly convicted and sentenced to prison was later determined to be actually innocent, he sought compensation under the Timothy Cole ActIt included payment for child support obligations. Ex-wife had obtained a divorce in Arkansas and, when she sought to register and enforce it in Texas, father defaulted. The Supreme Court ruled the Comptroller was not bound by the judgment, but his decision was subject to review. The "Comptroller's authority to determine the compensation owed is exclusive, and . . . [he] is not bound by a court's judgment in a child support enforcement proceeding. . . . [T]he Comp-troller's statutory duty is ministerial, and . . . the Comptroller's determinations are in turn subject to review by this Court. . . ." The Court granted relief "to direct the Comptroller to correct legal errors in his determination. . . ."

"The Tim Cole Act . . . provides compensation for the time a person is wrongfully imprisoned and for child support owed but not paid by the person, plus interest, while imprisoned. The Act states that '[t]he Comptroller shall determine . . . the amount of compensation owed'."

The "Comptroller's authority to determine compensation owed . . . is exclusive, ministerial, and subject to review." Footnote 14: "We have jurisdiction over the petition."

The Comptroller determines the eligibility of the claimant and the amount of compensation. "The Comptroller's authority is to determine, not child support arrearages as between parents, but '*compensation* for child support . . . arrearages'. The arrearage is what one parent owes the other; compensation is what the State (and taxpayers) owe the claimant. Compensation is to be based on arrearages, but the amount is to be determined by the Comptroller, not the court."

At the default judgment, the state was not a party and its interest was not represented. The Comptroller is not bound by it.

The Comptroller's duty to determine the compensation owed is ministerial. "An officer's duty is ministerial when the 'law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.' A mandamus action is a proper remedy to redress a failure to perform such a duty." Even though the law being applied is from Arkansas, an "official 'has no

discretion or authority to misinterpret the law' or the rules of arithmetic."

"The Comptroller's authority to determine compensation owed . . . remains subject to review."

The arrearages are not barred by limitations. "As of 2009, Texas did not have a statute of limitations for bringing an action to collect child support arrears." "The Comptroller [had] erred in refusing compensation for interest that accrued during [father's] incarceration on pre-incarceration arrearages, but did not err in excluding interest that accrued post-incarceration."

13. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"The Texas Optometry Act prohibits commercial retailers of ophthalmic goods from attempting to control the practice of optometry. Section 351.603(b) . . . authorizes the Texas Optometry Board . . . and the Attorney General to sue a violator for 'a civil penalty not to exceed $1,000 for each day of a violation.' Section 351.605 provides that '[a] person injured as a result of a violation . . . is entitled to the remedies in . . . Section 351.603(b).'"

"The Attorney General and the Board may enforce this prohibition [in setting hours] by a suit for injunctive relief, a civil penalty not to exceed $1,000 per day, and attorney fees. A person injured by a violation 'is entitled to' the same relief as well as damages. A violation is also actionable under the Texas Deceptive Trade Practices-Consumer Protection Act and is a misdemeanor. . . ."

Here, "is [the] possibility [under the statute] of a wide, standardless range of permissible penalties that makes civil penalties much like exemplary damages when they were limited only by constitutional and common-law principles. This uncertainty, verging on arbitrariness, is precisely what Chapter 41 addresses."

The "Act allows for a private suit for damages as well as enforcement by the Attorney General and the Board."

The Act caps civil penalties "at $1,000 per day. But there is no limit on the number of days that a violation can occur, and thus no limit on the amount of civil penalties that a claimant can receive for a single violation."

14. *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1 (Tex. 2016)

Home-rule city enacts an amended clean-air ordinance, regulating facilities already subject to Texas Commission on Environmental Quality (TCEQ) regulation under the Texas Clean Air Act (the Act). The ordinance incorporates TCEQ rules, provides for fines for violations of those rules after prosecution in municipal court, and requires facilities to register with the city and pay registration fees, even if they have already been approved by TCEQ. Facilities sue for a declaration that the ordinance's enforcement and registration schemes are pre-empted by state law and that the incorporation of TCEQ rules violates the non-delegation doctrine under the Texas Constitution.

"A home-rule municipality does not derive its power to enact ordinances from the Legislature" and "looks to the Legislature and Constitution only for limitations on its power to enact ordinances." Further, the Act allows a municipality to "'enact and enforce and ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with'" the Act or TCEQ rules. Preemption of "a home-rule municipality's power to enforce state air-quality standards by ordinance" occurs only if the "legislative limitation" on that power "appears with 'unmistakable clarity.'"

However, the Supreme Court held that the ordinance's enforcement provision was preempted by the Act, because it authorizes criminal prosecution of violations of the Act in circumvention of TCEQ's enforcement discretion, including TCEQ's discretion to determine "that civil or administrative remedies would appropriately address the situation." "[T]he Legislature expressed its clear intent to have the TCEQ determine the appropriate remedy in every case . . . favoring statewide consistency in enforcement." The ordinance's enforcement provisions "are inconsistent with the statutory requirements for criminal prosecution and the statutory scheme providing other enforcement options."

The Supreme Court also held that the ordinance's registration and fee requirements were preempted by the Act because it made it "'unlawful'" to operate a

facility without a city registration even where the facility has a TCEQ permit, and thus "made unlawful an act approved by TCEQ."

The Supreme Court held, however, that the ordinance's "incorporation of TCEQ rules does not unconstitutionally delegate the city council's lawmaking power." "'The nondelegation doctrine should be used sparingly,' and 'courts should, when possible, read delegations narrowly to uphold their validity.'" Here, "when the City adopted the TCEQ rules as they currently exist and as they may be amended, the Ordinance complied with the Act's mandate that any ordinance must not be inconsistent with the TCEQ's rules."

15. *Hallmark Marketing Company, LLC v. Hegar*, 488 S.W.3d 795 (Tex. 2016)

Taxpayer filed franchise-tax protest against state comptroller, arguing that comptroller's calculation of the apportionment of taxpayer's taxable margin conflicted with the statute. Taxpayer argued that comptroller improperly required taxpayer to deduct a net loss from the sale of investments from its total receipts, which had the effect of increasing its apportionment factor and, therefore its taxable margin.

The Texas franchise tax on businesses based or operating in Texas is calculated, in its simplest form, "by multiplying a business's taxable margin by the applicable franchise-tax rate." "Taxable margin is determined by multiplying a business's total margin by an apportionment factor designed to limit the franchise tax to revenue attributable to business conducted in Texas." The apportionment factor is calculated by dividing "receipts from business conducted in Texas" by "receipts from all business anywhere, including Texas." Thus, the lower the receipts from all business anywhere, the higher the apportionment factor and the higher the tax liability.

Under TEX. TAX CODE § 171.105(b), "'[i]f a taxable entity sells an investment or capital asset, the taxable entity's gross receipts from its entire business for taxable margin includes *only the net gain* from the sale.'" However, comptroller adopted and applied a rule, TEX. ADMIN. CODE § 3.591(e)(2), "providing that '[i]f the combination of net gains and losses results in a net loss, the taxable entity should net the loss against other receipts, but not below zero.'"

"The comptroller is charged with administering the franchise tax and has broad discretion to adopt rules for its collection as long as those rules do not conflict with state or federal law." "'If there is vagueness, ambiguity, or room for policy determinations' in the language of a statute, 'we normally defer to [an] agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute.'"

Here, "comptroller's reading would rewrite the statute to . . . include 'only the net gain *or net loss*.' Not only would this add to the statute's plain language, it would effectively write the word 'only' out of the statute." "We generally defer to an agency's 'reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; "an agency's opinion cannot change plain language."'" Because TEX. TAX CODE § 171.105(b) is unambiguous and because TEX. ADMIN. CODE § 3.591(e)(2) "directly conflicts with" it, the rule "is not entitled to our deference."

16. *Clint Independent School District v. Marquez*, 487 S.W.3d 538 (Tex. 2016)

Parents sued school district seeking to enjoin what they argue is an unconstitutional distribution of funds among schools in the district. District filed a plea to the jurisdiction, arguing in part that parents failed to exhaust their administrative remedies. Parents argued that the exhaustion-of-administrative-remedies requirement does not apply.

"If the Legislature expressly or impliedly grants an agency sole authority to make an initial determination" in disputes that arise within its regulatory arena, "the agency has exclusive jurisdiction and a party 'must exhaust its administrative remedies before seeking recourse through judicial review.'" "If the party files suit before exhausting exclusive administrative remedies, the courts lack jurisdiction and must dismiss the case."

The Texas Education Code provides, with certain exceptions, that persons "'aggrieved by[] the school laws of this state; or actions or decisions of any school district board of trustees that violate[] the school laws of this state'" may "appeal in writing" to the Commissioner of Education. "However, '[a] person is not required to appeal to the commissioner before pursuing a remedy under a law outside of [the school laws] to which [the school laws] make[] reference or with which [the school laws] require[] compliance.'"

Although the word "may" is used, the Supreme Court had "interpreted the statute to *require* a person who *chooses* to appeal to first seek relief through the

administrative process." "However, we have also been clear that this exhaustion requirement applies only to complaints that the Legislature has authorized the Commissioner to resolve." Thus, parents must first exhaust their administrative remedies by an appeal to the Commissioner if their claims are within the scope of the statute, unless an exception applies.

Parents argued that because they only pled causes of action for violations of the Texas Constitution, their claims were not based on "the school laws of the state" and were thus not subject to the exhaustion-of-administrative-remedies requirement. However, while "the constitutional provisions are not 'school laws of the state,'" "[t]he nature of the claims, rather than the nomenclature, controls, and artful pleadings cannot circumvent statutory jurisdictional requirements." Parents' "petition as a whole reflect[ed] the true nature of the parents' complaint: that the district defies the Constitution's mandates *by violating the requirements of the Education Code*." Moreover, because "the school district's obligation to provide a constitutionally adequate education derives not directly from the Constitution but from the Legislature's decision to 'rely heavily on school districts to discharge its [constitutional] duty,'" parents' claims were not in pursuit of "'under a law outside of [the school laws]'" and were thus not excepted from the administrative remedy requirement.

Because parents were required to exhaust their administrative remedies by appealing to the Commissioner and failed to do so, the courts lacked jurisdiction over their suit.

17. *McMillen v. Texas Health & Human Services Commission*, 485 S.W.3d 427 (Tex. 2016)

Whistleblower suit claiming retaliation after agency fired attorney-employee for reporting improper collection of Medicaid funds by agency. The Supreme Court ruled that employee's report to the Office of Inspector General was appropriate. Determining the appropriateness of the report here involved consideration of the particular law that the employee claimed was violated. The law, 42 U.S.C. § 1396p(b), "generally prohibits any 'adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan,' with limited exceptions under which 'the State shall seek adjustment or recovery.' . . . Texas law incorporates this federal statute. . . ." Given this, the "OIG is an appropriate law-enforcement authority." It investigates fraud or abuse related to Medicaid. That includes "providers and recipients" as well as the proper implementation of federal law. "To the extent other Texas agencies violate section 1396p(b), the OIG also has power to enforce the law."

D. Choice of Law; Stare Decisis

1. *Pidgeon v. Turner*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

The court of appeals' "requirement that the trial court proceed 'consistent with'" a Fifth Circuit case "conflicts with our previous decisions holding that Fifth Circuit decisions are not binding on Texas courts." "[W]hile 'Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, . . . they are *obligated* to follow only higher Texas courts and the United States Supreme Court.'"

2. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of a director's fiduciary duty, the Supreme Court applied Delaware substantive law and Texas procedural law. "Texas courts apply the law of the jurisdiction that has the most significant relationship to the particular substantive issue to be resolved. . . . The law of Texas, as the forum state, governs matters of procedure."

3. *Engelman Irrigation District v. Shields Brothers, Inc.*, 514 S.W.3d 746 (Tex. 2017)

Contractor sued district, a governmental entity, for breach of contract, and obtained a judgment after trial. The court of appeals affirmed the trial court's denial of district's assertion that governmental immunity deprived the trial court of subject matter jurisdiction, relying on *Missouri Pacific Railroad Co. v. Brownsville Navigation District* and holding that "sue and be sued" language in district's enabling statute effects a waiver of sovereign immunity.

After the judgment becomes final, the Texas Supreme Court overruled *Missouri Pacific* in *Tooke v. City of Mexia* and holds that statutory "sue and be sued" language does not waive governmental immunity. District filed the instant suit seeking a declaration that the original judgment is void for lack of subject matter jurisdiction based on the holding in *Tooke*.

The Texas Supreme Court holds that the change

of law in *Tooke*, even though it had retroactive effect, does not disturb the application of res judicata to the original judgment. "A judicial decision generally applies retroactively," and this was expressly the case with *Tooke*. However, "retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted." "'That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata.'" However, "res judicata does not apply when the first tribunal lacked subject-matter jurisdiction," and "[a] judgment rendered without subject-matter jurisdiction is void and subject to collateral attack."

4. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court had to determine whether a statement in a prior holding constituted dictum, and the trial court's use of definitions used by the court of appeals in a prior holding.

"This Court has defined dictum as: 'An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; . . . an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point.' We have recognized two types of dicta: judicial dictum and obiter dictum. Obiter dictum is not binding as precedent. . . . Judicial dictum is 'a statement made deliberately after careful consideration and for future guidance in the conduct of litigation.' As such, "[i]t is at least persuasive and should be followed unless found to be erroneous.'"

"When determining whether a statement is dictum, we look to the language and structure of the opinion. . . ." Here, the Court observed that "we cannot say that the court of appeals held that [deceased] was a leased-in worker. . . . The court of appeals' statement . . . was made 'without argument, or full consideration of the point.'"

"When an appellate court remands a case to the trial court, the trial court 'has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate.'" Thus, here, the trial court was bound by a definition provided by the court of appeals. But, while the court of appeals used definitions in its opinion, the "inclusion of those definitions in Instruction No. 6 was completely unnecessary. Any error was harmless, however, because the proper definition was included in the instruction."

E. Governmental Liability and Sovereign Immunity

1. *City of Krum v. Rice*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Resident who pleaded to deferred adjudication for a sex offense was required to register and stay a certain distance from places where children gather. After "general law municipality" passed a local ordinance requiring (among other things) double the distance, resident sued challenging the validity of the ordinance. Trial court and court of appeals denied city's plea to the jurisdiction. While the case was on appeal, the Legislature passed enabling law for the municipality, which differed in the distance, and the city amended its ordinance to comply with the statute. The Supreme Court ruled that the case became moot, and therefore "the courts lack jurisdiction over those claims."

Footnote 2: "Because one justice dissented in the court of appeals, we have jurisdiction over this interlocutory appeal under the applicable version of the Texas Government Code."

2. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled: "Rios made an irrevocable election to pursue a vicarious-liability theory against the Center by alleging in his original petition state-law tort claims against both the Center and the Doctors that were premised on the Doctors' being Center employees. Defendants' motion to dismiss the Doctors under subsection(e) of the Act's election-of-remedies provision confirmed the Doctors' status as employees and accrued their right to

dismissal from the lawsuit. Rios could not avoid this result by amending his petition to drop the tort claims against the Center; nor did defendants' amended motion to dismiss vitiate its already-triggered statutory right to dismissal of the Doctors."

"A public employee may be individually liable for his tortious conduct outside the general scope of employment, but [TEX. CIV. PRAC. & REM. CODE §] 101.106 . . . 'requir[es] a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone.' If the plaintiff nevertheless sues both employer and employee, [TEX. CIV. PRAC. & REM. CODE §] 101.106(e) requires that the employee 'immediately be dismissed' on the employer's motion. . . . [T]his statutory right to dismissal accrues when the motion is filed and is not impaired by later amendments to the pleadings or motion. . . . [Here,] the individuals sued were employees of a state agency" and must be dismissed.

Footnote 4: "State universities are state agencies and share the State's immunity."

TEX. CIV. PRAC. & REM. CODE §§ 101.001 *et seq*. "waives a governmental unit's immunity from suit when acting through an employee, defined to exclude an independent contractor."

The "Legislature enacted a comprehensive election-of-remedies provision in 2003." "A plaintiff must [irrevocably] 'decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable.'" Under *Cannon*, "this requirement effectively makes a plaintiff's apparent nonchoice an election to sue only the government." Also, in *Cannon*, the employee's right to dismissal "could not be effectuated without an order by the court," before which the plaintiff can amend to add a claim outside of the Texas Tort Claims Act. But that does not deny an employee a right to a ruling on his motion.

Here, the Center pleaded that the doctors acted in the course and scope of their employment with the Center. By "'filing such a motion, the [Center] effectively confirm[ed] the [Doctors were employees] acting within the scope of employment and that the [Center], not the [Doctors], is the proper party.'"

When determining whether a person acted in the course and scope, the putative employees are "'not required to prove their subjective intent.'" The determination turns on whether "'there a connection between the employee's job duties and the alleged tortious conduct[.]'" Here, the doctors' statements arose from their employment with the Center.

When "interpreting [TEX. CIV. PRAC. & REM. CODE §] 101.106, courts 'must favor a construction that most clearly leads to the early dismissal of a suit against an employee when the suit arises from an employee's conduct that was within the scope of employment.'"

Regardless of the amended petition, the doctors' filing of a motion to dismiss triggers the right to dismissal.

If TEX. R. CIV. P. 65, which indicates that amended pleadings supersede prior ones, "is inconsistent with [TEX. CIV. PRAC. & REM. CODE §] 101.106(e), enacted in 2003, the statute must prevail."

3. *Harris County Appraisal District v. Texas Workforce Commission*, 519 S.W.3d 113 (Tex. 2017)

Several members of an appraisal district's appraisal review board (ARB) file for unemployment compensation after their terms expire or after their hours are reduced. Appraisal district argues that ARB members are not the district's employees for purposes of the Texas Unemployment Compensation Act (TUCA), in part because of the "members of the judiciary" exemption of TUCA. The Texas Supreme Court agrees.

ARB members also did not fall under TUCA's exemption for those employed "as a member of the judiciary" under TEX. LAB. CODE § 201.603(a)(1)(C). The statute does not define "judiciary," so the Court looked to the "'term's plain or ordinary meaning,'" holding that "the judiciary exemption only applies to members of the judiciary, that is, the judicial branch of government." While they may serve a judicial function, ARB members are not part of the judicial branch of government.

"First, there is a distinction between quasi-judicial bodies and the judiciary." "[T]he separation of powers provision [does] 'not bar administrative agencies of the executive branch of government from working in tandem with the judicial branch to administer justice." "'"Agency adjudications do not reflect an exercide assigned to the 'courts' of the State . . .; they are simply executive measures taken in the administration of statutory provisions."'" The "delegation of authority" to "conduct[] hearings, determine[] findings of fact, and issue[] conclusions of law . . . does not place the Board members in the judicial branch of our government."

4. *University of the Incarnate Word v. Redus*, 518 S.W.3d 905 (Tex. 2017)

Family of student who was killed by university police officer off campus when suspected of DWI sued school and officer. After trial court denied a plea to the jurisdiction, school filed an interlocutory appeal. The issue was "whether a private university that operates a state-authorized police department is such a 'governmental unit.'" The Supreme Court ruled that the court of appeals had jurisdiction because "the university is a governmental unit for purposes of this interlocutory appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) "authorizes an interlocutory appeal from an order granting or denying a governmental unit's plea to the jurisdiction." "The term 'governmental unit' has the same meaning here as it does in the Texas Tort Claims Act."

"Although private institutions are not commonly understood to be a part 'of government,' we have held that a private institution can be a governmental unit." University must satisfy two conditions of the definition of "governmental unit" in the TTCA. "First, UIW must be an 'institution, agency, or organ of government,' and, second, UIW must derive its 'status and authority . . . from the Constitution of Texas or from laws passed by the legislature under the constitution.'"

Here, though the school is not publicly funded, its officers have the same license, take the same oath, and meet the same requirements, as other peace officers, and they enforce state law on campus and elsewhere. They are also subject to Public Information Act disclosures. Accordingly, university "clearly derives its status and authority to commission and employ peace officers and operate a police department from laws passed by the Legislature."

The issue then was whether the school's police department was an "organ" of the state. The Court ruled that it is "part of a larger governmental system." The Legislature has granted them "limited immunity" when acting to provide "mutual assistance." "Because the law enforcement is uniquely governmental, . . . [the university] is a governmental unit for purposes of law enforcement. . . ."

This ruling does not determine whether the college has sovereign immunity. "[S]overeign immunity is a common-law doctrine and that courts determine whether an entity is immune in the first instance." "To determine whether an entity is immune, courts should rely not on the Tort Claims Act's definition of governmental unit, as we have here, but on the 'nature and purposes' of sovereign immunity."

5. *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017)

Resident doctor was paid through a foundation, but worked at a clinic and was supervised by that center's Program Director. When sued for malpractice, doctor sought immunity under the election-of-remedies of the Texas Tort Claims Act. The Supreme Court ruled that "the details of [doctor's] tasks as a resident physician were, under the relevant contract and other documents and in actual practice, controlled by UTHSCH and its physicians, not the Foundation." She was thus not an employee of the foundation and not entitled to immunity.

When considering a motion to dismiss under the TTCA, "we may consider whether there are issues of material fact that should have precluded the trial court from granting the motion to dismiss."

Footnote 5: In an appeal of the denial of "sovereign immunity, and evidence was presented to the trial court, [the] appellate court addresses de novo whether evidence raises material issue of fact."

To be an employee of a governmental unit, he must be in the paid service of that unit. But, the definition excludes persons for whom the unit does not have "'the legal right to control.'" Here, some administrative services were provided by the foundation, which paid the residents, but the Program Director determined their assignments and duties. Essentially, the bylaws of the foundation indicate that it "does not control physicians. . . ."

The policies of the foundation "include those set out in a formal governing document of the corporation," such as its bylaws. In fact, they "expressly and emphatically disavow any right to control a physician working at any hospital not owned by the Foundation."

A person's status as an employee "turns on who controlled the details of the employee's work."

Doctor argued "that 'legal' control means a theoretical right to control as opposed to an actual right to control. We see no reason to adopt such a novel definition." As "a general rule of statutory construction, we give words their ordinary and plain meaning." "Legal" control, argued by doctor, "is not ordinarily used as the opposite of, or in contrast to, actual."

For the purposes of TEX. CIV. PRAC. & REM. CODE § 101.106, "a general right to change the terms and conditions of employment should not trump control of the details of [doctor's] employment—the relevant statutory inquiry. . . ."

Footnote 24: "Many residents do not have

immunity afforded to governmental employees because they are residents at private hospitals and work under residency programs administered by such hospitals. And of course we cannot rewrite the relevant statute to effect our own public policy goals regarding the best training environment for residents."

6. *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017)(4/7/17)

Prior opinion, dated 12/9/16 (*see below*), was reissued with generally the same holding. The Court added: "Because the statements at issue in this appeal are based on conduct within the general scope of Laverie's employment and no one disputes Wetherbe's claims could have been brought against Texas Tech, Wetherbe's claims at issue in this appeal are considered to be against Laverie in her official capacity only. She is therefore entitled to dismissal as to the claims at issue in this appeal pursuant to the election-of-remedies provision."

7. *Engelman Irrigation District v. Shields Brothers, Inc.*, 514 S.W.3d 746 (Tex. 2017)

Contractor sued district, a governmental entity, for breach of contract, and obtained a judgment after trial. The court of appeals affirmed the trial court's denial of district's assertion that governmental immunity deprived the trial court of subject matter jurisdiction, relying on *Missouri Pacific Railroad Co. v. Brownsville Navigation District* and holding that "sue and be sued" language in district's enabling statute effects a waiver of sovereign immunity.

After the judgment becomes final, the Texas Supreme Court overruled *Missouri Pacific* in *Tooke v. City of Mexia* and holds that statutory "sue and be sued" language does not waive governmental immunity. District filed the instant suit seeking a declaration that the original judgment is void for lack of subject matter jurisdiction based on the holding in *Tooke*.

The Texas Supreme Court holds that the change of law in *Tooke*, even though it had retroactive effect, does not disturb the application of res judicata to the original judgment. "A judicial decision generally applies retroactively," and this was expressly the case with *Tooke*. However, "retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted." "'That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata.'" However, "res judicata does not apply when the first tribunal lacked subject-matter jurisdiction," and "[a] judgment rendered without subject-matter jurisdiction is void and subject to collateral attack."

The "crux of this case" is whether sovereign immunity deprives a court of subject matter jurisdiction such that it renders a final judgment void, and the Supreme Court holds here that it does not. While the Supreme Court has "stated that sovereign immunity is a jurisdictional bar," it has "more recently . . . been more guarded in our description of the interplay of jurisdiction and sovereign immunity[,]" stating, "quite deliberately, that sovereign immunity 'implicates' the trial court's subject-matter jurisdiction. We did not hold that sovereign immunity equates to a lack of subject-matter jurisdiction for all purposes or that sovereign immunity so implicates subject-matter jurisdiction that it allows collateral attack on a final judgment."

"Holding that sovereign immunity so implicates subject-matter jurisdiction that [a] final judgment . . . can be challenged by collateral attack in a later proceeding would run counter to the trend of Texas law and of American jurisprudence generally . . . of 'reduc[ing] the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" "Sovereign immunity implicates a court's subject-matter jurisdiction, but their contours are not coextensive."

The Court followed the general rule set forth in section 12 of the Second Restatement of Judgments: "'When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation.'" This "general rule is particularly warranted where the issue of subject-matter jurisdiction was actually litigated in the first proceeding," and where the judgment was rendered by a "'court[] of record or of general jurisdiction [which is] presumed to have been based on proper subject matter jurisdiction.'"

The Court was "unpersuaded" by district's argument that failure to apply *Tooke* retroactively to the original judgment would "offend separation-of-powers principles by denying the Legislature its authority to waive sovereign immunity." While "the decision to waive sovereign immunity is largely left to the Legislature[,] . . . sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine."

Here, the Court is "not depriving the Legislature of its role in waiving sovereign immunity so much as [it is] deciding the effect of a final judgment rendered by the judiciary," which is "very much a matter that should be left to the courts." Also, the Legislature itself would lack authority to reopen a final judgment by statute, which would violate separation of powers by "infring[ing] on the power of the judicial branch to render dispositive judgments[.]"

8. *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017)

Regent for The University of Texas System sued the System's Chancellor for refusal to grant regent complete access to student-admission records—the Chancellor instead invoked the federal Family Educational Rights and Privacy Act (FERPA). Because the Chancellor was being sued in his official capacity and there was no statutory waiver of immunity, regent's suit could proceed only if the Chancellor's "actions in redacting the records were *ultra vires*—without state authority." The Supreme Court held that they were not, and that sovereign immunity therefore required dismissal.

Here, the Legislature "vested governing power [over the UT System] in a nine-member Board of Regents" gave it "expansive authority" over the System. The Legislature "authorized the Board to promulgate rules and to use those rules to 'delegate a power or duty of the board'" to officers and others, and directed the Board "to appoint the Chancellor 'or other chief executive officer of the system." The statute "says little else about the Chancellor's duties," and so the Chancellor's specific responsibilities "come from the rules and resolutions of the Board."

Here, the other members of the board who supported regent's request for access to the records conditioned their votes on the Chancellor's office engaging in a review to determine whether the records were protected by FERPA. The Board promulgated a rule providing that "'the Chancellor, in consultation with the U.T. System General Counsel, shall determine whether a Regent may review information that is protected by [FERPA].'" After regent filed his lawsuit, the Board endorsed the Chancellor's approach.

Absent a statutory waiver, sovereign immunity bars suit against a state official in his official capacity, unless the official's actions are *ultra vires*. "An *ultra vires* action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" "An *ultra vires* claim based on actions taken 'without legal authority' has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority."

Here, the Board granted the Chancellor discretion to interpret FERPA. His "only duty is that he 'shall determine whether a Regent may review information that is protected by [FERPA].'" "His discretion in making that determination is otherwise unconstrained." In *Houston Belt & Terminal Railway Co. v. City of Houston*, the Court "concluded that sovereign immunity 'bars suits complaining of an exercise in *absolute* discretion but not suits complaining of . . . an officer's exercise of judgment or *limited* discretion without reference to or in conflict with the constraints of the law authorizing the official to act.'"

"When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous." Because the Chancellor's discretion was "'absolute' under our framework from *Houston Belt*," the Chancellor "whether right or wrong—was not without legal authority in making" the determination that regent was not entitled to complete access under FERPA, and was acting under the Board's instructions in redacting information "he determined protected under FERPA." Thus, he was not acting *ultra vires* and sovereign immunity barred regent's suit.

9. *Laverie v. Wetherbe*, ___ S.W.3d ___ (Tex. 2016)(12/9/16)

Texas Tech professor sued another for defamation alleging she said he had an inside track to be appointed as dean and that he used listening devices. Her motion for summary judgment asserting immunity was denied because she had not demonstrated the lack of her own personal motive. The Supreme Court reversed. "Government employees are not required to prove their subjective intent behind an allegedly tortious act in order to be dismissed from a suit pursuant to the Tort Claims Act's election-of-remedies provision."

Defendant "was entitled to dismissal when she furnished conclusive evidence she was acting within the scope of her employment; she need not have offered evidence of her motives for making the allegedly defamatory statements."

"The Tort Claims Act provides a limited waiver of governmental immunity . . . and contains an election-of-remedies provision intended to 'force a plaintiff to decide at the outset whether an employee acted

independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable.'" This is required "'to 'reduc[e] the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery.'" "'In waiving governmental immunity, the Legislature correspondingly sought to discourage or prevent recovery against an employee.'" "The function of the election-of-remedies provision . . . is not to adjudicate the underlying tort claim but to quickly dismiss government employees when the suit should be brought against their employer."

A "defendant is entitled to dismissal upon proof that the plaintiff's suit is (1) based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the Tort Claims Act." The scope of employment means "'being in or about the performance of a task lawfully assigned to an employee by competent authority.'" Subject intent is not "a necessary component of the scope-of-employment analysis." There is an "objective assessment."

"We presume the Legislature knew of our longstanding approach to the scope-of-employment analysis and see nothing in the Tort Claims Act compelling a different approach."

The scope-of-employment analysis is objective: "Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." Personal motivations do not change "job responsibilities."

Requiring "proof of an employee's subjective intent would burden government employees with proving a negative to attain dismissal; that is, that they acted without ulterior motives or animus."

Here, responding to a provost's question, and "bringing personnel complaints" to him were within her job duties.

10. *Byrdson Services, LLC v. South East Texas Regional Planning Commission*, ___ S.W.3d ___ (Tex. 2016)(12/23/16)

Contractor sued regional planning commission for payment due under a contract to provide homeowner repair services after a disaster. At issue was whether contractor's suit fell under Chapter 271 of the Local Government Code's waiver of governmental immunity for suits on contracts which, "among other things, provides 'goods or services to the local governmental entity.'"

Commission argued that the waiver did not apply because the contract was to provide repair services to homeowners, not to the commission itself. The Court held that the waiver did apply, because these were services that the commission was obligated to provide to homeowners itself under its contract with the State, and commission "relieved itself" of those obligations by contracting with contractor. Thus the contract "provided real and direct services to the Planning Commission that bring the agreements within chapter 271."

11. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016)

County and college filed a petition under TEX. R. CIV. P. 202 to investigate a potential claim against city. The Supreme Court granted mandamus requiring the county court "to first determine its jurisdiction" over the potential claim.

12. *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016)

City failed to reconnect with disconnected 911 caller reporting drug overdose of son, and then failed to arrive at scene, and plaintiff's son died. City filed a motion to dismiss under TEX. R. CIV. P. 91a. The Supreme Court held that "governmental immunity is not waived and dismissal is required because the requisite causal nexus between the alleged condition and [plaintiff's son's] injury is lacking."

Under TEX. R. CIV. P. 91a., whether "the dismissal standard is satisfied depends 'solely on the pleading of the cause of action.'" A motion to dismiss under TEX. R. CIV. P. 91a. has "been analogized to a plea to the jurisdiction, which requires a court to determine whether the pleadings allege facts demonstrating jurisdiction."

Governmental immunity is waived for an injury caused by a condition or use of personal or real property. For a waiver to occur, the "injury or death must be proximately caused by a condition or use of tangible personal or real property."

"Proximate cause requires both 'cause in fact and foreseeability.' For a condition of property to be a cause in fact, the condition must 'serve[] as 'a substantial factor in causing the injury and without which the injury would not have occurred.'' When a

condition or use of property merely furnishes a circumstance 'that makes the injury possible,' the condition or use is not a substantial factor in causing the injury. To be a substantial factor, the condition or use of the property 'must actually have caused the injury.' . . . Thus, the use of property that simply hinders or delays treatment does not 'actually cause[] the injury' and does not constitute a proximate cause of an injury."

Here, the "malfunction [of the 911 system] was too attenuated from the cause of [plaintiff's son's] death. . . . The alleged defect did not actually cause [his] death nor was his death 'hastened or exacerbated' by a telephone malfunction."

13. *McIntyre v. El Paso Independent School District*, 499 S.W.3d 820 (Tex. 2016)

Home-schooling family sued school district and its employee for filing unfound criminal charges of truancy. The Supreme Court ruled that they did not fail to exhaust administrative remedies; it also ruled that the employee had qualified immunity.

"Under the doctrine of qualified immunity, 'courts may not award damages against a government official in his personal capacity unless 'the official violated a statutory or constitutional right,' and 'the right was 'clearly established' at the time of the challenged conduct.'" The Fifth Circuit has repeatedly held "that there is "no Fourteenth Amendment 'liberty interest' or substantive due process right to be free from criminal prosecution unsupported by probable cause. . . ." Here, the employee had qualified immunity.

14. *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016)

On rehearing, the Supreme Court withdrew its prior opinion in this inverse condemnation case, 485 S.W.3d 1, and substituted this one, reversing its prior ruling. See *infra*.

In this case, homeowners had sued county and flood control district for compensation for damage to their property from flooding, arguing that county's approval of development and failure to adopt a flood mitigation plan while knowing that this would lead to flooding constituted a taking.

"Only affirmative conduct by the government will support a takings claim." "We have not recognized a takings claim for nonfeasance." Here, district could not be liable for a taking for failing to implement a particular flood control plan, but instead could "derive, if at all, from the County's affirmative acts of approving development."

A takings claim also requires specificity of intent. "The government must know that 'a *specific* act is causing *identifiable* harm' or know that '*specific property damage* is substantially certain to result from an authorized government action.'" "We have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction."

There is also a public use element to a takings claim. Here, that element was not satisfied because there was no evidence that county "ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures."

The Court declined to recognize a takings claim in these circumstances "in a manner that makes the government an insurer for all manner of natural disasters and inevitable man-made accidents." "Accepting such a capacious approach to takings would endanger the ability of governments to finance and carry out their necessary functions, the basis for sovereign immunity."

15. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

Law professor tripped on "an improperly secured extension cord." The Supreme Court ruled that the case was "a premises defect claim, and there is no evidence that UT had actual knowledge of the tripping hazard created by the cord's position over the retaining wall and across the sidewalk."

"Generally, 'immunity from suit implicates courts' subject-matter jurisdiction' for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit. A state agency, such as UT, shares this governmental immunity. The state or governmental unit can be sued only if the Legislature waives immunity in 'clear and unambiguous language.' There are two distinct principles of sovereign immunity: immunity from suit and immunity from liability. . . . [A] governmental unit is immune from suit unless the Tort Claims Act expressly waives immunity, which it does in three areas when the statutory requirements are met: (1) use of publicly owned automobiles; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects."

"Whether a court has subject matter jurisdiction is a question of law, properly asserted in a plea to the jurisdiction. 'Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*.' Generally, the standard mirrors that of a summary judgment. . . . '[I]f the plaintiffs' factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction.' When the evidence submitted to support the plea implicates the merits of the case, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor."

The act imposes different duties depending upon whether the claim is "'a condition or use of tangible personal property'" versus one based on a "'premises defect.'" "If the claim 'arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property.' The duty owed to a licensee on private property requires that 'a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.'" "Whether a claim is based on a premises defect is a legal question." And, a "claim can[not] be both a premises defect claim and a claim relating to a condition or use of tangible property." "*Miranda* made clear that a claim for a condition or use of real property is a premises defect claim under the Tort Claims Act. . . ." This "Court . . . has consistently treated slip/trip-and-fall cases as . . . premises defects" cases.

A "plaintiff cannot plead around the heightened standard for premises defects, which requires proof of additional elements such as actual knowledge, by casting his claim instead as one for a condition or use of tangible personal property."

Because the Tort Claims Act "ostensibly incorporates common law principles by using the term 'premises defect,' . . . [w]e therefore look to the common law premises defect cause of action for guidance. . . ."

The common law recognizes "two subspecies of negligence: causes of action for premises liability and negligent activity. 'We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.' When distinguishing between a negligent activity and a premises defect, this Court has focused on whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect." Under the Tort Claims Act, "the dangerous condition upon which a premises defect claim is based may be created by an item of tangible personal property. The distinction lies in whether it is the actual use or condition of the tangible personal property itself that allegedly caused the injury, or whether it is a condition of real property—created by an item of tangible personal property—that allegedly caused the injury."

To "state a 'use' of tangible personal property claim under the Tort Claims Act, the injury must be *contemporaneous* with the use of the tangible personal property. . . ." A "governmental unit "does not 'use' tangible personal property . . . by merely providing, furnishing, or allowing . . . access to it.'" The distinction is whether "the tangible personal property itself caused the injury, or whether the tangible personal property created the dangerous real-property condition, making it a premises defect."

Here, the "injury did not result from the use of tangible personal property because a UT employee was not putting or bringing the cord into action or service *at the time* of the injury." When "an item of tangible personal property creates a condition of real property that results in a slip/trip-and-fall injury, it is . . . a premises defect cause of action."

"Absent willful, wanton, or grossly negligent conduct, a licensee must prove the following elements to establish the breach of duty owed to him: '(1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of injury to the licensee.'"

"'Actual knowledge, rather than constructive knowledge of the dangerous condition is required.'" The "licensee must show that the owner actually knew of the 'dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time.' Hypothetical knowledge will not suffice. Additionally, that the owner could have done more to warn the licensee is not direct

evidence to show that the owner had actual knowledge of the dangerous condition." Courts "'generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition.'"

Here, the issue is not who initially placed the cord, it is "whether UT had actual knowledge of the dangerous condition created by the cord's position at the time of Sampson's fall. . . ." "While circumstantial evidence can establish actual knowledge, such evidence must ''either directly or by reasonable inference' support that conclusion.' An inference is not reasonable if premised on mere suspicion—'some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.'"

Evidence "'that an owner or occupier knew of a safer, feasible alternative design, without more, is not evidence that the owner knew . . . that a condition on its premises created an unreasonable risk of harm.' Despite the evidence of prior falls, employees in the area, and a feasible, safer alternative design, we held [in *City of Dallas v. Thompson*] that the plaintiff failed to present any evidence of the City's actual knowledge of the protruding coverplate." Here, awareness "'of a potential problem [with the cord] is not actual knowledge of an existing danger.'" "'Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time.'"

16. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio,* 489 S.W.3d 448 (Tex. 2016)

Contractor sued municipally-owned electric and gas utility for breach of a construction contract, seeking damages and attorney's fees. Following *Wasson Interests, Ltd. v. City of Jacksonville,* 489 S.W.3d 427 (Tex. 2016), the Supreme Court held that utility "was performing a proprietary function and [was] therefore not immune from suit based on governmental immunity . . . even in the contract-claims context." The Court additionally held that contractor's "claim for attorney's fees does not implicate immunity."

"Just as the nature of governmental immunity does not 'inherently limit[] the [proprietary-governmental] dichotomy's application to tort claims,' it likewise does not inherently preclude a claim for attorney's fees from a breach-of-contract claim arising from a proprietary function."

17. *Wasson Interests, Ltd. v. City of Jacksonville,* 489 S.W.3d 427 (Tex. 2016)

City leased land to plaintiff who filed a declaratory judgment action concerning the lease. The Supreme Court ruled that city did not have immunity. "[S]overeign immunity does not imbue a city with derivative immunity when it performs proprietary functions . . . [*viz.* when] the city acts of its own volition for its own benefit and not as a branch of the state. We therefore hold that the common-law distinction between governmental and proprietary acts—known as the proprietary-governmental dichotomy—applies in the contract-claims context just as it does in the tort-claims context."

"Texas is inviolably sovereign . . . [which is] inherent in its statehood." "Political subdivisions of the state—such as counties, municipalities, and school districts—share in the state's inherent immunity." "[S]overeign immunity as it applies to such political subdivisions—referred to as governmental immunity—[involves a distinction] . . . between those acts performed as a branch of the state and those acts performed in a proprietary, non-governmental capacity." A "'municipality's immunity extends only as far as the state's but no further,'" and does not shield it from torts committed during proprietary functions. Footnote 3: While cities may have proprietary functions, "counties [and] school districts 'perform[] no proprietary functions. . . .'"

A city does not "have immunity from suit for proprietary acts." Acts "performed as part of a city's proprietary function do not implicate the state's immunity . . . [because] they are not performed under the authority, or for the benefit, of the sovereign."

Footnote 4: "When the government contracts with private citizens, it waives immunity from liability, but not its immunity from suit."

The purposes of "immunity have changed over time." It went from "the King can do no wrong" to the dignity of the state, to a protection of the treasury by "'shield[ing] the public from the costs and consequences of improvident actions of their governments.'"

The judiciary defines sovereign immunity and its boundaries. Then, it will "defer to the sovereign will of the state . . . for any waiver of already existing immunity." The will of the people "'is expressed in the Constitution and laws of the State,' and thus 'to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.'" The Court ordinarily defers "to the Legislature to waive

sovereign immunity from suit, because this allows the Legislature to protect its policymaking function."

When "a government officer acts *ultra vires*, immunity does not protect his acts . . . is because acts done 'without legal authority' are not done as a branch of the state."

Cities, like other political subdivisions, are not "'sovereign entities.'" Footnote 8: "This is true for both home-rule and general-law cities."

"The judiciary determines the applicability of immunity in the first instance and delineates its boundaries. If immunity is applicable, then the judiciary defers to the legislature to waive such immunity."

Abrogation of common law is disfavored, and Chapter 271 does not abrogate the governmental-proprietary dichotomy. The dichotomy is used to determine if immunity exists, and Chapter 271 to determine if an existing immunity is waived.

The "constitution authorizes the legislature to 'define . . . functions . . . that are . . . governmental and those that are proprietary. . . . [T]he TTCA generally defines governmental functions as those 'that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty. . . .' It then provides a non-exhaustive list, enumerating thirty-six legislatively-defined governmental functions. Proprietary functions . . . are generally defined by the TTCA as 'those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality. . . .'" The definitions can guide contract claims as well as tort claims.

18. *Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016)

City ordinance authorized city's director of public works and engineering to charge drainage fees to the owners of "benefitted properties" based on the area of "impervious surface" on the property. Railroads sued city and director, challenging director's determination that all of their property in the city was "benefitted property" and that nearly the entire surface of their properties was "impervious surface." Railroads alleged *ultra vires* claims and seek injunctive relief, arguing that director acted outside his authority under the ordinance. City filed plea to the jurisdiction as to railroads' *ultra vires* claims based on governmental immunity.

"[W]hile governmental immunity provides broad protection to the state and its officers, it does not bar a suit against a government officer for acting outside his authority—i.e., an *ultra vires* suit." "'To fall within this *ultra vires* exception,' however, 'a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'"

The Supreme Court clarified the principle developed in its recent cases addressing the *ultra vires* exception to governmental immunity—*City of El Paso v. Heinrich*, *Tex. Parks & Wildlife Department v. Sawyer Trust*, and *Klumb v. Houston Municipal Employees Pension System*—which "affirm that while the protections of governmental immunity remain robust, they are not absolute." "[G]overnmental immunity protects exercises of discretion, but when an officer acts beyond his granted discretion—in other words, when he acts without legal authority—his acts are not protected." "[T]he principle arising out of *Heinrich* and its progeny is that governmental immunity bars suits complaining of an exercise of *absolute* discretion but not suits complaining of *either* an officer's failure to perform a ministerial act *or* an officer's exercise of judgment or *limited* discretion without reference to or in conflict with the constraints of the law authorizing the official to act. Only when such absolute discretion—free decision-making without any constraints—is granted are *ultra vires* suits absolutely barred. And, as a general rule, 'a public officer has no discretion or authority to misinterpret the law.'"

Here, the ordinance, which charged director with "'administration of [the ordinance],'" "'does not contain any language indicating—even if the director has the authority to make [benefitted property determinations—that he personally decides which properties are "benefitted."'" Instead, director's "authority here [was] explicitly limited" to administration of "the ordinance 'in accordance with and subject to [its] provisions,'" with "no language in the ordinance grant[ing] [director] discretion to interpret" the "expressly define[d]" term, "benefitted property." "Accordingly," director "[did] not have authority" to determine what is "benefitted property" in a way that conflicts with the ordinance, and railroads asserted a viable *ultra vires* claim that director acted "without legal authority."

Likewise, while the ordinance granted director authority to determine the area of "impervious surface" on a "benefitted property," his discretion in making this determination was likewise not absolute because the ordinance expressly defines the term "impervious surface" and "lays out the specific types of data

[director] may use in his determination." Because railroads alleged that the data used by director did not meet the standard required by the ordinance, railroads sufficiently pled a claim that director "acted *ultra vires* in determining the impervious surface of their properties.

19. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch. 107, and then sued the Commission for damages. The trial court denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on the good-faith defense was error.

The legislative resolution granting permission to sue did not preclude the Commission from asserting a good-faith defense. TEX. CIV. PRAC. & REM. CODE § 107.002 does not permit the legislature to "waive any defense of law or fact 'except the defense of immunity from suit without legislative permission.'" While "[t]he Commission's immunity from suit is a jurisdictional component of its sovereign immunity and exists under common law unless expressly waived by statute," the good-faith defense under TEX. NAT. RES. CODE § 89.045 "provides a statutory affirmative defense to liability" that is "distinct from and independent of the Commission's common-law immunity from suit."

Under TEX. NAT. RES. CODE § 89.045, "'[t]he commission and its employees and agents, the operator, and the non-operator are not liable for any damages that may occur as a result of acts done or omitted to be done by them or each of them in a good-faith effort to carry out' Chapter 89" of the Natural Resources Code. The application of the good-faith defense is not limited to acts that involve discretion. The statute's "language is broad, foreclosing liability for 'any damages' resulting from acts or omissions 'in a good-faith effort to carry out' Chapter 89." The common-law official immunity doctrine, which is limited to discretionary acts, "has no bearing on our interpretation of an independent, unrelated statute." Additionally, it "is not limited to tort actions," and applies to breach of contract actions.

The statutory good-faith defense does not include a standard of objective reasonableness. "The statute does not define 'good-faith' or 'good-faith effort.'" "An undefined statutory term is given its ordinary meaning unless 'a different or more precise definition is apparent from the term's use in the context of the statute.'" The common definitions of 'good-faith' "focus overwhelmingly on subjective state of mind." Thus "good-faith effort to carry out Chapter 89 requires conduct that is honest in fact and is free of both improper motive and willful ignorance of the facts at hand." Here, there was a fact question as to whether the Commission's conduct was a "good-faith effort," and the trial court's failure to submit a jury question on this defense was error.

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

F. Agents and Agency; Vicarious Liability

1. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories, one of which involved agency. The Supreme Court upheld summary judgment for all defendants.

"Authority to act on the principal's behalf and control are the two essential elements of agency. . . . Agency is not presumed; a party alleging the existence of an agency relationship bears the burden of proving it." A "'principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's

performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority.'"

Here, Exxon had no contract with DISA, its alleged agent, or the "requisite control."

G. Contract Law and Contract Construction

1. *Noble Energy, Inc. v. ConocoPhillips Company*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Noble bought interests from Alma, which had filed for bankruptcy. Long before the bankruptcy, Alma and Conoco had swapped properties; as part of that agreement, they had agreed to indemnify each other. That was not expressly disclosed in the asset purchase agreement by which Noble bought the interests. The Supreme Court said that the issue was "whether, under the terms of a bankruptcy court order confirming a plan of reorganization and an agreement for sale of the debtor's [Alma's] assets, the purchaser [Noble] was assigned an undisclosed contractual indemnity obligation of the debtor. We agree . . . that the answer is yes. . . ." So, Noble was required to provide indemnity to Conoco.

One issue was whether the agreement swapping properties was an "executory contract." In the bankruptcy context, an executory contract is "'a contract 'on which performance is due to some extent on both sides.'" The test: "'an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other part.'" "Courts have uniformly held that contracts imposing ongoing indemnity obligations contingent on future events are executory." Unlike licensing agreements incidental to the sale of a business, "[t]he mutual indemnity obligations . . . were in no sense minor or unrelated to the property swap." The property swap agreement was thus executory.

Footnote 10: "'A purchaser is charged with knowledge of the provisions and contents of recorded instruments.' 'Third persons are deemed to have constructive knowledge or notice of the existence and contents of recorded instruments affecting immovable property.'"

A "'claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed and certain.'"

2. *In re Dean Davenport*, 522 S.W.3d 452 (Tex. 2017)

Attorneys had contingency fee agreement with client concerning his monetary recovery. However, when client purchased opponent's interest in business after a trial, attorneys sought to receive interest in business. A suit with client ensued in which trial court granted new trial. The Supreme Court ruled that the trial court's finding that the fee agreement permitted attorneys an interest in business "was an abuse of discretion because the agreement unambiguously states that the lawyers were only entitled to attorney fees from a monetary recovery. Accordingly, we conditionally grant [client's] petition for writ of mandamus. . . ."

Here, the fee agreement "unambiguously allows for [attorneys] to only recover money in exchange for their legal services."

"The term 'sums' in the contract is the crux of the dispute. . . . Black's Law Dictionary defines 'sum' as '[a] quantity of money.'"

The attorneys had agreed not to take a fee interest in different entities. That "clause, which explicitly prohibits the lawyers from taking a fee out of two specified companies, [does not] . . . mean the lawyers are entitled to take a fee out of other ownership interests as a matter of law."

Moreover, because "'a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.' A lawyer has a duty to 'appreciate the importance of words' and 'detect and repair omissions in client-lawyer contracts.' The goal of an attorney-client fee agreement is to ensure that the client is informed of the terms. . . . [W]hether the lawyer was reasonably clear is determined from the client's perspective. Placing the burden on the lawyers to be 'clear' in fee agreements is warranted, given a lawyer's sophistication, the trusting relationship between a lawyer and his client, and a lawyer's responsibility to notify the client of the fee's basis or rate at the outset. Specifically to a contingent-fee agreement applied to interests other than money, we have held that the 'burden' is on the lawyer 'to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages.'"

Here, the attorneys could easily have explicitly provided for non-cash compensation. Thus, "we find

that the Agreement only permits recovery from monetary awards."

3. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017)

Doctor enters five-year employment agreement with a non-profit to work at a hospital. Employment agreement allows non-profit to terminate doctor without cause with sixty days' notice if doctor's annual practice losses exceed $500,000 at the end of any of the last three years of the contract.

During the third year of the contract, doctor has a disagreement with other physicians at the hospital and stops accepting referrals. Vice president of practice management company recommends that the non-profit terminate doctor "without cause" at the end of the year. When doctor's practice losses exceed $500,000 at the end of the third year, the CEO of the hospital, acting on behalf of the non-profit, gives sixty-days' notice that doctor is being terminated without cause. Doctor sues non-profit for breach of contract.

The Supreme Court affirmed the trial court's summary judgment for non-profit on the breach of contract claim because non-profit gave doctor sufficient notice under the contract and the only evidence showed that the annual practice loss exceeded $500,000, thus fulfilling the conditions subsequent under the contract that allowed non-profit to terminate doctor without cause. "'[A]bsent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." Here, as long as the conditions were met, the termination provision was "effectively a 'termination-upon-notice' provision[], and '[a] contract that a party may terminate under such a clause is terminable at will.'"

Because the contract was terminable at will, it was unnecessary for non-profit to prove the grounds on which it terminated doctor. Footnote 6: "Texas courts have long held that when a party properly terminates a contract pursuant to a without-cause provision, the reason for the termination is irrelevant."

4. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

"Tortious interference with a contract occurs when a party interferes with a contract willfully and intentionally and the interference proximately causes actual damages or loss. Justification is an affirmative defense to such a claim and 'is established as a matter of law when the acts the plaintiff complains of as tortious interference are merely the defendant's exercise of its own contractual rights.'"

5. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank caused lengthy delays in providing a loan to buyer of business. Business ultimately failed, and seller of business intervened in buyer's suit against bank, asserting that seller was a third-party beneficiary of the loan. The Supreme Court ruled that the "the contract is unambiguous and does not make the [seller] a third-party beneficiary." Further, "the trial court erred by submitting that issue to the jury and by instructing the jury that it could consider extrinsic evidence to add a third-party-beneficiary term to the unambiguous written agreement."

"'As a general rule, parties in Texas may contract as they wish,' and only 'the parties to an agreement determine its terms.'"

Ordinarily, only the parties to a contract and those in privity can sue under the contract. "An exception to this general rule permits a person who is not a party to the contract to sue for damages caused by its breach if the person qualifies as a third-party beneficiary." A "'person seeking to establish third-party-beneficiary status must demonstrate that the contracting parties 'intended to secure a benefit to that third party' and 'entered into the contract directly for the third party's benefit.'" It is insufficient that the third party would benefit from the contract or that the parties knew that it would benefit. "To create a third-party beneficiary, the contracting parties must have intended to grant the third party the right to be a 'claimant' in the event of a breach." Courts "must look solely to the contract's language, construed as a whole. The contract must include 'a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party. . . .'" The presumption is against a third-party beneficiary.

Here, loan letters were unambiguous and did not express an intent to make seller a third-party beneficiary.

The jury should not have determined if seller was a third-party beneficiary because that was a legal question. "When a contract's language is unambiguous, courts must 'construe the contract as a matter of law.'" "And whether the contract is ambiguous is itself a question of law for the court to decide."

"When a written contract is unambiguous and

does not clearly express the parties' intent to create a third-party beneficiary, extrinsic evidence is simply irrelevant and inadmissible on that issue." To determine a third-party beneficiary, "courts must look solely to the contract's language."

Construction "of an unambiguous contract, including the determination of whether it is unambiguous, depends on the language of the contract itself, construed in light of the surrounding circumstances."

"When parties 'have a valid, integrated written agreement,' the parol-evidence rule 'precludes enforcement of prior or contemporaneous agreements.' As a result, 'extrinsic evidence cannot alter the meaning of an unambiguous contract.' . . . [The] parties may not rely on extrinsic evidence 'to create an ambiguity or to give the contract a meaning different from that which its language imports.'"

The "'parol-evidence rule 'does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.'" "'Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.'"

The "parol-evidence rule 'does not apply to agreements made *subsequent* to the written agreement,'" but here a purported oral agreement was made beforehand.

Just as "dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract's unambiguous language."

Footnote 16: Here, the statute of frauds is not an obstacle to arguing there was an oral agreement because First Bank "failed to give the notice the statute requires. . . . [L]oan agreements are subject to the statute of frauds."

The "parol-evidence rule 'does not apply to agreements made *subsequent* to the written agreement,'" but here a purported oral agreement was made beforehand.

6. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Tenant had habitually paid rent late, which landlord accepted; though commercial lease contained a "nonwaiver" provision, tenant argued landlord waived the nonwaiver provision. The Supreme Court ruled that "as a matter of law, accepting late rental payments does not waive the nonwaiver provision in the underlying lease. . . . Moreover, [landlord] did not act inconsistently with its right to accept untimely rent without waiving the nonwaiver provision."

Texas has a "strong public policy favoring freedom of contract." "Freedom of contract is a policy of individual self-determination; individuals can control their destiny and structure their business interactions through agreements with other competent adults of equal bargaining power, absent violation of law or public policy."

"[C]ompetent parties ''shall have the utmost liberty of contract, and [] their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.'' This ''paramount public policy'' mandates that courts ''are not lightly to interfere with this freedom of contract.'' 'Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered,' and '[a]s a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.'"

Generally, "nonwaiver provisions are binding and enforceable."

Parties "can contractually waive certain substantive and procedural rights." Individual self-determination means that "'any competent adult can abandon a legal right and if he does so then he has lost it forever.'" "[W]e affirm that a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly." Yet, a "nonwaiver provision is [not] wholly ineffective in preventing waiver through conduct the parties explicitly agree will never give rise to waiver."

"Parties are presumed to know the contents of their contracts."

"Our rules of contract construction simply do not permit us to rewrite a contract."

Footnote 33: In insurance policies, nonwaiver "agreements are strictly construed against the insured and will not be extended by implication beyond their exact terms."

7. *Loya v. Loya*, 526 S.W.3d 448 (Tex. 2017)

Construction of an MSA in a family law case. "Because an MSA is a contract, we look to general contract-interpretation principles to determine its meaning. . . . When construing a contract, 'a court must ascertain the true intentions of the parties as expressed

in the writing itself.' 'We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.'"

8. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017)

Cimco supplied a refrigeration system to Bartush. When the system failed to achieve the desired temperature, Bartush obtained an alternate system and quit paying Cimco on an installment contract. The jury found that both companies breached the contract. The Supreme Court ruled that the "jury's findings that Cimco failed to comply with the agreement first and that its failure to comply was not material mean that (1) Bartush remained liable for its subsequent failure to comply, but (2) Bartush's claim for damages caused by Cimco's prior breach remained viable."

"'It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.' By contrast, when a party commits a nonmaterial breach, the other party 'is not excused from future performance but may sue for the damages caused by the breach.'"

A breach of contract "claim requires a finding of breach, not a finding of material breach. . . . [A] material breach by Cimco would have excused Bartush from making further contractual payments, while a nonmaterial breach would have simply given rise to a claim for damages."

Here, the jury "found that Bartush's breach was not excused. To make the latter finding, the jury must have concluded that Cimco's prior breach was not material." "Generally, materiality is an issue 'to be determined by the trier of facts.'" Materiality "may be decided as a matter of law only if reasonable jurors could reach only one verdict."

The Court outlined in *Mustang Pipeline* several factors in determining whether a failure to perform is material:

> "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

In "*Mustang* we held that a contractor's failure to meet a deadline in contravention of an express time-is-of-the-essence clause was a material breach as a matter of law."

"While a party's nonmaterial breach does not excuse further performance by the other party, neither does the second breach excuse the first. To the contrary, a material breach does not discharge a claim for damages that has already arisen."

Footnote 5: when a contractor sues for the balance and the owner counterclaims for defective work, "if the contractor has substantially completed performance, *i.e.*, the contractor's breach is not material, then the contractor has a claim for the unpaid balance and the owner has a claim for damages."

9. *Great American Insurance Company v. Primo*, 512 S.W.3d 890 (Tex. 2017)

Former director sought coverage under D&O policy after association's assignee (a first insurance company) sued him. The Supreme Court ruled the director's claim was barred by the policy's "insured-v.-insured" exclusion.

The issue turned on whether the first carrier "succeed[ed]" to the interest of the association by the assignment. Here, the exclusion "proscribes coverage of claims made by an insured against an insured" and against those who succeeds to an insured's interest.

"We interpret insurance policies under the well-established rules of contract construction. . . . [E]very contract should be interpreted as a whole and in accordance with the plain meaning of its terms. When reviewing policy language, we . . . ensure that no provision is rendered meaningless. We also refuse to insert language or provisions the parties did not use or to otherwise rewrite private agreements."

"The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used. . . . 'Plain meaning' is a watchword for contract interpretation because word choice evinces intent. A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.' And we assign terms their

ordinary and generally accepted meaning unless the contract directs otherwise."

"If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law. An ambiguity does not arise merely because a party offers an alternative conflicting interpretation, but only when the contract is actually 'susceptible to two or more reasonable interpretations.'"

'"A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the parol evidence rule. . . .'"

10. *Nassar v. Liberty Mutual Fire Insurance Company*, 508 S.W.3d 254 (Tex. 2017)

Dispute over interpretation of a homeowner's insurance policy concerning a claim for hurricane damage to homeowner's house and fence. Homeowner argued that the fence was covered as part of his "dwelling," while carrier argued that the fence fell under a separate, lower policy limit for "other structures." The Supreme Court held that because homeowner's "interpretation of the policy language is reasonable and the policy is unambiguous," homeowners' "fencing is covered under the 'dwelling' provision as a matter of law."

"If . . . only one party's interpretation of the insurance policy is reasonable, then the policy is unambiguous and the reasonable interpretation should be adopted. Alternatively, if we determine that both interpretations are reasonable, then the policy is ambiguous[,]" and "'we must resolve the uncertainty by adopting the construction that most favors the insured.'" Thus, if homeowner's "interpretation is reasonable," then it "must be adopted even if [carrier's] interpretation is also, or more reasonable."

Here the "dwelling" provision included "'structures attached to the dwelling.'" "'Structure'" is not defined in the policy or Texas case law, but "*Black's Law Dictionary* defines 'structure' as '[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together.'" Because the fencing is a "structure" under that definition and attached to the dwelling, homeowner's interpretation is reasonable and must be adopted as a matter of law.

The Court rejected carrier's argument that the fence fell under the "other structures" provision because that provision "'includes structures connected to the dwelling by only a fence, utility line, or similar connection," the fence was a "connection" and not a "structure." "Connection" and "structure" are not mutually exclusive, and the "inferential leap required to cause" the fencing to "transform from a 'structure' to an 'other structure' because it is a 'connection' renders [carrier's] interpretation unreasonable because the plain language . . . make[s] such a leap unnecessary."

11. *In re Red Dot Building System, Inc*., 504 S.W.3d 320 (Tex. 2016)

For venue purposes, in breach of contract cases, courts consider "where the contract was made, performed, and breached." Venue is proper in the county where the buyer was solicited and the contract formed. Venue is also proper in the county where the materials are fabricated and shipped.

"[A]bsent special circumstances, a surety cannot be sued without also suing its principal. . . . [But] "'a principal obligor on a contract may be sued alone.'" TEX. CIV. PRAC. & REM. CODE § 17.001(a).

12. *North Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598 (Tex. 2016)

Optionee executed an option contract allowing it to select land from a described tract on which to execute oil and gas leases. Optionee had paid $50 per acre optioned, and agreed to pay $200 per acre leased when it exercised its option. Land was described in the option contract as '"1,210.8224 acres of land, more or less, out of the 1673.69 acres . . . and being the same land described in'" a 1996 lease. The 1996 lease describes the land as "'[b]eing 1273.54 acres . . . and being all of the 1673.69 acre tract described on EXHIBIT "A" attached hereto, SAVE AND EXCEPT a 400.15 acre tract described in" a 1995 lease to another lessee. The parties disagreed over whether the option contract includes the 400.15 acres of the 1995 lease tract—optionee contends that the option contract covers the entire 1673.69 acre tract.

A contract is not ambiguous "'merely because parties to an agreement proffer different interpretations of a term.'" "'For an ambiguity to exist, both interpretations must be *reasonable*.'" "'[T]he contract may be read in light of the circumstances surrounding its execution to determine whether an ambiguity exists.'"

Here, those circumstances "include the amount paid for the optioned acreage." The description was not

ambiguous here because optionee only paid the price for 1210.8224 acres.

Optionee also argued that the contract was a selection agreement allowing it to choose any 1,210.8224 acres out of the 1673.69 acres. While "selection agreements are valid and enforceable under Texas law," and the option contract it issued "is a selection agreement," it allowed optionee to choose acres out of the 1210.8224 acres described.

Optionee also argued that the difference between 1,210.8224 identified in the contract and 1,273.54 acres identified in the 1996 lease made seller's interpretation unreasonable. "Slight differences in acreage when the description uses the phrase 'more or less' will not preclude an interpretation of the description to include the larger acreage." "'[T]he call for acreage . . . "is the least reliable of all calls in a deed."'"

Optionee also sued driller for geophysical trespass for seismic survey driller performed over the optioned land. However, while optionee attempted to exercise its option over part of the property, paid the $200 per acre exercise price, and began production, it never executed the lease form attached to the option contract.

"An option agreement does not pass title or convey an interest in property," but "merely gives the optionee the option to purchase property or execute a lease within a certain time period." Because optionee never executed the lease, it never acquired a possessory interest in the land and thus lacked standing to sue for trespass.

13. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"A voidable policy or agreement is one that "can be affirmed or rejected at the option of one of the parties.'" Here, because the policy if "voidable" under the statute, the insured "has the option to either enforce its rights 'under the contract,' or rescind the contract."

14. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The jury did not find tenant negligent, but found she violated lease by failing to pay for damage. The Supreme Court ruled that the lease did not violate public policy: it was not "unenforceable on public-policy grounds because (1) the disputed lease provision can be enforced without contravening the Property Code and (2) the record here does not conclusively establish the factual predicate necessary to preclude its enforcement."

"Texas's strong public policy favoring freedom of contract is firmly embedded in our jurisprudence. Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered."

Parties "in Texas may contract as they wish so long as the agreement reached does not violate positive law or offend public policy." "'The Legislature determines public policy through the statutes it passes.'" "'Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited.'"

To some extent, the "Texas Property Code restricts freedom of contract in residential tenancies." But, the "Property Code imposes no barrier to contract beyond those deriving from its terms." There is "no public-policy bar—either under the Property Code or at common law—to contractually allocating responsibility for repair costs negligently or intentionally caused by the tenant or a cotenant."

A "party seeking to avoid liability under [an] agreement has the burden to plead and prove facts making it unlawful, unless the agreement is facially invalid."

"'A contract to do a thing which cannot be performed without violation of the law' violates public policy and is void.'" A "contract will not be declared void merely because it *could have been* performed illegally or contrary to public policy." The lease provision here is "unenforceable per se only if it could not be performed without violating the Property Code.

Parties are "'presumed to know the law'" and they are presumed to intend that their contracts "'have a legal effect.'"

The "first step in determining whether public policy precludes subject matter of a contract involves ascertaining the contract's scope." Then, the "second step in public-policy analysis requires consideration of explicit legislative policy decisions and, in the absence of such, consideration of the general public policies of Texas."

"A contract is ambiguous if it is subject to two or more reasonable interpretations. But when a contract provision is worded so that it can be assigned a definite meaning, no ambiguity exists, and we construe the contract as a matter of law."

"Though we strive to construe contracts in a manner that avoids rendering any language

superfluous, redundancies may be used for clarity, emphasis, or both."

The tenant "carries the burden of pleading and proving the contract's invalidity as an affirmative defense." TEX. R. CIV. P. 94 lists "contract-avoidance defenses that are affirmative defenses—failure of consideration, fraud, illegality, and statute of frauds—and extending the affirmative-pleading requirement to 'any other matter constituting an avoidance or affirmative defense')."

15. *Apache Deepwater, LLC v. McDaniel Partners, Ltd*., 485 S.W.3d 900 (Tex. 2016)

Production payments from four oil and gas leases were assigned by one instrument. Later, two leases lapsed due to loss of production. Applying rules of construction, the Supreme Court ruled that the "production payment should be reduced to reflect the loss of" the two leases.

"[P]arties' conflicting interpretations, without more, do not create an ambiguity. Instead, ambiguity exists when an agreement's meaning is uncertain or its terms are reasonably susceptible to more than one interpretation. When an agreement can be given a definite or certain legal meaning, it is not ambiguous and is construed as a matter of law." This conveyance was unambiguous.

"Ultimately, the nature of this particular production payment and its burden on the underlying leasehold estates rests on what the assignment says, not on what a party argues it should have said. When a contract's meaning is unambiguous, our task is to determine the parties' intentions as expressed in the written instrument. Our approach is holistic. We 'examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.' No single provision taken alone is controlling, but rather all provisions are 'considered with reference to the whole instrument.' Moreover, we 'construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served.'"
Here, "[n]either the inclusion of the four leases in a single instrument nor the instrument's statement of the leases' cumulative working interest as a single fraction demonstrates that the parties intended the production payment to be carved from something other than the estates conveyed. To the contrary, the [assignment mentions] . . . assignor's interest in the 'respective' leases, indicating that the reserved interest pertains to the particular leases separately."

16. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch. 107, and then sued the Commission for damages. At trial, the trial court denied the Commission's request for a jury question on contract formation, holding as a matter of law that a contract was formed at the meeting. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on contract formation was error.

The parties disputed whether they intended to be bound by the oral agreement that occurred prior to the plugging of the well, before the execution of the formal written agreement. In the situation in which '"an [a]greement was reached as to certain material terms, yet another formal document was contemplated by the parties,'" formation of a contract depends on "whether 'the contemplated formal document [was] a condition precedent to the formation of a contract or merely a memorial of an already enforceable contract.' The answer depends on the intent of the parties, which is usually a question for the trier of fact." Here, there was conflicting evidence as to whether the parties intended to be bound by the initial oral agreement, and thus contract formation was "a disputed fact issue that should have been presented to the jury."

17. *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231 (Tex. 2016)

Seller entered agreement to sell tax-consulting business. Purchase price included a payment for a percentage of projects pending at the time of close, based on agreed percentages of completion, plus four annual "earn-out payments" where seller remained as employee of buyer for a period of years. For the final year, seller was to receive an additional "pending-projects" payment for projects that had not yet been

completed at the end of the term. The amount of this payment was to be based on a percentage of completion of the projects that would "have to be mutually agreed upon by [buyer] and [seller]."

After disputes arose, buyer argued that this pending-projects payment constitutes an unenforceable agreement to agree. The Supreme Court disagreed, holding "that the pending-projects clause is sufficiently definite to enable a court to determine the parties' obligations and to provide a legal remedy," and thus enforceable.

"[I]t is fundamental that 'we may neither rewrite the parties' contract nor add to its language.'" However, "because the law disfavors forfeitures, we will find terms to be sufficiently definite whenever the language is reasonably susceptible to that interpretation," favoring constructions that make an instrument valid and avoiding constructions that lead to forfeitures.

Further, "when construing an agreement to avoid forfeiture, we may imply terms that can reasonably be implied." "[A] term that 'appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties.'"

Finally, "'[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.' And in fact, the parties' actions 'in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.'"

"Applying these principles," the Supreme Court held the pending-projects clause enforceable. The pending-projects payment was part of the purchase price for the business, and a "'failure to specify the price does not leave the contract so incomplete that it cannot be enforced'" when "the parties 'have done everything else necessary to make a binding agreement.'"

Here, the language of the parties' agreement "confirmed their mutual intent to reach a binding agreement" that buyer would make a pending-projects payment to seller. While leaving the amount subject to a future mutual agreement, the agreement provided that buyer "'shall pay'" the final earn-out payment, which "'will include'" the pending-projects payment, thus describing buyer's "then-present and immediate intent to be bound to pay" the pending-projects payment.

While the clause did not "specify the *amount* of the pending-projects payments," because the parties could not know how complete the projects would have been at the end of the earn-out period, it provided a formula—the completion percentages of the projects at the end of the term—on which the pending-projects payments were to be based. "[W]hen a 'contract was about as definite and certain as the parties could have made it under the circumstances and it was sufficiently definite and certain to furnish a basis for arriving with reasonable certainty at the minimum damages,' the contract is enforceable."

H. Insurance Law, Insurance Contracts, *Stowers*, Subrogation, Indemnity, Bad Faith

1. *In re Accident Fund General Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Injured worker was terminated after failing to accept employer's offer of modified-duty work, which was made under a "bona-fide-employer-offer" process under the Workers' Compensation Act. Workers sued employer and workers' compensation carrier, alleging that the modified-duty offer was a sham to set up a pretext for retaliation against worker for making a workers' compensation claim. Worker also sued carrier for conspiracy, aiding and abetting, and tortious interference, alleging that carrier directed and encouraged employer's conduct.

In a *per curiam* opinion, the Texas Supreme Court held that the trial court lacked subject-matter jurisdiction over an employee's suit against a workers' compensation carrier arising from employer's alleged retaliatory discharge because the Texas Workers' Compensation Act provides the exclusive process and remedy for such a claim, applying *In re Crawford & Company*, 458 S.W.3d 920, 925-26 (Tex. 2015) (orig. proceeding) and *Texas Mutual Insurance Company v. Ruttiger*, 381 S.W.3d 430, 444, 456 (Tex. 2012). "The Workers' Compensation Act 'provides the exclusive procedures and remedies for claims alleging that a workers' compensation carrier has improperly investigated, handled, or settled a workers' claim for benefits.'"

In *Crawford*, Supreme Court applied this bar to hold "a host of tort, contract, and statutory claims could not go forward against the carrier in the trial court." "Not all statutory and common-law claims against a carrier run counter to the Act, but at the same time, neither a claim's label nor the relief requested is determinative of the jurisdictional inquiry."

Here, all of the claims against carrier "derive from its participation in the bona-fide-job-offer process" under the workers' compensation system. They therefore "arise out of the statutory claims-handling

process" and, as a result, fall within the exclusive jurisdiction of the Workers' Compensation Division.

2. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

Homeowners sued builder for poor construction, and builder's CGL carrier for failing to defend builder. The issue was whether the suit against the builder was fully adversarial to bind the CGL carrier. The Supreme Court ruled that it was not binding because an agreement rendered the trial not fully adversarial, and further that the suit against the carrier had to be remanded: "this insurance litigation may serve to determine the insurer's liability, although the parties in this case understandably focused on other issues during the trial."

"Texas follows the ''actual injury' or 'injury-in-fact' approach, [under which] the insurer must defend any claim of physical property damage that occurred during the policy term.'"

"'A plaintiff's factual allegations that potentially support a covered claim is [sic] all that is needed to invoke the insurer's duty to defend . . . .'"

An "insurer that wrongfully refuses to defend its insured is barred from collaterally attacking a judgment or settlement between the insured and the plaintiff. However, . . . in *Gandy* we narrowed the scope of that rule under certain circumstances in which the plaintiff seeks to enforce the judgment against the insurer as the insured's assignee." *Gandy* announced the general rule:

> "[A] defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim."

"'In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee.'"

Here, the builder's "assignment of its claims against Great American to the Hamels was valid."

"One way to ensure that a judgment accurately reflects the plaintiff's damages is to require that the loss be determined through a proceeding in which the parties 'fully'—or at least actually and effectively—oppose and contest each other's positions. The difficulty with this approach, however, is in determining just how effective each party's trial performance must be."

Regarding the "fully adversarial" nature of the trial against the insured, "the controlling factor is whether, at the time of the underlying trial or settlement, the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages and thus the defendant-insured's covered liability loss."

"When the parties reach an agreement before trial or settlement that deprives one of the parties of its incentive to oppose the other, the proceeding is no longer adversarial." Here, "the parties' pretrial agreement eliminated any meaningful incentive the Builder had to contest the judgment." For instance, plaintiffs had agreed not to enforce a judgment against the builder's personal assets. A "formal, written pretrial agreement that eliminates the insured's financial risk will [not] always be either necessary or sufficient to disprove adversity. We hold instead that the presence of such an agreement creates a strong presumption that the judgment did not result from an adversarial proceeding, while the absence of such an agreement creates a strong presumption that it did." Plaintiffs who receive an assignment from the insured "may overcome the presumption by submitting evidence demonstrating that the defendant retained a meaningful incentive to defend the underlying suit despite an agreement that eliminated the defendant's financial risk." Accordingly, "an after-the-fact evaluation of the parties' trial strategies therefore has no place in the analysis." Here, the judgment against the builder did not bind the carrier.

It is difficult to determine a defendant's liability after a settlement. "We believe an insurer's wrongful refusal to defend presents a compelling reason to engage in this endeavor despite its difficulty."

"Accordingly, while we will not hold an insurer to a judgment that was not the result of an adversarial proceeding, we will not preclude the parties from properly litigating the underlying liability issues in a subsequent coverage suit."

Footnote 10: "We recognize that, under the collateral-estoppel doctrine, 'prior adjudication of an issue will be given estoppel effect . . . if it was adequately deliberated and firm.' Further, collateral estoppel bars a third party insofar as privity exists with a party to the original suit. In *Block*, we held that the

insurer was not collaterally estopped from relitigating coverage issues that had been resolved in the first suit, in part because the insurer's and insured's positions were in conflict on that issue. Similarly, when the plaintiff and insured defendant lack adversity in the underlying suit to determine the insured's liability, we cannot say that the insurer's and insured's positions are aligned with respect to those issues. For this reason, the doctrine of collateral estoppel does not preclude adjudication of liability and damages issues in this Insurance Suit."

Here, the parties did not effectively retry the damages case against the builder in the insurance suit against the builder's CGL carrier. "Accordingly, we believe a remand in the interest of justice is necessary."

3. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Footnote 33: In insurance policies, nonwaiver "agreements are strictly construed against the insured and will not be extended by implication beyond their exact terms."

4. *BankDirect Capital Finance, LLC v. Plasma Fab, LLC*, 519 S.W.3d 76 (Tex. 2017)

Bank financed the payment of premiums of insurance policy. Policyholder was late paying bank, and bank provided nine days' notice it would cancel policy, but the statute required ten. Policyholder suffered fire that later resulted in a large judgment against policyholder. The Supreme Court ruled that the bank improperly canceled the policy: "The notice thus violated [TEX. INS. CODE § 651.161(b)] because the 'stated time' in the notice was 'earlier than the 10th day after the date the notice [was] mailed.'" The Court refused to engraft onto the statute a "substantial compliance" standard requested by bank.

The "Texas Premium Finance Act . . . prescribes certain notice-before cancellation requirements. One such requirement: The premium finance company must mail to the defaulting insured a notice of intent to cancel that states a time by which default must be cured, and '[t]he stated time may not be earlier than the 10th day after the date the notice is mailed.'" "This notice requirement is unambiguous, and '[w]here text is clear, text is determinative.'"

5. *USAA Texas Lloyds Company v. Menchaca*, ___ S.W.3d ___ (Tex. 2017)(4/7/17)

This suit for breach of a homeowners' insurance policy and Insurance Code violations, the jury did not find that insurer failed to comply with its obligations under the policy, but found violations of the Insurance Code and damages. The Supreme Court "seek[s] to clarify our precedent by announcing five rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code."

First, the "[t]he general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy."

Second, the "entitled-to-benefits rule" holds "that 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 benefits." "[S]ome Texas courts" have incorrectly held that an insured cannot recover policy benefits as damages for an Insurance Code violation incorrectly interpreted Supreme Court precedent.

Third, the "benefits-lost rule" holds "that an insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right*." [Emphasis in original.] This rule has been applied in the context of policy misrepresentations, "claims based on waiver and estoppel[,]" and "when the insurer's statutory violation actually caused the policy not to cover losses that it otherwise would have covered," such as where the violation resulted in payments to other insureds diminishing the available policy limits.

The "independent-injury rule," the fourth rule, "derives from the fact that an insurer's extra-contractual liability is 'distinct' from its liability for benefits under the insurance policy." This rule has "two aspects,": (1) "[I]f an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits;" and (2) "an insurer's statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless

the violation causes an injury that is independent from the loss of benefits." "[A] successful independent-injury claim would be rare, and we in fact have yet to encounter one."

Fifth, and finally, the "no-recovery rule" "is simply the natural corollary to the first four rules: An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits."

6. *Great American Insurance Company v. Primo*, 512 S.W.3d 890 (Tex. 2017)

Former condo association director allegedly wrongly paid himself $100K. Association made a loss claim with a first carrier and assigned its claim to it. That carrier sued director, who then demanded a defense under the D&O coverage of Great American. After first carrier's suit was dismissed, director sued Great American for failing to defend him. It asserted that an exclusion for claims by one insured against another defeated coverage. The Supreme Court ruled "that the insured-v.-insured exclusion in the D&O policy applies in this instance, [so] the policy provides no coverage for the claims" of the director.

The issue turned on whether the first carrier "succeed[ed]" to the interest of the association by the assignment. Here, the exclusion "proscribes coverage of claims made by an insured against an insured" and against those who succeeds to an insured's interest.

"We interpret insurance policies under the well-established rules of contract construction. . . . [E]very contract should be interpreted as a whole and in accordance with the plain meaning of its terms. When reviewing policy language, we . . . ensure that no provision is rendered meaningless. We also refuse to insert language or provisions the parties did not use or to otherwise rewrite private agreements."

"The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used. . . . 'Plain meaning' is a watchword for contract interpretation because word choice evinces intent. A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.' And we assign terms their ordinary and generally accepted meaning unless the contract directs otherwise."

"If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law. An ambiguity does not arise merely because a party offers an alternative conflicting interpretation, but only when the contract is actually 'susceptible to two or more reasonable interpretations.'"

"'A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the parol evidence rule. . . .'"

Here, the term "succeeds" occurs in the "insured-v.-insured" exclusion; these clauses "typically provide that the insurer is not liable for claims made by one insured against another, which includes litigation between directors and officers and the entity which they serve." And, the plain meaning here "comports with the interpretation commentators and other courts have given" such exclusions.

"'When the issue of coverage is resolved in the insurer's favor, extra contractual claims do not survive.'"

7. *Nassar v. Liberty Mutual Fire Insurance Company*, 508 S.W.3d 254 (Tex. 2017)

Dispute over interpretation of a homeowner's insurance policy concerning a claim for hurricane damage to homeowner's house and fence. Homeowner argued that the fence is covered as part of his "dwelling," while carrier argued that the fence fell under a separate, lower policy limit for "other structures." The Supreme Court held that because homeowner's "interpretation of the policy language is reasonable and the policy is unambiguous," homeowners' "fencing is covered under the 'dwelling' provision as a matter of law."

"If . . . only one party's interpretation of the insurance policy is reasonable, then the policy is unambiguous and the reasonable interpretation should be adopted. Alternatively, if we determine that both interpretations are reasonable, then the policy is ambiguous[,]" and "'we must resolve the uncertainty by adopting the construction that most favors the insured.'" Thus, if homeowner's "interpretation is reasonable," then it "must be adopted even if [carrier's] interpretation is also, or more reasonable."

Here the "dwelling" provision included "'structures attached to the dwelling.'" "'Structure'" is not defined in the policy or Texas case law, but "*Black's Law Dictionary* defines 'structure' as '[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together.'" Because the fencing is a "structure" under that definition and attached to the dwelling,

homeowner's interpretation is reasonable and must be adopted as a matter of law.

The Court rejected carrier's argument that the fence fell under the "other structures" provision because that provision "'includes structures connected to the dwelling by only a fence, utility line, or similar connection," the fence was a "connection" and not a "structure." "Connection" and "structure" are not mutually exclusive, and the "inferential leap required to cause" the fencing to "transform from a 'structure' to an 'other structure' because it is a 'connection' renders [carrier's] interpretation unreasonable because the plain language . . . make[s] such a leap unnecessary."

8. *In re Red Dot Building System, Inc.*, 504 S.W.3d 320 (Tex. 2016)

"[A]bsent special circumstances, a surety cannot be sued without also suing its principal. . . . [But] "'a principal obligor on a contract may be sued alone.'" TEX. CIV. PRAC. & REM. CODE § 17.001(a).

9. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved instead that he was not]. . . . Coverage is therefore precluded as a matter of law."

"A *Stowers* cause of action arises when an insurer negligently fails to settle a claim covered by an applicable policy within policy limits. To prove a *Stowers* claim, the insured must establish that (1) the claim is within the scope of coverage; (2) a demand was made that was within policy limits; and (3) the demand was such that an ordinary, prudent insurer would have accepted it, considering the likelihood and degree of the insured's potential exposure to an excess judgment."

An "'insurer has no duty to settle a claim that is not covered under its policy.'"

"'An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy.'" "In a *Stowers* action, . . . the burden is on the insured to prove coverage." "A *Stowers* plaintiff cannot recover under a *Stowers* cause of action without first satisfying the precondition of establishing each element of coverage."

"Although a common CGL policy endorsementexcludes liability for injury to independent contractors, . . . [rig owner's] CGL policy expressly covered liability for injury to independent contractors."

"Most CGL policies have provisions that exclude coverage for claims that would otherwise be covered under workers' compensation insurance, which is required in most states. . . . CGL policies were never meant to cover claims by employees against their employers." "Most CGL policies now include some kind of express leased worker exclusion."

Regarding the burden of proving coverage, there "'is no 'right' of noncoverage that is subject to being waived by the insurer.'"

"Only by establishing each of these elements—that a covered injury or loss was incurred at a time covered by the policy and incurred by a person whose injuries are covered by the policy—can a plaintiff prove coverage, and only then does the burden shift to the insurer to prove that a coverage exclusion applies."

For exclusions, to "'avoid liability, the insurer then has the burden to plead and prove that the loss falls within an exclusion to the policy's coverage.'" Here, because plaintiffs "met their initial burden to prove coverage, the burden shifts to the *Stowers* Insurers to prove that [their] claim is excluded from coverage under the policy."

Here, though plaintiffs only pleaded generally that coverage existed, their "general pleading is sufficient in this case because we 'construe the pleadings liberally' in favor of coverage when reviewing a *Stowers* action."

Because the policy here excluded employees, deceased "was not a party to the insurance policy, [and] he is necessarily a third party."

"Under Texas Insurance Code section 101.201(a), '[a]n insurance contract effective in this state and entered into by an unauthorized insurer is unenforceable by the insurer.' . . . Although the Insurance Code levies harsh penalties on unauthorized insurers, the Legislature carved out several exceptions for eligible surplus lines insurers, such as the exception in [TEX. INS. CODE] section 101.201(b)." Under it, the limitation of TEX. INS. CODE section 101.201(a) does not apply to surplus lines, such as the policy here. A "managing general agent can accept surplus lines

business only through a licensed general property and casualty agent. TEX. INS. CODE § 981.220." But, here, the carriers "failed to present evidence that the premium tax was paid, and [thus they] do not qualify for the exception in [TEX. INS. CODE] section 101.201(b)." As a result, "they are limited by section 101.201(a)'s restriction on unauthorized insurers, and the insurance policy is 'unenforceable' by the *Stowers* Insurers."

"Under [TEX. INS. CODE] section 981.005(a), 'an insurance contract obtained from an eligible surplus lines insurer is . . . valid and enforceable as to all parties' unless a material and intentional violation of Chapter 981 exists. . . . 'A material and intentional violation of [Chapter 981, however,] does not preclude the insured from enforcing the insured's rights under the contract.'" So, the insured can enforce the contract, but the carrier cannot.

"A voidable policy or agreement is one that "can be affirmed or rejected at the option of one of the parties.'" Here, because the policy if "voidable" under the statute, the insured "has the option to either enforce its rights 'under the contract,' or rescind the contract."

If "an insurance policy is written on an unapproved form, the insurer may not enforce it. . . . [Thus,] the policy was voidable. Accordingly, the insured . . . could elect to rescind or enforce the voidable policy. However, if an insured elects to enforce the policy, 'he or she must do so under the agreed terms.'" So, if plaintiffs try to enforce the policy here, they are "bound by the policy's terms." Accordingly, they must accept the exclusions in the policy. "We reject [plaintiffs'] arguments that [TEX. INS. CODE] section 101.201 and section 981.005 preclude the *Stowers* Insurers from asserting policy exclusions in a *Stowers* case in which the plaintiffs rely on the policy to present their case."

"A leased-in worker is a person who performs work for the insured under an agreement with another allowing temporary use of the worker, even though the leased worker would not be an employee of the insured." This is not mutually exclusive with an independent contractor. Footnote 19: "We do not suggest that the definition of "leased-in worker" used in this case should be applied in any other case."

Here, deceased "was a temporary worker on each of . . . seven rigs because his services as a derrick hand would not be needed unless [rig owner] entered into a new drilling contract for a similar project."

10. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The "prompt-payment provision . . . [turns on] when a policyholder is actually notified that their [sic] claim was approved."

I. Suit on an Acccount

No cases to report.

J. Secured Transactions

1. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016)

Certified question. Receiver of Stanford sued Golf Channel to "claw back" $5.9M of payments it received from media services. The Supreme Court ruled that, under the Texas Uniform Fraudulent Transfer Act (TUFTA), the "'reasonably equivalent value' requirement [to avoid a claw back] can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business." This is true even though the debtor was engaged in a Ponzi scheme.

"TUFTA operates to 'prevent debtors from defrauding creditors by placing assets beyond their reach,' but it also protects transferees 'who took in good faith and for a reasonably equivalent value.'"

If the transferee meets the requirements of TUFTA, it has "a *complete defense*." TUFTA includes an "affirmative defense in section 24.009(a)."

Under TUFTA, an "asset transferred with 'actual intent to hinder, delay, or defraud' a creditor may be reclaimed for the . . . creditors unless the transferee 'took [the asset] in good faith and for a reasonably equivalent value.' Even without proof of actual intent, an asset transfer may be avoided if the transferor was financially vulnerable at the time of the transaction and the 'value' exchanged was not reasonably equivalent."

"TUFTA provides a list of eleven, nonexclusive indicia of fraudulent intent," each called a "badge of fraud." "Intent to defraud is ordinarily a fact question."

"Whether a debtor obtained reasonably equivalent value in a particular transaction is determined from a reasonable creditor's perspective at the time of the

exchange, without regard to the subjective needs or perspectives of the debtor or transferee and without the wisdom hindsight often brings. Considering TUFTA's definitions, . . . , we conclude the reasonably equivalent value requirement in section 24.009(a) of TUFTA is satisfied when the transferee fully performed in an arm's-length transaction in the ordinary course of its business at market rates." Footnote 81: such value does not include the hope of employment, marital harmony, spiritual benefits, love and affection, and family obligations.

The Court held that TUFTA "does not contain separate standards for assessing 'value' and 'reasonably equivalent value' based on whether the debtor was operating a Ponzi scheme. Transactions for consumable goods and services may deplete a debtor's leviable assets, but that factor alone does not render the exchange valueless. Value must be determined objectively at the time of the transfer and in relation to the individual exchange at hand rather than viewed in the context of the debtor's entire enterprise, viewed subjectively from the debtor's perspective, or based on a retrospective evaluation of the impact it had on the debtor's estate."

K. Equitable Remedies, Defenses, Injunctions (Equitable Bill of Review is at IV(N))

1. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of fiduciary duty by two directors, the Supreme Court ruled that Here there was no evidence defendants "acquired any specific lease as result of the breaches of fiduciary duties." Thus, LEC was not entitled to a constructive trust imposed upon the leases defendants acquired. Moreover, there was no jury finding of lost profits.

"Longview had the burden to prove its entitlement to any recovery on a lease-by-lease basis and failed to do so."

"Texas law . . . limits disgorgement to a fiduciary's profits." But no such question was submitted to the jury.

2. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance," holding that a constructive trust imposed by the trial court sufficed.

The "constructive trust is imposed on exactly the amount of money the jury believed the [plaintiffs] were entitled to under any theory of recovery," though defendants had depleted some of it. The "constructive trust was an adequate remedy even if it ultimately does not provide the full measure of relief the jury awarded." Yet, "it is not because it is inherently inadequate to redress this wrong."

Here, the trial court had discretion to impose "a constructive trust." "'A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment.'" While, "a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust," it is not always required and the types of circumstances "in which equity impresses a constructive trust are numberless. . . ."

Defendant's argument of "unclean hands" was unavailing. A "party relying on the 'unclean hands' doctrine must show that she herself suffered because of the opposing party's conduct." Here, any malfeasance of plaintiffs was "collateral" to the basis upon which they sought relief.

"We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust."

3. *Honorable Mark Henry v. Honorable Lonnie Cox*, 520 S.W.3d 28 (Tex. 2017)

Trial court granted injunction when District Judge sued County Judge to reinstate a court administrative employee at a set salary. The Supreme Court ruled that the "Government Code divides power, letting commissioners set a salary range while letting local judges decide if compensation within that range is reasonable. The judicial branch may direct the Commissioners Court to set a new range, but it cannot dictate a specific salary outside that range."

"We review a trial court's order granting a temporary injunction for clear abuse of discretion. We limit the scope of our review to the validity of the order, without reviewing or deciding the underlying merits, and will not disturb the order unless it is 'so

arbitrary that it exceed[s] the bounds of reasonable discretion.' No abuse of discretion exists if some evidence reasonably supports the court's ruling."

4. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

Mineral owner (Lightning) sought injunction when surface owner leased to Anadarko the right to drill through subsurface to reach minerals Anadarko had leased under a neighboring surface. The case "concerns whose permission is necessary for an oil and gas operator to drill through a mineral estate it does not own to reach minerals under an adjacent tract of land." The Supreme Court ruled "that the loss of minerals Lightning will suffer by a well being drilled through its mineral estate is not a sufficient injury to support a claim for trespass. Accordingly, such a loss will not support injunctive relief."

"To obtain injunctive relief, Lightning must have proved that absent such relief, it will suffer imminent, irreparable harm."

5. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)

A court may abate a nuisance through injunctive relief "whether it is temporary or permanent," and "the decision to enjoin" the conduct is "'a discretionary decision for the judge after the cases has been tried and the jury discharged.'"

6. *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016)

Indigent litigants who sued for divorce in family district courts each file uncontested affidavits of indigency in lieu of paying costs, as permitted under TEX. R. CIV. P. 145. However, after the final divorce decrees allocated costs to "'the party who incurred them'" without stating the amount of the costs due or that litigants could afford them, the district clerk sent demands to each litigant for court costs and fees, "threaten[ing] that the sheriff would seize property to satisfy the debt."

Litigants sued the district clerk in civil district court (not the family district courts in which the costs were taxed) for mandamus, injunctive, and declaratory relief and obtained a temporary injunction enjoining the district clerk "from 'continuing his policy of collection of court costs from indigent parties who have filed an affidavit of indigency.'" In an interlocutory appeal, the district clerk argued that litigants had an adequate remedy at law, precluding injunctive relief.

The Supreme Court rejected the district clerk's argument that litigants could have filed a motion to retax costs and thus had an adequate remedy at law. "Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law will lead to a multiplicity of suits, 'that very fact prevents it from being complete and adequate.' '[T]he unlawful acts of public officials' are prime candidates for injunctions 'when [those acts] could cause irreparable injury or when such remedy is necessary to prevent a multiplicity of suits.'"

"A motion to retax costs confront[ed] the correctness of the clerk's ministerial calculations," and is properly used to correct such "fact-specific errors" as "miscalculating the cost of an item or billing an item that is not statutorily taxable" and "made in individual cases that require a similarly individual approach to redress."

Here, by contrast, litigants were "complaining of . . . a systematic policy that contravenes the law," and "[i]t would be wasteful to force each individual [litigant] to file a motion to retax costs when a single injunction will do."

Also, the injunction, which enjoined the district clerk not just "from billing costs to the named parties, but to all litigants who qualify as indigent," was not overbroad. "An injunction must be broad enough to 'prevent repetition of the evil sought to be stopped.'" "When a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties." The injunction was not overbroad, because it "tracks the language of Rule 145" and "does not restrain the District Clerk from any lawful activity."

Finally, injunction, rather than mandamus, was the appropriate remedy. "When the purpose of the suit is to compel action, then mandamus is proper; conversely, when the purpose is to restrain action or threatened action, then an injunction is proper." Here, because "the true relief lies in enjoining the District Clerk from continuing his policy" of collecting costs from indigent litigants, injunction was

L. Wrongful Death and Survival Actions

No cases to report.

M. Torts and Causes of Action Generally

1. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance," holding that a constructive trust imposed by the trial court sufficed.

Footnote 3: "Undue influence itself is not an actionable tort; consequently, damages are not recoverable based solely on an undue-influence finding. . . . Rather, an undue-influence finding typically is grounds for setting aside an otherwise binding document, in this case a trust or deed."

"Neither our precedent nor the Legislature has blessed tortious interference with an inheritance as a cause of action in Texas."

"We take a host of factors into account when considering a previously unrecognized cause of action. Not the least of them is the existence and adequacy of other protections." Footnote 6: "'When recognizing a new cause of action and the accompanying expansion of duty, we must perform something akin to a cost-benefit analysis to assure that this expansion of liability is justified.' 'The analysis is complex, requiring consideration of a number of non-dispositive factors including, but not limited to: the foreseeability, likelihood, and magnitude of the risk of injury; the existence and adequacy of other protections against the risk; the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question; and the consequences of imposing the new duty, including whether Texas's public policies are served or disserved; whether the new duty may upset legislative balancing-of-interests; and the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms.'"

2. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

Waitress alleged she was sexually assaulted at work. The Supreme Court ruled the TCHRA did not preempt her claim.

"'[A]brogation of common-law claims [by statutes] is disfavored. However, we will construe the enactment of a statutory cause of action as abrogating a common-law claim if there exists 'a clear repugnance between the two causes of action.'"

Footnote 3: "'When actions are taken by a vice-principal of a corporation, those acts may be deemed to be the acts of the corporation itself.'"

3. *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98 (Tex. 2017)

The "risk must be both foreseeable and unreasonable to impose a duty on a property owner. This approach is not peculiar to premises-liability cases; it is essential to the determination of duty in all of tort law." "Foreseeability is a 'prerequisite to imposing a duty.' But once foreseeability is established, 'the parameters of the duty must still be determined.' Courts will also consider 'the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case.'"

The *Timberwalk* factors "cannot, without more, determine the reasonableness of a risk of harm." "Unreasonableness turns on the risk and likelihood of injury to the plaintiff . . . as well as the magnitude and consequences of placing a duty on the defendant.' A risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk. None of the *Timberwalk* factors compels any consideration of what burdens a property owner would necessarily incur to prevent or reduce the risk of a crime. Likewise, the factors do not address whether, as a matter of public policy, it is preferable to impose such burdens or, instead, accept the risk that a crime will occur."

"The unreasonableness inquiry . . . explores the policy implications of imposing a legal duty to protect against foreseeable criminal conduct. This includes whether a duty would 'require 'conspicuous security' at every point of potential contact between a patron and a criminal' or require adoption of 'extraordinary measures to prevent a similar occurrence in the future.' Accordingly, 'if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk.' But 'if the burden of preventing the harm is

unacceptably high, the risk of the harm is not unreasonable.'"

"[F]oreseeability and unreasonableness are not wholly independent. . . ."

4. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse, holding that there was no evidence of negligent entrustment.

Footnote 6: "The reference to the requirement that the operator be 'licensed' arises from cases alleging negligent entrustment of an automobile, and is based on the fact that Texas statutes require all drivers to be licensed and prohibit an owner from knowingly permitting an unlicensed driver to operate the owner's vehicle. Because the statutes' purpose is to 'insure a minimum of competence and skill on the part of drivers . . . ,' the vehicle owner's violation of the statute constitutes negligence per se."

"If Texas statutes required [electrician] to be legally licensed to operate the forklift, then permitting him to operate it without a legal license would constitute negligence per se."

5. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)

Pipeline builds noisy compressor stations near ranch owned for recreational purposes. Ranch owners sue for nuisance. In a lengthy opinion, the Supreme Court took "this opportunity to clarify the law" of private nuisance in Texas.

The Court confirmed the definition of nuisance used in recent cases: "'A "nuisance" is a condition that substantially interferes with 'the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.'"

However, to "reduce the confusion" resulting from the "variety of ways" in which the term "nuisance" has been used, the Court clarified that the term does not refer "to a cause of action or to the defendant's conduct or operations," but rather that it "describes a type of injury that the law has recognized can give rise to a cause of action because it is an invasion of a plaintiff's legal rights." In other words, nuisance is a type of legal injury, not a cause of action. A cause of action "'generally accrues when a wrongful act causes a legal injury,'" and nuisance refers to the legal injury, not the wrongful act.

The injury here—"the interference with the use and enjoyment of property"—only rises to the level of a legal injury where "the interference is 'substantial' and causes 'discomfort or annoyance' that is 'unreasonable.'"

The requirement that the interference be "substantial" sets a "minimum threshold" and "confirms that the law 'does not concern itself with trifles[.]'" "Whether an interference is substantial or merely a 'trifle' or 'petty annoyance' necessarily depends on the particular facts at issue, including, for example, the nature and extent of the interference, and how long the interference lasts or how often it recurs."

To prove a nuisance as a legal injury, "a plaintiff must establish that the effects of the substantial interference on the plaintiff are unreasonable—not that the defendant's conduct or land use was unreasonable." "[T]he standard for determining whether the effects of the interference are unreasonable is an objective one." The effects must be "'such as would disturb and annoy persons of ordinary sensibilities, and of ordinary tastes and habits.'"

Because nuisance describes only a legal injury, there must also be a wrongful act in order to create liability. "[T]here must be some level of culpability on behalf of the defendant; nuisance cannot be premised on a mere accidental interference." The court "retain[ed] the three general categories of conduct that may support liability": intentional conduct, negligence, and conduct giving rise to strict liability.

"[A] defendant intentionally causes a nuisance if the defendant 'acts for the purpose of causing' the interference or 'knows that [the interference] is resulting or is substantially certain to result' from the defendant's conduct." Intent is "measured by a subjective standard, meaning the defendant must have actually" had the requisite intent. The plaintiff must prove that the defendant intended the interference, not just the "conduct that caused the interference." Finally, the plaintiff need not prove that the defendant's conduct was unreasonable, only that the resulting "effects of the substantial interference be unreasonable."

A defendant may also "be liable for 'negligently' causing a 'nuisance.'" "In this category, the claim is

governed by ordinary negligence principles," with the elements of "'the existence of a legal duty, breach of that duty, and damages proximately caused by the breach.'" "The only unique element . . . is the burden to prove that the defendant's negligent conduct caused a nuisance[.]"

A claim for strict liability for creation of a nuisance cannot be established merely by "'abnormal and out of place' conduct," but instead requires "conduct that constitutes an 'abnormally dangerous activity' or involves an abnormally 'dangerous substance' that creates a 'high degree of risk' of serious injury."

The questions of substantial interference; unreasonable effects; and whether the defendant created the nuisance intentionally, negligently, or through conduct giving rise to strict liability "generally present questions of fact for the jury to decide."

The three different remedies available for a private-nuisance claim are "damages, injunctive relief, and self-help abatement." A court may abate a nuisance through injunctive relief "whether it is temporary or permanent," and "the decision to enjoin" the conduct is "'a discretionary decision for the judge after the cases has been tried and the jury discharged.'"

Damages for a temporary nuisance is generally limited to "'lost use and enjoyment . . . that has already accrued'" at the time of trial, while an owner in a permanent nuisance claim "may recover the lost market value." The general calculation is "'the difference in the reasonable market value of the property immediately before and immediately after the injury,'" but "when the damage results from an ongoing condition rather than a single event that results in a permanent nuisance, courts apply a 'more flexible' rule." "The proper comparison in those circumstances is 'of market value with and without the nuisance.'"

In proving negligence in a nuisance case, the standard of care owed is generally that of "a person of ordinary prudence in the same or similar circumstances," which a "jury [does] not need expert testimony to understand."

6. *Southwestern Energy Production Co. v. Berry-Helfland*, 491 S.W.3d 699 (Tex. 2016)

Engineers sued oil company, asserting misappropriation of trade secrets and other claims relating to oil company's acquisition and use of information on well locations developed by engineers. The jury found for engineers and awards damages for misappropriation and breach of a confidentiality agreement. Oil company appealed on multiple issues.

"A 'flexible and imaginative' approach is applied to the calculation of damages in misappropriation-of-trade-secrets cases." "Absent proof of a specific injury, the plaintiff can seek damages measured by a 'reasonable royalty.'" Here, the jury's award was based on engineers' expert's testimony that a 3% overriding royalty based on the terms of a similar deal made by engineers and that 3% was an average royalty earned by engineers was "reasonable royalty." However, the exemplar deal actually had a "sliding scale" for royalty payment, and there was no evidence as to how that royalty structure would apply to the disputed wells.

"In trade-secret cases, a measure of uncertainty is tolerated, and to an extent, unavoidable. However, if there is objective evidence from which more certainty can be gleaned, it is incumbent on the plaintiff to produce that evidence." Thus, "legally sufficient evidence exists to support an award of actual damages, but insufficient evidence exists to support the entire amount the jury awarded," requiring reversal of the damages award and a remand for new trial. "Rendition is not proper . . . because an overstatement of damages does not entirely defeat recovery when there is legally sufficient evidence that damages exist."

Oil company had failed to carry its burden on appeal of showing that the trade secret claims were barred as a matter of law by the three-year statute of limitations. "A cause of action for trade-secret misappropriation accrues 'when the trade secret is actually used'" (*Computer Associates Intern., Inc. v. Atlai, Inc.*, 918 S.W.2d. 453 (Tex. 1996)) meaning "'commercial use by which the offending party seeks to profit from the use of the secret.'"

The "discovery rule applies to trade-secret misappropriation claims, however," and so the limitations period did not begin to run until the plaintiff "knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the misappropriation." "[R]easonable diligence is an issue of fact," and a defendant can overcome a jury's findings on this affirmative defense only "with conclusive evidence." Here, oil company's evidence was of "mere surprise, suspicion, and accusation." "Without more, subjective beliefs and opinions are not facts that in the exercise of reasonable diligence would lead to the discovery of a wrongful act."

N. Negligence and Duty

1. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that plaintiff's experts provided legally sufficient evidence that the negligence of the child's treating doctors proximately caused her loss of sight.

"A plaintiff seeking to prevail on a negligence cause of action must establish the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. 'The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.'" The "'ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.''"

The "court of appeals erred in not applying the substantial-factor test because the jury heard ample evidence supporting the combined negligence" of defendants.

2. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

"Whether a duty exists is a question of law for the court, and the presence of an unreasonably dangerous condition weighs in favor of recognizing a duty."

3. *Pagayon v. Exxon Mobile Corporation*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Employee at convenience store felt that co-worker was harassing him. Twice he spoke to the manager. Father of employee spoke with co-worker, and they argued. Less than a week later, when father came to pick up employee, a short fight broke out among co-worker, father, and employee. Father was hurt and taken to hospital, where several weeks later he died. A jury found that employer was at fault in large part, and awarded $2M. The Supreme Court reversed and rendered. "[E]mployers sometimes have a duty to control their employees. We have never defined the contours of any general duty, and we do not do so today. We conclude only that an employer in the circumstances presented here has no such duty."

"'The threshold inquiry in a negligence case is duty. . . . [T]he existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question.'" When determining a duty:

> The considerations include social, economic, and political questions and their application to the facts at hand. We have weighed the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Also . . . [is] whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm.

Though unusual, some factors, like risk and foreseeability, "'may turn on facts . . . [that] must instead be resolved by the factfinder.'" Here, the material facts concerning duty are undisputed.

"No general duty to control others exists, but a special relationship may sometimes give rise to a duty to aid or protect others. Employment is such a relationship. We have acknowledged limited instances where an employer has a duty to control its employee and is directly liable when it fails to do so."

The Court has never generally adopted "Section 317 of the *Restatement (Second) of Torts*" concerning a master's duty to control his servant. "Texas law requires the court to be more specific, to balance the relevant factors in determining the existence, scope, and elements of legal duties." "Whether a duty to control employees should be imposed when employers know or should know of the necessity and opportunity for exercising control can be determined only after weighing the burden on the employer, the consequences of liability, and the social utility of shifting responsibility to employers."

The Court has not defined the duty that "should be imposed on employers to prevent employees from harming third persons is difficult to state generally," and does not do so here. In this situation, the risk of an occurrence is small. The foreseeability and likelihood

of jury is small. The burden to the employer is significant. The consequences can be extreme. And the social utility is small.

4. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse, holding that there was no evidence of negligent entrustment, and that there was no premises defect.

Footnote 4: "Generally, every person has a duty not to negligently entrust a vehicle to another. But a premises owner 'does not have a duty to see that an independent contractor performs work in a safe manner' unless the owner retains or exercises 'supervisory control' over the contractor's work."

The Court has not determined that a forklift can be the object of a negligent entrustment. But, there is a list of chattels other than a motor vehicle to which a negligent entrustment theory has been applied. Footnote 5: "We have recognized liability for conduct at least akin to negligent entrustment in a case involving the rental of a horse. . . . Other Texas courts have applied the negligent-entrustment theory to a variety of chattel. . . . A few have applied it specifically to forklifts."

Negligent entrustment required proof "that:

> (1) 4Front entrusted the forklift to Reyes [the contracting electrician];
>
> (2) Reyes was an unlicensed, incompetent, or reckless forklift operator;
>
> (3) At the time of the entrustment, 4Front knew or should have known that Reyes was an unlicensed, incompetent, or reckless operator;
>
> (4) Reyes was negligent on the occasion in question; and
>
> (5) Reyes's negligence proximately caused the accident."

Footnote 6: "The reference to the requirement that the operator be 'licensed' arises from cases alleging negligent entrustment of an automobile, and is based on the fact that Texas statutes require all drivers to be licensed and prohibit an owner from knowingly permitting an unlicensed driver to operate the owner's vehicle. Because the statutes' purpose is to 'insure a minimum of competence and skill on the part of drivers . . . ,' the vehicle owner's violation of the statute constitutes negligence per se. But . . . Texas law does not require a license to operate a forklift or prohibit an owner from permitting an unlicensed person from operating a forklift."

Here, there was no proof of actual knowledge; instead, plaintiff sought to prove warehouse "should have known" that electrician "was incompetent or reckless."

There is a "distinction between an operator who is 'incompetent or reckless' and one who is merely 'negligent.' In a sense, the name 'negligent entrustment' can be misleading, because the claim requires a showing of more than just general negligence." Plaintiff had to prove electrician was "*incompetent* to operate the forklift or would operate it recklessly, and that [warehouse] knew or should have known of [electrician's] incompetence or recklessness." Here, there was no evidence of prior problems of electrician operating the forklift. Habit "'evidence has been offered to show that the driver was blatantly incompetent or reckless.'"

As here, a "claimant can prove that a defendant 'should have known' a fact by relying on evidence that the defendant should reasonably have inquired about that fact but failed to do so." But, plaintiff must prove that the failed inquiry "would have 'revealed the risk' that establishes liability for negligent entrustment." Plaintiff had to show that the warehouse would have learned electrician was incompetent or reckless, not just lacking formal training or a certificate. Plus, the "lack of formal training and certification does not establish that the operator was incompetent or reckless. Even the lack of a required legal license does not establish incompetence or recklessness."

A "lapse[] in professional judgment" has been characterized as negligence. "Evidence of negligence does not establish recklessness . . . [which is] 'an act that the operator knew or should have known posed a high degree of risk of serious injury.'"

Here, the record does not show electrician "was incompetent or reckless" though he "was negligent while driving the forklift."

5. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

"Breach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable."

6. *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640 (Tex. 2016)

Prior plant owner built an acid system that injured the worker of the company that had bought the plant. The jury returned a verdict that prior plant owner was negligent in its design and instructions for the acid system. But the Supreme Court rendered judgment against the plaintiff "[b]ecause the [prior plant] owner sold the property several years before the plaintiff's accident and did not otherwise owe the plaintiff a duty of care apart from its ownership and control of the property. . . ."

"A claim against a property owner for injury caused by a condition of real property generally sounds in premises liability. That liability typically ends with the property's sale. When the property's dangerous condition is caused or created by another, an independent claim against the other may lie in negligence and that claim, unlike the premises-liability claim against the owner, does not necessarily end with the property's sale."

A "person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner. When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises-liability principles apply."

"Under premises-liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances. That duty generally runs with the ownership or control of the property and upon a sale ordinarily passes to the new owner."

Under the Restatement, a party who builds a dangerous structure on another's property can be liable to those injured by it. But, "section 385 plainly concerns only the liability of independent contractors and other third parties who create dangerous conditions while making improvements 'on behalf of' property owners; it does not purport to apply to property owners themselves."

"An owner who creates a dangerous condition on its own property has breached no duty of care unless and until the owner exposes certain people to the danger. . . . [Premises] liability rests on two theoretical assumptions: (1) the property owner controls the premises and is therefore responsible for dangerous conditions on it and (2) the property owner is in a superior position to know of and remedy the dangerous condition. . . ." The "duty of these third parties is not necessarily co-extensive with that of the property owner. . . ." A "contractor's duties are thus tied not only to its control of the premises but also to the quality of its contracted work. This latter duty may be judged under ordinary-negligence principles even after the contractor no longer controls the premises."

With "land conveyances, . . . the deed has traditionally been viewed as the parties' full agreement, excluding all other terms and liabilities. In this area, 'the ancient doctrine of caveat emptor' retains 'much of its original force,' requiring the vendee to make his own inspection of the property and relieving the vendor of responsibility for existing defects."

"We . . . reject the notion that a property owner acts as both owner and independent contractor when improving its own property, subjecting itself to either premises-liability or ordinary-negligence principles depending on the injured party's pleadings. We hold instead that premises-liability principles apply to a property owner who creates a dangerous condition on its property, and that the claim of a person injured by the condition remains a premises liability claim as to the owner-creator, regardless of how the injured party chooses to plead it."

If "an injury should occur after the condition's creator has conveyed the property, the premises-liability claim will, as a general rule, lie against the property's new owner, who ordinarily assumes responsibility for the property's condition with the conveyance."

O. Fiduciary Duty

1. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

Jury found that two directors of Longview Energy Company breached fiduciary duties to LEC by taking corporate opportunities and by failing to disclose they were competing with company, concerning oil and gas leases in the Eagle Ford Shale. The directors and their own companies obtained leases in the formation after opposing the efforts of LEC to obtain leases there. The Supreme Court ruled, however, that, at trial, LEC failed to identify specific leases that directors usurped and upon which the trial court imposed a constructive trust. Likewise, the Court ruled that, at trial, LEC failed to prove the profits defendants realized by their breach of fiduciary duties: "there is no evidence to support the trial court's damages award."

The Court ruled that defendants did not waive charge error. Defendants objected to a certain jury question on several grounds, including that there was no identification of the property that was wrongly obtained, and no tracing of specific property. "By those objections, the Huff Defendants clearly preserved error as to the legal sufficiency of the evidence to support tracing any specific lease Riley-Huff acquired to Huff's or D'Angelo's breaches of fiduciary duties."

Here there was no evidence defendants "acquired any specific lease as result of the breaches of fiduciary duties." Thus, LEC was not entitled to a constructive trust imposed upon the leases defendants acquired.

"Longview had the burden to prove its entitlement to any recovery on a lease-by-lease basis and failed to do so."

"Texas law . . . limits disgorgement to a fiduciary's profits." But no such question was submitted to the jury.

2. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. Despite a lack of evidence of causation, the Supreme Court reversed in part a summary judgment for attorney.

"Generally, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages."

"In *Kinzbach*, we held that the client was not required to prove damages when he established that a defendant breached a fiduciary duty and obtained a 'secret gain or benefit.'" An "agent should not escape liability for, and retain the profits from, breaching the duty of loyalty to a principal simply because the principal might not be able to prove that the breach caused damages."

"'It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for [the agent's] compensation.' Pragmatically, fee forfeiture also serves as a deterrent. The central purpose . . . 'of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.'"

In "*Kinzbach* evidence of causation was not necessary because the remedy sought was equitable forfeiture of an improper benefit received by the agent."

For "the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. . . . On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought."

"[T]he fair-notice standard measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response. Claiming that Parker 'knowingly' participated in Lamb's breach of fiduciary duty does not give Parker information sufficient to understand that the church was asserting a claim for aiding and abetting. This is especially true because several of the other claims the church asserted—e.g. civil conspiracy and joint venture—required proof of knowing participation."

3. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

Medical malpractice case related in part to improper handling of an autopsy.

Because the hospital's "actions in connection with . . . the autopsy are recast HCLCs, it follows that both the breach of fiduciary duty and negligence claims founded upon the same factual bases are likewise recast HCLCs."

P. Motor Vehicles

1. *Allways Auto Group, Ltd. v. Walters*, 530 S.W.3d 147 (Tex. 2017)

Dealership provided loaner vehicle to customer whose care was being serviced. Some evidence indicated he was drunk at the time, and he had multiple prior DWI convictions. Eighteen days later, customer caused a collision with plaintiffs. The Supreme Court affirmed a summary judgment in suit against dealership alleging negligent entrustment holding that there was no proximate cause.

"'For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment.' If [customer] were visibly intoxicated when he got the loaner, Allways could reasonably have anticipated he might have a wreck before he sobered up. But Allways could not have foreseen that [customer] would get drunk eighteen days later (after repairs were delayed and he lost his job) and drive his vehicle into

[plaintiff's] vehicle." The "'connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause,' which 'is not established if the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible.'"

2. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse, holding that there was no evidence of negligent entrustment, and that there was no premises defect.

Footnote 4: "Generally, every person has a duty not to negligently entrust a vehicle to another. But a premises owner 'does not have a duty to see that an independent contractor performs work in a safe manner' unless the owner retains or exercises 'supervisory control' over the contractor's work."

The Court has not determined that a forklift can be the object of a negligent entrustment. But, there is a list of chattels other than a motor vehicle to which a negligent entrustment theory has been applied. Footnote 5: "We have recognized liability for conduct at least akin to negligent entrustment in a case involving the rental of a horse. . . . Other Texas courts have applied the negligent-entrustment theory to a variety of chattel. . . . A few have applied it specifically to forklifts."

Negligent entrustment required proof "that:

> (1) 4Front entrusted the forklift to Reyes [the contracting electrician];
>
> (2) Reyes was an unlicensed, incompetent, or reckless forklift operator;
>
> (3) at the time of the entrustment, 4Front knew or should have known that Reyes was an unlicensed, incompetent, or reckless operator;
>
> (4) Reyes was negligent on the occasion in question; and
>
> (5) Reyes's negligence proximately caused the accident."

Footnote 6: "The reference to the requirement that the operator be 'licensed' arises from cases alleging negligent entrustment of an automobile, and is based on the fact that Texas statutes require all drivers to be licensed and prohibit an owner from knowingly permitting an unlicensed driver to operate the owner's vehicle. Because the statutes' purpose is to 'insure a minimum of competence and skill on the part of drivers . . . ,' the vehicle owner's violation of the statute constitutes negligence per se. But . . . Texas law does not require a license to operate a forklift or prohibit an owner from permitting an unlicensed person from operating a forklift."

Here, there was no proof of actual knowledge; instead, plaintiff sought to prove warehouse "should have known" that electrician "was incompetent or reckless."

There is a "distinction between an operator who is 'incompetent or reckless' and one who is merely 'negligent.' In a sense, the name 'negligent entrustment' can be misleading, because the claim requires a showing of more than just general negligence." Plaintiff had to prove electrician was "*incompetent* to operate the forklift or would operate it recklessly, and that [warehouse] knew or should have known of [electrician's] incompetence or recklessness." Here, there was no evidence of prior problems of electrician operating the forklift. Habit "'evidence has been offered to show that the driver was blatantly incompetent or reckless.'"

As here, a "claimant can prove that a defendant 'should have known' a fact by relying on evidence that the defendant should reasonably have inquired about that fact but failed to do so." But, plaintiff must prove that the failed inquiry "would have 'revealed the risk' that establishes liability for negligent entrustment." Plaintiff had to show that the warehouse would have learned electrician was incompetent or reckless, not just lacking formal training or a certificate. Plus, the "lack of formal training and certification does not establish that the operator was incompetent or reckless. Even the lack of a required legal license does not establish incompetence or recklessness."

A "lapse[] in professional judgment" has been characterized as negligence. "Evidence of negligence does not establish recklessness . . . [which is] 'an act that the operator knew or should have known posed a high degree of risk of serious injury.'"

Here, the record does not show electrician "was incompetent or reckless" though he "was negligent while driving the forklift."

3. *J&D Towing, LLC v. American Alternative Insurance Corporation*, 478 S.W.3d 649 (Tex. 2016)

Tow truck was struck by a car, rendering the truck a total loss. Towing company settled with the car's driver for the driver's liability policy limit, then sued its own insurer for compensation for loss of use of the truck under its underinsured motorist coverage. Insurer argued that loss-of-use damages are not available where property is totally destroyed. Overruling the opinions of most Texas courts of appeals on the issue, the Supreme Court held that loss-of-use damages are recoverable in total-destruction cases.

"Actual damages may be either direct or consequential." "Where [d]irect damages compensate for a loss that is the necessary and usual result of the tortious act, . . . consequential damages, also known as special damages, compensate for a loss that results naturally, but not necessarily, from the tortious act," so long as they are "both foreseeable and directly traceable to the act." Loss-of-use damages are a form of consequential damages.

"[L]oss-of-use damages compensate a property owner for damages that result from 'a reasonable period of lost use' of the personal property. The amount of damages may thus be measured according to the particular loss experienced, such as the amount of lost profits, the cost of renting a substitute chattel, or the rental value of the owner's own chattel."

Texas law has been "clear" that "the owner may recover loss-of-use damages" when "personal property has been only *partially* destroyed." "Where personal property has been *totally* destroyed, however, Texas law is less clear." While "the measure of direct damages is the fair market value of the property immediately before the injury at the place where the injury occurred," the Supreme Court had "not yet directly spoken on loss-of-use damages in total-destruction cases," and "some courts of appeals have held that loss-of-use damages are unavailable in total-destruction cases."

After examining the history of Texas cases on the subject, looking '"to other jurisdictions for guidance,'" and considering the principle of "full and fair compensation" as the appropriate measure of actual tort damages, the Supreme Court agreed with the "modern trend," and held that "the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury."

The Supreme Court cautioned that "[p]ermitting loss-of-use damages in total-destruction cases . . . is not a license for unrestrained raids of defendants' coffers." The damages must be "foreseeable and directly traceable to the tortious act," and the "must not be speculative." "Moreover, the damages may not be awarded for an unreasonably long period of lost use." Loss-of-use damages in total-destruction cases are limited to "a period [no] longer than that reasonably needed to replace the personal property."

Q. Premises Liability

1. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Plant worker was injured by defective scaffold that was supposed to be inspected by contractor. Plaintiff obtained a verdict at trial based upon a general-negligence theory, which defendant had urged in an earlier trial. The Supreme Court reversed and rendered. "Considering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability. Levine's failure to request or secure findings to support his premises liability claim, therefore, 'cannot support a recovery'. . . . Additionally, USI was under no obligation to object to Levine's submission of an improper theory of recovery, and USI preserved its improper-theory argument by raising it in a motion for judgment notwithstanding the verdict."

"Levine's claim is premised on USI's having the right to control the scaffold at the time Levine allegedly suffered injury."

"Whether the condition that allegedly caused the plaintiff's injury is a premises defect is a legal question, which we review de novo."

A "premises defect case improperly submitted to the jury under only a general-negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."

"'A general contractor in control of the premises may be liable for two types of negligence in failing to keep the premises safe: that arising from an activity on the premises, and that arising from a premises defect.'"

Footnote 1: "[W]e considered [in *Olivo*] the character of the plaintiff's claim by first determining the source of the plaintiff's alleged injury—premises defect—and then determining the duties owed, concluding that the general contractor defendant owed the plaintiff premises duties if it retained a right to

control the work that created the dangerous condition." . . . [W]e reject the dissent's implication that premises liability is simply an affirmative defense, requiring the defendant to bear the burden of ensuring submission of the proper theory of recovery to support a premises liability judgment in the plaintiff's favor."

"'[A] person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner. When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises-liability principles apply.' Negligence and premises liability claims thus are separate and distinct theories of recovery" and they are not "interchangeable."

"In a negligent-activity case, a property owner or occupier must 'do what a person of ordinary prudence in the same or similar circumstances would have . . . done,' whereas a property owner or occupier in a premises liability case must 'use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about.'" "'[A] premises owner or occupier must either adequately warn of the dangerous condition or make the condition reasonably safe.'"

"'[N]egligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.' Generally, a plaintiff need only submit a general-negligence question in support of its claim for a defendant's liability under a negligent-activity theory."

"For a premises liability defendant to be liable for a plaintiff's injury, . . . we held in *Corbin v. Safeway Stores, Inc.*, that a plaintiff must prove:

> (1) that [the defendant] had actual or constructive knowledge of some condition on the premises; (2) that the condition posed an unreasonable risk of harm to [the plaintiff]; (3) that [the defendant] did not exercise reasonable care to reduce or to eliminate the risk; and (4) that [the defendant's] failure to use such care proximately caused [the plaintiff's] personal injuries."

When submitting a premises liability case, "'a simple negligence question, unaccompanied by the *Corbin* elements as instructions or definitions, cannot support a recovery. . . .'"

To distinguish between negligent activity and premises liability, "'this Court has focused on whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect.'" Slip-and-fall cases "'have consistently been treated as premises defect causes of action.'" As here, with the scaffold's faulty plywood, "slip-and-fall claims [are] premises defect cases because the injuries were alleged to have resulted from physical conditions on property." This is a premises defect case.

"Generally, an owner or occupier of property has a duty to keep the premises under its control in a safe condition. However, an owner or occupier 'is not an insurer of [a] visitor's safety. '[A] premises-liability defendant may be held liable for a dangerous condition on the property if it assumed control over and responsibility for the premises, even if it did not own or physically occupy the property.' Moreover, a premises liability defendant may be subject to liability if it has a right to control the premises, which 'may be expressed by contract or implied by conduct.' Accordingly, physical possession does not equate to the right to control the premises; one can exist without the other."

"An owner or occupier generally does not have a duty to ensure that a general contractor performs work in a safe manner." A "general contractor that assumes control of or retains the right to control the premises 'is charged with the same duty as an owner or occupier.'" A "defendant's liability under a premises liability theory rests on the defendant's assumption of control of the premises and responsibility for dangerous conditions on it."

In all negligence actions, including premises liability, "'the foreseeability of the harmful consequences resulting from the particular conduct is the underlying basis for liability.'"

Here, Levine was an invitee. "'An invitee is one who enters the property of another with the owner's knowledge and for the mutual benefit of both. Employees working at their employers' premises fit this description. . . .'" The "duty owed to Levine as an invitee would be 'to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not.' This duty is imposed on owners, occupiers, or persons in control of the premises because they are 'typically in a better position than the

invitee to be aware of hidden hazards on the premises.'"

Because USI was "hired to install, inspect, modify, and dismantle scaffolding," it "is a general contractor. As a general contractor, USI thus may be subject to liability for breaching any duties that a property owner would owe to business invitees. In evaluating whether a general contractor owes an invitee a duty of care as to the property condition, the 'relevant inquiry is whether the [contractor] assumed sufficient control over the part of the premises that presented the alleged danger so that the [contractor] had the responsibility to remedy it.'" The issue is "whether USI maintained a right to control the scaffold. . . ." Upon a review of the pleadings and evidence, the Court determined that USI had the right to control the scaffold.

Footnote 3: "OSHA defines a 'competent person' as 'one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.'"

Control does not require unrestricted access. "[W]e have never required exclusive control in the premises liability context. We have merely required 'sufficient control over the part of the premises that presented the alleged danger so that the defendant has the responsibility to remedy it.'" The Court looks at control over the "'safety and security of the premises, rather than the more general right of control over operations. . . . If [the defendant] did not have any right to control the security of the station, it cannot have had any duty to provide the same.'" Footnote 5: "Indeed, if control requires unrestricted access to the premises, few contractors could ever establish the right to control the premises. We do not read the law to impose premises liability duties on contractors only when the owner has relinquished all right to control or restrict access to its property."

Footnote 6: A "contractor whose work created a dangerous condition on the property that ultimately caused injury is not immune from liability solely because his work was completed and accepted by the owner before the plaintiff's injury." But, in *Allen Keller*, "the contractor owed no duty to warn the public or rectify the unreasonably dangerous site condition."

The "plaintiff bears the burden of proof on ownership or control and absence of any such evidence is fatal to the plaintiff's claim."

"'[I]f a claim is properly determined to be one for premises defect, a plaintiff cannot circumvent the true nature of the claim by pleading it as general negligence.'"

General-negligence "questions submitted in premises liability cases were 'immaterial' because 'absent any determination that the factual predicates giving rise to a legal duty were satisfied, the defendants' failure to use reasonable care was of no legal consequence.'"

A "premises defect claim against a contractor who retained the right to control the premises at the time of the plaintiff's alleged injury must be submitted to the jury as a premises liability claim."

2. *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98 (Tex. 2017)

After being robbed in an apartment complex parking lot, plaintiff sued the complex. The Supreme Court reversed a decision for plaintiff from the court of appeals "because it failed to properly consider whether the risk of harm was unreasonable. . . ." The Court rendered judgment for the complex because plaintiff "offered no evidence of the burden that preventing such a crime would impose on" defendant.

"Generally, property owners have no legal duty to protect persons from third-party criminal acts. But a property owner who 'controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee.'"

The "risk must be both foreseeable and unreasonable to impose a duty on a property owner. This approach is not peculiar to premises-liability cases; it is essential to the determination of duty in all of tort law." "Foreseeability is a 'prerequisite to imposing a duty.' But once foreseeability is established, 'the parameters of the duty must still be determined.' Courts will also consider 'the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case.'" Footnote 2: "'The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty . . . .' '[A] property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.'"

The *Timberwalk* factors considered foreseeability. "'These factors—proximity, recency, frequency, similarity, and publicity—must be considered together in determining whether criminal conduct was

foreseeable.'"

The *Timberwalk* factors "cannot, without more, determine the reasonableness of a risk of harm." "Unreasonableness 'turns on the risk and likelihood of injury to the plaintiff . . . as well as the magnitude and consequences of placing a duty on the defendant.' A risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk. None of the *Timberwalk* factors compels any consideration of what burdens a property owner would necessarily incur to prevent or reduce the risk of a crime. Likewise, the factors do not address whether, as a matter of public policy, it is preferable to impose such burdens or, instead, accept the risk that a crime will occur."

"The unreasonableness inquiry . . . explores the policy implications of imposing a legal duty to protect against foreseeable criminal conduct. This includes whether a duty would 'require 'conspicuous security' at every point of potential contact between a patron and a criminal' or require adoption of 'extraordinary measures to prevent a similar occurrence in the future.' Accordingly, 'if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk.' But 'if the burden of preventing the harm is unacceptably high, the risk of the harm is not unreasonable.'"

"[F]oreseeability and unreasonableness are not wholly independent. . . ."

Here, plaintiff offered no evidence of an unreasonable risk of harm; he argued only foreseeability. He failed to offer a report of lighting to the trial court. At "no point before oral argument to this Court did [plaintiff] propose utilizing on-premises courtesy officers, off-duty police officers, or trimming back hedges to prevent crime." Moreover, there was no evidence "on what it would cost [defendant] to implement a police presence in its parking lot. . . ."

3. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse, holding that there was no evidence of negligent entrustment, and that there was no premises defect.

Footnote 3: "When Chapter 95 applies, 'it grants the property owner additional protection by requiring the plaintiff to prove that the owner 'had actual knowledge of the danger or condition,' so the owner is not liable based merely on what it reasonably should have known.'"

Footnote 4: "Generally, every person has a duty not to negligently entrust a vehicle to another. But a premises owner 'does not have a duty to see that an independent contractor performs work in a safe manner' unless the owner retains or exercises 'supervisory control' over the contractor's work."

Here, there was "no evidence of any 'condition of the premises' of which [warehouse] was required to warn or that [it] was required to make safe." This theory focuses upon "the 'state of being' of the property itself." Though tangible property "can cause a dangerous 'condition of the premises,' when (as here) the danger arises from the contemporaneous use of the tangible property, the claim is for negligent 'use' of property, not for premises liability."

Further, "'we have declined to impose a duty for premises conditions that are open and obvious, regardless of whether such conditions are artificial or naturally occurring. Any danger the sidewalk presented was open and obvious. . . .'"

4. *Union Pacific Railroad Company v. Nami*, 498 S.W.3d 890 (Tex. 2016)

Railroad worker contracted West Nile Virus from mosquitoes, contending that railway failed to mow right-of-way, failed to provide repellant, and failed to secure compartment of rail car. The Supreme Court reversed a verdict for him under FELA, holding "the *ferae naturae* doctrine applies, and thus Union Pacific owed Nami no duty to prevent his infection with mosquito-borne West Nile virus."

Under "the doctrine of *ferae naturae*, a property owner owes an invitee no duty of care to protect him from wild animals indigenous to the area unless he reduces the animals to his possession, attracts the animals to the property, or knows of an unreasonable risk and neither mitigates the risk nor warns the invitee."

Footnote 41: "A landowner must warn of or make safe *unreasonably dangerous* conditions. If the condition is not unreasonably dangerous, no warning is required."

5. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95. The Supreme Court ruled that "the statute applies to negligence claims other than those that assert premises liability," that it does not apply "to claims against a property owner's employee," and that the evidence here did not create a fact issue that precluded summary judgment.

Chapter 95 "protects property owners against liability to contractors, subcontractors, and their employees under certain circumstances." "A 'property owner' is a 'person or entity that owns real property primarily used for commercial or business purposes.'" Chapter 95 "grants the property owner additional protection by requiring the plaintiff to prove that the owner 'had actual knowledge of the danger or condition,' so the owner is not liable based merely on what it reasonably should have known. If Chapter 95 applies, it is the plaintiff's 'sole means of recovery.'" A "claim" is "'a claim for damages caused by negligence,' without distinguishing between different categories of negligence claims." A "'condition' refers to premises and 'use' refers to activities."

"Under the common law, an independent contractor or its employee can recover against a property owner for premises liability or negligence if the owner exercised some control over the relevant work and either knew or reasonably should have known of the risk or danger."

There is "nothing in the language of Chapter 95 that indicates it applies to claims against a property owner's employees."

"Neither Chapter 95 nor the Code Construction Act defines the term 'entity.'" According to BLACK'S LAW DICTIONARY (10th ed. 2014) "the term's ordinary meaning refers to an 'organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners.' In the absence of any authority to the contrary, we must apply the term's common meaning, which refers only to the legal organization itself." "We conclude that the context of section 95.001(3)'s inclusion of a 'person' reflects a reference to the common meaning of both that term and the term 'entity,' such that the definition refers separately to both a natural person (a human being) and an artificial person (an entity)." Thus, the "definition of 'property owner' in section 95.001(3) does not include an owner's employees who do not own the property at issue." Further, "Chapter 95 does not protect a property owner's agents. . . ." And, "Chapter 95 protects a property owner even against claims asserting vicarious liability based on respondeat superior. . . ."

"[O]ur task is to construe Chapter 95 as written, not as we may believe makes the most sense."

"Chapter 95 only applies when the injury results from a condition or use of the same improvement on which the contractor (or its employee) is working when the injury occurs." However, the Court here held that plaintiff was working on the same improvement. "Chapter 95 does not define 'improvement,' but we have 'broadly defined an 'improvement' to include 'all additions to the freehold except for trade fixtures [that] can be removed without injury to the property.'" The "entire system was a single 'improvement' under Chapter 95."

"Because evidence of actual knowledge triggers an exception to the protection that Chapter 95 otherwise provides, the plaintiff has the burden to prove the owner's actual knowledge. . . . [O]nce defendant proves the applicability of Chapter 95, the burden shifts back to the plaintiff to fulfill the requirements of section 95.003."

"'Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge[,] which can be established by facts or inferences that a dangerous condition could develop over time.' 'Circumstantial evidence establishes actual knowledge only when it 'either directly or by reasonable inference' supports that conclusion.'"

Plaintiff's "injuries arose not from the presence of gas at the plant, but from the presence of gas in the pipe on which he was working." The "danger or condition was the presence of gas in the line on which [plaintiff] was working, and there is no evidence that [defendant's] had knowledge of that danger or condition."

6. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

Tort Claims Act case. Law professor tripped on "an improperly secured extension cord." The Supreme Court ruled that the case was "a premises defect claim, and there is no evidence that UT had actual knowledge of the tripping hazard created by the cord's position over the retaining wall and across the sidewalk."

"The duty owed to a licensee on private property requires that 'a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee

of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.'" "Absent willful, wanton, or grossly negligent conduct, a licensee must prove the following elements to establish the breach of duty owed to him: '(1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of injury to the licensee.'"

This "Court . . . has consistently treated slip/trip-and-fall cases as . . . premises defects" cases.

The common law recognizes "two subspecies of negligence: causes of action for premises liability and negligent activity. 'We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.' When distinguishing between a negligent activity and a premises defect, this Court has focused on whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect." Under the Tort Claims Act, "the dangerous condition upon which a premises defect claim is based may be created by an item of tangible personal property. The distinction lies in whether it is the actual use or condition of the tangible personal property itself that allegedly caused the injury, or whether it is a condition of real property—created by an item of tangible personal property—that allegedly caused the injury."

"'Actual knowledge, rather than constructive knowledge of the dangerous condition is required.'" The "licensee must show that the owner actually knew of the 'dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time.' Hypothetical knowledge will not suffice. Additionally, that the owner could have done more to warn the licensee is not direct evidence to show that the owner had actual knowledge of the dangerous condition." Courts "'generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition.'"

Evidence "'that an owner or occupier knew of a safer, feasible alternative design, without more, is not evidence that the owner knew . . . that a condition on its premises created an unreasonable risk of harm.' Despite the evidence of prior falls, employees in the area, and a feasible, safer alternative design, we held [in *City of Dallas v. Thompson*] that the plaintiff failed to present any evidence of the City's actual knowledge of the protruding coverplate."

"'Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time.'"

7. *First Texas Bank v. Carpenter*, 491 S.W.3d 729 (Tex. 2016)

Plaintiff was injured while showing an adjuster damage on bank's roof. Bank had not determined to hire plaintiff to repair the damage. The Court held that plaintiff "was not engaged in the work covered by" TEX. CIV. PRAC. & REM. CODE, ch. 95, and thus it did not bar his claim.

Chapter 95 "limits a property owner's liability for injuries to a contractor" who constructs or repairs an improvement to real property. A person can be "a contractor without an 'actual' contract to perform specific work for stated compensation."

"Chapter 95 does not define 'contractor', so we give the word its ordinary meaning unless a more precise meaning is apparent from the context of the statute." Accordingly, a "contractor is simply someone who works on an improvement to real property."

"Chapter 95 is not a statute regulating contracting in general but one prescribing the conditions under which an owner is liable to someone working on improvements to real property. Its applicability turns on the kind of work being done, not on whether an agreement for the work to be done is written, or formal, or detailed. . . . The statute covers not only contractors who have agreements with owners, but their employees, subcontractors, and their subcontractors' employees, none of whom would ordinarily have a contract with the owner."

"But Chapter 95 does not cover everyone injured while working on real property. . . . " It applies to those who create or modify an improvement to real property. Improvement to realty.

Here, had bank hired plaintiff "to fix the roof, and a necessary first step was demonstrating hail damage to the adjuster and obtaining insurance proceeds, then he would have been engaged in repairing or modifying the roof, an improvement to real property. But the evidence does not come close to establishing those

things. Rather, the evidence fairly shows that the Bank had never fully decided what, if any, repairs to make to the roof before [plaintiff] was injured."

8. *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640 (Tex. 2016)

Prior plant owner built an acid system that injured the worker of the company that had bought the plant. The jury returned a verdict that prior plant owner was negligent in its design and instructions for the acid system. But the Supreme Court rendered judgment against the plaintiff "[b]ecause the [prior plant] owner sold the property several years before the plaintiff's accident and did not otherwise owe the plaintiff a duty of care apart from its ownership and control of the property. . . ."

"A claim against a property owner for injury caused by a condition of real property generally sounds in premises liability. That liability typically ends with the property's sale. When the property's dangerous condition is caused or created by another, an independent claim against the other may lie in negligence and that claim, unlike the premises-liability claim against the owner, does not necessarily end with the property's sale."

A "person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner. When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises-liability principles apply."

"Under premises-liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances. That duty generally runs with the ownership or control of the property and upon a sale ordinarily passes to the new owner."

Under the Restatement, a party who builds a dangerous structure on another's property can be liable to those injured by it. But, "section 385 plainly concerns only the liability of independent contractors and other third parties who create dangerous conditions while making improvements 'on behalf of' property owners; it does not purport to apply to property owners themselves."

"An owner who creates a dangerous condition on its own property has breached no duty of care unless and until the owner exposes certain people to the danger. . . . [Premises] liability rests on two theoretical assumptions: (1) the property owner controls the premises and is therefore responsible for dangerous conditions on it and (2) the property owner is in a superior position to know of and remedy the dangerous condition. . . ." The "duty of these third parties is not necessarily co-extensive with that of the property owner. . . ." A "contractor's duties are thus tied not only to its control of the premises but also to the quality of its contracted work. This latter duty may be judged under ordinary-negligence principles even after the contractor no longer controls the premises."

With "land conveyances, . . . the deed has traditionally been viewed as the parties' full agreement, excluding all other terms and liabilities. In this area, 'the ancient doctrine of caveat emptor' retains 'much of its original force,' requiring the vendee to make his own inspection of the property and relieving the vendor of responsibility for existing defects."

"We . . . reject the notion that a property owner acts as both owner and independent contractor when improving its own property, subjecting itself to either premises-liability or ordinary-negligence principles depending on the injured party's pleadings. We hold instead that premises-liability principles apply to a property owner who creates a dangerous condition on its property, and that the claim of a person injured by the condition remains a premises liability claim as to the owner-creator, regardless of how the injured party chooses to plead it."

If "an injury should occur after the condition's creator has conveyed the property, the premises-liability claim will, as a general rule, lie against the property's new owner, who ordinarily assumes responsibility for the property's condition with the conveyance."

R. Realty, Personal Property, Construction, Condemnation, Oil and Gas

1. *Allen-Pieroni v. Pieroni*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

After divorce, husband was ordered to pay wife $500K in installments of $10K/month. Husband made payments, and later bought a house. Wife filed an abstract of judgment reflecting husband's obligation to her, which husband discovered years later when his sale of the house fell through. Husband sued the wife successfully for slander of title. The Supreme Court reversed and remanded, holding that trial court used the wrong measure of damages: when "the plaintiff

still owns the property at the time of trial, the amount of actual damages caused by the slander is generally the difference between the contract price (the amount the plaintiff would have received but for the defendant's title disparagement) and the property's market value at the time of trial with the cloud removed."

"'Slander of title' consists of a 'false and malicious statement made in disparagement of a person's title to property which causes special damages.' . . . Special damages are simply economic damages."

"The law does not presume damages as a consequence of slander of title; rather, the plaintiff must prove special damages. Special damages exist when the plaintiff can show the loss of a specific, pending sale that was frustrated by the slander. But the seller's lost profit from the sale is not the relevant measure of those damages."

"In *Reaugh*, we adopted this measure [of damages], quoting in support a Restatement comment . . . :

> (d) Extent of loss, how proved. The extent of the pecuniary loss caused by the prevention of a sale is determined by the difference between the price which would have been realized by it and the salable value of the thing in question after there has been a sufficient time following the frustration of the sale to permit its marketing. The depreciation of the thing from any cause after such time has elapsed is immaterial."

Here, "no evidence exists that [husband's] property was worth less than the previous contract price at the time of trial or that [wife's] invalid lien had any continuing effect on the property's value or marketability following its removal. As the party seeking affirmative relief, [husband] had the burden to prove these damages."

2. *Wenske v. Ealy*, 521 S.W.3d 791 (Tex. 2017)

Interpretation of a deed conveying a mineral estate along with the surface above it "subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty." Under the heading "Reservations from Conveyance," 3/8th of the mineral estate was reserved to grantors. "Under the heading "Exceptions to Conveyance and Warranty," grantors identified a 1/4th non-participating royalty interest (NPRI) that had been reserved by a prior owner in a prior, recorded instrument.

In a declaratory judgment suit between grantors and grantees over from whose share of the royalties the 1/4th NPRI would come, grantors argued that their 3/8th interest was unburdened by the NPRI, while grantees argued that the NPRI burdened both grantors' and grantees' respective estates in proportion to their interest in the minerals.

The Supreme Court reiterated its prior rejection of "mechanical rules of construction, such as giving priority to certain clauses over others, or requiring the use of so-called 'magic words.'" "The parties' intent, 'when ascertained, prevails over arbitrary rules.'" The Supreme Court disagreed with the court of appeals' application of "the alleged 'default rule' from *Pich v. Lankford*," 302 S.W.2d 645 , 650 (Tex. 1957), that "'Ordinarily the royalty interest . . . would be carved proportionately from the twi mineral ownerships.'" Because "we can ascertain the parties' intent here by careful examination of the entire deed," "[a]pplying default rules" is "both unnecessary and improper."

Here, the case turned on the interpretation of the "'subject to' clause," but Supreme Court rejected the argument that it must give the clause the same treatment a "subject to" clause was given in *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969). The Court limited that case to the specific language in the deed.

Here, the case turned on the interpretation of the "'subject to' clause," and "[g]iving the deed's words their plain meaning, reading it in its entirety, and harmonizing all of its parts, we cannot construe it to say the parties intended the [grantees] interest to be the *sole* interest subject to the NPRI." The "exceptions to conveyance and exceptions to warranty are combined into one clause in this deed," which "indicates an intent to avoid a breach of warranty (and therefore an over-conveyance problem), rather than a clear attempt to reserve a full 3/8ths interest." The reservation paragraph also allocated any existing lease and its benefits proportionately to the parties, "strengthen[ing]" the Court's "confidence" in its interpretation. Thus, the "only reasonable reading" is that the deed resulted in the grantors and grantees sharing the burden of the prior NPRI proportionately.

3. *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 26 (Tex. 2017)

Oil and gas lessors and stakeholders of pooled mineral interests sued lessee, Samson, for underpaid royalties under leases and pooling agreements. One group, the "Unpooling Stakeholders," sued because the lessee unilaterally amended the boundaries of their

pooling unit to exclude a producing well. The second group, the "Overlapping Unit Stakeholders," were pooled into a unit that included a well that was also inadvertently included in the Unpooling Stakeholders' unit, and sued when the lessee paid only the Unpooling Stakeholders on that well.

In a series of summary judgments, the trial court awarded breach-of-contract damages to both the Unpooling Stakeholders and Overlapping Unit Stakeholders, but applied a proportionate-reduction clause to the Overlapping Unit Stakeholders' damages. After all parties appealed, the court of appeals reversed and rendered judgment against the Unpooling Stakeholders on the basis that they had ratified the amendment to the pooling unit, but affirmed the judgment in favor of the Overlapping Unit Stakeholders.

All parties petitioned for review to the Texas Supreme Court. Samson argued: (1) because the pooling operates as a cross-conveyance of title and the same property cannot be conveyed twice, the pooling and the obligation to pay the Overlapping Unit Stakeholders is invalid; (2) the Overlapping Unit Stakeholders' claims were barred by quasi-estoppel and scrivener's error; and (3) if it had to pay the Overlapping Unit Stakeholders, it had overpaid the Unpooling Stakeholders and was entitled to reimbursement from them. The Unpooling Stakeholders argued that the court of appeals improperly relied on *Hooks v. Samson Lone Star, Ltd. P'ship* in holding that they had ratified the amendment to the pooling unit. The Overlapping Unit Stakeholders argued that the trial court improperly applied a proportionate-reduction clause to its damages. The Supreme Court affirmed the court of appeals' judgment.

The Supreme Court rejected Samson's "cross-conveyancing" argument. "Under the law in Texas, pooling implicates both contract and property law—the authority to pool emanates from contract but pooling agreements give rise to interests in realty." "The cross-conveyancing theory can be critical, even 'outcome determinative' as to some issues, such as venue, but Samson's argument in this case is a theoretical construct that holds no water." "Considering the pertinent authority" holding that contract that fails as a conveyance is still enforceable as a contract, "we discern no impediment to Samson's obligations in this case under a contract theory even if the pooling designation failed to effect a conveyance of title."

The Supreme Court also rejected a quasi-estoppel argument based on statements made to the Overlapping Unit Stakeholders before the revised pooling unit designation and on the Overlapping Unit Stakeholders' acceptance of royalties that did not include the overlapped well. "'Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken.'" "'The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.'" Here, the statements on which Samson bases its argument "occurred long before" the revision of the pooling designation and "are no evidence of inconsistency," and "accepting an underpayment is not inconsistent with claiming an entitlement to more."

The scrivener's error defense failed as well. "A 'scrivener's failure to embody the true agreement of the parties in a written instrument' provides grounds for the equitable remedy of 'reformation on the basis of mutual mistake.'" "Mutual mistake, which is the key to establishing a scrivener's error, requires evidence showing both parties were acting under the same misunderstanding regarding the same material fact." Here, the record "betrays no hint of mutual misunderstanding" because "Samson alone was responsible for delineating the pooled unit's boundaries."

Samson's claim for reimbursement from the Unpooling Stakeholders failed under the "voluntary payment rule." "'"[M]oney voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability."'" Samson had ample opportunity to correct its error in amending the pooling designation, which was "a circumstance of Samson's own making[.]" "Samson must bear its contractual obligation to pay royalties out of its working interest rather than seeking reimbursement from" the Unpooling Stakeholders.

The Supreme Court affirmed the court of appeals' holding that the Unpooling Stakeholders ratified the amendment to their pooling unit that omitted a well. The court of appeals relied on *Hooks v. Samson Lone Star, Ltd. P'ship*, involving a ratification defense by Samson "in a similar context against similarly situated stakeholders" in the same unit "making similar unpooling claims[.]" In Hooks, the Supreme Court held that Samson "conclusively established ratification by the lessors" because the lessors "'received notice of an amendment to the unit designation, accepted royalties from the amended unit, and [did] not challenge the

amended unit.'" The Unpooling Stakeholders argued that they did not receive the same letter the *Hooks* lessors received notifying them of the amendment. However, the Unpooling Stakeholders had received "functionally equivalent" notice when they joined the lawsuit, and "[n]othing in *Hooks* suggests that the specific method of notice—the letter from Samson to the lessors—was necessary as opposed to sufficient."

The court of appeals and trial court properly applied a proportionate-reduction clause to reduce the Overlapping Unit Stakeholders' damages. "A proportionate-reduction clause protects the lessee from paying the lessor more royalties than are due if the lessor owns less than the entire fee simple estate in the leased premises." Here, the clause provided that moneys paid under the lease "'shall only be paid in the proportion which the interest therein covered by this lease bears to the whole or undivided fee simple estate therein.'" Proportionate reduction was "authorized if the lease 'covers an interest in the oil and gas in all or any part of the leased premises than the entire undivided fee simple estate.'" Here, because the lease only covered a 50% interest in the oil and gas, the proportionate-reduction clause applied.

4. *Noble Energy, Inc. v. ConocoPhillips Company*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Footnote 10: "'A purchaser is charged with knowledge of the provisions and contents of recorded instruments.' 'Third persons are deemed to have constructive knowledge or notice of the existence and contents of recorded instruments affecting immovable property.'"

5. *Kyle v. Strasburger*, 522 S.W.3d 461 (Tex. 2017)

Per curiam opinion applying the Supreme Court's recent holdings in *Garofolo v. Ocwen Loan Servicing* and *Wood v. HSBC Bank USA, N.A.* to a suit to declare an allegedly forged home equity loan void and to forfeit principal and interest.

The Supreme Court reversed the trial court's summary judgment that homeowner's claim for a declaration that the disputed deed of trust was invalid was barred by limitations. Under *Wood*, TEX. CONST. art. XVI, § 50(c) "renders liens securing constitutionally noncompliant home-equity loans invalid until cured," not merely voidable, and thus "no statute of limitations applies[.]"

The Supreme Court's holding in *Garofolo* foreclosed homeowner's "constitutional claim for forfeiture of principal and interest paid on the loan at issue" because "forfeiture is not an independent cause of action under the Texas Constitution." "[T]he Constitution itself simply serves as a defense to foreclosure when its mandates are not followed." However, the Supreme Court remanded for consideration of homeowner's claim for "an independent contractual right to compel forfeiture," because that claim had not been considered by the lower courts.

6. *Sommers v. Sandcastle Homes, Inc.*, 521 S.W.3d 749 (Tex. 2017)

Expungement of a lis pendens under TEX. PROP. CODE § 12.0071 does not affect a purchaser's notice of a claim gained independently of the lis pendens, for purpose of determining whether the purchaser is a bona fide purchaser.

TEX. PROP. CODE § 12.0071(f) "provides that a purchaser cannot be charged with record notice, actual or constructive, following a proper expungement. But the extent of that protection is expressly limited to 'the notice of lis pendens' and 'any information derived from the notice.' '[B]y negative implication, expunction is given no effect with respect to the universe of other information, not included in the scope of section 12.0071(f), that is neither (a) the 'notice of lis pendens' itself nor (b) 'information derived from the notice' of lis pendens.'"

As a result, a buyer with actual notice of a claim obtained independently of a notice of lis pendens is not a bona fide purchaser even after a notice of lis pendens is expunged.

7. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of fiduciary duty by two directors.

The "party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed."

Here there was no evidence defendants "acquired any specific lease as result of the breaches of fiduciary duties." Thus, LEC was not entitled to a constructive trust imposed upon the leases defendants acquired.

8. *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corporation*, 520 S.W.3d 887 (Tex. 2017)

When water supply company sued engineers who designed plant, it attached a certificate of merit. The engineers objected, claiming the affiant was not properly qualified and did not opine upon the legal elements of each cause of action. The Supreme Court found no abuse of discretion in "determining the certificate of merit sufficient."

TEX. CIV. PRAC. & REM. CODE, ch. 150 "generally requires that a sworn "certificate of merit" accompany a plaintiff's 'complaint' in a case that 'aris[es] out of the provision of professional services by a licensed or registered professional' named in the statute. The sworn certificate or affidavit must be from a similarly licensed professional who meets certain qualifications and attests to the lawsuit's merit. If the plaintiff fails to file a compliant certificate of merit, the statute directs the complaint's dismissal. And the 'order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.'"

TEX. CIV. PRAC. & REM. CODE § 150.002(a) "requires that a certificate of merit accompany the initiation of a lawsuit against these named design professionals. A certificate of merit is an affidavit from a third-party professional who is competent to testify, holds the same license or registration as the defendant, and is knowledgeable in the defendant's practice area. The affiant must also be licensed or registered in Texas and actively engaged in the practice." The certificate of merit "must come from a competent and qualified third-party engineer who can attest to the factual basis of the plaintiff's underlying complaint."

The Court cited the following concerning the expert's qualifications:

> "What chapter 150 requires, with respect to subject-area expertise, is that the affiant 'is knowledgeable in the area of practice of the defendant.' Chapter 150 does not require that an affiant establish his or her knowledge through testimony that would be competent or admissible as evidence, or even that the affiant explicitly establish or address such knowledge within the face of the certificate—indeed, it imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge."

The "statute's knowledge requirement [is not] synonymous with its licensure or active engagement requirements. . . ." Here, unlike *Levinson Alcoser*, the expert's "knowledge or experience" was provided. The expert provided sufficient "'factual statements'" to demonstrate his knowledge in defendant's area of practice.

"The statute does not expressly require that the expert's qualifications appear in the affidavit itself. . . . Nevertheless, the affidavit is a reasonable place to provide this information—as [the expert] has done here."

The statute requires "that the expert's affidavit address the lawsuit's 'factual basis.'" "We . . . typically give statutory terms their ordinary or common meaning unless context or a supplied definition indicates that a different meaning was intended." "Because 'factual basis' has no special, technical, or acquired meaning and is not otherwise defined in the certificate-of-merit statute, we interpret the term according to its ordinary meaning." It refers to "the events or circumstances giving rise to the professional errors or omissions identified by the third-party expert as distinguished from their legal effect."

"The 2009 amendment [to the statute] thus clarified that the statute was not to be limited to professional-negligence claims." "We . . . do not interpret the 2009 amendment as enlarging the factual-basis requirement or otherwise changing its existing relationship within the statute." "We accordingly reject [engineer's] interpretation of the statute, which would require the expert's affidavit to address the elements of the plaintiff's various theories or causes of action. The statute instead obligates the plaintiff to get an affidavit from a third-party expert attesting to the defendant's professional errors or omissions and their factual basis. The trial court then determines whether the expert's affidavit sufficiently demonstrates that the plaintiff's complaint is not frivolous."

Affiant concluded his certificate of merit by saying he reserved the right to modify his opinions. This "reservation merely [recognizes] the preliminary nature of the certificate of merit, which . . . must be 'filed early in the litigation, before discovery and before other dispositive motions may be available.'" At that stage, "'the plaintiff is not required to fully marshal his evidence.'"

9. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

By a general grant, in 1991 two people sold their rights in real property in a county. 20 years later, they deeded their rights to a landman. Landman sued original purchaser to quiet title, asserting the deeds

insufficiently described the interests. The Supreme Court ruled that a deed of all of one's interest in a county was sufficient. "Texas law has long given effect to a general conveyance of all the grantor's property in a geographic area, such as a county, the state, or even the United States, thereby enlarging an accompanying conveyance of property specifically described."

"While the Statute of Frauds requires only that certain promises or agreements be in writing and signed by the person to be charged, as applied to real-estate conveyances, 'the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty.'" And, a "Mother Hubbard clause is not effective to convey a significant property interest not adequately described in the deed"

Here, the property descriptions did not satisfy the statute of frauds. "But Texas law has also long regarded general granting clauses as valid and effective. . . ." Landman argued "that the deficiencies of the specific descriptions cannot be cured by the general granting clause. But that is precisely the purpose of the general grant when included with specific grants."

Evidence of original purchaser's "character is no reason to interpret the general grants in the 1991 deeds other than according to their plain terms."

In addition to seeking to quiet title, landman alleged other theories, including conversion of royalties and adverse possession. But, original purchaser "cannot have fraudulently claimed, or converted royalties from, property he owns." Further, landman "has no standing to prosecute any claim for adverse possession" that sellers might have had.

10. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance." The Court further affirmed the finding of elderly woman's lack of capacity when she executed ranch sale and estate documents.

Here, there was "'some evidence upon which reasonable minds could conclude that Lesey lacked sufficient mind and memory to understand the nature and effect of her acts at the time she executed the trust amendments and sales instruments at issue.'" "Documents executed by one who lacks sufficient legal or mental capacity may be avoided." One has capacity "if she 'appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting.' The proper inquiry is whether Lesey had capacity on the days she executed the documents at issue. But courts may also look to state of mind at other times if it tends to show one's state of mind on the day a document was executed."

"Evidence of physical infirmities, without more, does not tend to prove mental incapacity. But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." Here, a forensic psychiatrist testified about her "dementia and cognitive impairment," and that she could not "transact business." Relatives further testified she was confused and forgetful. A voicemail was incoherent, and even the defendant had emails about her lack of lucidity. This constituted "sufficient evidence" to support the verdict. It "is not our place to weigh the testimony adduced at trial. That is the jury's province."

Footnote 3: "Undue influence itself is not an actionable tort; consequently, damages are not recoverable based solely on an undue-influence finding. . . . Rather, an undue-influence finding typically is grounds for setting aside an otherwise binding document, in this case a trust or deed."

11. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

Mineral owner (Lightning) sought injunction when surface owner leased to Anadarko the right to drill through subsurface to reach minerals Anadarko had leased under a neighboring surface. The case "concerns whose permission is necessary for an oil and gas operator to drill through a mineral estate it does not own to reach minerals under an adjacent tract of land." The Supreme Court ruled "that the loss of minerals Lightning will suffer by a well being drilled through its mineral estate is not a sufficient injury to support a claim for trespass. Accordingly, such a loss will not support injunctive relief."

"'Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property.' '[E]very unauthorized entry upon land of another is a trespass even if no damage is done or

injury is slight.' The owner of realty generally 'has the right to exclude all others from use of the property.' But ownership of property does not necessarily include the right to exclude *every* invasion or interference based on what might, at first blush, seem to be rights attached to the ownership."

"Although the surface owner retains ownership and control of the subsurface materials, a mineral lessee owns a property interest—a determinable fee—in the oil and gas in place in the subsurface materials."

The law distinguishes "between the earth surrounding hydrocarbons and earth embedded with hydrocarbons." Although "the surface owner owns and controls the mass of earth undergirding the surface, those rights do not necessarily mean it is entitled to make physical intrusions into formations where minerals are located and remove some of the minerals. . . ." But the surface owner has "the right to inject and store non-native gas in the formation before all of the native gas was produced."

The mineral lessee's "interest includes 'the exclusive right to possess, use, and appropriate gas and oil.' The mineral estate is the dominant estate in the sense that the mineral owner has the right to use as much of the surface 'as is reasonably necessary to produce and remove the minerals' encompassed by the lease. [But, the] rights accruing to the dominant mineral estate are . . . not absolute."

The property owner's "right to exclude is both dictated and circumscribed by the scope of an owner's rights in the property." Thus, "a trespass is not just an unauthorized interference with physical property, but also is an unauthorized interference with one of the rights the property owner holds."

"When the owner of a fee simple estate severs the mineral estate by a conveyance, five rights are conveyed to the transferee or grantee: '(1) the right to develop, (2) the right to lease, (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments.' And an oil and gas lessee such as Lightning is generally only granted the right to develop under a lease."

The "rights conveyed by a mineral lease generally encompass the rights to explore, obtain, produce, and possess the minerals subject to the lease; they do not include the right to possess the specific place or space where the minerals are located. Thus, an unauthorized interference with the place where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights."

The "Railroad Commission monitors, and has rules closely controlling, the location and number of wells that may be drilled on a tract of land."

"The accommodation doctrine has long 'provided a sound and workable basis for resolving conflicts' between owners of mineral and surface estates that allows the mineral owner to use as much of the surface—and subsurface—as is reasonably necessary to recover its minerals."

The "rule of capture . . . vests title in whoever brings the minerals to the wellhead, even if the minerals flowed into the production area from outside the lease or property boundaries."

"Whether the small amount of minerals lost through that process will support a trespass action must, in the end, be answered by balancing the interests involved. . . ." To balance the interests, "we weigh 'the interests of society and the interest of the oil and gas industry as a whole against the interest of the individual operator.'" Drilling from "adjacent surface locations . . . allow[s] for recovering the most minerals while drilling the fewest wells. And this Court has always viewed waste-reducing innovations favorably." Here, the "individual interests in the oil and gas lost through being brought to the surface as part of drilling a well are outweighed by the interests of the industry as a whole and society in maximizing oil and gas recovery."

Anadarko's rights here "extend only as far as those held by the owners of the surface estate. Lightning's mineral estate remains the dominant estate regarding use of the surface—and subsurface—for development of its mineral estate."

Finally, "the number of wells a pass-through driller might drill is not relevant with respect to claims in trespass against that driller."

12. *Town of DISH v. Atmos Energy Corporation*, 519 S.W.3d 605 (Tex. 2017)

Residents and town sued owners of natural gas compressors due to the noise and smell they emitted. Because of prior complaints, a town meeting, and a report, the Supreme Court held that "the two-year statute of limitations bars their claims."

Footnote 2: "Trespass is a cause of action–generally, an intentional tort. . . . [N]uisance is not a cause of action, but a type of legal injury."

"A condition is a nuisance when it substantially interferes with 'the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.' And 'unreasonableness must be determined

based on an objective standard of persons of ordinary sensibilities, not on the subjective response of any particular plaintiff.'"

"Boilerplate language in [plaintiffs'] affidavits that each 'noticed a significant change in the noise being emitted' from the [compressor] station in late 2009 to early 2010 does not counteract Enterprise's evidence that it could not have contributed to that change. Nor can" the issuance of a certain report about emissions.

No evidence rebutted one defendant's contention that it was "not one of the alleged offenders. As the residents never responded to Enterprise's no-evidence point, the trial court properly granted Enterprise's summary-judgment motion. TEX. R. CIV. P. 166a(i) ('The court must grant the [no-evidence summary-judgment] motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.')."

"A cause of action accrues 'when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.' And '[a] permanent nuisance claim accrues when the condition first 'substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.'"

A "trespass claim accrues once 'known injury begins.'" The "'accrual date is not defined by statute, but is a question of law for the courts.'"

"Claims for nuisance 'normally do not accrue when a potential source is under construction,' but 'once operations begin and interference occurs, limitations runs against a nuisance claim just as any other.' Trespass claims are no different. And although completion of construction is not dispositive of an accrual date, it is a logical starting point. . . ." In this case, "if limitations did not begin to run when construction was completed, it began to run before," due to prior complaints, meetings, emails, and a report.

The difference between this case and *Justiss* "is that in *Justiss* objective evidence corroborated the plaintiffs' claims that conditions worsened in 1997 and 1998. *Justiss* does not stand for the proposition that mere subjective affidavit evidence can defeat a limitations defense."

13. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Tenant had habitually paid rent late, which landlord accepted; though commercial lease contained a "nonwaiver" provision, tenant argued landlord waived the nonwaiver provision. The Supreme Court ruled that "as a matter of law, accepting late rental payments does not waive the nonwaiver provision in the underlying lease or . . . [the] requirement that rent is due on the first of the month, without prior demand, and no later than the tenth day of the month. Moreover, [landlord] did not act inconsistently with its right to accept untimely rent without waiving the nonwaiver provision."

Here, the lease not only provided that the acceptance of late rent would not waive landlord's rights; it further required that all waivers of its terms be in writing. "The decisive issue is whether waiver of a nonwaiver provision can be anchored in the same conduct the parties specifically agreed would not give rise to a waiver of contract rights. We hold it cannot."

Texas has a "strong public policy favoring freedom of contract." Generally, "nonwaiver provisions are binding and enforceable." But, "we affirm that a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly." Yet, a "nonwaiver provision is [not] wholly ineffective in preventing waiver through conduct the parties explicitly agree will never give rise to waiver."

Waiver "requires intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." "Though we do not hold a nonwaiver provision may never be waived, there must, at a minimum, be some act inconsistent with its terms," which did not occur in this case.

And, here, tenant has not "identified any false or misleading representation supporting an equitable-estoppel bar to eviction. . . ."

The focus in a forcible entry and detainer action "is the right to immediate possession of real property. To establish a superior right to immediate possession, [landlord] had the burden to prove (1) [landlord] owns the property, (2) [tenant] is either a tenant at will, tenant at sufferance, or a tenant or subtenant willfully holding over after the termination of the tenant's right of possession, (3) [landlord] gave proper notice to [tenant] to vacate the premises, and (4) [tenant] refused to vacate the premises." The right to possession is governed by the lease.

Footnote 44: A "lease of real estate for a term longer than one year, like the one here, comes within the statute of frauds."

14. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017)

Footnote 5: When a contractor sues for the balance and the owner counterclaims for defective work, "if the contractor has substantially completed performance, *i.e.*, the contractor's breach is not material, then the contractor has a claim for the unpaid balance and the owner has a claim for damages."

15. *BP America Production Company v. Red Deer Resources, LLC*, 526 S.W.3d 389 (Tex. 2017)

After declining in production, the sole operational gas well on a bottom lease went eight days with no production. On the eighth day of no production, lessee shut off the well and, the next day, invoked the lease's shut-in royalty clause. The shut-in royalty clause reads, in part:

> Where gas from any well or wells capable of producing gas . . . is not sold or used during or after the primary term . . . lessee may pay or tender as shut-in royalty . . . , payable annually on or before the end of each twelve month period during which such gas is not sold or used . . . [and] it shall be considered that gas is being produced in paying quantities, and this lease shall remain in force during each twelve-month period for which shut-in royalty is so paid or tendered . . . .

Top lessee sued to terminate the bottom lease, arguing that the lease terminated due to an unexcused total cessation of production and that the shut-in clause did not save the lease because the well was not capable of producing gas in paying quantities on the date the shut-in royalty clause was invoked. The jury found that the well was not capable of producing in paying quantities on the shut in date, and the trial court enters judgment terminating the lease.

Under a typical lease's habendum clause, a lease remains in force for "a fixed primary period and 'as long thereafter as oil, gas, or other minerals is produced' during the secondary term." "'Although the habendum clause generally controls the mineral estate's duration,'" the duration may be extended by "'a savings clause, such as a shut-in gas well clause[.]'" "'[A] shut-in royalty clause 'provides for a substitute or contractual method of production, which will maintain the lease in force and effect when a gas well is drilled and for which no market exists.'""

"Invocation of the shut-in royalty clause 'is constructive production and will maintain the lease if its terms are satisfied.'" However, "the party seeking to exercise its shut-in rights must comply with the terms set out in the mineral lease. In many cases," as with the lease at issue in this case, "this means 'it must be capable of producing gas in paying quantities at the time it is shut-in.'" "'[C]apable of production' means that a well is 'capable of producing in paying quantities without additional equipment or repairs.'" "This determination, of course, must be made over a reasonable period of time under the circumstances."

Here, top lessee contended that the lease terminated due to a total cessation in production for longer than permitted under the lease, which "automatically terminates the lease, without regard to the reasonableness of the operator's actions, absent a properly invoked savings clause." Here, "the reasonably-prudent-operator inquiry" central to cessation of production in paying quantities "does not come into play." "Rather, the party claiming total cessation of production must prove that (1) there has been a total cessation of production for a period longer than that permitted in the lease's cessation-of-production savings clause; and (2) no other savings provision, such as a shut-in royalty clause, sustains the lease."

The Supreme Court held that top lessee failed to satisfy its burden of showing that bottom lessee failed to properly invoke its shut-in rights. Under plain language of this lease, "tender of a shut-in royalty within twelve months of the last day gas is sold or used will sustain the lease through retroactive constructive production, so long as the well was capable of production in paying quantities over a reasonable period of time on the date that gas was last sold or used." The operative date was the date gas was last sold or used, and "the date the shut-in royalty is tendered is irrelevant so long as it is within the twelve-month period because, under the plain language of this shut-in clause, the payment relates back to the beginning of the accrual period when the last gas was sold or used."

To negate bottom lessee's shut-in rights, top lessee thus bore the burden of proving that the "well was incapable of production in paying quantities over a reasonable period of time as of" the date gas was last sold or used. Bottom lessee failed to obtain a finding that the well was incapable of production in paying quantities on that date. The jury was asked only whether the well was incapable of production in paying quantities on the date the shut-in royalty was tendered, which was immaterial and could not support the judgment.

16. *Pedernal Energy, LLC v. Bruington Engineering, Ltd*., ___ S.W.3d ___ (Tex. 2017)(4/28/17)

Pedernal sued Bruington concerning engineering services, but failed to attach a Certificate of Merit under TEX. CIV. PRAC. & REM. CODE, ch. 150. It dismissed its claim and refiled with a COM that was found to be deficient. The trial court dismissed without prejudice. The Supreme Court ruled that "Section 150.002(e) required dismissal of the claims against Bruington, but the statute affords trial courts discretion to dismiss either with or without prejudice," and that the trial court did not abuse its discretion.

Chapter 150 "requires a plaintiff to file an expert affidavit in a lawsuit or arbitration for damages arising out of the provision of professional services by licensed or registered professionals." Otherwise, "the trial court shall dismiss the claim and the dismissal may be with prejudice."

Reading the first sentence of the statute "in context with the second, it is clear that the Legislature intended the dismissal language in the first sentence to reference dismissal without prejudice. . . . It is only if the Legislature intended the first sentence to reference dismissal without prejudice that the second sentence has meaning by expressly authorizing trial courts to dismiss with prejudice." But the statute does not guide the trial court "about how to determine whether to dismiss with or without prejudice."

The Supreme Court declined to import a "good cause" requirement into the statute "when the Legislature did not place it there." The "trial court's discretion should not be measured by good faith, but by the broader purposes of the statute." Here, the "Legislature did not explicitly declare its purpose in enacting section 150.002." But the title gives a clue that "a section 150.002(e) dismissal 'is a sanction . . . to deter meritless claims and bring them quickly to an end.'"

"Pedernal's failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice."

"'Rather than remanding the case to the court of appeals for it to [to consider appellee's argument that the deficient COM indicated plaintiff's claims lacked merit], . . . we address the issue in the interest of judicial economy.'" Here, the trial court concluded Pedernal's claim had merit. Thus, it did not abuse its discretion by dismissing the suit without prejudice. "Moreover, assuming, again without deciding, that the statute requires an affidavit addressing each theory of recovery, the failure of Jennings's affidavit to specifically address each theory was in substance the filing of a second complaint without a supporting affidavit."

17. *BP America Production Company v. Laddex, Ltd.*, 513 S.W.3d 476 (Tex. 2017)

Oil and gas lessors informed lessee that they believed the lease had terminated due to a failure to produce in paying quantities and cessation of production during a slowdown between August 2005 and October 2006. In 2007, lessors executed a top lease commencing when the prior lease was released or terminated by judgment and which "'[was] intended to and does include and vest in Lessee any and all remainder and reversionary interest'" of lessor.

Top lessee sued the prior, bottom lessee alleging that the bottom lease terminated for failure to produce in paying quantities. Bottom lessee moved to dismiss for lack of subject matter jurisdiction, arguing that the top lease violates the rule against perpetuities and is void. At trial, the jury charge asked whether the lease failed to produce in paying quantities between August 2005 and October 2006, and the jury answered yes. The trial court rendered judgment on this verdict decreeing that the bottom lease terminated.

Footnote 1: "'Basically, a top lease is a subsequent oil and gas lease which covers one or more mineral interests that are subject to a valid, subsisting prior lease.'" "The prior lease is commonly referred to as a bottom lease."

The common-law rule against perpetuities, which is enshrined in the Texas Constitution, "provides that 'no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance.'" A conveyance instrument "'is void if by any possible contingency the grant or devise could violate the Rule.'" "However, . . . 'where an instrument is equally open to two constructions, the one will be accepted which renders it valid rather than void[.]'" Also, "the Rule does not apply to present interests or to future interests that vest at their creation."

Bottom lessee argued that the top lease was void because its vesting was contingent on the expiration of the bottom lease, which could occur at any time in the future and violate the Rule. The Court agreed "that a top-lease conveyance contingent on the expiration of a determinable-fee bottom lease, without more, generally violates the Rule." However, here, the top lease was open to the "plausible" interpretation that it was a

present "'partial alienation'" of lessors' possibility of reverter, thus conveying a vested future interest to which the Rule does not apply, and that interpretation controls because it renders the conveyance valid.

The Supreme Court held that the jury charge was erroneous because it limited the period of time over which the jury could consider whether the well was producing in paying quantities and thus "did not permit the jury to appropriately discharge its fact-finding duties[.]" "Whether a well is producing in paying quantities is a question of fact for the jury[.]" It is governed by a "two-pronged analysis": "(1) whether the well 'pays a profit, even small, over operating expenses,' . . . and (2) if not, whether, 'under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation,' continue to operate the well as it had been operated.'"

"'[T]here can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased.'" Here, the jury charge improperly limited the jury's consideration to the fifteen months of slowed production. While the parties may focus the jury on a particular period of time, "the *charge* may not ask or instruct the jury about a specific period without unduly influencing the jury and violating *Clifton* [*v. Koontz*]."

18. *ExxonMobil Corporation v. Lazy R Ranch, LP*, 511 S.W.3d 538 (Tex. 2017)

ExxonMobil left property after 60 years of production. Ranch sued asserting that ExxonMobil contaminated four fields. It first sought money damages, then later sought injunctive relief to compel ExxonMobil to remediate certain contamination. In an appeal after a motion for summary judgment, the Supreme Court ruled that limitations barred the suit regarding two of four fields. However, it "decline[d] to consider the availability of injunctive relief to remedy such contamination because the issue was not properly raised in the trial court."

Under "Texas law, a recovery of damages for a permanent injury to real property is generally limited to the difference in value before and after the injury. Even if the injury is temporary, the cost to repair the injury cannot be recovered when the cost exceeds the loss in the land's value due to the injury—what we have referred to as 'the economic feasibility exception'." Footnote 5: the economic feasibility exception "'limits the owner to the lesser amount of damages when necessary to avoid overcompensation.'"

Here, evidence showed plaintiff was unaware of some contamination before limitations ran. But, two of four sites had been abandoned more than 10 years earlier; thus limitations would bar those claims.

"The discovery rule applies when a type of injury is objectively verifiable and inherently undiscoverable within the limitations period. Soil contamination from oil spills is unquestionably objectively verifiable, but it is not inherently undiscoverable within the limitations period. On the contrary, we have previously stated that application of the discovery rule in nuisance cases is rare. . . ."

"Fraudulent concealment requires showing that the 'defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.'" But, here, there "is no evidence that ExxonMobil was incorrect or deceptive in its reports. . . ."

"A motion for summary judgment must state the specific grounds entitling the movant to judgment, identifying or addressing the cause of action or defense and its elements. And while the availability of injunctive relief was discussed at the hearing on the motion, the motion itself did not 'present[]' the issue, as the rule requires." "Because the issue of the Ranch's entitlement to any injunctive relief was not properly presented to the trial court, we . . . must decline to address it."

19. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

Suit concerning commercial retail project. Defendant appealed the trial court's order denying its motion to dismiss that challenged the Certificate of Merit filed by plaintiff. The Supreme Court ruled that "neither the affidavit nor record here confirms that the affiant possessed the requisite knowledge to issue the certificate of merit." Because the certificate was non-compliant, the suit should be dismissed.

TEX. CIV. PRAC. & REM. CODE § 150.001(1-a) "applies to suits against architects, engineers, surveyors, and landscape architects." It "generally requires that a sworn 'certificate of merit' accompany a plaintiff's complaint" in a suit under the statute. "The certificate or affidavit must be from a similarly licensed professional, who meets certain qualifications and attests to the merit of the underlying claim. If the plaintiff fails to file a compliant certificate of merit, the statute directs dismissal of the complaint."

Under the statute, "the affiant should be

'knowledgeable in the (defendant's) area of Practice' and that the affidavit should set forth the professional's negligence or other wrongdoing and its 'factual basis.'"

TEX. CIV. PRAC. & REM. CODE § 150.002(f) "provides for an interlocutory appeal."

A "sworn certificate or affidavit must be by a similarly licensed or registered professional capable of attesting to any professional errors or omissions forming the basis of the suit. The statute describes the affiant's qualifications and what the affidavit should include. The affidavit is generally a prerequisite to the suit going forward, and the failure to file it contemporaneously with the complaint will ordinarily result in dismissal."

The certificate of merit must be signed by a "professional who:

> (1) is competent to testify;
>
> (2) holds the same professional license or registration as the defendant; and
>
> (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
>
> > (A) knowledge;
> >
> > (B) skill;
> >
> > (C) experience;
> >
> > (D) education;
> >
> > (E) training; and
> >
> > (F) practice."

"The certificate of merit must thus come from a competent third party expert who meets the statutory qualifications, which are that the expert (1) hold the same professional license or registration as the defendant, (2) be licensed or registered in this state, (3) be actively engaged in the practice, and (4) be knowledgeable in the defendant's area of practice."

Here, the affidavit did not "provide any information about Payne's knowledge of [defendant's] area of practice. . . ."

The "issue of Payne's knowledge of the [defendants'] area of practice was presented to the trial court and preserved for review."

A prior version of the statute was amended. Because the amended version applied, the professional who signed the Certificate of Merit "did not have to be actively engaged in the practice area at issue to be knowledgeable and qualified to render an opinion under the statute."

"We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. Here, we have no such evidence. Although we generally agree that such knowledge may be inferred from record sources other than the expert's affidavit, here the affidavit is all we have of Payne's qualifications. Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendants' area of practice beyond the generalized knowledge associated with holding the same license, we conclude that Payne has not shown himself qualified to render the certificate of merit."

The "statute's plain text does not require that the expert's qualifications be included in the certificate of merit or that a curriculum vitae be attached thereto. . . ." But, "if this information is not included in the certificate of merit, it must be available somewhere else in the record."

20. *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017)

Company condemned landowner's property to build a carbon dioxide pipeline. At issue was whether company is a "common carrier" under the Texas Natural Resources Code and the test the Supreme Court set out before remanding the same case in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Texas Rice I*), 263 S.W.3d 192 (Tex. 2012).

Under TEX. NAT. RES. CODE § 111.019(a), "'[c]ommon carriers have the right and power of eminent domain.'" For a pipeline to qualify as a common carrier under *Texas Rice I*, "'a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.'" "[T]he Texas Constitution requires at least some objective evidence that a pipeline will probably serve the public for its owner to gain the power to condemn private property under the authority of eminent domain."

Here, evidence that company entered into a contract after construction of the pipeline to transport gas for an unaffiliated customer, along with the proximity of the pipeline to potential customers, conclusively established that the company was a common carrier as a matter of law. The *Texas Rice I* test does not focus on intent, and evidence that the pipeline actually transported gas for a customer after

construction establishes reasonable probability as a matter of law.

Also, the *Texas Rice I* test does not require that "the future use of the pipeline serve a 'substantial public interest.'" Proof of "a reasonable probability that the pipeline will . . . serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use under the *Texas Rice I* test."

21. *North Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598 (Tex. 2016)

Oil optionee executed an option contract allowing it to select land from a described tract on which to execute oil and gas leases. Optionee had paid $50 per acre optioned, and agreed to pay $200 per acre leased when it exercised its option. Land was described in the option contract as "'1, 210.8224 acres of land, more or less, out of the 1673.69 acres . . . and being the same land described in" a 1996 lease. The 1996 lease described the land as "'[b]eing 1273.54 acres . . . and being all of the 1673.69 acre tract described on EXHIBIT "A" attached hereto, SAVE AND EXCEPT a 400.15 acre tract described in" a 1995 lease to another lessee. The parties disagreed over whether the option contract included the 400.15 acres of the 1995 lease tract—optionee contended that the option contract covered the entire 1673.69 acre tract.

A contract was not ambiguous "'merely because parties to an agreement proffer different interpretations of a term.'" "'For an ambiguity to exist, both interpretations must be *reasonable*.'" "'[T]he contract may be read in light of the circumstances surrounding its execution to determine whether an ambiguity exists.'"

Here, those circumstances "include the amount paid for the optioned acreage." The description was not ambiguous here because optionee only paid the price for 1210.8224 acres.

Optionee also argued that the contract was a selection agreement allowing it to choose any 1210.8224 acres out of the 1673.69 acres. While "selection agreements are valid and enforceable under Texas law," and the option contract it issued "is a selection agreement," it allowed optionee to choose acres out of the 1210.8224 acres described.

Optionee also argued that the difference between 1210.8224 identified in the contract and 1273.54 acres identified in the 1996 lease made seller's interpretation unreasonable. "Slight differences in acreage when the description uses the phrase 'more or less' will not preclude an interpretation of the description to include the larger acreage." "'[T]he call for acreage . . . "is the least reliable of all calls in a deed."'"

Optionee also sued driller for geophysical trespass for seismic survey driller performed over the optioned land. However, while optionee attempted to exercise its option over part of the property, paid the $200 per acre exercise price, and began production, it never executed the lease form attached to the option contract.

"An option agreement does not pass title or convey an interest in property," but "merely gives the optionee the option to purchase property or execute a lease within a certain time period." "'An option contract has two components: (1) an underlying contract that is not binding until accepted and (2) a covenant to hold open to the optionee the opportunity to accept.'" Because optionee never executed the lease, it never acquired a possessory interest in the land and thus lacked standing to sue for trespass.

22. *In re Carolyn Frost Keenan*, 501 S.W.3d 74 (Tex. 2016)

In a deed restrictions suit, an issue arose over the validity of a vote of amendment. The trial court allowed only the homeowner's attorney to see the ballot results. The Supreme Court granted mandamus directing the trial court to permit the homeowner "to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial. The ballots should be included in the record. The court may order redaction of names of the voters or require the ballots to be filed under seal, or impose some other appropriate protective order to protect confidentiality."

The deed restrictions were amended under TEX. PROP. CODE § 204.005.

The ballots were not statutorily protected *per se*. "Section 209.00594(c) states that only a person qualified to tabulate votes in a property owners' association election 'may be given access to the ballots.'" But, this protection does not "'affect a person's obligation to comply with a court order for the release of ballots or other voting records.'"

23. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)

Pipeline builds noisy compressor stations near ranch owned for recreational purposes. Ranch owners sue for nuisance. In a lengthy opinion, the Supreme Court took "this opportunity to clarify the law" of private nuisance in Texas.

The Court confirmed the definition of nuisance used in recent cases: "'A "nuisance" is a condition that substantially interferes with 'the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.'"

However, to "reduce the confusion" resulting from the "variety of ways" in which the term "nuisance" has been used, the Court clarified that the term does not refer "to a cause of action or to the defendant's conduct or operations," but rather that it "describes a type of injury that the law has recognized can give rise to a cause of action because it is an invasion of a plaintiff's legal rights." In other words, nuisance is a type of legal injury, not a cause of action. A cause of action "'generally accrues when a wrongful act causes a legal injury,'" and nuisance refers to the legal injury, not the wrongful act.

The injury here—"the interference with the use and enjoyment of property"—only rises to the level of a legal injury where "the interference is 'substantial' and causes 'discomfort or annoyance' that is 'unreasonable.'"

The requirement that the interference be "substantial" sets a "minimum threshold" and "confirms that the law 'does not concern itself with trifles[.]'" "Whether an interference is substantial or merely a 'trifle' or 'petty annoyance' necessarily depends on the particular facts at issue, including, for example, the nature and extent of the interference, and how long the interference lasts or how often it recurs."

To prove a nuisance as a legal injury, "a plaintiff must establish that the effects of the substantial interference on the plaintiff are unreasonable—not that the defendant's conduct or land use was unreasonable." "[T]he standard for determining whether the effects of the interference are unreasonable is an objective one." The effects must be "'such as would disturb and annoy persons of ordinary sensibilities, and of ordinary tastes and habits.'"

Because nuisance describes only a legal injury, there must also be a wrongful act in order to create liability. "[T]here must be some level of culpability on behalf of the defendant; nuisance cannot be premised on a mere accidental interference." The court "retain[ed] the three general categories of conduct that may support liability": intentional conduct, negligence, and conduct giving rise to strict liability.

"[A] defendant intentionally causes a nuisance if the defendant 'acts for the purpose of causing' the interference or 'knows that [the interference] is resulting or is substantially certain to result' from the defendant's conduct." Intent is "measured by a subjective standard, meaning the defendant must have actually" had the requisite intent. The plaintiff must prove that the defendant intended the interference, not just the "conduct that caused the interference." Finally, the plaintiff need not prove that the defendant's conduct was unreasonable, only that the resulting "effects of the substantial interference be unreasonable."

A defendant may also "be liable for 'negligently' causing a 'nuisance.'" "In this category, the claim is governed by ordinary negligence principles," with the elements of "'the existence of a legal duty, breach of that duty, and damages proximately caused by the breach.'" "The only unique element . . . is the burden to prove that the defendant's negligent conduct caused a nuisance[.]"

A claim for strict liability for creation of a nuisance cannot be established merely by "'abnormal and out of place' conduct," but instead requires "conduct that constitutes an 'abnormally dangerous activity' or involves an abnormally 'dangerous substance' that creates a 'high degree of risk' of serious injury."

The questions of substantial interference; unreasonable effects; and whether the defendant created the nuisance intentionally, negligently, or through conduct giving rise to strict liability "generally present questions of fact for the jury to decide."

The three different remedies available for a private-nuisance claim are "damages, injunctive relief, and self-help abatement." A court may abate a nuisance through injunctive relief "whether it is temporary or permanent," and "the decision to enjoin" the conduct is "'a discretionary decision for the judge after the cases has been tried and the jury discharged.'"

Damages for a temporary nuisance is generally limited to "'lost use and enjoyment . . . that has already accrued'" at the time of trial, while an owner in a permanent nuisance claim "may recover the lost market value." The general calculation is "'the difference in the reasonable market value of the property immediately before and immediately after the injury,'" but "when the damage results from an ongoing condition rather than a single event that results in a permanent nuisance, courts apply a 'more flexible' rule." "The proper comparison in those circumstances is 'of market value with and without the nuisance.'"

In proving negligence in a nuisance case, the standard of care owed is generally that of "a person of ordinary prudence in the same or similar circumstances," which a "jury [does] not need expert

testimony to understand."

24. *Centerpoint Builders GP LLC v. Trussway, Ltd.*, 496 S.W.3d 33 (Tex. 2016)

General contractor was sued after worker was injured when a truss broke. General contractor sought indemnity from maker under Ch. 82, claiming it was a seller. The Supreme Court ruled that, applying "chapter 82's definition of 'seller,' . . . the general contractor is not a seller" because it was not "'engaged in the business of' commercially distributing or placing trusses in the stream of commerce."

"'Traditionally, courts have been reluctant to impose products liability on sellers of improved real property in that such property does not constitute goods.'" Here, general contractor was not "'engaged in the business of' selling trusses." Instead, it sold services as a general contractor. Footnote 6: "[C]ontractors' businesses involve the rendition of construction services, while 'the materials that pass are incidental.'"

Footnote 8: Here, the "'Project' is 'construction and services,' and materials were ancillary to those services."

A "general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a 'seller' of every material incorporated into its construction projects for statutory-indemnity purposes."

25. *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016)

On rehearing, the Supreme Court withdrew its prior opinion in this inverse condemnation case, 485 S.W.3d 1, and substituted this one, reversing its prior ruling. See *infra*.

In this case, homeowners had sued county and flood control district for compensation for damage to their property from flooding, arguing that county's approval of development and failure to adopt a flood mitigation plan while knowing that this would lead to flooding constituted a taking.

"Only affirmative conduct by the government will support a takings claim." "We have not recognized a takings claim for nonfeasance." Here, district could not be liable for a taking for failing to implement a particular flood control plan, but instead could "derive, if at all, from the County's affirmative acts of approving development."

A takings claim also requires specificity of intent. "The government must know that 'a *specific* act is causing *identifiable* harm' or know that '*specific property damage* is substantially certain to result from an authorized government action.'" "We have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction."

There is also a public use element to a takings claim. Here, that element was not satisfied because there was no evidence county "ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures."

The Court declined to recognize a takings claim in these circumstances "in a manner that makes the government an insurer for all manner of natural disasters and inevitable man-made accidents." "Accepting such a capacious approach to takings would endanger the ability of governments to finance and carry out their necessary functions, the basis for sovereign immunity."

26. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016)

Ranch sold its groundwater to city in 1953. The deed allowed city to drill water wells and test wells "at any time and location . . . for the purpose of" obtaining water. In 2012, city planned to drill 20 test wells and 60 additional wells spread throughout the ranch, where city had only drilled seven wells along the northern edge of the ranch before. Ranch objected that the new drilling would unnecessarily injure the surface, and sued to enjoin city from proceeding. City argued that it was acting under the broad rights granted under the deed, and that the common-law "accommodation doctrine" imposing restrictions on mineral owners does not apply to groundwater owners.

Generally, the owner of a "severed mineral estate has the implied right to use as much of the surface estate as reasonably necessary to produce and remove minerals." However, the accommodation doctrine, which is "based on the principle that conflicting estates should act with due regard for each other's rights," limits this right. It provides that where there is "'an existing use by the surface owner which would otherwise be precluded or impaired'" by the mineral owner's use of the land, and where there are "'alternatives available'" to the mineral owner for recovering the minerals '"under established practices

in the industry,'" a court may "'require the adoption of an alternative'" by the mineral owner.

While the Court has previously "applied the doctrine only when mineral interests are involved," the "similarities between mineral and groundwater estates, as well as their conflicts with surface estates, persuade us to extend the accommodation doctrine to groundwater interests." Both groundwater and mineral interests are subject to the "rule of capture" and are "owned by the landowner in place below the surface." "Common law rules governing mineral and groundwater estates are not merely similar; they are drawn from the same source."

"Accordingly, we hold that the accommodation doctrine applies to resolve conflicts between a severed groundwater estate and the surface estate that are not governed by the express terms of the parties' agreement." To be entitled to an accommodation, "the surface owner must prove that (1) the groundwater owner's use of the surface completely precludes or substantially impairs the existing use, (2) the surface owner has no available, reasonable alternative to continue the existing use, and (3) given the particular circumstances, the groundwater owner has available reasonable, customary, and industry accepted methods to access and produce the water and allow continuation of the surface owner's existing use."

27. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016)

Closing fees exceeded 3% on home-equity loan, and lenders did not timely attempt to cure. Homeowners brought suit to quiet title. The Supreme Court ruled that "liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations." However, following *Garofolo*, homeowners' did not have "a cognizable claim for forfeiture."

The constitution's language proscribing a lien on a homestead for noncompliant loans is "clear, unequivocal, and binding."

"In 1997, the Constitution was amended to permit homestead liens to secure home-equity loans, but, consistent with Texas's long tradition of protecting the homestead, the amendments clearly prescribed very specific and extensive limitations on those encumbrances. Section 50 allows such loans to be secured by the homestead only if . . . they are made on the condition that forfeiture of all principal and interest is available if the loan is constitutionally noncompliant and the lender fails to cure within 60 days of being given notice by the borrower. The Constitution provides simple methods for curing specific defects. . . ."

The Court held "in *Garofolo* that section 50(a) does not create substantive rights beyond a defense to foreclosure of a home-equity lien securing a constitutionally noncompliant loan, observing that the terms and conditions in section 50(a)(6) 'are not constitutional rights and obligations unto themselves.'" The "'forfeiture remedy [is not] a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible.' . . . [B]orrowers may access the forfeiture remedy through a breach-of-contract action based on the inclusion of those terms in their loan documents, as the Constitution requires to make the home-equity lien foreclosure-eligible. . . . Section 50(c) . . . expressly addresses the validity of any homestead lien, broadly declaring the lien invalid if the underlying loan does not comply with section 50."

A "'homestead lien that may not have complied with constitutional requirements at the outset can be made valid at a later date if the power to do so exists under our constitution or statutes," and complying with a cure provision 'validate[s] a lien securing a section 50(a)(6) extension of credit.'"

A "lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. . . . [T]herefore no statute of limitations applies to an action to quiet title on an invalid home-equity lien." A "lien is made valid by the lender's compliance with a cure provision." "Lenders face no great burden to cure, even though it may require them to maintain thorough records. . . ."

A "'void' act 'is one which is entirely null, not binding on either party, and not susceptible of ratification.' In comparison, 'a voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated and which may be subsequently ratified or confirmed.' When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it. 'When a deed is merely voidable, equity will not intervene as the claimant has an adequate legal remedy.'"

"Section 50(c) starts with the premise that a lien securing a noncompliant loan is never valid. Implementing a section 50(a)(6)(Q)(x) cure provision brings the loan into constitutional compliance, thereby validating the accompanying lien. These cure provisions are the sole mechanism to bring a loan into

constitutional compliance. Further, while a lender has 60 days to cure after notice, the borrower has no corresponding deadline by which it must request cure. A lien that was invalid from origination remains invalid until it is cured."

Section 50(i) protects "home-equity foreclosure purchasers without actual knowledge of a constitutional defect. This deviation from the common-law . . . evinces an understanding that home-equity liens securing constitutionally noncompliant loans do not neatly fit into a common-law category. By including a bona-fide purchaser provision, section 50(i) effectively sets its own cut-off. Once a third-party buys without actual knowledge of the invalid lien, that transaction will not be undone notwithstanding the invalid lien."

The Court ruled that "no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under section 50(c). 'We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred.'"

A "borrower's right to quiet title under section 50(c) is not restricted by our holding in *Garofolo* that borrowers must litigate noncompliance with section 50(a)(6)(x)'s cure provisions within the context of their loan agreement."

Even though homeowners "may pursue their quiet-title claim [that] does not extend to their declaratory-judgment claim for forfeiture of all principal and interest," which is barred by *Garofolo*. Section 50(a) "does not create substantive rights beyond a defense to a foreclosure action. . . ." "The forfeiture provision . . . does not create a constitutional cause of action . . . and must be litigated in the context of the borrower's loan agreement."

28. *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016)

Homeowner paid off home-equity loan, but lender did not provide "a release of lien in recordable form as required by her loan's terms," despite the 60 days' notice. Homeowner sued in federal court breach of contract and violation of the constitution, seeking forfeiture of principal and interest. Answering certified questions, the Supreme Court ruled she had no constitutional cause of action. "Our constitution lays out the terms . . . a home equity loan must include if the lender wishes to foreclose on a homestead following borrower default. It does not . . . create a constitutional cause of action or remedy for a lender's subsequent breach of those terms. . . . A post-origination breach . . . may give rise to a breach-of-contract claim for which forfeiture can sometimes be an appropriate remedy." "A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower." "[W]hen forfeiture is unavailable . . . the borrower must show actual damages or seek some other remedy such as specific performance to maintain her suit."

"The Texas Constitution allows a home-equity lender to foreclose on a homestead only if the underlying loan includes specific terms and conditions. Among them is a requirement that a lender deliver a release of lien to the borrower after a loan is paid off. Another is that lenders that fail to meet their loan obligations may forfeit all principal and interest payments received from the borrower."

"In Texas, 'the homestead has always been protected from forced sale, not merely by statute as in most states, but by the Constitution.'" "Today, section 50 of the constitution protects the homestead from foreclosure for the payment of debts subject to eight exceptions, one of which covers only those home-equity loans that contain a litany of exacting terms and conditions set forth in the constitution." These "terms and conditions [do not] amount to substantive constitutional rights and obligations. . . . [S]ection 50(a) does not directly create, allow, or regulate home-equity lending. . . . It simply describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower default."

The constitution's "terms and conditions are not constitutional rights and obligations unto themselves. They only assume constitutional significance when their absence in a loan's terms is used as a shield from foreclosure."

"From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible. . . . A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its

word, but it has not violated the constitution."

The terms are not constitutional rights "nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure eligible." "The constitution prohibits foreclosure when a home-equity loan fails to include a constitutionally mandated term or condition, but it does not address post-origination enforcement of a loan's provisions." "But borrowers are not without recourse when a lender fails to meet its obligations, they are just without *constitutional* recourse."

In addition, the homeowner cannot "seek forfeiture through her breach-of contract claim absent actual damages." The homeowner "[had] not suffered any damages," and the forfeiture remedy "does not apply to a failure to deliver a release of lien."

Under the contractual terms (required by the constitution), the "harsh forfeiture penalty is triggered when, following adequate notice, a lender fails to *correct* the complained-of deficiency *by* performing one of six available corrective measures." "The obvious intent behind the forfeiture remedy as a whole is to encourage lenders to correct loan infirmities under the threat of the stiff punishment of forfeiture." The "six specific corrective measures exist to give lenders avenues to avoid forfeiture by fixing problems rather than furnishing technicalities that can be manipulated to avoid them." But, none of them applies to a release of lien.

"Moreover, the constitution invokes forfeiture when a lender 'fails to correct *the failure to comply*.'" That cannot occur here. "Accordingly, if a lender fails to meet its obligations under the loan, forfeiture is an available remedy only if one of the six corrective measures can actually correct the underlying problem and the lender nonetheless fails to timely perform. . . ." The "addition of six specific corrective measures is most reasonably understood to bookend the [forfeiture] remedy's applicability." Footnote 9: "The $1,000-refund component of subparagraph (f) is best interpreted as a liquidated-damages provision inextricably tied to the offer to refinance."
Footnote 8: It "is unnecessary to refer to any legislative history in this case. Section 50(a)(6)(Q)(x) is clear, and when text is clear, it is determinative."

The homeowner's "remedy simply lies elsewhere—for instance, in a traditional breach-of contract claim, in which a borrower seeks specific performance or other remedies contingent on a showing of actual damages."

29. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The jury did not find tenant negligent, but found she violated lease by failing to pay for damage. The Supreme Court ruled that the lease did not violate the Texas Probate Code. "Though . . . the lease . . . does not expressly incorporate statutory carve-outs, . . . the contract is [not] unenforceable on public-policy grounds because (1) the disputed lease provision can be enforced without contravening the Property Code and (2) the record here does not conclusively establish the factual predicate necessary to preclude its enforcement."

"'The Legislature determines public policy through the statutes it passes.'" It "is up to the Legislature, not the courts, to decide what the policy of this state should be in the landlord-tenant context." "In the residential-leasing context, privilege of contract is circumscribed by statute, but the restraint the Legislature chose is limited and exceptions exist." The "Texas Property Code restricts freedom of contract in residential tenancies." The Property Code deviates "from common law landlord-tenant duties and remedies, but all rights not inconsistent with the statute remain intact." The "Property Code imposes no barrier to contract beyond those deriving from its terms." "'Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited.'"

TEX. PROP. CODE § 92.006(c) "generally prohibits waiver of statutory repair duties and remedies," while TEX. PROP. CODE § 92.052 "delineates the landlord's duty to repair or remedy conditions materially affecting the physical health or safety of an ordinary tenant. In *Churchill Forge*, we held: (1) Section 92.006(c) does not restrict freedom of contract unless the landlord has a duty to repair, and (2) under section 92.052(b) a landlord has no duty to repair conditions 'caused by' the tenant. If the landlord has a repair duty and section 92.006(c) is therefore implicated, section 92.006(d)–(f) describes permissive contractual arrangements excluded from the general prohibition." Agreements "between parties concerning tenant-caused damages are excluded from section 92.006(c)'s non-waiver prohibition." "When section 92.006(c) applies, . . . the exceptions are permissive, but they are also exclusive."

A "landlord owning more than one rental dwelling

'cannot ask a tenant to pay for repairs that the landlord has the duty to make,' but (1) '[e]xcepted from that dictate . . . are three specific kinds of repairs that the parties can, by contract, shift the duty to pay for from the landlord to the tenant' and (2) 'not covered by that dictate are those agreements between the parties concerning damages for which the landlord has no duty to repair, i.e., tenant-caused damages.'" A landlord "does not have a statutory duty to repair all conditions that may arise in a tenancy." Footnote 8: the "Legislature has not (1) categorically prohibited shifting of repair costs, (2) prohibited tenants from assuming responsibility for repairs that are not caused by the tenant, or (3) prohibited shifting the costs to repair conditions of habitability. Rather, the Legislature has only prohibited contractual shifting of repair costs if both habitability and third-party cause are factually presented."

A "party seeking to avoid liability under [an] agreement has the burden to plead and prove facts making it unlawful, unless the agreement is facially invalid." There is "no public-policy bar—either under the Property Code or at common law—to contractually allocating responsibility for repair costs negligently or intentionally caused by the tenant or a cotenant." The lease provision here is "unenforceable per se only if it could not be performed without violating the Property Code."

The reimbursement provision of the lease here "is unambiguous."

In *Kamarath*, the Court found an implied warranty of habitability, but that was superseded by legislation "that 'abrogat[ed] the implied warranty and creat[ed] a limited landlord duty to repair.'" Regarding habitability, under TEX. PROP. CODE § 92.052, after "receiving proper notice from a tenant in good standing, a landlord must make a diligent effort to repair or remedy only those conditions (1) materially affecting the tenant's physical health or safety or (2) involving proper operation of a water heater."

TEX. PROP. CODE § 92.052(b) "does not include fault-based language, and the causal standard is not specified." Since "the causal standard in section 92.052(b) is not fault-based, [the tenant] bears the burden of proving facts in avoidance of contract enforcement. [The tenant] . . . cannot rely on the jury's negative finding to question one—inquiring whether her negligence caused the fire—as a substitute for an affirmative finding that the damages were not tenant caused. [The tenant's] . . . failure to submit a causation question . . . is the lynchpin for concluding she has failed to prove her affirmative defense."

TEX. PROP. CODE § 92.0563(b) provides "a statutory remedy if a landlord knowingly contracts to waive the landlord's duty to repair."

TEX. PROP. CODE § 95.052 "defines the landlord's duty by both positive and negative references and imposes a repair obligation only if all its elements are satisfied. Such a construction properly places the burden of proof on the party claiming the existence of a duty. . . . But more importantly, it places the burden of proof on the party who controls the leased premises and is, therefore, in the best position to (1) avoid damage to the premises and (2) prove that another party is responsible for the damage." TEX. PROP. CODE § 95.053(a) "necessarily allocates the burden of proof under section 92.052 to the tenant."

"Taken together, sections 92.052 and 92.053 create a presumption that damage to premises under the tenant's control was caused by the tenant and the tenant must prove otherwise."

Here, the Property Code "construed as a whole, reflects the Legislature's decision to incorporate fault based standards in some provisions and not others."

30. *Lira v. Greater Houston German Shepherd Dog Rescue*, 488 S.W.3d 300 (Tex. 2016)

Dog escaped from owners' home with no tags and no microchip, and is picked up by city animal control. After three days, animal control scheduled dog to be euthanized because it tests a "'weak positive'" for heartworms and cannot be sold under city ordinance, but dog rescue answered animal control's request to accept and foster the dog. Owners, who had been searching for dog, learned that the dog was with rescue, but rescue refused to return the dog. Owners sued rescue for conversion and other claims, seeking damages and return of the dog.

In a per curiam opinion, the Supreme Court held that the dog belonged to owners and that owner had not been divested of ownership of the dog.

There was nothing in the record to suggest that owners had abandoned the dog, and there was no common-law authority "holding that dog owners' property rights are lost because their dog escapes and cannot be located for a few days." "Under the common law, one who finds lost property cannot retain it against a claim by the property's true owner."

The Supreme Court rejected rescue's argument that the operation of city ordinances divested owners of ownership of the dog. "Assuming that the ordinances comport with due process and other requirements of Texas and federal law, and that cities possess police

power to enact ordinances that sometimes divest an owner of property rights in his dog, nothing in [the city's] ordinances did so in this case."

The Court construed the city ordinances regarding stray dogs, which were enacted pursuant to the state rabies control statute, "under the same rules applicable to the construction of statutes." "We also consider as an aid in construction the principle that the law abhors a forfeiture of property. Private property rights are 'a foundational liberty, not a contingent privilege.'" "'A forfeiture of rights of property is not favored by the courts, and laws will be construed to prevent rather than to cause such a forfeiture.'"

The city "ordinances, whether considered individually or as a whole, did not expressly or impliedly divest [owners] of their ownership rights to [the dog]," a result "further compelled by the rule that any doubts as to their meaning should be resolved against a forfeiture of property." In particular, while the ordinances authorized euthanasia of the dog or placing the dog with a private shelter for adoption in lieu of euthanasia, and "putting down a dog is arguably so inconsistent with the rights of the original owner as to imply a divestment of property rights," the dog was not actually euthanized, and nothing in the ordinances "states or implies that a dog merely held by a private shelter, awaiting adoption, has been divested of the ownership rights of the original owner." "In short, [the dog] belonged to [owners] at the time they requested his return, and [rescue] should have honored that request.

Regarding the evidence of the dog's positive heartworm test, if rescue "is suggesting that [the dog] was mistreated by [owners], such mistreatment would not entitle [rescue] to keep [the dog]." "There is a separate statutory regime for removing an animal from its owner due to animal cruelty" that "was not invoked here."

31. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137 (Tex. 2016)

State condemned property for use as a storm water detention pond in connection with a highway widening project. Condemned property was in the Texas Commission on Environmental Quality's Voluntary Cleanup Program, but completion and regulatory closing of the cleanup process was delayed as a result of State's announcement of its project to condemn the property and change its use.

In the condemnation proceeding, State put on evidence that the condemned property would not be marketable for eight years because of the cleanup process, reducing its value. Landowner offered evidence that cleanup would have been completed much earlier, and the value of the property would be much higher, but for the change in proposed future use caused by State's announcement of its condemnation plans. State moved to exclude evidence of the State's role in delaying cleanup, arguing both that it was evidence of "announcement damages" barred by *Westgate Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992) and that it was inadmissible under the "project influence" rule.

The Texas Constitution's "imperative" that "'[n]o person's property shall be taken . . . without adequate compensation being made'" is "effectuated . . . by requiring payment of the 'market value' of the condemned property—that is, 'the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying.'"" An impending condemnation project, however, can distort the value of the property." When "deflationary," this distortion is "referred to as 'condemnation blight,' or, perhaps more appropriately, project diminishment." Because this effect does not "reflect[] true 'market value' . . . the project-influence rule has evolved to ensure that such components of value are removed from the market-value determination."

The project influence rule "provides that any change in property value that results from the government manifesting a definite purpose to take property as part of a governmental project must be excluded from an award of adequate compensation." The court, "not the jury, must make the preliminary determination that the evidence warrants application of the rule."

"While we have long recognized the preferable course to admit evidence, under proper instruction, to permit the jury to eliminate the distorting effect of the project, we have never foreclosed use of an evidentiary exclusion to eliminate the distorting effect of the project in an appropriate case. We believe the use of a proper instruction, as opposed to an evidentiary exclusion, is particularly appropriate in cases like this, where project diminishment is implicated."

Here, "the trial court enforced the project-influence rule with a sweeping evidentiary exclusion," which "was antithetical to the rule's substantive purpose of ensuring that the compensation award did not reflect the deflationary effects of the government's project." "'[I]t would be manifestly unjust to permit a public authority to depreciate property values by a

threat of the construction of a government project and then to take advantage of this depression in the price,' . . . [y]et [] the trial court's evidentiary exclusion allowed the State to do just that."

The "trial court abused its discretion in applying the project-influence rule," which "required the trial court to admit the evidence concerning the State's role in delaying the property's remediation."

Also, *Westgate*'s prohibition of "announcement damages" was inapplicable. In *Westgate*, the Supreme Court rejected a condemnee's claim for inverse condemnation where "the condemnee asserted that the government's announcement of its project amounted to a *de facto* taking" and "sought to recover consequential damages in the form of lost profits." Neither a *de facto* taking nor consequential damages were claimed by landowner here.

32. *Apache Deepwater, LLC v. McDaniel Partners, Ltd*., 485 S.W.3d 900 (Tex. 2016)

Production payments from four oil and gas leases were assigned by one instrument. After two leases expired, "a dispute arose over the production payment's calculation," with the payee asserting that the production payment jointly, and the payor claiming that the leases should be considered "respectively" and thus the "production payment should be reduced to reflect the loss of" the two leases. The Supreme Court agreed with the latter, "allowing for the production payment's adjustment based on the expiration of an underlying lease." "Absent express language in the assignment to the contrary, . . . 'when an oil and gas lease terminates, the overriding royalty [or similar production payment] created in an assignment of the lease is likewise extinguished.'"

"[P]arties' conflicting interpretations, without more, do not create an ambiguity. Instead, ambiguity exists when an agreement's meaning is uncertain or its terms are reasonably susceptible to more than one interpretation. When an agreement can be given a definite or certain legal meaning, it is not ambiguous and is construed as a matter of law." This conveyance was unambiguous.

"A production payment, sometimes referred to as an 'oil payment' when so limited, is a share of production from described premises, free of production costs at the surface, terminating when a given production volume has been paid or when a specified sum from its sale has been realized. Production payments may be created from different estates and in a variety of ways."

"When . . . the production payment is carved from the lessee's working interest, it is like an overriding-royalty interest, except for its more limited duration. And, like an overriding royalty, 'anything that terminates the lease necessarily destroys the [production] payment.' Thus, in the case of a single lease, an overriding royalty (and by analogy a production payment) will not survive termination of the leasehold it burdens unless the parties have expressly agreed otherwise."

The assignment in this case fixed the dollar and volume of production, but that does not necessarily "inform[] the rate at which it was to be delivered to the assignor's account. . . ."

"Ultimately, the nature of this particular production payment and its burden on the underlying leasehold estates rests on what the assignment says, not on what a party argues it should have said. When a contract's meaning is unambiguous, our task is to determine the parties' intentions as expressed in the written instrument. Our approach is holistic. We 'examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.' No single provision taken alone is controlling, but rather all provisions are 'considered with reference to the whole instrument.' Moreover, we 'construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served.'"

Here, the assignor did not assign "land," but instead conveyed interests in "four leasehold estates." "Neither the inclusion of the four leases in a single instrument nor the instrument's statement of the leases' cumulative working interest as a single fraction demonstrates that the parties intended the production payment to be carved from something other than the estates conveyed. To the contrary, the [assignment mentions] . . . assignor's interest in the 'respective' leases, indicating that the reserved interest pertains to the particular leases separately."

33. *J&D Towing, LLC v. American Alternative Insurance Corporation*, 478 S.W.3d 649 (Tex. 2016)

Tow truck was struck by a car, rendering the truck a total loss. Towing company settled with the car's driver for the driver's liability policy limit, then sued its own insurer for compensation for loss of use of the truck under its underinsured motorist coverage. Insurer argued that loss-of-use damages are not available where property is totally destroyed. Overruling the

opinions of most Texas courts of appeals on the issue, the Supreme Court held that loss-of-use damages are recoverable in total-destruction cases.

"Actual damages may be either direct or consequential." "Where [d]irect damages compensate for a loss that is the necessary and usual result of the tortious act, . . . consequential damages, also known as special damages, compensate for a loss that results naturally, but not necessarily, from the tortious act," so long as they are "both foreseeable and directly traceable to the act." Loss-of-use damages are a form of consequential damages.

"[L]oss-of-use damages compensate a property owner for damages that result from 'a reasonable period of lost use' of the personal property. The amount of damages may thus be measured according to the particular loss experienced, such as the amount of lost profits, the cost of renting a substitute chattel, or the rental value of the owner's own chattel."

Texas law has been "clear" that "the owner may recover loss-of-use damages" when "personal property has been only *partially* destroyed." "Where personal property has been *totally* destroyed, however, Texas law is less clear." While "the measure of direct damages is the fair market value of the property immediately before the injury at the place where the injury occurred," the Supreme Court had "not yet directly spoken on loss-of-use damages in total-destruction cases," and "some courts of appeals have held that loss-of-use damages are unavailable in total-destruction cases."

After examining the history of Texas cases on the subject, looking '"to other jurisdictions for guidance,'" and considering the principle of "full and fair compensation" as the appropriate measure of actual tort damages, the Supreme Court agreed with the "modern trend," and held that "the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury."

The Supreme Court cautioned that "[p]ermitting loss-of-use damages in total-destruction cases . . . is not a license for unrestrained raids of defendants' coffers." The damages must be "foreseeable and directly traceable to the tortious act," and the "must not be speculative." "Moreover, the damages may not be awarded for an unreasonably long period of lost use." Loss-of-use damages in total-destruction cases are limited to "a period [no] longer than that reasonably needed to replace the personal property."

34. *Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870 (Tex. 2016)

Rehearing denied and substituted opinion makes minor changes to certain phrases and footnotes, but no substantive changes. *See* below for original holding.

35. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch 107, and then sued the Commission for damages. At trial, the trial court denied the Commission's request for a jury question on contract formation, holding as a matter of law that a contract was formed at the meeting. The trial court also denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on contract formation and the failure to submit a jury question on the good-faith defense were both error.

The legislative resolution granting permission to sue did not preclude the Commission from asserting a good-faith defense. TEX. CIV. PRAC. & REM. CODE § 107.002 does not permit the legislature to "waive any defense of law or fact 'except the defense of immunity from suit without legislative permission.'" While "[t]he Commission's immunity from suit is a jurisdictional component of its sovereign immunity and exists under common law unless expressly waived by statute," the good-faith defense under TEX. NAT. RES. CODE § 89.045 "provides a statutory affirmative defense to liability" that is "distinct from and independent of the Commission's common-law immunity from suit."

Under TEX. NAT. RES. CODE § 89.045, "'[t]he

commission and its employees and agents, the operator, and the non-operator are not liable for any damages that may occur as a result of acts done or omitted to be done by them or each of them in a good-faith effort to carry out' Chapter 89" of the Natural Resources Code. The application of the good-faith defense is not limited to acts that involve discretion. The statute's "language is broad, foreclosing liability for 'any damages' resulting from acts or omissions 'in a good-faith effort to carry out' Chapter 89." The common-law official immunity doctrine, which is limited to discretionary acts, "has no bearing on our interpretation of an independent, unrelated statute." Additionally, it "is not limited to tort actions," and applies to breach of contract actions.

The statutory good-faith defense does not include a standard of objective reasonableness. "The statute does not define 'good-faith' or 'good-faith effort.'" "An undefined statutory term is given its ordinary meaning unless 'a different or more precise definition is apparent from the term's use in the context of the statute.'" The common definitions of 'good-faith' "focus overwhelmingly on subjective state of mind." Thus "good-faith effort to carry out chapter 89 requires conduct that is honest in fact and is free of both improper motive and willful ignorance of the facts at hand." Here, there was a fact question as to whether the Commission's conduct was a "good-faith effort," and the trial court's failure to submit a jury question on this defense was error.

The Commission did not waive error by failing to request a definition of good faith in conjunction with their requested jury question. The Commission's requested jury question "generally tracked the pertinent statutory language," and thus complied with the requirements of Rule 278. "We are particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be."

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

Turning to the failure to submit a question on contract formation, the parties disputed whether they intended to be bound by the oral agreement that occurred prior to the plugging of the well, before the execution of the formal written agreement. In the situation in which "an [a]greement was reached as to certain material terms, yet another formal document was contemplated by the parties,'" formation of a contract depends on "whether 'the contemplated formal document [was] a condition precedent to the formation of a contract or merely a memorial of an already enforceable contract.' The answer depends on the intent of the parties, which is usually a question for the trier of fact." Here, there was conflicting evidence as to whether the parties intended to be bound by the initial oral agreement, and thus contract formation was "a disputed fact issue that should have been presented to the jury."

36. *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016)

Mother divided land among three children, and bequeathed "an undivided one-third (1/3) of an undivided (1/8)" of the royalties among them. Much later, when the royalties on oil and gas on one of the properties was not the historical one-eighth, the issue was whether, by use of a double fraction, she intended to provide a fixed fractional (1/24) royalty or whether she intended a floating '"fraction of' royalty" (1/3 to each child of the children of the actual royalty). The Supreme Court ruled the latter. "[O]ur objective is to effectuate the parties' intent as expressed within the four corners of the conveying instrument. Intent must be determined by . . . the document in its entirety, rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent. [Here, the] . . . will . . . demonstrates her intent to convey an equal royalty interest to each of her three children. We therefore . . . render judgment that the . . . will devised a 1/3 fraction of royalty, not a 1/24 fractional royalty."

The issue with double fractions was whether it was intended to be a fixed amount, or if "1/8 was intended as a synonym for the landowner's royalty."

"We determine intent by construing the instrument holistically and by harmonizing any apparent conflicts or inconsistencies in the language." Here, the Court determined the testatrix intended one-third for each child.

"If the terms of a will are ambiguous, extrinsic evidence is admissible to determine the testatrix's intent . . . and a presumption arises that she intended to treat heirs of the same class equally. . . . [W]hen a term in a will 'is open to more than one construction,' a court can consider 'the circumstances existing when the will was executed.'" There is no set rule of interpretation for every will. This is similar for construction of "instruments conveying mineral interests." The Court favors "a holistic and

harmonizing approach and reject[s] mechanical rules of construction, such as giving priority to certain types of clauses over others or requiring the use of magic words."

"An instrument conveying land in fee simple transfers both the surface estate and all minerals and mineral rights, unless the instrument contains a reservation or expresses a contrary intention. The mineral estate is comprised of five severable rights: '1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals, and 5) the right to receive royalty payments.' The holder of the leasing privilege is the executive-interest holder . . . [who] enjoys the exclusive right to make and amend mineral leases and, correspondingly, to negotiate for the payment of bonuses, delay rentals, and royalties, subject to a duty of utmost good faith and fair dealing to non-executive interest holders. 'In Texas, a typical oil and gas lease actually conveys the mineral estate (less those portions expressly reserved, such as royalty) as a determinable fee,' with the possibility of reverter as a future interest."

"'A royalty interest derives from the grantor's mineral interest and is a nonpossessory interest in minerals that may be separately alienated.' A party possessing a royalty interest that does not include the right to lease the mineral estate, receive delay rentals, or bonus payments is referred to as a non-participating royalty-interest holder."

"Royalty interests may be conveyed or reserved 'as a fixed fraction of total production' (fractional royalty interest) or 'as a fraction of the total royalty interest' (fraction of royalty interest)."

The notion of "estate misconception" involves the "once-common misunderstanding . . . that a landowner retained only 1/8 of the minerals in place after executing a mineral lease. . . ." Thus, it can be a short-hand way of describing a future royalty.

"When land is devised in fee simple, as it was here, the devise includes the mineral estate except on terms so specified." Here, the royalties were severed.

The will reflected mother's intention to "equally divide the royalties" among the children because: 1) it used identical language for each; 2) it used double fractions rather than a specific sum; 3) the use of a global application to all followed by a second provision that restated the devise to each; and 4) the "equal-sharing language" in a third clause. It conveyed "a floating fraction of royalty interest." Thus, mother "used 'one-eighth' as a shorthand for the entire royalty a lessor could retain. . . ." She "intended proportional equalization." Mother therefore "devised to each child 1/3 of any and all royalty interest. . . ."

37. *The Staley Family Partnership, Ltd. v. Stiles*, 483 S.W.3d 545 (Tex. 2016)

Purchaser of landlocked tract filed declaratory judgment and sought an easement by necessity over a contiguous tract. Because there was no public road in 1866, at the time the tracts were separated, the Supreme Court affirmed the denial of an easement: "there [is] no evidence that, at the time the two tracts were severed, the easement would have resulted in access to a public road from the landlocked property."

A "necessity easement 'is the legal doctrine applicable to landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.'"

"Whether a property owner is entitled to an easement by necessity is a question of law, although underlying factual issues may need to be resolved in order to reach the legal question. . . . We review a trial court's conclusions of law de novo."

"When an owner conveys part of a tract of land and retains a landlocked portion, a right of way by necessity over the portion conveyed is implied so the owner of the landlocked part can access it. The party claiming a necessity easement must show: (1) unity of ownership of the alleged dominant and servient estates before severance; (2) the claimed easement is a present necessity and not a mere convenience; and (3) the necessity for the easement existed when the two estates were severed. The party claiming a necessity easement has the burden to prove all facts necessary to establish it."

The relevant severance occurred when the tract was separated from the tract over which an easement is sought.

"[E]stablishing the 'necessity' part of an easement by necessity requires, in part, proof that at the time the dominant and servient estates were severed, the necessity arose for an easement across the servient estate in order that the dominant estate could in some manner gain access to a public road." "[N]ecessity no longer exists if . . . the easement does not result in such access [to a public road]."

38. *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640 (Tex. 2016)

Prior plant owner built an acid system that injured the worker of the company that had bought the plant. The jury returned a verdict that prior plant owner was

negligent in its design and instructions for the acid system. But the Supreme Court rendered judgment against the plaintiff "[b]ecause the [prior plant] owner sold the property several years before the plaintiff's accident and did not otherwise owe the plaintiff a duty of care apart from its ownership and control of the property. . . ."

"A claim against a property owner for injury caused by a condition of real property generally sounds in premises liability. That liability typically ends with the property's sale. When the property's dangerous condition is caused or created by another, an independent claim against the other may lie in negligence and that claim, unlike the premises-liability claim against the owner, does not necessarily end with the property's sale."

A "person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner. When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises-liability principles apply."

"Under premises-liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances. That duty generally runs with the ownership or control of the property and upon a sale ordinarily passes to the new owner."

Under the Restatement, a party who builds a dangerous structure on another's property can be liable to those injured by it. But, "section 385 plainly concerns only the liability of independent contractors and other third parties who create dangerous conditions while making improvements 'on behalf of' property owners; it does not purport to apply to property owners themselves."

"An owner who creates a dangerous condition on its own property has breached no duty of care unless and until the owner exposes certain people to the danger. . . . [Premises] liability rests on two theoretical assumptions: (1) the property owner controls the premises and is therefore responsible for dangerous conditions on it and (2) the property owner is in a superior position to know of and remedy the dangerous condition. . . ." The "duty of these third parties is not necessarily co-extensive with that of the property owner. . . ." A "contractor's duties are thus tied not only to its control of the premises but also to the quality of its contracted work. This latter duty may be judged under ordinary-negligence principles even after the contractor no longer controls the premises."

With "land conveyances, . . . the deed has traditionally been viewed as the parties' full agreement, excluding all other terms and liabilities. In this area, 'the ancient doctrine of caveat emptor' retains 'much of its original force,' requiring the vendee to make his own inspection of the property and relieving the vendor of responsibility for existing defects."

"We . . . reject the notion that a property owner acts as both owner and independent contractor when improving its own property, subjecting itself to either premises-liability or ordinary-negligence principles depending on the injured party's pleadings. We hold instead that premises-liability principles apply to a property owner who creates a dangerous condition on its property, and that the claim of a person injured by the condition remains a premises liability claim as to the owner-creator, regardless of how the injured party chooses to plead it."

If "an injury should occur after the condition's creator has conveyed the property, the premises-liability claim will, as a general rule, lie against the property's new owner, who ordinarily assumes responsibility for the property's condition with the conveyance."

S. Business Organizations

1. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. Despite a lack of evidence of causation, the Supreme Court reversed in part a summary judgment for attorney.

"The elements of a joint venture are (1) an express or implied agreement to engage in a joint venture, (2) a community of interest in the venture, (3) an agreement to share profits and losses from the enterprise, and (4) a mutual right of control or management of the enterprise. Joint venture liability serves to make each party to the venture an agent of the other venturers and hold each venturer responsible for the wrongful acts of the others in pursuance of the venture."

Here, "there is no evidence that Parker agreed with Lamb to either steal the church's money or share that money." Parker's paychecks do "not comprise evidence that Parker had a mutual right to control and

manage the stolen money, entered into a joint venture to steal the church's money, or had an agreement with Lamb to share profits and losses from the theft of the church's money."

2. *Great American Insurance Company v. Primo*, 512 S.W.3d 890 (Tex. 2017)

Former condo association director allegedly wrongly paid himself $100K. Association made a loss claim with a first carrier and assigned its claim to it. That carrier sued director, who then demanded a defense under the D&O coverage of Great American. After first carrier's suit was dismissed, director sued Great American for failing to defend him. It asserted that an exclusion for claims by one insured against another defeated coverage. The Supreme Court ruled "that the insured-v.-insured exclusion in the D&O policy applies in this instance, [so] the policy provides no coverage for the claims" of the director.

3. *Doctors Hospital at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545 (Tex. 2016)

Doctor was a limited partner in a limited partnership that owned hospital. After a birth injury, plaintiffs sued the hospital limited partnership and its general partner. The Supreme Court ruled "the partnership cannot be liable for the doctor's medical negligence."

A "partnership can be held liable for injury caused by a partner if the partner was acting in the ordinary course of the partnership's business or with the partnership's authority. . . . We conclude that the ordinary course of the partnership's business does not include a doctor's medical treatment of a patient and that the doctor was not acting with the authority of the partnership in treating the patient."

TEX. BUS. ORGS. CODE "chapter 153 governs limited partnerships. Chapter 153 provides that, to the extent chapter 153 is silent, chapter 152's provisions governing general partnerships also apply to limited partnerships. . . . Chapter 153 specifically limits the liability of a limited partner, but does not otherwise address a limited partnership's liability to third parties for the actions of a limited partner."

Under the statute, the limited partnership can be "liable for the conduct of a limited partner only if he was acting in the ordinary course of the partnership's business or with partnership authority." Here, neither occurred.

The "ordinary course of [the limited partnership'] business does not include the provision of medical care." Only "a licensed doctor can provide medical care. . . . Only a person, not a partnership, may be licensed to practice medicine. Corporate entities that exert control over a doctor's practice of medicine may be engaged in the unlawful practice of medicine without a license."

Despite its broad "purpose" clause, here the "limited partnership agreement expressly states that it is to be construed in accordance with Texas law and that Texas law controls to the extent that it conflicts. . . ."

"[L]imited partnerships provide limited partners with less control over and less liability for the business entity."

Footnote 2: "Analyzing the degree to which [the limited partnership] controlled [the doctor's] practice is relevant to determining whether [it] was engaged in the illegal practice of medicine by a non-person."

"Obstetrical services and labor and delivery services may fall under health care generally . . . without constituting medical care. [The limited partnership,] as the operator of a hospital, may be in the business of providing facilities . . . [for] medical care, without engaging in the illegal practice of medicine by a business entity."

Doctors can have professional associations or companies. "Under section 152.055, each partner must be a physician, and the purpose of the partnership must be to practice medicine within the scope of those physician–partners' practice." But this does not allow the practice of medicine by someone not licensed. "Professional associations may be vicariously liable for the negligence of their employees or agents."

A "partnership may be liable for the wrongful acts of a partner when the partner acts 'with the authority of the partnership.' The partnership agreement is the source of authority for partners to act on behalf of the partnership." Here, the agreement does not give limited partners authority to act on behalf of the partnership. "Further, actions taken with the authority of the partnership would typically follow from actions 'in the ordinary course of the business of the partnership.'"

"'Unlike a person doing business with a corporation, a person doing business with a limited partnership always has recourse against any general partner in the same manner as partners are liable for the liabilities of a partnership without limited partners.'" So, the general partner here is liable only if the limited partnership is liable.

T. Wills, Estates, Probate, and Trusts

1. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance," holding that a constructive trust imposed by the trial court sufficed. The Court further affirmed the finding of elderly woman's lack of capacity when she executed ranch sale and estate documents. The Court also found that the attorneys for the other ranch sellers failed to segregate their attorney's fees, and that issue of fees should be remanded.

Here, there was "'some evidence upon which reasonable minds could conclude that Lesey lacked sufficient mind and memory to understand the nature and effect of her acts at the time she executed the trust amendments and sales instruments at issue.'" "Documents executed by one who lacks sufficient legal or mental capacity may be avoided." One has capacity "if she 'appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting.' The proper inquiry is whether Lesey had capacity on the days she executed the documents at issue. But courts may also look to state of mind at other times if it tends to show one's state of mind on the day a document was executed."

"Evidence of physical infirmities, without more, does not tend to prove mental incapacity. But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." Here, a forensic psychiatrist testified about her "dementia and cognitive impairment," and that she could not "transact business." Relatives further testified she was confused and forgetful. A voicemail was incoherent, and even the defendant had emails about her lack of lucidity. This constituted "sufficient evidence" to support the verdict. It "is not our place to weigh the testimony adduced at trial. That is the jury's province."

Footnote 3: "Undue influence itself is not an actionable tort; consequently, damages are not recoverable based solely on an undue-influence finding. . . . Rather, an undue-influence finding typically is grounds for setting aside an otherwise binding document, in this case a trust or deed."

"Neither our precedent nor the Legislature has blessed tortious interference with an inheritance as a cause of action in Texas."

The "constructive trust is imposed on exactly the amount of money the jury believed the [plaintiffs] were entitled to under any theory of recovery," though defendants had depleted some of it. The "constructive trust was an adequate remedy even if it ultimately does not provide the full measure of relief the jury awarded." Yet, "it is not because it is inherently inadequate to redress this wrong."

Here, the trial court had discretion to impose "a constructive trust." "'A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment.'" While, "a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust," it is not always required and the types of circumstances "in which equity impresses a constructive trust are numberless. . . ."

Defendant's argument of "unclean hands" was unavailing. A "party relying on the 'unclean hands' doctrine must show that she herself suffered because of the opposing party's conduct." Here, any malfeasance of plaintiffs was "collateral" to the basis upon which they sought relief.

"We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust."

2. *In re Guardianship of Tonner*, 513 S.W.3d 496 (Tex. 2016)

Guardian of the estate and person of an incapacitated adult died. Disability advocate organization filed an application on behalf of ward to partially restore his capacity, based on evidence that he was able to make certain decisions for himself, and arguing that the guardianship order was "unduly restrictive" in violation of TEX. ESTATES CODE § 1001.001.

TEX. ESTATES CODE § 1202.051(3) "authorizes a ward to apply for an order finding that he is only partly incapacitated and limiting the guardian's powers or duties accordingly." However, ward had no guardian—prior guardian had died, and ward did not request that a successor guardian be appointed. "[T]he court could not determine whether a non-existent guardian's powers should be restricted or remain unchanged."

3. *Linegar v DLA Piper LLP (US)*, 495 S.W.3d 276 (Tex. 2016)

As a general rule, "ordinarily—but not always—the trustee is the proper plaintiff to bring suit for losses the trust suffers. However, . . . here . . . the case was not tried on claims that [firm] violated duties it owed to [entity] as trustee, nor on a claim that the trust assets for which [entity] was trustee suffered a loss." The case was tried on a breach of duties owed to plaintiff individually.

4. *Stephens v. Beard*, 485 S.W.3d 914 (Tex. 2016)

Husband killed wife and then shot himself two hours later. Though their wills employed "common disaster" provisions. The Supreme Court ruled they did not apply: "the order of death *must* be uncertain for a common-disaster provision to become effective."

"In construing a will, our focus is on the testator's intent, which is 'ascertained by looking to the provisions of the instrument as a whole, as set forth within the four corners of the instrument.' Thus, '[t]he court should focus not on 'what the [testator] intended to write, but the meaning of the words [he] actually used.'' Such words, 'whether technical or popular,' are construed 'in their plain and usual sense, unless a clear intention to use them in another sense' is present in the instrument. Generally, '[t]he will should be construed so as to give effect to every part of it, if the language is reasonably susceptible of that construction.'"

"The phrase 'common disaster' has a well-recognized legal meaning: '[a]n event that causes two or more persons [with related property interests] . . . to die at very nearly the same time, *with no way of determining the order of their deaths*.' . . . Common-disaster provisions are necessary because '[c]ases occasionally arise in which testator and legatee . . . are killed in a common disaster under circumstances which make it impossible to determine as a matter of fact which of them died first.' . . . Using a common-disaster provision thus ensures that, when the order of death is uncertain, property passes in a planned and predictable way." "Common disaster" does not apply to "'unrelated by closely-timed deaths.'"

Here, the court of appeals erroneously ignored the established legal definition of "common disaster" and created one of its own. When provisions have a settled usage interpreted by "'judicial decisions, it is presumed to be used in the sense that the law has given to it, and should be so construed, unless the context of the will shows a clear intention to the contrary.'" "[W]e 'prefer ordinary meaning to an unusual meaning that will avoid surplusage.'"

Footnote 1: "The legislature repealed the Probate Code and re-codified its provisions in the Estates Code, effective January 1, 2014. Probate Code Chapter 47's provisions are now contained in Estates Code Chapter 121."

5. *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016)

Mother divided land among three children, and bequeathed "an undivided one-third (1/3) of an undivided (1/8)" of the royalties among them. Much later, when the royalties on oil and gas on one of the properties was not the historical one-eighth, the issue was whether, by use of a double fraction, she intended to provide a fixed fractional (1/24) royalty or whether she intended a floating '"fraction of' royalty" (1/3 to each child of the children of the actual royalty). The Supreme Court ruled the latter. "[O]ur objective is to effectuate the parties' intent as expressed within the four corners of the conveying instrument. Intent must be determined by . . . the document in its entirety, rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent. [Here, the] . . . will . . . demonstrates her intent to convey an equal royalty interest to each of her three children. We therefore . . . render judgment that the . . . will devised a 1/3 fraction of royalty, not a 1/24 fractional royalty."

The issue with double fractions was whether it was intended to be a fixed amount, or if "1/8 was intended as a synonym for the landowner's royalty."

"We determine intent by construing the instrument holistically and by harmonizing any apparent conflicts or inconsistencies in the language." Here, the Court determined the testatrix intended one-third for each child.

"Our objective in construing a will is to discern and effectuate the testatrix's intent as reflected in the instrument as a whole. [The] . . . 'intent must be drawn from the will, not the will from the intent.'" Intent is determined not from what the testatrix intended to write, but from the meaning of the words that are used; intent comes from the four-corners of the will. The "'sense in which the words were used by the testator is the ultimate criterion.'"

"If the terms of a will are ambiguous, extrinsic evidence is admissible to determine the testatrix's intent . . . and a presumption arises that she intended to

treat heirs of the same class equally. . . . [W]hen a term in a will 'is open to more than one construction,' a court can consider 'the circumstances existing when the will was executed.'" There is no set rule of interpretation for every will. This is similar for construction of "instruments conveying mineral interests." The Court favors "a holistic and harmonizing approach and reject[s] mechanical rules of construction, such as giving priority to certain types of clauses over others or requiring the use of magic words."

The notion of "estate misconception" involves the "once-common misunderstanding . . . that a landowner retained only 1/8 of the minerals in place after executing a mineral lease. . . ." Thus, it can be a short-hand way of describing a future royalty.

The "holistic approach" determines "intent from all words and all parts of the conveying instrument. To discern intent, words and phrases must be construed together and in context, not in isolation. . . . Words and phrases generally bear their ordinary meaning unless the context supports a technical meaning or a different understanding. . . . [A]pparent inconsistencies or contradictions must be harmonized, to the extent possible, by construing the document as a whole." So, "meaning derived without reference to context is not confirmed merely because such a construction would not produce an inconsistency with another provision." Moreover, "'[w]ords must be given the meaning they had when the text was adopted.'"

"When land is devised in fee simple, as it was here, the devise includes the mineral estate except on terms so specified." Here, the royalties were severed.

The will reflected mother's intention to "equally divide the royalties" among the children because: 1) it used identical language for each; 2) it used double fractions rather than a specific sum; 3) the use of a global application to all followed by a second provision that restated the devise to each; and 4) the "equal-sharing language" in a third clause. It conveyed "a floating fraction of royalty interest." Thus, mother "used 'one-eighth' as a shorthand for the entire royalty a lessor could retain. . . ." She "intended proportional equalization." Mother therefore "devised to each child 1/3 of any and all royalty interest. . . ."

U. Conversion, Cargo, and Bailment

No cases to report.

V. Products Liability

1. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

Plaintiffs "in multiple-exposure asbestos cases need not prove but-for causation because ''application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.''"

2. *Centerpoint Builders GP LLC v. Trussway, Ltd.*, 496 S.W.3d 33 (Tex. 2016)

General contractor was sued after worker was injured when a truss broke. General contractor sought indemnity from maker under Ch. 82, claiming it was a seller. The Supreme Court ruled that, applying "chapter 82's definition of 'seller,' . . . the general contractor is not a seller" because it was not "'engaged in the business of' commercially distributing or placing trusses in the stream of commerce."

"[C]hapter 82 entitles the 'seller' of a defective product to indemnity from the product manufacturer for certain losses." It "gives the innocent seller of an allegedly defective product a statutory right to indemnity from the product's manufacturer for losses arising out of a products liability action." This is in addition to any indemnification created "by law, contract, or otherwise."

"'Products liability action' is broadly defined as 'any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product.' The term includes 'all direct allegations against the seller that relate to plaintiff's injury.'"

The "'purpose of section 82.002 is to protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers.'" The "duty to indemnify is triggered by allegations in the injured claimant's pleadings of a defect in the manufacturer's product, regardless of any adjudication of the manufacturer's liability to the claimant." "The manufacturer may 'escape this duty to indemnify' by proving that the seller's 'acts or omissions independent of any defect in the manufactured product cause[d] injury.'"

"While the scope of a manufacturer's duty to indemnify is often described as broad, it is owed only

to sellers, and an indemnity claimant's seller status is a necessary prerequisite to maintaining a claim. . . . The Act defines 'seller' as 'a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.'" Footnote 3: "Our precedent consistently determines seller or manufacturer status based on the evidence, and nothing in section 82.002(a) or the statute's purpose supports allowing the pleadings to dictate whether a party qualifies as a manufacturer or seller." Here, general contractor was not "'engaged in the business of' selling trusses." Instead, it sold services as a general contractor. Footnote 6: "[C]ontractors' businesses involve the rendition of construction services, while 'the materials that pass are incidental.'"

Regarding sellers who also supply services, as in *Fresh Coat*, Chapter 82 "'anticipates that a product seller may also provide services' and that a company's 'installation services do not preclude it from also being a seller.'" Footnote 4: Fresh Coat had followed the manufacturer's instructions and was "'considered a seller.'"

"'Traditionally, courts have been reluctant to impose products liability on sellers of improved real property in that such property does not constitute goods."

Footnote 5: The "Legislature chose to define 'seller' in chapter 82 just as we have construed the term for strict-liability purposes. Strict liability is limited to those 'engaged in the business of selling' a product, which we have long interpreted to include those '"engaged in the business of introducing the products into channels of commerce.'"

One "is not 'engaged in the business of' selling a product if providing that product is incidental to selling services." Footnote 7: A "hairdresser is in the business of selling haircuts, not selling handfuls of mousse." Footnote 8: Here, the "'Project' is 'construction and services,' and materials were ancillary to those services."

A "general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a 'seller' of every material incorporated into its construction projects for statutory-indemnity purposes." Here, the provision of trusses was incidental.

Strict "liability 'applies to those whose business is selling, not everyone who makes an occasional sale.'"

W. Medical Malpractice

1. *Miller v. JSC Lake Highlands Operations, LP*, ___ S.W.3d ___ (Tex. 2017) (12/15/17)

In a medical malpractice lawsuit against three defendants involving a nursing home resident who died of pulmonary edema, pneumothorax, and aspiration after doctors allegedly failed to identify a dental bridge lodged in the trachea, the plaintiff served four expert reports: one discussing each defendant's conduct, and a fourth discussing the cause of death. Defendants moved to dismiss, arguing that the reports were inadequate as to causation because the fourth report, discussing causation, did not discuss the conduct of any particular defendant, and the other reports did not adequately link the respective defendants' conduct to the death. The trial court denied the motion to dismiss, but the court of appeals reversed, refusing to read the fourth report along with any of the other reports and holding that the reports did not adequately describe the basis for the imaging company defendant's liability. In a *per curiam* opinion, the Supreme Court held that the trial court did not abuse its discretion in denying the motion to dismiss by reading the expert reports together.

"We have explained that [TEX. CIV. PRAC. & REM. CODE §] 74.351(i) 'provides that "*any requirement* of this section" can be fulfilled "by serving reports of separate experts."'" While the report on causation does not discuss the conduct of any of the defendants, it "simply articulates the medical event that in reasonable medical probability caused" the death and could be read along with other reports. The report "did not need to specifically name the person who caused the delay" that resulted in the death or "otherwise outline the conduct of a particular defendant who caused that delay because the other reports supplied that information."

The standard for the adequacy of an expert report under TEX. CIV. PRAC. & REM. CODE § 74.351 is whether the report represents "an 'objective good faith effort' to provide a fair summary of the applicable standard of care, the defendant's breach of that standard, and how that breach caused the patient's harm."

The other reports, read along with the report on causation, fulfilled the requirements of the statute. While the defendants criticized one reports use of the word "can" in its statement that a doctor's failure to

timely remove a foreign body "'can lead to aspiration, which can be deadly,'" the remainder of the report noted the diagnosis of aspiration and the imaging findings, showing, "in context," that the expert "opined that aspiration *can* be deadly and that it *was* deadly in this case." The "report adequately explains 'how and why'" the doctor's breached caused the death, "as his report 'make[s] a good faith effort to explain, factually, how proximate cause is going to be proven.'" Also, even if the report's "use of 'can' rendered his report insufficient," the causation report "remedies that deficiency."

Another expert report adequately set forth the basis for the imaging company defendant's liability, illustrating "how and why" the company's "failure to discover and report the bridge's presence on the images resulted in a delay," while the causation "report explains how the delay caused the series of pulmonary issues resulting" in the death. The court of appeals was apparently concerned about "the *believability*" of the expert's "articulated standards of care, not the manner in which she stated them. Our inquiry is not so exacting." The report "contains specific information about what, in her opinion, the applicable standards of care required" the defendant to do different, and "[a]t this preliminary stage, whether those standards appear reasonable is not relevant to the analysis of whether the expert's opinion constitutes good-faith effort."

"We remain mindful that an 'adequate' expert report 'does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial.'" Liability "is not the question at this state; that will be answered further in the litigation process." "The trial court had discretion—'indeed it was incumbent on the trial court,'—to review the reports and decide whether they demonstrated a good-faith effort to show that [the] claims had merit."

2. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that "legally sufficient evidence supports a jury's conclusion that the negligence of a premature infant's treating neonatologist proximately caused her loss of vision."

"To satisfy a legal sufficiency review, plaintiffs in medical-malpractice cases 'are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence.'" The "'ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.''"

A "plaintiff cannot show that a defendant's negligence was more likely than not a cause of injury 'where the defendant's negligence deprived the tort victim of only a 50% or less chance of avoiding the ultimate harm.'"

If "'there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.' . . . 'The expert must explain why the inferences drawn are medically preferable to competing inferences that are *equally consistent* with the known facts.'" But, "'a medical causation expert need not 'disprov[e] or discredit[] every possible cause other than the one espoused by him,'' absent evidence that 'presents 'other plausible causes of the injury or condition that could be negated.'' Thus, a plaintiff need not 'speculate about other possible unknown causes and then disprove them.'"

A "defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. There may be more than one proximate cause of an injury. 'While but for causation is a core concept in tort law, it yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible or such proof otherwise should not be required.'" Here, it was error to apply a but-for causation test rather than "the substantial factor test." "Thus, the court of appeals should have applied the substantial-factor test in assessing the acts of negligence by Dr. Ponte and Dr. Llamas rather than requiring proof that each independent act by each tortfeasor was a but-for cause of D.B.'s injury."

"*Havner*'s analysis of epidemiological principles does not govern this case. *Havner* involved the sufficiency of causation evidence in the context of toxic-substance exposure, not medical malpractice. There, the plaintiffs could not point to facts showing 'specific causation' (i.e., whether exposure to the

substance caused the plaintiff's particular injury) and were forced to . . . [use] epidemiological studies for proof of 'general causation' (i.e., whether the toxic substance itself was capable of causing a particular injury in the general population). This was necessary because there was no direct proof that the substance was responsible for the plaintiff's injury."

Havner did not apply to the use of the studies in this case. The experts here "based their causation opinions on their own clinical experience with [the disease] and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies. . . ." The studies supported their opinions.

"'The expert must . . . , to a reasonable degree of medical probability, explain how and why the negligence caused the injury.'" Here, the plaintiff's experts explained the basis or their opinions. Though the expert could not say precisely when the baby developed the disease, based upon his experience and observation of the baby he "could estimate the critical dates beyond mere speculation."

"In *Jelinek*, we held that *when equally* likely causes for an injury are present, an expert must explain why one cause and not the other was the proximate cause of the injury." There, the "expert conceded that the circumstantial evidence on which he relied to form his opinion that the patient suffered from the specific infection was 'equally consistent with two other infections cultured from' the patient's incision and blood—neither of which were treatable by the antibiotics in question." The expert failed to explain his opinion in the face of three equally likely causes. Here, though, the purported other possible causes were not causes, but rather "risk factors." The expert sufficiently negated alternative causes: the expert "expressly identified and ruled out" the defense theory.

"Dr. Good expressly addressed the[] cited causes for the impaired vision in D.B.'s left eye. . . . Thus, to the extent there were other plausible causes of D.B.'s impaired vision in her left eye, the record shows that Dr. Good expressly identified and ruled out those causes."

"To establish proximate cause in a medical-malpractice case, there must be 'evidence of a 'reasonable medical probability' or 'reasonable probability' that [the plaintiff's] injuries were proximately caused by the negligence of one or more defendants.' In other words, 'the ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.'"

In *Havner*, the "'use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.'" *Havner* does not apply here because, in that case, the plaintiff could not demonstrate "specific causation." In *Young*, "plaintiffs relied solely on epidemiological studies to establish 'general causation.'" There, "plaintiffs could not establish a greater than 50% probability of recovery necessary to establish causation." *Young* is not applicable here.

Here, plaintiff's "experts gave their causation opinions based on their own clinical experience . . . and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies in which they participated personally."

Plaintiffs here "presented evidence that if [the child's condition] had been diagnosed and treated early enough, it is more likely than not that" she would not have gone blind.

Plaintiff's expert "testified that the additional three-day delay 'incrementally increased' the likelihood of a poor outcome in D.B.'s particular case." Plaintiff showed that defendants "failed to ensure that D.B. received laser therapy at a time when it would have been effective by failing to communicate properly, screen timely, and treat timely."

Here, defendants "failed to ensure that [the child] received laser therapy at a time when it would have been effective by failing to communicate properly, screen timely, and treat timely."

The "court of appeals erred in not applying the substantial-factor test because the jury heard ample evidence supporting the combined negligence" of defendants. It also erred in rejecting plaintiffs' "study as no evidence of causation." There was legally sufficient evidence of defendant's negligence.

3. *Columbia Valley Healthcare System, L.P. v. Zamarripa*, 526 S.W.3d 453 (Tex. 2017)

After pregnant mother and baby died while being transferred from one hospital to another 150 miles away, family sued transferring hospital, among others. A nurse provided an expert report on breach of duty, and a doctor provided a report on causation. The

Supreme Court ruled, though, that the court of appeals erred when holding that the expert report need not address proximate causation. Here, the report did not, so the case was returned to the trial court to consider a 30-day extension. In addition, the Court ruled that the nurse who authored the expert report was qualified based upon past experience, even though she did not work in labor and deliver when the incident occurred or when she wrote the report.

The Texas Medical Liability Act (TMLA) imposes a requirement for an expert report, which is "'a statement of opinion by an individual with expertise indicating that the claim asserted . . . has merit.' This expert report must address, in part, 'the causal relationship' between a health care provider's failure to meet applicable standards of care and the claimed injury." "An expert report required by the Act must address the applicable standards of care, the failure of a health care provider to meet them, and the causal relationship between that failure and the injury, harm, or damages claimed." Only "physicians can be experts on causation."

Here, the asserted breach of duty by the hospital was that its nurses failed to advocate for various testing and treatment of the patient, and that she not be transferred.

Plaintiff's argument that defendant was not entitled to an interlocutory appeal because plaintiff had filed an expert report, though one arguably flawed, failed. TEX. CIV. PRAC. & REM. CODE § 74.351(c) "recognizes that 'an expert report has not been served within the period specified by Subsection (a) [when] elements of the report are found deficient.'" Thus, a "'motion to dismiss based on a timely but deficient report can be reviewed by interlocutory appeal." Moreover, "[w]e jurisdiction in interlocutory appeals 'when there is inconsistency in [Texas courts'] decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants,'" which exists here.

In an expert report, the expert "'must explain, based on facts set out in the report, how and why [a health care provider's] breach [of the standard of care] caused the injury. A bare expert opinion that the breach caused the injury will not suffice.'"

"The Act's expert-report requirement seeks 'to deter frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that his claim has merit.' Unquestionably, a plaintiff . . . who cannot prove that her injury was proximately caused by the defendant's failure to meet applicable standards of care, does not have a meritorious claim. While the plaintiff is not required to prove her claim with the expert report, the report must show that a qualified expert is of the opinion she can. The report need not use the words 'proximate cause,' 'foreseeability,' or 'cause in fact.' '[A] report's adequacy does not depend on whether the expert uses any particular 'magical words.'' And merely incanting words does not suffice. 'An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.' In showing how and why a breach of the standard of care caused injury, the expert report must make a good-faith effort to explain, factually, how proximate cause is going to be proven:

> Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred.

This is the causal relationship between breach and injury that an expert report must explain to satisfy the Act."

"The Act allows a trial court to grant one 30-day extension to cure a deficiency in an expert report, and a court must grant an extension if a report's deficiencies are curable."

Here, a registered nurse was permitted to opine on the standard of care in labor and delivery based upon her prior experience, even though she was not working in that specialty at the time of the incident or at the time of her report. Footnote 37: "But Section 74.351 (r)(5)(B) does not require an expert to have the same specialty as the health care provider she evaluates. . . . The trial court was within its discretion to determine that Nurse Spears's training as a registered nurse and her prior experience in the labor and delivery unit qualified her to opine on the standard of care."

4. *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017)

Resident doctor was paid through a foundation, but worked at a clinic and was supervised by that center's Program Director. When sued for malpractice, doctor sought immunity under the election-of-remedies of the Texas Tort Claims Act. The Supreme Court ruled that "the details of [doctor's] tasks as a resident

physician were, under the relevant contract and other documents and in actual practice, controlled by UTHSCH and its physicians, not the Foundation." She was thus not an employee of the foundation and not entitled to immunity.

To be an employee of a governmental unit, doctor must be in the paid service of that unit. But, the definition excludes persons for whom the unit does not have "'the legal right to control.'" Here, some administrative services were provided by the foundation, which paid the residents, but the Program Director determined their assignments and duties. Essentially, the bylaws of the foundation indicate that it "does not control physicians. . . ."

The policies of the foundation "include those set out in a formal governing document of the corporation," such as its bylaws. In fact, they "expressly and emphatically disavow any right to control a physician working at any hospital not owned by the Foundation."

A person's status as an employee "turns on who controlled the details of the employee's work."

Doctor argued "that 'legal' control means a theoretical right to control as opposed to an actual right to control. We see no reason to adopt such a novel definition." As "a general rule of statutory construction, we give words their ordinary and plain meaning." "Legal" control, argued by doctor, "is not ordinarily used as the opposite of, or in contrast to, actual."

For the purposes of TEX. CIV. PRAC. & REM. CODE § 101.106, "a general right to change the terms and conditions of employment should not trump control of the details of [doctor's] employment—the relevant statutory inquiry. . . ."

Footnote 24: "Many residents do not have immunity afforded to governmental employees because they are residents at private hospitals and work under residency programs administered by such hospitals. And of course we cannot rewrite the relevant statute to effect our own public policy goals regarding the best training environment for residents."

5. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

After nurse reported a doctor to hospital for not obtaining informed consent for a c-section, nurse's employer no longer scheduled her to work at hospital. After a jury verdict for nurse, the Supreme Court reversed and rendered, saying nurse "failed to establish that [hospital] illegally retaliated against her or tortuously interfered with her contract with" her employer.

TEX. HEALTH & SAFETY CODE § 161.135 proscribes retaliation "'against a person who is not an employee for reporting a violation of law.' A plaintiff alleging a violation of this section bears the burden of proof to establish the claim, but the statute provides 'a rebuttable presumption that the plaintiff was retaliated against' under specified circumstances. One such circumstance arises if, within sixty days 'after the date on which the plaintiff made a report in good faith,' the hospital" takes an adverse action against the person.

An issue is whether the reported act actually violated the law, or simply whether the person in good faith believed it did. The "Whistleblower Act 'requires only a good-faith belief that a violation of law has occurred.'" Here, three other sections provide guidance. Based upon them, the Court concludes "the statute promotes reporting all conduct in the health-care context that a reasonable person would conclude constitutes a violation of law . . . by protecting those who make such reports. . . ." It "permits the plaintiff to sue for retaliation if the plaintiff reported a violation of law in good faith."

In this context, "good faith" means "'that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience.'" Here, because the nurse did not actually hear the doctor speak to the patient when he obtained informed consent, "no evidence . . . demonstrates that [nurse's] subjective belief was objectively reasonable in light of her training and experience."

Here, there is no evidence of interference with an existing contract. Employer "had not agreed to schedule nurse at [that hospital], or indeed at any hospital."

6. *Ransom v. Eaton*, 503 S.W.3d 411 (Tex. 2016)

Plaintiff furnished defendant with her expert report before, but not after, filing suit. Following *Hebner v. Reddy*, the Supreme Court ruled that plaintiff had complied with the act.

"The Texas Medical Liability Act requires those pursuing a healthcare-liability claim to serve an expert report on each party or their attorney no later than 120 days after each defendant files an original answer."

In *Zanchi*, a health care provider was a party because he had been named in a suit. "Applying *Zanchi* to the facts presented in *Hebner*, we noted that 'we did not mandate that physicians or health-care

providers on the receiving end of a healthcare-liability claim must be a 'party' to a lawsuit before they could be properly served with an expert report.'" Further, "section 74.351(a) [does] not include an express or implicit prohibition on service before the defendant is named as a party." "'[P]re-suit service of an expert report . . . can only further the statute's objective of encouraging and enabling parties to settle healthcare liability claims without resorting to the lengthy and expensive litigation process.'" So, here, plaintiff satisfied the act's "expert report service requirement when she served [defendant] with a report concurrent with pre-suit notice." In addition, defendant "waived any objection to the sufficiency of [plaintiff's] expert report by failing to raise any objection within 21 days after filing her original answer and choosing instead to seek dismissal following the 120-day deadline."

7. *Doctors Hospital at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545 (Tex. 2016)

Doctor was a limited partner in a limited partnership that owned hospital. After a birth injury, plaintiffs sued the hospital limited partnership and its general partner. The Supreme Court ruled "the partnership cannot be liable for the doctor's medical negligence."

A "partnership can be held liable for injury caused by a partner if the partner was acting in the ordinary course of the partnership's business or with the partnership's authority. . . . We conclude that the ordinary course of the partnership's business does not include a doctor's medical treatment of a patient and that the doctor was not acting with the authority of the partnership in treating the patient."

TEX. BUS. ORGS. CODE "chapter 153 governs limited partnerships. Chapter 153 provides that, to the extent chapter 153 is silent, chapter 152's provisions governing general partnerships also apply to limited partnerships. . . . Chapter 153 specifically limits the liability of a limited partner, but does not otherwise address a limited partnership's liability to third parties for the actions of a limited partner."

Under the statute, the limited partnership can be "liable for the conduct of a limited partner only if he was acting in the ordinary course of the partnership's business or with partnership authority." Here, neither occurred.

The "ordinary course of [the limited partnership'] business does not include the provision of medical care." Only "a licensed doctor can provide medical care. . . . Only a person, not a partnership, may be licensed to practice medicine. Corporate entities that exert control over a doctor's practice of medicine may be engaged in the unlawful practice of medicine without a license."

Footnote 2: "Analyzing the degree to which [the limited partnership] controlled [the doctor's] practice is relevant to determining whether [it] was engaged in the illegal practice of medicine by a non-person."

"Obstetrical services and labor and delivery services may fall under health care generally . . . without constituting medical care. [The limited partnership,] as the operator of a hospital, may be in the business of providing facilities . . . [for] medical care, without engaging in the illegal practice of medicine by a business entity."

Doctors can have professional associations or companies. "Under section 152.055, each partner must be a physician, and the purpose of the partnership must be to practice medicine within the scope of those physician–partners' practice." But this does not allow the practice of medicine by someone not licensed. "Professional associations may be vicariously liable for the negligence of their employees or agents."

Footnote 3: "A hospital is generally not vicariously liable for the acts or omissions of a doctor on the hospital's medical staff."

"'Unlike a person doing business with a corporation, a person doing business with a limited partnership always has recourse against any general partner in the same manner as partners are liable for the liabilities of a partnership without limited partners.'" So, the general partner here is liable only if the limited partnership is liable.

8. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

During a medical malpractice case, doctor attempted to obtain peer review committee materials based upon an exception to their statutory protection. The Supreme Court granted mandamus, ruling that "the trial court abused its discretion in ordering the documents produced without a proper *in camera* inspection to determine whether the exception in section 160.007(d) applies."

"In section 160.007 of the Texas Occupations Code, the Legislature provided a privilege for records made by a medical peer review committee in the course of its review." The "'overarching purpose of the [medical peer review committee privilege] is to foster a free, frank exchange among medical professionals about the professional competence of

their peers.'" A "committee engages in 'medical peer review' when it evaluates 'medical and health care services'. . . ." Here, that occurred.

An exception requires "disclosure of the recommendation and decision to the affected physician . . . [but] this exception 'does not constitute waiver of the confidentiality requirements. . . .'"

"Because [hospital] presented a prima facie case for the privilege and tendered the allegedly privileged documents to the trial court, the trial court was obligated to review them before compelling production." "Mandamus relief is appropriate when a trial court 'fails to conduct an adequate *in camera* inspection of documents when such review is critical to evaluation of a privilege claim.'"

A medical peer review committee does not "take action" simply because "it convenes to review the quality of medical care or competence of a physician. . . ." The term "connotes a completion of review." Some "consequence" must be possible.

"For the exception in section 160.007(d) to apply, the medical peer review committee must have taken some action that could have resulted in discipline beyond simply convening to review the physician's actions." On the record here, the Court cannot make that determination.

9. *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016)

Plaintiff served a first expert report upon doctor along with notice letter. After filing suit, plaintiff erroneously served defendant with a second expert report for different client. The Supreme Court ruled that the first report satisfied Ch. 74: "a plaintiff can[] satisfy the expert-report requirement through pre-suit service of an otherwise satisfactory expert report."

Ch. 74's purpose "is to eliminate frivolous healthcare-liability claims, not potentially meritorious ones." An expert report must be served "on each party no later than the 120th day. . . ." The "expert-report requirement serves two purposes: (1) it 'inform[s] the defendant of the specific conduct the plaintiff has called into question[;]' and (2) it 'provide[s] a basis for the trial court to conclude that the claims have merit.' . . . [Knowing] 'what specific conduct the plaintiff's experts have called into question is critical' to the defendant's and the court's ability to evaluate the viability of a claim."

Footnote 1: Because the medical association's liability is "'purely vicarious, a report that adequately implicates the actions of [the association's] agents or employees is sufficient.'"

A "'document utterly devoid of substantive content will [not] qualify as an expert report.'" Footnote 2: A "report is insufficient if it 'merely states the expert's conclusions about the standard of care, breach and causation' or 'omits any of the statutory requirements.' . . . [A] report is deficient but curable if it 'contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated.'"

Footnote 6: "Section 74.351 was amended on September 1, 2013, and now requires that a claimant 'not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports.'"

The "Act requires mandatory dismissal when a claimant fails to timely serve a qualifying expert report."

"Whether an expert report served concurrently with a pre-suit notice letter is timely under section 74.351 (a) is a matter of statutory construction, a legal question we review de novo."

Ch. 74 requires "written notice by certified mail to 'each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit.' The purpose of the pre-suit notice letter is 'to encourage the parties to negotiate and settle disputes prior to suit.'"

In *Zanchi*, a "'mean[t] one named in a lawsuit,' without regard to whether they had yet been served or appeared in the lawsuit. . . ." *Zanchi* "did not mandate that physicians . . . receiving . . . a healthcare-liability claim must be a 'party' to a lawsuit before they could be properly served with an expert report. Nor does the statute's plain language impose any such requirement. . . . It does not prohibit the plaintiff from serving a report on a party before filing the petition, and we will not write such a requirement into the statute's language."

"[T]he statute does not say that the party must be a party at the time the report is served, and none of the statute's other provisions expressly or implicitly prohibit service before the defendant is named as a party to the suit. Accordingly, . . . the best course is to adopt a construction that 'does the least damage to the statutory language, and best comports with the statute's purpose.' Dismissal would dispose of a potentially meritorious claim and punish [plaintiff] for demonstrating her claims had merit from the moment she asserted them—a result the Legislature did not intend and our state constitution potentially does not allow." This interpretation does not prejudice

defendants.

The 21-day period for objections to the report began when defendant was served with citation; but, now, it starts from the "'*day after the date the defendant's answer is filed*.'"

10. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

After patient died in hospital, hospital improperly obtained consent for an autopsy by an affiliate rather than the medical examiner. Jury did not find malpractice, but returned a verdict against the hospital for the improper autopsy. Also, the trial court entered an award for sanctions against the hospital. The Supreme Court reversed and rendered, holding: "(1) the post-mortem fraud claim is a health care liability claim; (2) the claim is barred by the Act's two-year limitations period, as are the claims for breach of fiduciary duty and negligence that are based on the same underlying facts; and (3) . . . monetary sanctions" were properly reversed.

"Whether a claim is an HCLC under the Act is a question of law that we review de novo. In determining the question, we examine the underlying nature and gravamen of the claim, rather than the way it is pleaded."

Professional or administrative services are governed by Ch. 74. "A hospital's license may be suspended or revoked for failing to comply with Health and Safety Code requirements or Administrative Code requirements. Plaintiff's claims here "implicate such requirements." Plaintiff alleged violations of duties imposed by the Code of Criminal Procedure, which were necessary "in order [for the hospital] to maintain its license. . . ."

The claim must be directly related to health care. But, as "to a claim based on professional or administrative services, the statute does not require that the person alleging injury was a patient during the relevant period. Neither does it require that the alleged injury must have occurred during or contemporaneously with health care, nor that the alleged injury was caused by health care." The claim must simply relate "to [the] health care of some patient."

The phrase "directly related to" is not defined. According to the dictionary, "directly" means "without . . . intervention," and "related" means "[c]onnected in some way," so, together, the phrase means "'an uninterrupted, close relationship or link between the things being considered.'" Here, the autopsy and cover up were allegedly related to the hospital's improper treatment of the patient. This, its fraud constituted a HCLC. Because the hospital's "actions in connection with . . . the autopsy are recast HCLCs, it follows that both the breach of fiduciary duty and negligence claims founded upon the same factual bases are likewise recast HCLCs."

Ch. 74 provides a two-year statute of limitations. Though suit was timely filed, this claim was first pleaded three years afterwards. "TEX. CIV. PRAC. & REM. CODE § 16.068 [provides] that claims raised in a subsequent amended pleading relate back to a timely filed pleading and are not barred by limitations unless the amendment or supplemental pleading 'is wholly based on a new, distinct, or different transaction or occurrence.'" Here, the claim related to the autopsy did not relate back and was thus barred by limitations.

X. Employers' Liability, Labor Law, Whistleblower Act, Job-Related Injuries, FELA, and Workers' Compensation

1. *In re Accident Fund General Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Injured worker was terminated after failing to accept employer's offer of modified-duty work, which was made under a "bona-fide-employer-offer" process under the Workers' Compensation Act. Workers sued employer and workers' compensation carrier, alleging that the modified-duty offer was a sham to set up a pretext for retaliation against worker for making a workers' compensation claim. Worker also sued carrier for conspiracy, aiding and abetting, and tortious interference, alleging that carrier directed and encouraged employer's conduct.

In a *per curiam* opinion, the Texas Supreme Court held that the trial court lacked subject-matter jurisdiction over an employee's suit against a workers' compensation carrier arising from employer's alleged retaliatory discharge because the Texas Workers' Compensation Act provides the exclusive process and remedy for such a claim, applying *In re Crawford & Company*, 458 S.W.3d 920, 925-26 (Tex. 2015) (orig. proceeding) and *Texas Mutual Insurance Company v. Ruttiger*, 381 S.W.3d 430, 444, 456 (Tex. 2012). "The Workers' Compensation Act 'provides the exclusive procedures and remedies for claims alleging that a workers' compensation carrier has improperly investigated, handled, or settled a workers' claim for benefits.'"

In *Crawford*, Supreme Court applied this bar to

hold "a host of tort, contract, and statutory claims could not go forward against the carrier in the trial court." "Not all statutory and common-law claims against a carrier run counter to the Act, but at the same time, neither a claim's label nor the relief requested is determinative of the jurisdictional inquiry."

Here, all of the claims against carrier "derive from its participation in the bona-fide-job-offer process" under the workers' compensation system. They therefore "arise out of the statutory claims-handling process" and, as a result, fall within the exclusive jurisdiction of the Workers' Compensation Division.

2. *State Office of Risk Management v. Martinez*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Government worker was injured in a slip-and-fall while working from home. Government denied her workers' compensation claim on the basis that her injury did not arise out of and in the course and scope of employment. During the proceedings before the Texas Workers' Compensation Commission, government argued that worker violated agency policy by working from home without advance approval of overtime. Hearing officer ruled against worker, finding that worker was "'furthering the business and affairs' of her employer" but that her "injury 'did not involve any instrumentality of the [e]mployer'" and therefore was not compensable. Worker then appealed to the Texas Workers' Compensation Commission Appeals Panel, who ruled for worker and rendered a decision that she sustained a compensable injury.

Government appealed to district court. Both parties moved for summary judgment. In its motion, government did not reassert the argument that worker violated agency policy, but instead argued for the first time that worker violated a statute by working from home. Trial court granted government's motion for summary judgment and denies worker's motion.

Court of appeals reversed the grant of government's motion for summary judgment, holding that because government did not present the statutory-violation ground to the appeals panel, that "issue" was not "decided" by the appeals panel and therefore not within the scope of judicial review under TEX. LAB. CODE § 410.302(b). Court of appeals affirmed denial of worker's motion, however, rejecting her argument that the hearing officer's finding that she was furthering the employer's business, established course and scope and that government waived judicial review by failing to challenge this finding before the appeals panel. Both parties petitioned for review to the Supreme Court.

Under TEX. LAB. CODE § 410.302(b), judicial review of a final decision of the workers' compensation appeals panel "'is limited to issues decided by the appeals panel and on which judicial review is sought.'" Here, the court of appeals erred by conflating the meaning of "issue" under the Labor Code with the meaning of "issue" in the appellate context and "consequently defined the word too narrowly."

After analyzing the use of the word "issues" in the Labor Code, the Supreme Court held that, "within Chapter 410 [of the Labor Code], the term 'issue(s)' refers to the 'disputed issues' that the review officer identifies at the benefit review conference," and that, for these purposes "'issues' are different from 'issues,'" or points of error, "in the appellate context." "'[I]ssue' is a term that stands in useful contrast to 'argument,'" such that "if the parties offer a certain point as an argument on a particular issue, that point will not normally be an issue itself."

Here, the "issue" was whether worker was in the course and scope of employment. Whether worker violated a policy or a statute are arguments addressed to that issue, and thus the statutory-violation argument was properly before the trial court.

The Supreme Court disagreed with worker's argument that hearing officer's findings conclusively establish that worker suffered a compensable injury. The definition of a "'compensable injury'" under TEX. LAB. CODE § 401.011(10) "requires that the injury 'arise[] out of and in the course and scope of employment.'" Under Supreme Court precedent, "this requirement has two elements": (1) "the injury must 'relate to or originate in . . . the employer's business;'" and (2) "the injury must 'occur in the furtherance of[] the employer's business.'" While the hearing officer found that worker "was 'furthering the business and affairs of' her employer and that she was in 'the course of her work,'" those findings related only to the second element, and not the first. The hearing officer also found that the "injury 'did not involve any instrumentality' of her employer" and concluded that worker "'did not sustain a compensable injury." Worker "is not free to pick and choose among the hearing officer's findings of fact[,] . . . especially . . . when the conclusion she asks us to draw is contrary to some of the report's findings

of fact, to its main conclusion of law, and to the very decision that the hearing officer used the findings to support."

Government did not waive any issue by failing to challenge these findings before the appeals panel. "The Labor Code makes clear that a hearing officer's incorrect findings of fact are 'errors' but not 'issues.' While issues require individual appeal, errors do not."

3. *Pagayon v. Exxon Mobile Corporation*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Employee at convenience store felt that co-worker was harassing him. Twice he spoke to the manager. Father of employee spoke with co-worker, and they argued. Less than a week later, when father came to pick up employee, a short fight broke out among co-worker, father, and employee. Father was hurt and taken to hospital, where several weeks later he died. A jury found that employer was at fault in large part, and awarded $2M. The Supreme Court reversed and rendered. "[E]mployers sometimes have a duty to control their employees. We have never defined the contours of any general duty, and we do not do so today. We conclude only that an employer in the circumstances presented here has no such duty."

"No general duty to control others exists, but a special relationship may sometimes give rise to a duty to aid or protect others. Employment is such a relationship. We have acknowledged limited instances where an employer has a duty to control its employee and is directly liable when it fails to do so."

The Court has never generally adopted "Section 317 of the *Restatement (Second) of Torts*" concerning a master's duty to control his servant. "Texas law requires the court to be more specific, to balance the relevant factors in determining the existence, scope, and elements of legal duties." "Whether a duty to control employees should be imposed when employers know or should know of the necessity and opportunity for exercising control can be determined only after weighing the burden on the employer, the consequences of liability, and the social utility of shifting responsibility to employers."

The Court has not defined the duty that "should be imposed on employers to prevent employees from harming third persons is difficult to state generally," and does not do so here. In this situation, the risk of an occurrence is small. The foreseeability and likelihood of jury is small. The burden to the employer is significant. The consequences can be extreme. And the social utility is small.

4. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017)

Doctor enters five-year employment agreement with a non-profit to work at a hospital. Employment agreement allows non-profit to terminate doctor without cause with sixty days' notice if doctor's annual practice losses exceed $500,000 at the end of any of the last three years of the contract. Hospital and non-profit have the same owners, as does a practice management company that advises them on physician employment.

During the third year of the contract, doctor has a disagreement with other physicians at the hospital and stops accepting referrals. Vice president of practice management company recommends that the non-profit terminate doctor "without cause" at the end of the year. When doctor's practice losses exceed $500,000 at the end of the third year, the CEO of the hospital, acting on behalf of the non-profit, gives sixty-days' notice that doctor is being terminated without cause. Doctor sues non-profit for breach of contract and sues CEO, hospital, practice management company, and its vice president for tortious interference.

The Supreme Court affirmed the trial court's summary judgment for non-profit on the breach of contract claim because non-profit gave doctor sufficient notice under the contract and the only evidence showed that the annual practice loss exceeded $500,000, thus fulfilling the conditions subsequent under the contract that allowed non-profit to terminate doctor without cause. "'[A]bsent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." Here, as long as the conditions were met, the termination provision was "effectively a 'termination-upon-notice' provision[], and '[a] contract that a party may terminate under such a clause is terminable at will.'"

Because the contract was terminable at will, it was unnecessary for non-profit to prove the grounds on which it terminated doctor. Footnote 6: "Texas courts have long held that when a party properly terminates a contract pursuant to a without-cause provision, the reason for the termination is irrelevant."

The Supreme Court also affirmed the trial court's summary judgment on doctor's tortious interference claim against hospital and CEO, because the undisputed facts showed CEO was acting as an agent of the non-profit when terminating doctor. "To be legally capable of tortious interference, the defendant

must be a stranger to the contract with which he allegedly interfered," and "the general rule is that a corporation's agent cannot tortiously interfere with the corporation's contract, except under limited circumstances."

"[W]hen the defendant is both a corporate agent and the interfering tortfeasor, the plaintiff carries the burden of proving as part of its 'prima facie case' that the agent 'acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests' and thus could not have been acting within the scope of his agency at the time of the interference." In the summary judgment context, where "the summary-judgment record reveals no factual dispute as to the defendant's status as an agent to one party of the underlying contract," the plaintiff has "the burden to prove" this exception "as part of his 'prima facie case'—and to therefore avoid a summary judgment on no-evidence grounds[.]"

The trial court should not have granted a no evidence summary judgment for professional services company. The no evidence motion argued that there was no evidence that professional services company engaged in "'unlawful interference,'" but "interference by an unlawful means is not an essential element of the tort of interference with an existing contract[.]"

However, the trial court properly granted professional services company's traditional motion for summary judgment based on the defense of justification. The "affirmative defense of justification can be based on the exercise of either: (1) one's own legal rights; or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." "A defendant generally establishes justification as a matter of law 'when the acts the plaintiff complains of as a tortious interference are merely the defendant's exercise of its own contractual rights." If the defendant had "a legal right to interfere with a contract, the defendant's motive or good faith underlying the interference is irrelevant." "Conversely, if a defendant cannot establish the defense as a matter of law, the defendant 'can still establish the defense if the trial court determines that the defendant interfered while exercising a colorable right, and the jury finds that, although mistaken, the defendant exercised that colorable right in good faith'" "The defense does not apply when the interference is by illegal or tortious means, such as misrepresentation or fraud."

Here, professional services company and its vice president were responsible for evaluating and advising the non-profit on physician employment, and thus had the legal right to recommend termination of doctor.

5. *Exxon Mobil Corporation v. Rincones,* 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories, including discrimination. The Supreme Court upheld summary judgment for all defendants.

In Texas, "'employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.'"

An "employer discharges an individual or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment. *See* TEX. LAB. CODE § 21.051(1)."

An employee can prove "'discriminatory intent via direct evidence of what the defendant did and said.'" Secondly, the employee can obtain "burden-shifting." He must "establish a prima facie case of race or national-origin discrimination by showing: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) [employer] gave preferential treatment to a similarly situated employee outside the protected class." "'Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct.'" Here, employee did not prove a similarly situated "comparator."

"'An employer . . . commits an unlawful employment practice if the employer . . . retaliates or discriminates against a person who, under this chapter: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.' Opposing a discriminatory practice includes making an internal grievance. A plaintiff must prove '(1) [he] engaged in an activity protected by the [Texas Commission on Human Rights Act][;] (2) an adverse employment action occurred[;] and (3) there exists a causal link between the protected activity and the adverse action.'" Protected "'opposition must at least alert an employer to the employee's reasonable belief that unlawful discrimination is at issue.'"

6. *Harris County Appraisal District v. Texas Workforce Commission*, 519 S.W.3d 113 (Tex. 2017)

Several members of an appraisal district's appraisal review board (ARB) filed for unemployment compensation after their terms had expired or after their hours were reduced. Appraisal district argued that ARB members were not the district's employees for purposes of the Texas Unemployment Compensation Act (TUCA). The Texas Workforce Commission (TWC) determined that they were employees and eligible for unemployment compensation. The Texas Supreme Court agreed.

Under TUCA, "[a] presumption of employment arises upon a showing that an individual is paid for performing services," which "is rebutted only if the alleged employer carries its burden of showing the individual's service is 'free from control or direction under the contract and in fact.'" TWC adopted regulations to assist with this interpretation, which incorporate the common law control test.

Review of an agency's construction of a statute "is de novo, although 'an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration.' Under this serious consideration inquiry, we generally uphold an agency's interpretation of a statute, 'so long as the construction is reasonable and does not conflict with the statute's plain language.'" However, "[i]f an agency does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed.'"

Here, the presumption of employment under TUCA arose because the ARB members were paid by appraisal district. While the ARB members exercised "independent judgment" in their decisions, this did not preclude them "from meeting the definition of 'employment' under TUCA [.]" Also, while the Tax Code defines the qualifications, duties, and powers of ARB members, provides for their independence, and prescribes how they are appointed, it does not define the terms "employee" or "employment," and thus it does not control over TUCA's definition of the terms.

Reviewing the evidence under TWC's twenty-factor test, the Supreme Court held that "evidence falling within many of the . . . factors supports the TWC's finding" that the ARB members were employees of the district.

ARB members also did not fall under TUCA's exemption for those employed "as a member of the judiciary" under TEX. LAB. CODE § 201.603(a)(1)(C). The statute does not define "judiciary," so the Court looked to the "'term's plain or ordinary meaning,'" holding that "the judiciary exemption only applies to members of the judiciary, that is, the judicial branch of government." While they may serve a judicial function, ARB members are not part of the judicial branch of government.

7. *Green v. Dallas County Schools*, ___ S.W.3d ___ (Tex. 2017)(5/12/17)

Employee brought suit after being fired for an episode of incontinence on a school bus. The condition was related to his heart medications. The district claimed employee's disability was his heart condition. The Supreme Court ruled, "No one disputes that DCS fired Green because of his urinary incontinence, and based on the jury charge and the evidence presented, we conclude the jury could have found Green's incontinence was itself a disability."

"Under the Texas Labor Code, an employer 'commits an unlawful employment practice' if it discharges an individual 'because of . . . disability.' TEX. LAB. CODE § 21.051(1). At trial, the parties agreed that, to prevail on his disability-discrimination claim, Green must prove (1) he has a disability, (2) he was qualified for the job, and (3) he suffered an adverse employment decision because of his disability." "'In construing Texas law on [employment discrimination], we consider federal civil rights law as well as our own case law.'"

It was error to limit disability to the heart condition. "Under the Texas Labor Code, a disability includes any 'physical impairment that substantially limits at least one major life activity.' TEX. LAB. CODE § 21.002(6). A 'major life activity' includes activities like 'working,' but also 'the operation of a major bodily function, including . . . functions of the . . . bladder.' Green's urinary incontinence would qualify as a disability if it substantially limited his bladder function or his ability to perform work-related functions."

The "charge did not forbid the jury from finding that Green's urinary incontinence was itself a disability. To the contrary, . . . the charge referred to 'disabilities' in the plural, leaving it to the jury to determine which of his conditions was a disability, and if so, whether DCS terminated him 'because of' that disability."

Employee did not waive argument that his incontinence was a disability. He argued the facts about the employer's awareness of his condition and

need to take a pill, and that he was fired because of his incontinence on the bus. "Further, the charge itself squarely presented that issue. . . . Last, Green did not waive this argument because DCS's appeal from this specific jury verdict necessarily presented that issue to the court of appeals."

Employer argued the decision-maker did not know of the incontinence. But, some evidence shows he did. Moreover, the charge instructed that "DCS could act 'through its officers and employees,' not just through its 'decision makers.' DCS did not object to this instruction, so we must measure the sufficiency of the evidence in light of the jury instruction."

8. *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017)

Resident doctor sought immunity, but the Supreme Court ruled she was not an employee under the control of the governmental unit.

9. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

After nurse reported a doctor to hospital for not obtaining informed consent for a c-section, nurse's employer no longer scheduled her to work at hospital. After a jury verdict for nurse, the Supreme Court reversed and rendered, saying nurse "failed to establish that [hospital] illegally retaliated against her or tortuously interfered with her contract with" her employer.

TEX. HEALTH & SAFETY CODE § 161.135 proscribes retaliation "'against a person who is not an employee for reporting a violation of law.' A plaintiff alleging a violation of this section bears the burden of proof to establish the claim, but the statute provides 'a rebuttable presumption that the plaintiff was retaliated against' under specified circumstances. One such circumstance arises if, within sixty days 'after the date on which the plaintiff made a report in good faith,' the hospital" takes an adverse action against the person.

An issue is whether the reported act actually violated the law, or simply whether the person in good faith believed it did. The "Whistleblower Act 'requires only a good-faith belief that a violation of law has occurred.'" Here, three other sections provide guidance. Based upon them, the Court concludes "the statute promotes reporting all conduct in the health-care context that a reasonable person would conclude constitutes a violation of law . . . by protecting those who make such reports. . . ." It "permits the plaintiff to sue for retaliation if the plaintiff reported a violation of law in good faith."

In this context, "good faith" means "'that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience.'" Here, because the nurse did not actually hear the doctor speak to the patient when he obtained informed consent, "no evidence . . . demonstrates that [nurse's] subjective belief was objectively reasonable in light of her training and experience."

"Texas law recognizes two types of tortious-interference claims: one based on interference with an existing contract and one based on interference with a prospective business relationship. Tortious interference with a prospective business relationship requires a finding that the defendant engaged in independently tortious or unlawful conduct; interference with an existing contract does not." Footnote 6: The "'terminable-at-will status of a contract is no defense to an action for tortious interference with its performance.'"

"To prevail on a claim for tortious interference with an existing contract, [nurse] had to present evidence that [hospital] induced [nurse's employer] to 'breach the contract,' and thus interfered with [her] 'legal rights under the . . . contract.'" Here, there is no evidence of interference with an existing contract. Employer "had not agreed to schedule nurse at [that hospital], or indeed at any hospital."

"Legal justification is a defense to tortious interference when 'one is privileged to interfere with another's contract' either by 'a bona fide exercise of his own rights' or 'if he has an equal or superior right in the subject matter to that of the other party.'" Legal justification or excuse "'only protects good faith assertions of legal rights.'"

10. *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017)

Prior opinion, dated 12/9/16 (*see below*), was reissued with some changes in phrasing, but with generally the same holding.

11. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. Despite a lack of evidence of causation, the Supreme Court reversed in part a summary judgment for attorney.

"Generally, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." "In *Kinzbach*, we held that the client was not required to prove damages when he established that a defendant breached a fiduciary duty and obtained a 'secret gain or benefit.'" An "agent should not escape liability for, and retain the profits from, breaching the duty of loyalty to a principal simply because the principal might not be able to prove that the breach caused damages."

"In *Burrow v. Arce*, we . . . held that in the attorney-client context, 'a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.'"

"'A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter.'"

"'It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for [the agent's] compensation.' Pragmatically, fee forfeiture also serves as a deterrent. The central purpose . . . 'of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.'"

In "*Kinzbach* evidence of causation was not necessary because the remedy sought was equitable forfeiture of an improper benefit received by the agent."

For "the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. . . . On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought."

A "party cannot be a co-conspirator without knowledge of the wrong intended to be committed."

Even "assuming that Parker's failure to immediately disclose that the money was gone was unlawful . . . the church did not provide evidence that Parker's failure caused actual damages to the church."

"The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed."

Courts of appeals have "determined that [an aiding and abetting] claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff."

"While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place."

No joint enterprise existed because "there is no evidence that Parker agreed with Lamb to either steal the church's money or share that money." Parker's paychecks do "not comprise evidence that Parker had a mutual right to control and manage the stolen money, entered into a joint venture to steal the church's money, or had an agreement with Lamb to share profits and losses from the theft of the church's money." There was no express or implied agreement for a joint venture.

12. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

After a waitress was sexually assaulted at work by manager, she sued the restaurant and manager. The defense asserted that the Texas Commission on Human Rights Act preempted. The Supreme Court disagreed. Where "'the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts.' However, where the gravamen of the plaintiff's case is assault, we hold that the TCHRA does not preempt a common law assault claim. Because, on this record, the gravamen of B.C.'s claim is assault, we hold that Steak N Shake has not established, as a matter of law, that B.C.'s claim is preempted by the TCHRA."

"The TCHRA 'is modeled after federal law with the purpose of executing the policies set forth in Title VII of the federal Civil Rights Act of 1964.' Combating gender-based discrimination is one of those policies. Accordingly, 'Texas courts look to analogous federal law in applying the state Act.'"

"'Sexual harassment is a recognized cause of action under Title VII and the TCHRA,' and when pursuing a sexual harassment claim there are generally two types: quid pro quo and hostile work environment." Sexual "harassment is not a recognized common law tort in Texas."

This case differs from *Waffle House*. There, the frequency was greater, and here the severity is greater. Also, there, the claims were for negligent supervision and retention; here, the theory is assault, committed by an alleged vice principal of Steak N Shake. It is "distinguished based on the severity and frequency of the assailant's conduct, the nature of the plaintiff's claims, and the fundamental theory of potential employer liability." Footnote 3: "'When actions are taken by a vice-principal of a corporation, those acts may be deemed to be the acts of the corporation itself.'"

Proving a claim in *Waffle House* involved "the same factual predicate" as a claim under the TCHRA.

The public policy the TCHRA "advances is wholly inapposite to claims against individual assailants."

Here, plaintiff did not allege a prior of assaultive behavior, a hostile work environment, or tied sexual favors to job performance. "Therefore, where the gravamen of a plaintiff's claim is assault, absent the Legislature's proscription otherwise, a plaintiff must be able to pursue his or her common law claims, even when the alleged assault occurred in the workplace and the claims are against the employer."

13. *Laverie v. Wetherbe*, ___ S.W.3d ___ (Tex. 2016)(12/9/16)

Texas Tech professor sued another for defamation alleging she said he had an inside track to be appointed as dean and that he used listening devices. Her motion for summary judgment asserting was denied because she had not demonstrated the lack of her own personal motive. The Supreme Court reversed. "Government employees are not required to prove their subjective intent behind an allegedly tortious act in order to be dismissed from a suit pursuant to the Tort Claims Act's election-of-remedies provision."

The "scope-of-employment analysis in *respondeat superior* cases . . . concerns only whether the employee is 'discharging the duties generally assigned to her.'"

The scope-of-employment analysis is objective: "Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." The "'presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty, and in the prosecution of the master's work.'"

The Restatement's position is "that '[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.'" An "employee whose conduct is unrelated to his job, and therefore objectively outside the scope of his employment, is engaging in that conduct for his own reasons."

14. *Texas Department of Insurance, Workers' Compensation Division v. Jones*, 498 S.W.3d 610 (Tex. 2016)

Worker's compensation claimant settled with carrier for "partial" eligibility for SIBs for a certain time period. TDI appealed the trial court's approval, arguing the evidence did not fit the statutory scheme. The Supreme Court reversed. "Where supplemental income benefits are concerned, settlements cannot bypass a statutory formula, nor can they facilitate benefits where none were due as a matter of law."

To cut costs, the statute constrains judicial review and provides strict formulae for benefits. "Eligibility for benefits requires satisfaction of detailed and particular conditions, and courts do not have carte blanche to approve settlements awarding benefits that clash with these criteria."

Parties can seek judicial review of agency determinations of the eligibility for SIBs; the claimant must have actively sought employment to be eligible. Here, the trial court did not make factual findings of employment searches.

"When there is no dispute over whether the worker satisfied the eligibility requirements during a particular quarter, a court can still approve settlements of SIBs claims."

"The Labor Code and Division regulations provide a detailed formula for the calculation of SIBs, and this formula is one of the 'appropriate provisions of law' to which all SIBs settlements must adhere." "A settlement that 'on its face' does not comply with all appropriate statutory provisions 'is void.'" And, courts must approve them.

"We construe the Workers' Compensation Act, like other statutes, by considering the plain meaning of the text, given the statute as a whole." A settlement must "adhere" to "appropriate" provisions. "The verb 'to adhere' means 'to bind oneself to observance.'" "The adjective 'appropriate' denotes that which is 'specially suitable' with respect to the word or phrase it

modifies."

"Therefore, we hold that a court can only approve settlements that are strictly consistent with—indeed, settlements which 'adhere[] to'—the formula for calculating SIBs awards."

"[C]ivil litigants are generally free to settle whenever, and on whatever terms, they wish. . . . But while Texas public policy generally favors the settlement of legal disputes, the workers' comp scheme imposes special rules." The "Legislature extensively reformed the workers' compensation framework in order to discourage opportunistic suits seeking small-money judgments—suits prone to generating settlement awards regardless of their underlying merits."

SIBs "awards are typically relatively small compared with the costs of going to trial, and as a result are particularly vulnerable to the sort of nuisance suits that the Legislature sought to curb." The parties can still settle cases, though. They could "agree that the claimant was eligible for SIBs in one period but not another, and settle the case accordingly."

15. *Union Pacific Railroad Company v. Nami*, 498 S.W.3d 890 (Tex. 2016)

Railroad worker contracted West Nile Virus from mosquitoes, contending that railway failed to mow right-of-way, failed to provide repellant, and failed to secure compartment of rail car. The Supreme Court reversed a verdict for him under FELA, holding "the *ferae naturae* doctrine applies, and thus Union Pacific owed Nami no duty to prevent his infection with mosquito-borne West Nile virus."

The FELA provides that "'[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence . . . of such carrier . . . .' FELA thus imposes on railroads the duty to use reasonable care in providing their employees a safe workplace." "FELA liability is generally based on common-law negligence principles. One well-established principle, part of the doctrine of *ferae naturae*, limits a property owner's liability for harm from indigenous animals that he has not attracted to the property."

Only explicit alterations in the FELA constitute a departure from the common law; so, "'although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis.'" "In applying FELA, we look to the common law, not of Texas or any particular jurisdiction, but in general."

Departing from common law, the causation element in an FELA case "'is as broad as could be framed.'" It is met when the employer's "'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'"

But, the FELA is not worker's compensation, and the employer is not the "'insurer of the employee's safety.'"

Footnote 13: "Reasonable foreseeability [of harm] is *necessary* for FELA liability, but it is not *sufficient*."

"First, negligence means the failure to use ordinary care—failing to do what a reasonable person like the defendant would have done under the same or similar circumstances—to protect against unreasonable risk of harm. Second, 'an employer's duty to provide a safe workplace . . . always exists', and with regard to conditions on the premises, the duty is identical to that owed by property owners to invitees. And finally, an employer is not an insurer of an employee's safety; there are exceptions to the duty to provide a safe place to work."

Under "the doctrine of *ferae naturae*, a property owner owes an invitee no duty of care to protect him from wild animals indigenous to the area unless he reduces the animals to his possession, attracts the animals to the property, or knows of an unreasonable risk and neither mitigates the risk nor warns the invitee."

Since the doctrine of *ferae naturae* is not excluded by the FELA, it is entitled to "great weight." Here, mosquitoes invoke the doctrine. And the employer did not increase the risk.

16. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95. The Supreme Court ruled: "'Under the theory of respondeat superior, . . . an employer may be vicariously liable for the negligent acts of its employee if the employee's actions are within the course and scope of his employment.' Thus, when an employee acts negligently within the course and scope of employment, respondeat superior permits a person injured by that action to sue the employee's employer directly to recover all damages caused by the employee's negligence."

17. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved instead that he was not]. . . . Coverage is therefore precluded as a matter of law."

"TEX. LAB. CODE § 406.033(a) . . . [prohibits] employers that opt out of the workers' compensation system from asserting certain common law defenses to an employee's claim for damages resulting from personal injury or death within the course and scope of employment[]." Footnote 7: "Texas and Oklahoma are currently the only states to allow private employers to opt out of the workers' compensation system."

"Most CGL policies have provisions that exclude coverage for claims that would otherwise be covered under workers' compensation insurance, which is required in most states. . . . CGL policies were never meant to cover claims by employees against their employers." "Most CGL policies now include some kind of express leased worker exclusion."

Under the policy, a "leased-in worker is a person who performs work for the insured under an agreement with another allowing temporary use of the worker, even though the leased worker would not be an employee of the insured." This is not mutually exclusive with an independent contractor. Footnote 19: "We do not suggest that the definition of "leased-in worker" used in this case should be applied in any other case."

Here, deceased "was a temporary worker on each of . . . seven rigs because his services as a derrick hand would not be needed unless [rig owner] entered into a new drilling contract for a similar project."

18. *TIC Energy and Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016)

Plaintiff worked at plant where he was covered by "an owner-controlled insurance program (OCIP)." He sued subcontractor after he was injured and lost his leg. The subcontractor sought the "exclusive-remedy" defense of worker's compensation under the "the general contractor's written agreement to provide workers' compensation insurance to the subcontractor." It had not paid for coverage in its bid, but it assumed the "responsibilities of an employer" over its employees. The Supreme Court ruled that the employer was shielded by the workers' compensation bar. Specifically, "section 406.122(b) is a general rule and 406.123 is a permissive exception. [Here,] . . . the general contractor is the subcontractor's statutory employer under section 406.123, [so] the subcontractor is the general contractor's deemed employee for purposes of the exclusive-remedy defense."

"The Texas Workers' Compensation Act provides reciprocal benefits to subscribing employers and their employees. Covered employees sustaining work-related injuries are guaranteed prompt payment of their medical bills and lost wages without the time, expense, and uncertainty of proving liability under common-law theories. In exchange, the Act prohibits employees from seeking common-law remedies from their employers by making workers' compensation benefits an injured employee's exclusive remedy. The exclusive-remedy defense extends to the employer's servants. . . ."

Footnote 8: "An OCIP is designed to secure insurance, including workers' compensation insurance, at a reasonable price for all workers at a job site or construction site. . . . '[Without an OCIP,] then each contractor and subcontractor has to procure its own insurance and the higher cost of the insurance is passed on to the State.' . . . An OCIP allows for a coordinated risk management and safety program for workers and visitors to the construction site. An OCIP also provides for insurance premium rebates to the policy owner for good construction safety records.'"

A general contractor who purchases compensation for its subcontractors "'becomes the statutory employer of its subcontractor's employees, and is thus entitled to the benefits conferred on employers by the Act.'" A contractor can be covered even it does not purchase the policy directly. The Court provides a construction "of section 406.123 that 'favors blanket coverage to all workers on a site' [because that] accords with legislative intent and the 'Legislature's 'decided bias' for coverage.'"

"Under section 406.122(b) of the Labor Code, a subcontractor is not an employee of the general contractor if the subcontractor (1) is operating as an independent contractor and (2) has agreed in writing to assume the responsibilities of an employer for the performance of the work. However, section 406.123 . . . expressly confers statutory-employer

status on general contractors who provide workers' compensation insurance to their subcontractors pursuant to a written agreement." "Mutual protection from personal-injury claims by those engaged in a common endeavor is valuable and a significant component of the statutory scheme."

Here, "section 406.122 precedes section 406.123, and typically, a general rule is iterated before its exceptions, not after. Further, though a statutory heading does not limit or expand a statute's meaning, the heading can inform the inquiry into the Legislature's intent. The headings here confirm a rule/exception model, rather than the opposite." The fact that section 406.122 was enacted after 406.123 and therefore provides an exception "involves a statutory canon of construction we consult only in the event of a conflict."

19. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"The Texas Optometry Act prohibits commercial retailers of ophthalmic goods from attempting to control the practice of optometry. Section 351.603(b) . . . authorizes the Texas Optometry Board . . . and the Attorney General to sue a violator for 'a civil penalty not to exceed $1,000 for each day of a violation'. Section 351.605 provides that '[a] person injured as a result of a violation . . . is entitled to the remedies in . . . Section 351.603(b).'"

"The Attorney General and the Board may enforce this prohibition [in setting optometrists' hours] by a suit for injunctive relief, a civil penalty not to exceed $1,000 per day, and attorney fees. A person injured by a violation 'is entitled to' the same relief as well as damages. A violation is also actionable under the Texas Deceptive Trade Practices-Consumer Protection Act and is a misdemeanor. . . ."

The "Act allows for a private suit for damages as well as enforcement by the Attorney General and the Board."

The Act caps civil penalties "at $1,000 per day. But there is no limit on the number of days that a violation can occur, and thus no limit on the amount of civil penalties that a claimant can receive for a single violation."

"We conclude that a private recovery of civil penalties under the Act is subject to Chapter 41."

20. *McMillen v. Texas Health & Human Services Commission*, 485 S.W.3d 427 (Tex. 2016)

Whistleblower case. Employee of agency, who was an attorney, reported that agency wrongly collected funds from Medicaid, and notified the head of the Office of Inspector General Internal Affairs Division. When he filed suit after he was fired, agency claimed he did not notify an appropriate authority. The Supreme Court disagreed. "Because the reported-to persons had power beyond internal discipline to regulate under or enforce the law allegedly violated, they were an appropriate law-enforcement authority under the Whistleblower Act."

The Whistleblower Act "under certain circumstances waives a state entity's immunity from suit for retaliatory discharge." If "protects 'a public employee who in good faith reports a violation of law . . . to an appropriate law enforcement authority.'"

"To be in 'good faith,' an employee's belief about the reported-to authority's powers must be 'reasonable in light of the employee's training and experience.' An authority's power to discipline its own or investigate internally does not support a good-faith belief that it is an appropriate law-enforcement authority. Instead, the authority must have outward-looking powers."

Determining the appropriateness of the report here involved consideration of the particular law that the employee claimed was violated. The law, 42 U.S.C. 1396p(b), "generally prohibits any 'adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan,' with limited exceptions under which 'the State shall seek adjustment or recovery.' . . . Texas law incorporates this federal statute. . . ." Given this, the "OIG is an appropriate law-enforcement authority." It investigates fraud or abuse related to Medicaid. That includes "providers and recipients" as well as the proper implementation of federal law. "To the extent other Texas agencies violate section 1396p(b), the OIG also has power to enforce the law."

An "appropriate authority 'include[s] someone within an OIG or even an OIG within the same agency as the whistleblower, so long as the OIG has outward-looking law-enforcement authority.'"

Y. Dram Shop

No cases to report.

Z. Securities Law and Investments

1. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Footnote 3: "'Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.'"

AA. Negligent Misrepresentation

No cases to report.

BB. Fraud

No cases to report.

CC. Conspiracy

1. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. Despite a lack of evidence of causation, the Supreme Court reversed in part a summary judgment for attorney.

"An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement."

"'For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement.'"

A "party cannot be a co-conspirator without knowledge of the wrong intended to be committed."

Even "assuming that Parker's failure to immediately disclose that the money was gone was unlawful . . . the church did not provide evidence that Parker's failure caused actual damages to the church."

"The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed."

"[T]he fair-notice standard measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response. Claiming that Parker 'knowingly' participated in Lamb's breach of fiduciary duty does not give Parker information sufficient to understand that the church was asserting a claim for aiding and abetting. This is especially true because several of the other claims the church asserted—e.g. civil conspiracy and joint venture—required proof of knowing participation."

DD. Tortious Interference

1. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017)

Doctor enters five-year employment agreement with a non-profit to work at a hospital. Hospital and non-profit have the same owners, as does a practice management company that advises them on physician employment.

During the third year of the contract, doctor has a disagreement with other physicians at the hospital and stops accepting referrals. Vice president of practice management company recommends that the non-profit terminate doctor "without cause" at the end of the year, and the CEO of the hospital, acting on behalf of the non-profit, gives sixty-days' notice that doctor is being terminated without cause. Doctor sues sues CEO, hospital, practice management company, and its vice president for tortious interference.

The Supreme Court also affirmed the trial court's summary judgment on doctor's tortious interference

claim against hospital and CEO, because the undisputed facts showed CEO was acting as an agent of the non-profit when terminating doctor. "To be legally capable of tortious interference, the defendant must be a stranger to the contract with which he allegedly interfered," and "the general rule is that a corporation's agent cannot tortiously interfere with the corporation's contract, except under limited circumstances."

"[W]hen the defendant is both a corporate agent and the interfering tortfeasor, the plaintiff carries the burden of proving as part of its 'prima facie case' that the agent 'acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests' and thus could not have been acting within the scope of his agency at the time of the interference." In the summary judgment context, where "the summary-judgment record reveals no factual dispute as to the defendant's status as an agent to one party of the underlying contract," the plaintiff has "the burden to prove" this exception "as part of his 'prima facie case'—and to therefore avoid a summary judgment on no-evidence grounds[.]"

The trial court should not have granted a no evidence summary judgment for professional services company. The no evidence motion argued that there was no evidence that professional services company engaged in "'unlawful interference,'" but "interference by an unlawful means is not an essential element of the tort of interference with an existing contract[.]"

However, the trial court properly granted professional services company's traditional motion for summary judgment based on the defense of justification. The "affirmative defense of justification can be based on the exercise of either: (1) one's own legal rights; or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." "A defendant generally establishes justification as a matter of law 'when the acts the plaintiff complains of as a tortious interference are merely the defendant's exercise of its own contractual rights." If the defendant had "a legal right to interfere with a contract, the defendant's motive or good faith underlying the interference is irrelevant." "Conversely, if a defendant cannot establish the defense as a matter of law, the defendant 'can still establish the defense if the trial court determines that the defendant interfered while exercising a colorable right, and the jury finds that, although mistaken, the defendant exercised that colorable right in good faith'" "The defense does not apply when the interference is by illegal or tortious means, such as misrepresentation or fraud."

Here, professional services company and its vice president were responsible for evaluating and advising the non-profit on physician employment, and thus had the legal right to recommend termination of doctor.

2. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories, including "compelled self-defamation." The Supreme Court upheld summary judgment, ruling that there is no claim in Texas "for compelled self-defamation."

"The elements of a defamation claim 'include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases.' 'Publication' occurs if the defamatory statements are communicated orally, in writing, or in print to some third person who is 'capable of understanding their defamatory import and in such a way that the third person did so understand.' As a general rule a defendant who communicates a defamatory statement directly to the defamed person, who then relays it to a third person, has not published the matter to the third person."

The "publication element of a defamation claim cannot be satisfied by a theory of 'compelled' self-disclosure and there is no independent cause of action for compelled self-defamation." If the "'publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication.'"

3. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

"Tortious interference with a contract occurs when a party interferes with a contract willfully and intentionally and the interference proximately causes actual damages or loss. Justification is an affirmative defense to such a claim and 'is established as a matter of law when the acts the plaintiff complains of as tortious interference are merely the defendant's exercise of its own contractual rights.'"

4. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

After nurse reported a doctor to hospital for not obtaining informed consent for a c-section, nurse's employer no longer scheduled her to work at hospital. After a jury verdict for nurse, the Supreme Court reversed and rendered, saying nurse "failed to establish that [hospital] . . . tortuously interfered with her contract with" her employer.

"Texas law recognizes two types of tortious-interference claims: one based on interference with an existing contract and one based on interference with a prospective business relationship. Tortious interference with a prospective business relationship requires a finding that the defendant engaged in independently tortious or unlawful conduct; interference with an existing contract does not." Footnote 6: The "'terminable-at-will status of a contract is no defense to an action for tortious interference with its performance.'"

"To prevail on a claim for tortious interference with an existing contract, [nurse] had to present evidence that [hospital] induced [nurse's employer] to 'breach the contract,' and thus interfered with [her] 'legal rights under the . . . contract.'" Here, there is no evidence of interference with an existing contract. Employer "had not agreed to schedule nurse at [that hospital], or indeed at any hospital."

"Legal justification is a defense to tortious interference when 'one is privileged to interfere with another's contract' either by 'a bona fide exercise of his own rights' or 'if he has an equal or superior right in the subject matter to that of the other party.'" Legal justification or excuse "'only protects good faith assertions of legal rights.'"

Jury rejected hospital's claim it acted in good faith. Hospital "has not challenged that finding here or in the court of appeals. Its failure to do so prevents us from reversing the trial court's judgment on this ground. 'It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error.' It therefore cannot rely on its justification defense to defeat [nurse's] tortious interference claim."

EE. Bad Faith

No cases to report.

FF. Assault and Battery

1. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

After a waitress was sexually assaulted at work by manager, she sued the restaurant and manager. The defense asserted that the Texas Commission on Human Rights Act preempted. The Supreme Court disagreed. Where "'the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts.' However, where the gravamen of the plaintiff's case is assault, we hold that the TCHRA does not preempt a common law assault claim. Because, on this record, the gravamen of B.C.'s claim is assault, we hold that Steak N Shake has not established, as a matter of law, that B.C.'s claim is preempted by the TCHRA."

Footnote 2: "We have recognized that Texas courts in civil cases use the terms 'assault,' 'battery,' and 'assault and battery' interchangeably."

The public policy the TCHRA "advances is wholly inapposite to claims against individual assailants."

GG. Intentional Infliction of Emotional Distress

1. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017)

Family sued author for intentional infliction of emotional distress alleging she obtained publicity from a newspaper after family's son committed suicide following a car wreck. Author denied making the communication with the newspaper reporter. The Supreme Court ruled she could obtain dismissal under TEX. CIV. PRAC. & REM. CODE, ch. 27. "May a defendant obtain dismissal of a suit alleging such a communication if she denies making it? We hold that she may. We also hold that the communication alleged in this case is not extreme and outrageous to support an action for intentional infliction of emotional distress."

"Clearly, suicide prevention and awareness relate to health, safety, and community well-being, all included in the statutory definition of 'matters of public concern'" of TEX. CIV. PRAC. & REM. CODE, ch. 27.

"Once a movant meets her burden to prove that the Act applies, the burden shifts to the nonmovant to establish by 'clear and specific evidence a prima facie

case for each essential element of the claim in question.' Here, the Tatums' claim is for intentional infliction of emotional distress. This tort has four elements: (1) the defendant acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused the plaintiff emotional distress; and (4) the emotional distress was severe."

Here, plaintiffs failed to meet the second element. It is "only satisfied if the conduct is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' . . . The Tatums' loss was tragic, but Julie Hersh's indirect actions do not meet the high standard for extreme and outrageous conduct."

HH. Libel, Slander, Defamation

1. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017)

Family sued author for intentional infliction of emotional distress alleging she obtained publicity from a newspaper after family's son committed suicide following a car wreck. Author denied making the communication with the newspaper reporter. The Supreme Court ruled she could obtain dismissal under TEX. CIV. PRAC. & REM. CODE, ch. 27. "May a defendant obtain dismissal of a suit alleging such a communication if she denies making it? We hold that she may. We also hold that the communication alleged in this case is not extreme and outrageous to support an action for intentional infliction of emotional distress."

"The Texas Citizens Participation Act. . . provides a procedure for expeditiously dismissing a non-meritorious legal action that 'is based on, relates to, or is in response to the party's exercise of . . . the right of free speech', defined as 'a communication made in connection with a matter of public concern.'"

"The stated purpose of the Act is to 'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law'. Under the Act, '[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, . . . that party may file a motion to dismiss the legal action.' ''Exercise of the right of free speech' means a communication made in connection with a matter of public concern.' ''Matter of public concern' includes an issue related to . . . health or safety . . . .' 'In determining whether a legal action should be dismissed . . . , the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability . . . is based.' '[A] court shall dismiss a legal action . . . if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of . . . the right of free speech.'"

"Section 27.006(a) . . . plainly states that '[i]n determining whether a legal action should be dismissed . . . , the court shall consider the pleadings' as well as affidavits. Indeed, it would be impossible to determine the basis of a legal action, and thus the applicability of the Act, without considering the plaintiff's petition. As we have observed, 'the plaintiff's petition . . . , as so often has been said, is the 'best and all-sufficient evidence of the nature of the action.'' The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations. . . . When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."

"[U]nder Section 27.006(a), the trial court was obliged to consider the Tatums' pleadings irrespective of whether Hersh formally offered them as evidence. Under the Act, a defendant moving for dismissal need show only that the plaintiff's 'legal action is based on, relates to, or is in response to the [defendant's] exercise of . . . the right of free speech'—that is, 'a communication made in connection with a matter of public concern'—not that the communication actually occurred.

"Clearly, suicide prevention and awareness relate to health, safety, and community well-being, all included in the statutory definition of 'matters of public concern.'"

"Once a movant meets her burden to prove that the Act applies, the burden shifts to the nonmovant to establish by 'clear and specific evidence a prima facie case for each essential element of the claim in question.' Here, the Tatums' claim is for intentional infliction of emotional distress. This tort has four elements: (1) the defendant acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused the plaintiff emotional distress; and (4) the emotional distress was severe."

Here, plaintiffs failed to meet the second element. It is "only satisfied if the conduct is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.' . . . The Tatums' loss was tragic, but Julie Hersh's indirect actions do not meet the high standard for extreme and outrageous conduct."

2. *Bedford v. Spassoff*, 520 S.W.3d 901 (Tex. 2017)

Father of boy in youth baseball instruction program posted on Facebook saying that batting coach had an inappropriate relationship with father's wife. Owner of program sued father for defamation among other theories. Owner responded to father's motion to dismiss. But the Supreme Court ruled that the posted "statement cannot be defamatory per se and the plaintiffs failed to establish the necessary damages element by clear and specific evidence." Therefore, the trial court must dismiss the claim and determine attorney's fees.

According to TEX. CIV. PRAC. & REM. CODE, ch. 27, "a defendant may file a motion to dismiss an action that 'is based on, relates to, or is in response to a party's exercise of the right of free speech.' 'In reviewing that motion, the trial court is directed to dismiss the suit unless 'clear and specific evidence' establishes the plaintiffs' 'prima facie case.'"

"The elements of a prima facie case for defamation are: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages, unless the statement constitutes defamation per se."

"Under the Act, more than mere notice pleading is required to establish a plaintiff's prima facie case. Clear and specific evidence means that the 'plaintiff must provide enough detail to show the factual basis for its claim.' 'In a defamation case that implicates the [Act], pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist' a motion to dismiss under the Act. When considering the motion to dismiss, the court considers both the pleadings and any supporting and opposing affidavits."

"A plaintiff asserting a defamation claim 'must plead and prove damages, unless the defamatory statements are defamatory per se.'" Here, it is not. "'While a defamatory statement is one that tends to injure a person's reputation, such a statement is defamatory per se if it injures a person in her office, profession, or occupation.' . . . 'Disparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiff's business or profession.'" Here, the post did not accuse the program of lacking skill to run a baseball organization. So, plaintiff had "the burden of establishing damages by clear and specific evidence."

Plaintiff failed to prove actual damages. Neither "the petition, nor their response to Bedford's motion to dismiss, nor [plaintiff's] affidavit attached to the response, identifies any actual damages." There was no evidence the Facebook post was read, that there were any calls to the program about the post, or that there was lost business. "'[G]eneral averments of direct economic losses and lost profits' do not satisfy the Act's clear-and-specific-evidence standard without 'specific facts illustrating how [a defendant's] alleged remarks about [a plaintiff's] activities actually caused such losses.'"

3. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories, including "compelled self-defamation." The Supreme Court upheld summary judgment, ruling that there is no claim in Texas "for compelled self-defamation."

"The elements of a defamation claim 'include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases.' 'Publication' occurs if the defamatory statements are communicated orally, in writing, or in print to some third person who is 'capable of understanding their defamatory import and in such a way that the third person did so understand.' As a general rule a defendant who communicates a defamatory statement directly to the defamed person, who then relays it to a third person, has not published the matter to the third person."

The "publication element of a defamation claim cannot be satisfied by a theory of 'compelled' self-disclosure and there is no independent cause of action for compelled self-defamation." If the "'publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication.'"

4. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Magazine, in a story with a tag "Crime," labeled plaintiff as a "welfare queen." Magazine moved to dismiss under TEX. CIV. PRAC. & REM. CODE, ch. 27, the TCPA. The Supreme Court ruled that the gist of the article was defamatory. Sometimes "publications can and do cross the line from protected free speech to actionable defamation. Here, Rosenthal presented clear and specific evidence sufficient to support a prima facie case of defamation. . . . [T]herefore . . . dismissal of the claim . . . is not warranted. . . . However, the trial court erred in failing to award D Magazine attorney's fees in light of its dismissal of other [statutory] claims."

Both "the U.S. Constitution and the Texas Constitution robustly protect freedom of speech. But, these safeguards are not unlimited and do not categorically deprive individuals of legal recourse when they are injured by false and defamatory speech." "Federal constitutional protections for speech were 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' The Texas Constitution also explicitly protects freedom of expression. . . ." However, "members of the press are also 'responsible for the abuse of that privilege.' TEX. CONST. art. I, § 8."

"The TCPA is also designed to balance [freedom of press with compensating victims of defamation]. On the one hand, the statute shields 'citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.'" On the other hand, the statute 'protect[s] the rights of a person to file meritorious lawsuits for demonstrable injury.' Under the TCPA, a defendant may file a motion to dismiss a legal action that 'is based on, relates to, or is in response to a party's exercise of the right of free speech.' To avoid dismissal, the plaintiff must establish a prima facie case for each element of the asserted claims by clear and specific evidence. Clear and specific evidence means that the plaintiff 'must provide enough detail to show the factual basis for its claim.' If the plaintiff satisfies this burden, the defendant may still obtain dismissal by 'establish[ing] by a preponderance of the evidence each essential element of a valid defense' to the claim. When considering the motion to dismiss, the court considers both the pleadings and any supporting and opposing affidavits."

The elements of defamation "include: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages (unless the statement constitutes defamation per se)." The "plaintiff bears the burden of proving falsity if the alleged defamatory statements were made by a media defendant over a matter of public concern." Texas applies "a negligence standard in cases involving a private plaintiff seeking defamation damages from a media defendant." This means that "the defendant is negligent if it 'knew or should have known a defamatory statement was false,' unless the content of the false statement would not 'warn a reasonabl[y] prudent editor or broadcaster of its defamatory potential.'"

Historically, "'defamation *per se* has involved statements that are so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish.'"

To make "the initial determination of whether a publication is capable of a defamatory meaning, we examine its 'gist.' That is, we construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.'" Here, considering the gist of the article, "a reasonable person could construe the article as a whole to accuse the plaintiff of fraudulently obtaining public benefits" and plaintiff made a prima facie case of defamation.

The "substantial truth doctrine" provides that "a publication's truth or falsity depends on whether the publication 'taken as a whole is more damaging to the plaintiff's reputation than a truthful would have been.'" A "publication 'with specific statements that err in the details but [that correctly convey the gist of a story is substantially true publication].' Conversely, even if all the publication's individual statements are literally true, the story 'can convey a false or defamatory meaning by omitting or juxtaposing facts.'"

The TCPA generally provides two affirmative defenses: "truth and the fair comment privilege." However, "although truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern. Falsity is thus an element of Rosenthal's defamation claim. By contrast, an affirmative defense, such as the statute of limitations, is 'based on a different set of facts from those establishing' the cause of action and 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.'"

Magazine failed to prove the "fair comment privilege." "The fair comment privilege is an

affirmative defense to a defamation action extending to publications that are 'reasonable and fair comment[s] on or criticism[s] of . . . matter[s] of public concern published for general information.' This privilege applies only if the publication is 'fair, true, and impartial.'"

The court of appeals did have "jurisdiction to consider the magazine's appeal of the trial court's denial of its request for attorney's fees in connection with the partially granted motion to dismiss. . . ." The "trial court erred in awarding no fees."

The TCPA requires awarding attorney's fees if the court dismisses a "legal action," which is not confined to a defamation action and can include, as here, other statutory causes of action.

5. *ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895 (Tex. 2017)

Employee was terminated after supervisors reported in a "Near Loss Report"—used "'any time an incident occurs or [an] environmental or safety risk is observed'"—that employee failed to gauge petroleum product tanks. Employee sued supervisors and employer for defamation. Employer moved to dismiss under Chapter 27 of the Texas Civil Practice & Remedies Code, the Texas Citizens Participation Act (TCPA) or "anti-SLAPP" statute. Employee argued that the TCPA is inapplicable. In a per curiam opinion, the Texas Supreme Court holds that it is.

The TCPA provided for a "two-step procedure": The defendant moving to dismiss must first show "by a preponderance of the evidence that the plaintiff's claim 'is based on, relates to, or is in response to the [movant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association,'" and then "the burden shifts to the plaintiff to 'establish[] by clear or specific evidence a prima facie case for each essential element of the claim in question.'" The case is dismissed if the plaintiff fails to meet his burden, or "if the defendant 'establishes by a preponderance of the evidence each essential element of a valid defense' to the plaintiff's claim.'"

"The TCPA defines 'exercise of the right of free speech' as 'a communication made in connection with a matter of public concern,'" which "'includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace.'"

The Texas Supreme Court holds that the case is determined by the rule announced in 2015 in *Lippincott v. Whisenhunt* that "when construing the TCPA's 'right of free speech' prong, 'the plain language of the Act merely limits its scope to communications involving a public subject—not communications in the public form.'" Here, supervisors' statements, "although private . . . , related to a 'matter of public concern'" because the purpose of the task employee was accused of failing to perform was "at least in part" to "reduce [] environmental, health, safety, and economic risks."

6. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Brady sued newspaper and reporter for stories about his arrests and the conduct of his father, a chief deputy sheriff. The Supreme Court reversed a trial court verdict for plaintiff, holding that the charge did not properly set the burden of proof: a "private individual who sues a media defendant for defamation over statements of public concern must prove the statements were false. Further, to recover punitive damages, such a plaintiff must prove the defendant acted with 'knowledge of falsity or reckless disregard for the truth.'" The Court remanded, rather than rendered, because there was some evidence of damages.

Because the defamation occurred in a newspaper article, "the threshold question is whether the article wholly embraces matters of public concern." This, in turn, governs the charge. The "First Amendment requires private individuals to prove that statements made by media defendants on matters of public concern are false," rather than requiring the defendant to prove truthfulness.

"The First Amendment also requires that a private plaintiff prove actual malice, that is, 'knowledge of falsity or reckless disregard for the truth,' before recovering anything more than actual damages for a statement on a matter of public concern. But here 'malice' in the jury charge referred only to an intent to cause injury or conscious indifference to the risk of injury; it was not tied to the truth or falsity of the statements. Because 'the constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff,' proof of bad motive or ill will is not enough. Thus, in addition to proving the traditional malice' required to obtain exemplary damages under Texas law, one seeking exemplary damages for speech on a public matter must also prove constitutional 'actual malice.'" Footnote 2: "At times, 'actual malice' may evidence traditional malice. . . . But evidence of actual malice alone does not relieve the plaintiff of

proving traditional malice also to obtain punitive damages. . . ."

A "matter of public concern" is speech that "'can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" It is determined by the "'content, form, and context.'"

Even "if 'the general subject matter of a publication may be a matter of legitimate public concern,' some of the details may not be. But if a 'logical nexus' exists between these details 'and the general subject matter' of the article, then they are reasonably included as a matter of public concern." The "truth or falsity of [various] details does not change that they are a matter of public concern and thus does not affect [plaintiff's] burden under the First Amendment."

Here, defendants objected that the charge did not require plaintiff to prove the falsity of the statements, and to prove "actual malice before obtaining punitive damages. The media defendants objected to the charge . . . [and submitted] in writing proposed questions requiring [plaintiff] to prove falsity and actual malice. The media defendants raised the same point before the court of appeals. . . . The media defendants have preserved error, and the error is reversible."

"Damages . . . are not always an essential element of defamation. If the statement is defamatory *per se*, then nominal damages may be awarded without proof of actual injury because mental anguish and loss of reputation are presumed. . . . [I]f the plaintiff seeks actual damages for loss of reputation or mental anguish (general damages) or for economic loss (special damages), he must present evidence of the existence and amount of these damages. . . . The plaintiff can vindicate his name and obtain nominal damages without evidence of actual injury." Nominal damages can be recovered without "evidence of actual injury." They are traditionally one dollar, and pose no "threat to free expression."

If a defamatory "statement is not defamatory *per se*, then nominal damages are not recoverable, and the plaintiff must prove actual damages to prevail. Absent evidence of actual damages in a case of defamation *per quod*, judgment should be rendered for the defendant." Footnote 4: "Defamation *per quod* is '[d]efamation that either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but not a statement that is actionable per se.'"

"Compensatory damages in defamation cases must compensate for '*actual* injuries' and cannot merely be 'a disguised disapproval of the defendant.' But when the damages are for noneconomic losses, such as mental anguish or lost reputation, the jury must be given some latitude because these general damages are, by their nature, incapable of precise mathematical measure. . . . Showing that the community was aware of and discussed the defamatory statements is not enough; there must be evidence that people believed the statements and the plaintiff's reputation was actually affected."

Loss of a job "is not evidence of loss of reputation unless the evidence connects it to the defamation."

Here, because "some evidence of actual damages exists, the court of appeals properly remanded the case for a new trial instead of rendering judgment."

7. *KBMT Operating Company, LLC v Toledo*, 492 S.W.3d 710 (Tex. 2016)

Defamation case against TV station for report concerning a doctor's discipline by the Texas Medical Board. The Supreme Court ruled that plaintiff did not prove a prima facie case by clear and specific evidence as required by Ch. 27. The media may report official proceedings without independently investigating them.

A "private individual who sues a media defendant for defamation over statements of public concern bear the burden of proving that the statements were false—that is, . . . not substantially true. . . . [T]he truth of a media report of official proceedings . . . must be measured against the proceedings themselves, not against information outside the proceedings. The media may report on the proceedings themselves without independently investigating the matters involved. Because . . . the plaintiff . . . did not meet her burden under [Ch. 27] . . . that the media defendants' broadcast was false, an essential element of her defamation claim, . . . the defendants were entitled to dismissal."

Ch. 27 "allows for the early dismissal of a legal action implicating the defendant's free-speech rights unless the plaintiff can establish each element of her claim with clear and specific evidence." A suit for defamation "is based on [the] exercise of [the] right of free speech."

"At common law, truth was a defense in a suit for defamation; falsity was not an element of the action." However, under the constitution, courts "'long ago shifted the burden of proving the truth defense to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern.'" *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013). When a statement "is substantially true, it is not false. The test for

whether a report. . . is substantially true is whether the 'broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been'. This requires determining the . . . gist to the ordinary listener—and comparing it to a truthful report."

"The media have a common-law privilege to report on judicial proceedings without regard for whether the information from such proceedings is actually true." "While the defendant must still prove the applicability of the privilege—that the defendant is part of the media and that the statements complained of were an account of official proceedings of public concern—the plaintiff must prove the statements were false." Thus, "a private individual who sues a media defendant for defamation over a report on official proceedings of public concern has the burden of proving that the gist of the report was not substantially true—that is, that the report was not a fair, true, and impartial account of the proceedings. That burden is not met with proof that the report was not a substantially true account of the actual facts outside the proceedings."

Here, the Court believes an ordinary listener would infer the patient was an adult. Plaintiff's proof that "ordinary listeners were misled . . . was her affidavit which, besides being self-serving, was conclusory hearsay. Just last year we held that such "'[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the [Act].'" She did not identify any ordinary listener. Footnote 29: "Evidence of what an ordinary listener could have understood is not evidence of what the listener would have understood. The test for substantial truth and its application must be guided by the fact that 'since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive' . . . ,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."

8. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Trial court dismissed defamation suit under Ch. 27. Defendant appealed, asserting the court's award of attorney's fees was inadequate. The Supreme Court ruled the lower courts "used the wrong standard in determining the attorney's fees. . . ."

Ch. 27 "provides for the expedited dismissal of a legal action that implicates a defendant's right of free speech or other First Amendment right when the party filing the action cannot establish the Act's threshold requirement of a prima facie case. A successful motion to dismiss . . . entitles the moving party to an award of court costs, reasonable attorney's fees, and other expenses. . . ." The court can also award "sanctions 'sufficient to deter' future 'similar actions.'"

Under Ch. 27, an award of attorney's fees is mandatory.

Here, "the statute does not include a comma after 'other expenses' or after 'legal action,' and their absence indicates an intent to limit the justice-and-equity modifier [for the award of attorney's fees] to the last item in the series." Therefore, unlike fees, "'other expenses incurred in defending the legal action' are also recoverable, but only 'as justice and equity may require.'"

Ch. 27 requires an award of "'reasonable attorney's fees' to the successful movant [to dismiss]. A 'reasonable' attorney's fee 'is one that is not excessive or extreme, but rather moderate or fair.' That determination rests within the court's sound discretion, but that discretion, under [Ch. 27], does not also specifically include considerations of justice and equity."

9. *Greer v. Abraham*, 489 S.W.3d 440 (Tex. 2016)

Former school district board member, supporting his friend for office, attended an opponent's rally. It was wrongly reported on an internet blog that he heckled and was forcibly removed, so he sued for defamation. The Supreme Court ruled that "actual malice [is] an element of the public official's defamation claim."

"A public official who sues for defamation must prove the elements of the tort and, as a constitutional requirement, that the defendant published the falsehood knowing it to be false or acting with reckless disregard for whether it was true or false. This . . . [is] the actual-malice element. . . ." "Actual malice in this context does not mean bad motive or ill will but rather knowledge of, or reckless disregard for, the falsity of a statement."

Ch. 27 "requires the dismissal of legal actions that impinge on First Amendment rights unless 'the party bringing the legal action establishes by clear and specific evidence a prima facie case. . . .'"

Ch. 27 "provides an expedited procedure for the early dismissal of groundless legal actions that impinge

on First Amendment rights. The Act imposes the initial burden on the movant . . . to establish by a preponderance of the evidence 'that the . . . [suit relates to] the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.' The Act then shifts the burden to the nonmovant . . . stating that the court may not dismiss 'if the party bringing the legal action establishes by clear and specific evidence a prima facie case. . . .'"

Plaintiff requested discovery. This was necessary because, when the defendant files a motion to dismiss under Ch. 27 that "typically suspends all discovery . . . until the court rules on the motion." Here, the defendant asserted the "journalist's privilege" and refused to reveal his sources.

Ch. 27 requires "the trial court to rule on a motion to dismiss within thirty days of the motion's hearing." The trial court found plaintiff did not bring suit to deter defendant from exercising his constitutional rights. Footnote 1: "This finding is the only one expressly required by [Ch. 27] if requested by the party seeking dismissal. The Act does not otherwise expressly address findings of fact and conclusions of law, but neither does it forbid them."

The United States Constitution "'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" The "constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff.'" "'[O]fficial conduct' . . . [does] not merely include the official's performance of official duties but also the official's fitness for office. . . ." An "express reference" to "official capacity" is unnecessary.

"'A charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule. . . .'"

The defamatory statement here was on the web. That "the offending publication may circulate beyond the public official's own community does not diminish its effect within the official's community." It merely must circulate in the community where the official is so well known that the public associates him with the office.

Plaintiff's "pleadings and affidavit are significant here because [Ch. 27] identifies them as the primary 'evidence' for determining whether a legal action should be dismissed under the Act."

10. *TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, 490 S.W.3d 29 (Tex. 2016)

Interlocutory appeal from denial of a special appearance, which presents the Supreme Court's "first opportunity to address specific jurisdiction in the context of defamation claims arising from media broadcasts." Mexican broadcasters ran allegedly defamatory news stories on celebrity who resided in Texas. Stories were broadcast over the air on signals that originated in Mexico but reached and were viewable in parts of Texas. Celebrity sued broadcasters for defamation in Texas.

The Texas long-arm statute "reaches 'as far as the federal constitutional requirements for due process will allow.'" Thus, a Texas court may only exercise personal jurisdiction over a nonresident defendant if "(1) the defendant has established 'minimum contacts' with the state and (2) the exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice.'"

The minimum-contacts test requires that "the defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,'" such that the defendant "'could reasonably anticipate being hauled into court there.'" The Court analyzed four cases—three from the U.S. Supreme Court cases and one from the Texas Supreme Court—on purposeful availment.

In *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) the U.S. Supreme Court held that a nonresident magazine that had defamed a nonresident plaintiff had minimum contracts where the magazine had "'continuously and deliberately exploited'" the forum state's market by distributing thousands of copies of its magazine in the forum state.

In *Calder v. Jones*, 465 U.S. 783 (1984) the U.S. Supreme Court held that the a nonresident reporter and editor had minimum contacts where they defamed a resident plaintiff in a tabloid article that concerned the plaintiff's activities in the forum state, was drawn from sources in the forum state, and caused the plaintiff to suffer "'the brunt of the harm'" in the forum state. Also, as in *Keeton*, the editor and publisher knew that the thousands of copies of the tabloid were distributed in the forum state.

In *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005), which applied *Calder* and *Keeton*, the Texas Supreme Court held that a

nonresident RV dealer did not have minimum contacts with Texas based on misrepresentations made in a phone call with a Texas resident plaintiff who had contacted the dealer to purchase an RV. The *Michiana* Court rejected an argument based on *Calder* that the dealer knew that the "brunt of the injury" would be suffered by a Texas resident in Texas because the sale of a single RV in Texas was not the "substantial presence" the *Calder* defendants had in the forum state. The *Michiana* Court rejected the "'directed-a-tort'" test that was "'based solely upon the effects or consequences' in the forum state," concluding "that 'the important factor was the extent of the defendant's activities, not merely the residence of the victim.'"

In the case *Walden v. Fiore*, ___ U.S. ___ (2014), the U.S. Supreme Court "confirmed our understanding of *Calder* and *Keeton*," where it held that a nonresident police officer did not have minimum contacts with the forum state in a suit by resident plaintiffs for violation of their Fourth Amendment rights through the officer's filing of a false affidavit that resulted in the seizure of their property outside the forum state. The *Walden* Court "reaffirmed that the specific-jurisdiction inquiry 'focuses "on the relationship among the defendant, the forum, and the litigation."' Thus, 'the relationship must arise out of contacts that "the defendant *himself*" creates with the forum State,' and the 'analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.'" "'[M]ere injury to a forum resident is not a sufficient connection to the forum,'" but instead "'an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.'"

Here, celebrity contended that broadcasters: (1) "'directed a tort' at [celebrity] in Texas;" (2) "broadcast allegedly defamatory statements in Texas;" (3) "knew the statements would be broadcast in Texas;" and (4) "intentionally targeted Texas through those broadcasts." The Court held that "the evidence of the first three contentions does not establish purposeful availment, but the evidence of the fourth one does."

The contention that broadcasters "directed a tort" at a Texas resident by directing defamatory statements at a plaintiff who lives in and suffered injuries in Texas was insufficient to establish specific jurisdiction. "There is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." "Under *Keeton*, *Calder*, *Walden*, and *Michiana*, the fact that the plaintiff lives and was injured in the forum state is not irrelevant to the jurisdictional inquiry, but it is relevant only to the extent that *the forum state* was 'the focus of the activities of the defendant.'"

The contention that broadcasters' "broadcasts, though originating in Mexico, reached Texas residents through their television sets in their Texas homes" was also insufficient to establish personal jurisdiction. Unlike the magazines distributed in the forum state in *Keeton* and *Calder*, over-the-air broadcast signals that happen to reach the forum state are not, by themselves, evidence of contacts that are "'purposeful rather than random, fortuitous, or attenuated.'"

The contention that broadcasters "*knew* their broadcasts would reach Texas homes" was likewise insufficient. As in "stream-of-commerce" cases "a broadcaster's mere knowledge that its programs will be received in another jurisdiction is insufficient to establish that the broadcaster purposefully availed itself of the benefits of conducting activities in that jurisdiction. Instead, evidence of 'additional conduct' must establish that the broadcaster had 'an intent or purpose to serve the market in the forum State.'"

However, there was evidence that broadcasters intentionally targeted Texas with their broadcasts. This evidence did not come from *Calder*'s "subject-and-sources" test, because there was no evidence that the broadcast was based on Texas sources and the broadcast concerned celebrity's activities outside Texas. However, the "subject-and-sources" test is not the only "method of proving that a defamation defendant targeted the forum state, and it need not be met when evidence otherwise establishes that the defendant's statement was 'aimed at or directed to' the state."

Here, while the mere fact that the broadcast signals reached into Texas was insufficient, celebrity submitted evidence that broadcasters "made substantial and successful efforts to benefit from the fact that the signals travel into Texas." There was evidence that broadcasters "actually physically 'entered into' Texas to produce and promote their broadcasts": one opened a business office and production studio in Texas, another sent an employee to expand broadcasts in Texas through cable distribution, and their anchor (also a defendant) traveled to Texas to promote her books about the program on which the defamatory statements were aired. There was evidence that broadcasters "derived substantial revenue and other benefits by selling advertising time to Texas businesses." Finally, there was evidence that broadcasters "made substantial and successful efforts to distribute their programs and increase their popularity in Texas."

Thus, "the evidence supports the trial court's

finding that through their broadcasts, [broadcasters] purposefully availed themselves of the benefits of conducting activities in Texas, such that they 'could reasonably anticipate being hauled into court there.'"

Purposeful availment only supports specific jurisdiction over a claim that "arises from or is related to [the defendants'] purposeful activities in the state,'" meaning that there must be "a 'substantial connection between those contacts and the operative facts of the litigation.'" This test does not require a "'but for'" cause or "'proximate cause'" between the contacts and the liability. "Instead, we consider what the claim is 'principally concerned with,' whether the contacts will be 'the focus of the trial' and 'consume most if not all of the litigation's attention,' and whether the contacts are 'related to the operative facts of the claim."' Here, celebrity's claims "arise directly out of" the broadcasts that were the subject of broadcasters' purposeful availment.

"Even when a nonresident has established minimum contacts with a state, due process permits the state to assert jurisdiction over the nonresident only if doing so comports with 'traditional notions of fair play and substantial justice.'" However, "rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice" where purposeful availment has been established.

The facts considered to evaluate "the fairness and justness of exercising jurisdiction over a nonresident defendant" are "(1) the burden on the defendant; (2) the interests of the forum in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the international judicial system's interest in obtaining the most efficient resolution of controversies; [] (5) the shared interest of the several nations in furthering fundamental substantive social policies; . . . (6) 'the unique burdens placed upon the defendant who must defend itself in a foreign legal system;' (7) the state's regulatory interests; and (8) 'the procedural and substantive policies of other nations whose interests are affected as well as the federal government's interest in its foreign relations policies.'" "'To defeat jurisdiction, [the defendant] must present "a compelling case that the presence of some consideration would render jurisdiction unreasonable."'"

Here, the Court rejected broadcaster's argument Texas "lacks a constitutionally sufficient interest in providing a forum for the adjudication" of a suit "by Mexican citizens 'against other Mexican citizens of Mexican news broadcasts about Mexican activities.'" "Fundamentally, '[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory,' and we have never conditioned that interest on the plaintiff's status as a Texas 'citizen,' as opposed to a Texas 'resident.'"

II. Engineers and Licensed or Registered Professionals

1. *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corporation*, 520 S.W.3d 887 (Tex. 2017)

When water supply company sued engineers who designed plant, it attached a certificate of merit. The engineers objected, claiming the affiant was not properly qualified and did not opine upon the legal elements of each cause of action. The Supreme Court found no abuse of discretion in "determining the certificate of merit sufficient."

TEX. CIV. PRAC. & REM. CODE, ch. 150 "generally requires that a sworn "certificate of merit" accompany a plaintiff's 'complaint' in a case that 'aris[es] out of the provision of professional services by a licensed or registered professional' named in the statute. The sworn certificate or affidavit must be from a similarly licensed professional who meets certain qualifications and attests to the lawsuit's merit. If the plaintiff fails to file a compliant certificate of merit, the statute directs the complaint's dismissal. And the 'order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.'"

TEX. CIV. PRAC. & REM. CODE § 150.002(a) "requires that a certificate of merit accompany the initiation of a lawsuit against these named design professionals. A certificate of merit is an affidavit from a third-party professional who is competent to testify, holds the same license or registration as the defendant, and is knowledgeable in the defendant's practice area. The affiant must also be licensed or registered in Texas and actively engaged in the practice." The certificate of merit "must come from a competent and qualified third-party engineer who can attest to the factual basis of the plaintiff's underlying complaint."

The Court cited the following concerning the expert's qualifications:

> "What chapter 150 requires, with respect to subject-area expertise, is that the affiant 'is knowledgeable in the area of practice of the defendant.' Chapter 150 does not require that an affiant establish his or her knowledge through testimony that would be competent or admissible as evidence, or even that the affiant

> explicitly establish or address such knowledge within the face of the certificate—indeed, it imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge."

The "statute's knowledge requirement [is not] synonymous with its licensure or active engagement requirements. . . ." Here, unlike *Levinson Alcoser*, the expert's "knowledge or experience" was provided. The expert provided sufficient "'factual statements'" to demonstrate his knowledge in defendant's area of practice.

"The statute does not expressly require that the expert's qualifications appear in the affidavit itself. . . . Nevertheless, the affidavit is a reasonable place to provide this information—as [the expert] has done here."

The statute requires "that the expert's affidavit address the lawsuit's 'factual basis.'" "We . . . typically give statutory terms their ordinary or common meaning unless context or a supplied definition indicates that a different meaning was intended." "Because 'factual basis' has no special, technical, or acquired meaning and is not otherwise defined in the certificate-of-merit statute, we interpret the term according to its ordinary meaning." It refers to "the events or circumstances giving rise to the professional errors or omissions identified by the third-party expert as distinguished from their legal effect."

"The 2009 amendment [to the statute] thus clarified that the statute was not to be limited to professional-negligence claims." "We . . . do not interpret the 2009 amendment as enlarging the factual-basis requirement or otherwise changing its existing relationship within the statute." "We accordingly reject [engineer's] interpretation of the statute, which would require the expert's affidavit to address the elements of the plaintiff's various theories or causes of action. The statute instead obligates the plaintiff to get an affidavit from a third-party expert attesting to the defendant's professional errors or omissions and their factual basis. The trial court then determines whether the expert's affidavit sufficiently demonstrates that the plaintiff's complaint is not frivolous."

Affiant concluded his certificate of merit by saying he reserved the right to modify his opinions. This "reservation merely [recognizes] the preliminary nature of the certificate of merit, which . . . must be 'filed early in the litigation, before discovery and before other dispositive motions may be available.'" At that stage, "'the plaintiff is not required to fully marshal his evidence.'"

2. *Pedernal Energy, LLC v. Bruington Engineering, Ltd.*, ___ S.W.3d ___ (Tex. 2017)(4/28/17)

Pedernal sued Bruington concerning engineering services, but failed to attach a Certificate of Merit under TEX. CIV. PRAC. & REM. CODE, ch. 150. It dismissed its claim and refiled with a COM that was found to be deficient. The trial court dismissed without prejudice. The Supreme Court ruled that "Section 150.002(e) required dismissal of the claims against Bruington, but the statute affords trial courts discretion to dismiss either with or without prejudice," and that the trial court did not abuse its discretion.

Chapter 150 "requires a plaintiff to file an expert affidavit in a lawsuit or arbitration for damages arising out of the provision of professional services by licensed or registered professionals." Otherwise, "the trial court shall dismiss the claim and the dismissal may be with prejudice."

Reading the first sentence of the statute "in context with the second, it is clear that the Legislature intended the dismissal language in the first sentence to reference dismissal without prejudice. . . . It is only if the Legislature intended the first sentence to reference dismissal without prejudice that the second sentence has meaning by expressly authorizing trial courts to dismiss with prejudice." But the statute does not guide the trial court "about how to determine whether to dismiss with or without prejudice."

The Supreme Court declined to import a "good cause" requirement into the statute "when the Legislature did not place it there." The "trial court's discretion should not be measured by good faith, but by the broader purposes of the statute." Here, the "Legislature did not explicitly declare its purpose in enacting section 150.002." But the title gives a clue that "a section 150.002(e) dismissal 'is a sanction . . . to deter meritless claims and bring them quickly to an end.'"

"Pedernal's failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice."

"'Rather than remanding the case to the court of appeals for it to [consider appellee's argument that the deficient COM indicated plaintiff's claims lacked

merit], . . . we address the issue in the interest of judicial economy.'" Here, the trial court concluded Pedernal's claim had merit. Thus, it did not abuse its discretion by dismissing the suit without prejudice. "Moreover, assuming, again without deciding, that the statute requires an affidavit addressing each theory of recovery, the failure of Jennings's affidavit to specifically address each theory was in substance the filing of a second complaint without a supporting affidavit."

3. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

Suit concerning commercial retail project. Defendant appealed the trial court's order denying its motion to dismiss that challenged the Certificate of Merit filed by plaintiff. The Supreme Court ruled that "neither the affidavit nor record here confirms that the affiant possessed the requisite knowledge to issue the certificate of merit." Because the certificate was non-compliant, the suit should be dismissed.

TEX. CIV. PRAC. & REM. CODE § 150.001(1-a) "applies to suits against architects, engineers, surveyors, and landscape architects." It "generally requires that a sworn 'certificate of merit' accompany a plaintiff's complaint" in a suit under the statute. "The certificate or affidavit must be from a similarly licensed professional, who meets certain qualifications and attests to the merit of the underlying claim. If the plaintiff fails to file a compliant certificate of merit, the statute directs dismissal of the complaint."

Under the statute, "the affiant should be 'knowledgeable in the (defendant's) area of Practice' and that the affidavit should set forth the professional's negligence or other wrongdoing and its 'factual basis.'"

TEX. CIV. PRAC. & REM. CODE § 150.002(f) "provides for an interlocutory appeal."

A "sworn certificate or affidavit must be by a similarly licensed or registered professional capable of attesting to any professional errors or omissions forming the basis of the suit. The statute describes the affiant's qualifications and what the affidavit should include. The affidavit is generally a prerequisite to the suit going forward, and the failure to file it contemporaneously with the complaint will ordinarily result in dismissal."

The certificate of merit must be signed by a "professional who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:

(A) knowledge;

(B) skill;

(C) experience;

(D) education;

(E) training; and

(F) practice."

"The certificate of merit must thus come from a competent third party expert who meets the statutory qualifications, which are that the expert (1) hold the same professional license or registration as the defendant, (2) be licensed or registered in this state, (3) be actively engaged in the practice, and (4) be knowledgeable in the defendant's area of practice."

Here, the affidavit did not "provide any information about Payne's knowledge of [defendant's] area of practice. . . ."

The "issue of Payne's knowledge of the [defendants'] area of practice was presented to the trial court and preserved for review."

A prior version of the statute was amended. Because the amended version applied, the professional who signed the Certificate of Merit "did not have to be actively engaged in the practice area at issue to be knowledgeable and qualified to render an opinion under the statute."

"We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. Here, we have no such evidence. Although we generally agree that such knowledge may be inferred from record sources other than the expert's affidavit, here the affidavit is all we have of Payne's qualifications. Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendants' area of practice beyond the generalized knowledge associated with holding the same license, we conclude that Payne has not shown himself qualified to render the certificate of merit."

The "statute's plain text does not require that the expert's qualifications be included in the certificate of merit or that a curriculum vitae be attached thereto. . . ." But, "if this information is not included in the certificate of merit, it must be available somewhere else in the record."

JJ. Consumer Law, DTPA, and Antitrust

1. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"The Attorney General and the Board may enforce this prohibition [in setting hours of optometrists] by a suit for injunctive relief, a civil penalty not to exceed $1,000 per day, and attorney fees. A person injured by a violation 'is entitled to' the same relief as well as damages. A violation is also actionable under the Texas Deceptive Trade Practices-Consumer Protection Act. . . ."

KK. Banking, Commercial Paper, and Lender Liability

1. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank caused lengthy delays in providing a loan to buyer of business. Business ultimately failed, and seller of business intervened in buyer's suit against bank, asserting that seller was a third-party beneficiary of the loan. The Supreme Court ruled that the "the contract is unambiguous and does not make the [seller] a third-party beneficiary." Further, "the trial court erred by submitting that issue to the jury and by instructing the jury that it could consider extrinsic evidence to add a third-party-beneficiary term to the unambiguous written agreement."

"'As a general rule, parties in Texas may contract as they wish,' and only 'the parties to an agreement determine its terms.'"

Ordinarily, only the parties to a contract and those in privity can sue under the contract. "An exception to this general rule permits a person who is not a party to the contract to sue for damages caused by its breach if the person qualifies as a third-party beneficiary." A "'person seeking to establish third-party-beneficiary status must demonstrate that the contracting parties 'intended to secure a benefit to that third party' and 'entered into the contract directly for the third party's benefit.'" It is insufficient that the third party would benefit from the contract or that the parties knew that it would benefit. "To create a third-party beneficiary, the contracting parties must have intended to grant the third party the right to be a 'claimant' in the event of a breach." Courts "must look solely to the contract's language, construed as a whole. The contract must include 'a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party. . . .'" The presumption is against a third-party beneficiary.

Here, loan letters were unambiguous and did not express an intent to make seller a third-party beneficiary.

The jury should not have determined if seller was a third-party beneficiary because that was a legal question. "When a contract's language is unambiguous, courts must 'construe the contract as a matter of law.'" "And whether the contract is ambiguous is itself a question of law for the court to decide."

"When a written contract is unambiguous and does not clearly express the parties' intent to create a third-party beneficiary, extrinsic evidence is simply irrelevant and inadmissible on that issue." To determine a third-party beneficiary, "courts must look solely to the contract's language."

Construction "of an unambiguous contract, including the determination of whether it is unambiguous, depends on the language of the contract itself, construed in light of the surrounding circumstances."

"When parties 'have a valid, integrated written agreement,' the parol-evidence rule 'precludes enforcement of prior or contemporaneous agreements.' As a result, 'extrinsic evidence cannot alter the meaning of an unambiguous contract.' . . . [The] parties may not rely on extrinsic evidence 'to create an ambiguity or to give the contract a meaning different from that which its language imports.'"

The "'parol-evidence rule 'does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.'" "'Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.'"

The "parol-evidence rule 'does not apply to agreements made *subsequent* to the written agreement,'" but here a purported oral agreement was made beforehand.

Just as "dictionary definitions, other statutes, and

court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract's unambiguous language."

Footnote 16: Here, the statute of frauds is not an obstacle to arguing there was an oral agreement because First Bank "failed to give the notice the statute requires. . . . [L]oan agreements are subject to the statute of frauds."

The "parol-evidence rule 'does not apply to agreements made *subsequent* to the written agreement,'" but here a purported oral agreement was made beforehand.

2. *BankDirect Capital Finance, LLC v. Plasma Fab, LLC*, 519 S.W.3d 76 (Tex. 2017)

Bank financed the payment of premiums of insurance policy. Policyholder was late paying bank, and bank provided nine days' notice it would cancel policy, but the statute required ten. Policyholder suffered fire that later resulted in a large judgment against policyholder. The Supreme Court ruled that the bank improperly canceled the policy: "The notice thus violated [TEX. INS. CODE § 651.161(b)] because the 'stated time' in the notice was 'earlier than the 10th day after the date the notice [was] mailed.'" The Court refused to engraft onto the statute a "substantial compliance" standard requested by bank.

The "Texas Premium Finance Act . . . prescribes certain notice-before cancellation requirements. One such requirement: The premium finance company must mail to the defaulting insured a notice of intent to cancel that states a time by which default must be cured, and '[t]he stated time may not be earlier than the 10th day after the date the notice is mailed.'" "This notice requirement is unambiguous, and '[w]here text is clear, text is determinative.'"

3. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Borrower "sent a usury demand letter to [lenders, and their] . . . attorneys responded with a usury cure letter and amended [lenders'] answer [in usury suit] to include the affirmative defense of usury cure and *bona fide* error. *See* TEX. FIN. CODE §§ 305.006(c), .101, .103."

Footnote 3: "'Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.'"

4. *Linegar v DLA Piper LLP (US)*, 495 S.W.3d 276 (Tex. 2016)

The "debt was subject to challenge under section 547 of the Bankruptcy Code, at least in part because [entity's] security interest was not perfected until after [subsequent lawyer] discovered the [failure to file a UCC-1] in June 2008."

LL. Family Law, Juveniles, Indigents

1. *In re M.M.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Following its ruling of the same date in *In re K.S.L.*, below, the Supreme Court ruled that a mother who had signed a statutorily-compliant affidavit terminating her parental rights had terminated her right to appeal, other than for "fraud, duress, or coercion." In particular, she could not maintain an appeal on the grounds "that the evidence of the child's best interest was factually and legally insufficient."

The mother's "appeal of the termination of parental rights fails because [TEX. FAM. CODE §] 161.211(c) precludes an appeal except on grounds that the affidavit of relinquishment was tainted by fraud, duress, or coercion. Because the [m]other's appeal is not 'limited to issues relating to fraud, duress, or coercion' under the language of [TEX. FAM. CODE §] 161.211(c), but is instead based on insufficiency of the evidence, the appeal is foreclosed by statute."

"As we conclude today in *K.S.L.*, holding that [TEX. FAM. CODE §] 161.211(c) means what it says does not deprive the parent of her due process rights."

2. *In re K.S.L.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Mother and father of child signed statutorily compliant affidavits relinquishing parental rights. The issue on appeal was whether the evidence established that terminating parental rights was in the child's best interest. The Supreme Court ruled that clear and convincing evidence supported the termination.

"Reflecting the grave significance of [termination], [TEX. FAM. CODE § 161.103 includes 28 subparts. The statute requires . . . for a valid affidavit: (1) a waiting period after birth; (2) two witnesses; (3) verification by the parent that termination of the

parent-child relationship is in the child's best interest; (4) designation of the person or agency to serve as the child's managing conservator; (5) a statement that the parent has been informed of parental rights and duties; and (6) a statement that the termination is irrevocable if that is . . . the case."

The "affidavit itself, in the ordinary case, can be ample evidence to support a best-interest determination."

"This case concerns the interplay of . . . [TEX. FAM. CODE §§] 161.001(b) (governing grounds for termination orders) and 161.211 (governing attacks on termination orders)."

The "statute is unmistakably written in the conjunctive and requires both a statutorily-compliant affidavit *and* a finding that termination is in the child's best interest. But the trial court made the required best-interest finding. . . ."

"The parents contend [TEX. FAM. CODE §] 161.211(c) should only apply to challenges to the affidavit, rather than all challenges to the order of termination. We cannot agree. . . ." "Regardless of what [TEX. FAM. CODE §] 161.001 requires of the trial judge, [TEX. FAM. CODE §] 161.211(c) limits appellate review of the termination order to grounds the parents did not raise."

"In *Santosky*, the [U.S. Supreme] Court held, under the Due Process Clause of the Fourteenth Amendment, that when the State seeks to sever irrevocably the parent-child relationship, it must establish its grounds by clear and convincing evidence." In "the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child's best interest, would satisfy a requirement that the trial court's best-interest finding be supported under this higher standard of proof."

"The parents argue that reading [TEX. FAM. CODE §] 161.211(c) to bar them from challenging the factual and legal sufficiency of the best-interest determination would violate their federal due process rights. We disagree." As "we examine federal due process law in the area of appellate review, its requirements mainly concern the equal treatment of litigants." "Texas law does not discriminate against any class of litigants in a manner that would raise federal due process or equal protection concerns." "[P]rocedural due process concerns are addressed and preserved in [TEX. FAM. CODE §] 161.211(c), by allowing the parent to appeal on grounds that the affidavit was the product of fraud, duress, or coercion."

"Under *Matthews*, we must balance three elements: the private interests at stake, the government's interest supporting the challenged procedure, and the risk that the procedure will lead to erroneous decisions."

The "needs of the child are not best served by a legal process that fosters delay and unrestrained second-guessing."

3. *The Office of the Attorney General of Texas v. C.W.H.*, ___ S.W.3d ___ (Tex. 2017)(10/20/17)

The Office of the Attorney General (OAG) filed a motion to modify a child support and conservatorship order, and the case is referred to the Title IV-D associate judge. The father, who was sole managing conservator but who was incarcerated, filed a *pro se* answer and requested a bench warrant so that he could participate in the hearing. IV-D associate judge denied the request, found that the father did not appear, appointed the mother and grandparents as joint managing conservators, and ordered the father to have no contact with the children.

The father appealed, arguing that the IV-D associate judge did not have authority to hear a motion to modify conservatorship and that the associate judge erred by failing to consider his request to participate in the hearing remotely. The court of appeals agreed. On petition for review to the Supreme Court, the OAG conceded that the order should be reversed due to the associate judge's failure to consider father's request to participate in the hearing, but asked the Supreme Court to hold that the court of appeals erred in holding that the IV-D associate judge lacked authority to modify conservatorship. The Supreme Court agreed.

The case was heard prior to the Legislature's recent amendment of the Family Code expressly granting IV-D associate judges authority to modify conservatorship, but IV-D judge nonetheless had authority in this case. The case was properly referred to the IV-D judge under TEX. FAM. CODE § 101.034 because "the OAG is providing services in this case relating to the modification of a child-support obligation," and such cases are required to be referred by general order. Even the prior version of the Family Code authorized a Title IV-D associate judge to "'render and sign any order that is not a final order on the merits of the case'" and "'recommend to the referring court any order after a trial on the merits.'" "Any party who is dissatisfied with the associate judge's order or judgment may request a de novo hearing before the referring court" and where a de novo hearing is waived or not requested, the order

automatically becomes an order of the referring court.

4. *Loya v. Loya*, 526 S.W.3d 448 (Tex. 2017)

Family law case in which ex-wife sought part of ex-husband's bonus that was paid the year following a Mediated Settlement Agreement. The Supreme Court ruled that the MSA awarded future income, including the bonus, to the ex-husband.

"Like any contract, the express terms of a mediated settlement agreement control. Moreover, the MSA in this case dictates how the parties must resolve disputed interpretations of its terms. To the extent the MSA did not clearly partition future income, the arbitrator clarified that all of the parties' future income was partitioned as of June 13, 2010. Miguel's future income encompasses the 2011 discretionary bonus, which was neither owed nor paid to him until nine months after the MSA was signed."

MSA's are valuable to "amicably resolve contentious family-law disputes. These agreements further the express legislative policy . . . of 'encourag[ing] the peaceable resolution of disputes. . . .'"

Under the Family Code, "'If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on [the MSA]. . . .'" The agreement is "'binding on the parties.'"

"[U]nmatured retirement benefits earned during marriage 'constitute a contingent interest in property and a community asset.'"

Here, it is irrelevant if the bonus might be community property because it was partitioned by the MSA.

"Because an MSA is a contract, we look to general contract-interpretation principles to determine its meaning. . . . When construing a contract, 'a court must ascertain the true intentions of the parties as expressed in the writing itself.' 'We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.'"

"[I]ncome includes all forms of payment received, and that future income means payment received at a later time," including the bonus. By including a date certain it made no difference whether any underlying work on which the bonus was declared occurred before that date. When the parties signed the MSA, the bonus declared the following year did not exist.

5. *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017)

Wife appealed from entry of a divorce decree incorporating a settlement agreement, arguing that the settlement was procured by fraud and coercion. Husband moved to dismiss the appeal, arguing that wife was estopped from challenging the decree because she accepted benefits under it. The Supreme Court used the opportunity to clarify the acceptance-of-benefits doctrine in the context of a divorce decree, which "has been applied irregularly and has become unmoored from its equitable underpinnings" in the 65 years since the Supreme Court's only prior application of the doctrine in a marital-dissolution case.

"The acceptance-of-benefits doctrine is . . . anchored in equity and bars an appeal if the appellant voluntarily accepts the judgment's benefits and the opposing party is thereby disadvantaged." "The burden of approving an estoppel rests on the party asserting it, and the failure to prove all essential elements is fatal." "Whether estoppel of the right to appeal is warranted involves a fact-dependent inquiry entrusted to the courts' discretion."

The Court noted the "trajectory toward a rigid and formulaic application of the doctrine" since the Court's last examination of the acceptance-of-benefits doctrine in *Carle v. Carle* 65 years ago. It clarified "that the acceptance-of-benefits doctrine is a fact-dependent, estoppel-based doctrine focused on preventing unfair prejudice to the opposing party." "Under this doctrine, a merits-based disposition may not be denied absent acquiescence in the judgment to the opposing party's irremediable disadvantage." "[M]erely using, holding, controlling, or securing possession of community property awarded in a divorce decree does not constitute clear intent to acquiesce in the judgment and will not preclude an appeal absent prejudice to the nonappealing party."

Recognizing that "definitive, bright-line rules are hard to come by in matters of equity," the Court set forth "several nonexclusive factors" that "inform the estoppel inquiry, including:

- whether acceptance of benefits was voluntary or was the product of financial duress;
- whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment;

- whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified;
- whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession;
- whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one;
- if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted;
- whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment;
- whether the issue on appeal is severable from the benefits accepted;
- the presence of actual or reasonably certain prejudice; and
- whether any prejudice is curable."

Here, wife took ownership and control of property awarded to her under the decree, collected rent from property awarded to her under the decree, and sought the opportunity to retrieve personal property awarded to her. However, this "mere acceptance, possession, and control of community property does not equiate to acquiescence," and there was no evidence that any of these acts prejudiced husband. Thus, wife was not estopped from challenging the decree and her appeal should not have been dismissed.

6. *Ochsner v. Oshsner*, 517 S.W.3d 717 (Tex. 2016)

Child support enforcement action. Divorce decree ordered father to pay a sum for child's tuition through the registry. Over time, he paid far more than ordered, but not through the registry. Mother brought an enforcement action. The Supreme Court ruled that a trial court may consider the parent's tuition payments made directly to the child's schools.

"A trial court in a child-support *enforcement* proceeding [TEX. FAM. CODE, ch. 157]—a wholly separate action from the initial child-support *order* proceeding [TEX. FAM. CODE, ch. 154]—may consider evidence of direct payments like those that were undisputedly made here when confirming the amount of arrearages. [Father's] direct tuition payments satisfied—indeed, *exceeded*—his child-support obligation."

"One key way to reduce parental bickering—and protect kids caught in the crossfire—is through a child-support order that specifies how the noncustodial parent is to provide financial support. If the order is violated, the Family Code provides enforcement options."

"The Family Code directs a trial court in an enforcement proceeding to determine the amount of unmet child-support obligation, and in no way removes a court's discretion to consider direct tuition payments made outside the registry."

TEX. FAM. CODE §§ 157.008 and 157.009 "authorize an offset or credit in two circumstances. . . ." TEX. FAM. CODE § 157.263 constitutes "the central provision of the child-support enforcement statute. . . ." "An arrearage in the child-support context occurs when an obligor has not satisfied his obligation." The "'amount,' in the realm of arrearage, is 'a principal sum and the interest on it.'" Construing the child support statute, the "verb 'to confirm' means 'to give *new* assurance of the truth or validity' of some state of affairs."

A "trial court may consider the obligor's regular and long-term payments of tuition that the obligee was obliged to make."

Nothing in 42 U.S.C §§ 654a(e) and 654(b) allowing withholding of earnings "requires that payments made voluntarily, as opposed to payments withheld from income, must be made through a state registry."

A "trial court in a subsequent [TEX. FAM. CODE] Chapter 157 enforcement suit presides over an entirely different proceeding from the one resulting in the issuance of the child-support order under [TEX. FAM. CODE] Chapter 154."

In an enforcement action, a "trial court has discretion to consider a range of evidence. The trial court must determine the quantity of the child-support obligation that is unmet. . . ." Specifically, a "trial court in an enforcement action cannot alter the amount deemed payable in the original child-support order. But the trial court in an enforcement action is permitted to *consider* tuition payments made in a manner not specified in the order in confirming the amount of arrearages."

"Our precedent forbids private arrangements that allow a child-support obligor to shirk his obligation, but that has not happened here." These "cases have been limited to situations where child-support obligors have attempted to privately agree with the obligee to reduce—or indeed entirely eliminate—the obligation."

"Where a parent fails to support a child, we do not 'compromise the welfare of a child who is at the mercy of his parents' choices.'" But, here, this suit is not brought to enforce a private agreement to modify a child-support obligation. And, "child support is not a debt owed by one parent to the other. . . ."

In *Office of* Att*'y Gen. of Tex. v. Scholer*, 403 S.W.3d 859 (Tex. 2013), the Court rejected "the affirmative defense of estoppel. But in an enforcement action the movant must still establish that an arrearage exists."

Father "paid over $20,000 more than the original child-support order contemplated, and the trial court had discretion to consider this in confirming the amount of arrearage." Father was "paying down the tuition obligation that [mother] incurred for their daughter. . . . Covering a cost that plainly benefits the child and that reduces the financial burden on the obligee is a fact a trial court may consider in a child-support enforcement proceeding." The tuition payments "furthered the child's interests."

"The dissent incorrectly looks only to the original child-support order—a decree issued in a proceeding governed by an entirely different chapter of the Family Code." The analysis here "focuses on [TEX. FAM. CODE] section 157.263, governing the 'amount of arrearages, . . ." Trial courts "are competent to make case-by-case findings."

This decision "should be confined to the facts presented. It should not be read to hold that tuition payments always qualify as child support. Further, it should not be read to encourage spouses to make direct payments and thereby bypass the registry or other payment mechanisms set forth in the divorce decree." Under different facts, the trial court may refuse "to consider such payments."

7. *In re Steven C. Phillips*, 496 S.W.3d 769 (Tex. 2016)

Suit for compensation of a father who was wrongly incarcerated. The Supreme Court ruled that the Comptroller's duty to determine the compensation owed under the Tim Cole Act is "exclusive, ministerial, and subject to review." He is not bound by a default judgment taken enforce a foreign judgment. But, his determination is subject to judicial review.

The Comptroller determines the eligibility of the claimant and the amount of compensation under the Act. "The Comptroller's authority is to determine, not child support arrearages as between parents, but '*compensation* for child support . . . arrearages.' The arrearage is what one parent owes the other; compensation is what the State (and taxpayers) owe the claimant. Compensation is to be based on arrearages, but the amount is to be determined by the Comptroller, not the court."

Analyzing Arkansas law, the Court "conclude[s] that the interest on all [father's] arrearages is 10 percent." And it is "simple" rather than compounded.

The arrearages are not barred by limitations. "As of 2009, Texas did not have a statute of limitations for bringing an action to collect child support arrears." "The Comptroller [had] erred in refusing compensation for interest that accrued during [father's] incarceration on pre-incarceration arrearages, but did not err in excluding interest that accrued post-incarceration."

8. *In the Interest of M.N., V.W., and Z.W., Children*, 505 S.W.3d 618 (Tex. 2016)

In suit to terminate parental rights, father's lawyer withdrew while the case was on appeal and filed an *Anders* brief. Following the contemporaneously decided *In re P.M.* (see below), the Supreme Court abated and "refer[ed] this case to the trial court for the appointment of counsel."

9. *In re J.R., a Child*, 505 S.W.3d 620 (Tex. 2016)

In suit to terminate parental rights, father's lawyer withdrew while the case was on appeal and filed an *Anders* brief. Following the contemporaneously decided *In re P.M.* (see below), the Supreme Court abated and "refer[ed] this case to the trial court for the appointment of counsel."

10. C.*S.F. v. Texas Department of Family and Protective Services*, 505 S.W.3d 618 (Tex. 2016)

Parent appealed a termination of his rights, and untimely filed papers with the Supreme Court pro se, including an indigence affidavit. The Supreme Court abated the suit and directed the trial court to appoint counsel.

Following the contemporaneously decided *In re P.M.* (see below), the Court ruled that "in government-initiated parental rights termination proceedings, the statutory right of indigent parents to counsel endures until all appeals are exhausted, including appellate proceedings in this Court."

The Court has held that the "statutory right to counsel in parental-rights termination cases included, as a matter of due process, the right to effective

counsel. And we have extended this holding to effective assistance of counsel in pursuing an appeal; procedural requirements, in some cases, may have to yield to constitutional guarantees of due process. . . . Not every failure to preserve error or take timely action, however, will rise to level of ineffective assistance of counsel."

11. *In re P.M., a Child*, 520 S.W.3d (Tex. 2016)

In a suit to terminate the parent-child relationship, the trial court granted an appointed attorney's motion to withdraw during an appeal after a second trial. The Supreme Court ruled that there was no abuse of discretion in granting that motion, and that mother was entitled to appointed counsel on appeal.

"Section 107.013(a) of the Texas Family Code provides that '[i]n a suit filed by a governmental entity . . . in which termination of the parent-child relationship . . . is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent . . . .' The issue: . . . whether this right to appointed counsel extends to proceedings in this Court, including the filing of a petition for review. We hold that it does. . . ."

Under TEX. FAM. CODE § 107.013(e), once a parent is found indigent, he is presumed indigent for the remainder of the case, "absent changed circumstances."

The provisions of the Family Code "establish[es] the right of an indigent parent to appointed counsel in the trial court and court of appeals." Since "the right to counsel is as important in petitioning this Court for review . . . as in appealing to the court of appeals," the "right to counsel under [TEX. FAM. CODE §] 107.013(a)(1) through the exhaustion of appeals under [TEX. FAM. CODE §] 107.016(2)(B) includes all proceedings in this Court. . . . Once appointed by the trial court, counsel should be permitted to withdraw only for good cause and on appropriate terms and conditions. Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California*, and its progeny. . . . [A]n *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review."

A lawyer's motion to withdraw may be decided by the court of appeals, or the court may "refer the motion to the trial court for evidence and a hearing. An appellate court must ordinarily refer the matter of appointment of replacement counsel to the trial court."

12. *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016)

Indigent litigants who sued for divorce in family district courts each file uncontested affidavits of indigency in lieu of paying costs, as permitted under TEX. R. CIV. P. 145. However, after the final divorce decree allocated costs to "'the party who incurred them'" without stating the amount of the costs due or that litigants could afford them, the district clerk sent demands to each litigant for court costs and fees, "threaten[ing] that the sheriff would seize property to satisfy the debt."

Litigants sued the district clerk in civil district court (not the family district courts in which the costs were taxed) for mandamus, injunctive, and declaratory relief and obtained a temporary injunction enjoining the district clerk "from 'continuing his policy of collection of court costs from indigent parties who have filed an affidavit of indigency.'" In an interlocutory appeal, the district clerk argued that the TEX. CIV. PRAC. & REM. CODE § 65.023(b) deprived the civil district court of jurisdiction and that litigants had an adequate remedy at law, precluding injunctive relief.

TEX. CIV. PRAC. & REM. CODE § 65.023(b), which dates to 1846, "provides that '[a] writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.'" "The purposes of the statute . . . are 'to protect the judgments and processes of one court from interference by another by direct attack' and to 'prevent[] a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case.'" Thus, the "'test of jurisdiction in such cases is whether the relief sought may be granted independently of the judgment or its mandate sought to be enjoined.'"

Here, the civil district court's injunction met that test, because it did not disturb the judgments of the family district courts. "[T]he family courts here did not order costs," but "merely la[id] out the division of any costs, not an amount to be charged." Nor could they "order costs despite an affidavit of inability to pay,"

which would "fl[y] in the face of our Constitution and case law." TEX. R. CIV. P. 145 "is but one manifestation of the open courts guarantee that 'every person . . . shall have remedy by due course of law.'" "It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence."

In holding that TEX. CIV. PRAC. & REM. CODE § 65.023(b) did not apply, the Supreme Court overruled *Evans v. Pringle*, 643 S.W.2d 116 (Tex. 1982) (per curiam), which held that a civil district court lacked jurisdiction to enjoin the sheriff from enforcing writs of execution against bond sureties to collect post-judgment interest on a bond forfeiture judgment issued by a criminal district court. "*Evans* did not" correctly interpret the statute, and the sureties in that case "should [not] have been required to return to the court that issued the processes giving rise to their objections to post-judgment interest." "*Evans* must therefore be overruled."

Having establishes that the civil district court had jurisdiction, the Supreme Court turned to the merits of the injunction and rejected the district clerk's argument that litigants could have filed a motion to retax costs and thus had an adequate remedy at law. "Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law will lead to a multiplicity of suits, 'that very fact prevents it from being complete and adequate.' '[T]he unlawful acts of public officials' are prime candidates for injunctions 'when [those acts] could cause irreparable injury or when such remedy is necessary to prevent a multiplicity of suits.'"

"A motion to retax costs confronts the correctness of the clerk's ministerial calculations," and is properly used to correct such "fact-specific errors" as "miscalculating the cost of an item or billing an item that is not statutorily taxable," "made in individual cases that require a similarly individual approach to redress."

Here, by contrast, litigants are "complaining of . . . a systematic policy that contravenes the law," and "[i]t would be wasteful to force each individual [litigant] to file a motion to retax costs when a single injunction will do."

Also, the injunction, which enjoined the district clerk not just "from billing costs to the named parties, but to all litigants who qualify as indigent," was not overbroad. "An injunction must be broad enough to 'prevent repetition of the evil sought to be stopped.'" "When a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties." The injunction was not overbroad, because it "tracks the language of Rule 145" and "does not restrain the District Clerk from any lawful activity."

Finally, injunction, rather than mandamus, was the appropriate remedy. "When the purpose of the suit is to compel action, then mandamus is proper; conversely, when the purpose is to restrain action or threatened action, then an injunction is proper." Here, because "the true relief lies in enjoining the District Clerk from continuing his policy" of collecting costs from indigent litigants, injunction was proper.

MM. Maritime, Admiralty Law, and Jones Act

1. *Helix Energy Solutions Group, Inc. v. Gold*, 522 S.W.3d 427 (Tex. 2017)

Plaintiff, an able-bodied seaman, was injured while he was assigned to a vessel that was being redesigned and was out of navigation for 20 months. The Supreme Court ruled that he had no claim under the Jones Act: "major overhauls that render watercraft practically incapable of transportation are sufficient to remove those crafts from 'vessel in navigation' status." While this is normally a fact question, "absent any such disputes about relevant facts, and faced with conclusive proof above and beyond the threshold for summary judgment, we hold as a matter of law that the [vessel] was not in navigation and therefore that the Jones Act did not apply. . . ."

"The Jones Act provides a compensation scheme designed to mitigate the unique perils faced by 'seamen'—maritime workers with a substantial connection to a 'vessel in navigation.'" It provides "heightened legal protection."

Here, the employer "bore the burden to conclusively negate the 'seaman' element" of the Jones Act suit in its motion for summary judgment.

The Longshore and Harbor Workers' Compensation Act (LHWCA) "provides coverage to 'land-based maritime workers but which also explicitly excludes from its coverage 'a master or member of a crew of any vessel.'"

A "Jones Act seaman must be a member of a crew of a . . . 'vessel in navigation.'" There are "two basic components of Jones Act coverage: the maritime worker must (1) be a crew member who does the 'ship's work' and (2) have a substantial connection to a vessel in navigation." The "worker's duties must 'contribut[e] to the function of a vessel or to the accomplishment of its mission.'" Also, a "Jones Act

seaman must bear a requisite connection—one that is 'substantial in terms of both its duration and its nature'—to a vessel in navigation."

A "vessel" means "'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' . . . [The] Supreme Court recently stressed the importance of considering objective evidence of the status and characteristics of the watercraft in lieu of subjective evidence of the owner's intent."

The first question is whether the structure is "designed to function in the manner of a seafaring 'vessel,' or does it merely happen to float?"

Next, "'major renovations can take a ship out of navigation, even though its use before and after the work will be the same.'" An "extended overhaul can remove the structure from navigation." "Yet, at the same time, 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or dockside,' even when she 'is taken to a drydock or shipyard to undergo repairs in preparation to making another trip.'" Temporary and regular repairs do not take a vessel out of navigation. To determine whether repairs take the vessel out of navigation, "'the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done.'" "When a maritime worker suffers an injury during a routine repair, we can confidently attribute the worker's injury to a risk associated with 'go[ing] down to sea in ships.'" "But a maritime worker whose only connection is to a ship undergoing a nonroutine, major overhaul incurs risks more akin to those faced by land-based construction workers—a danger better addressed by the" LHWCA. Only "overhauls that render ships practically incapable of transportation will take those ships out of navigation."

"A plaintiff's status as a seaman under the Jones Act is a mixed question of law and fact. More specifically, 'whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide,'" except "'where the facts and the law will reasonably support only one conclusion.'"

Courts will not look to the owner's subjective intent. Instead, they will look to "'the status of the ship, the pattern of the repairs, and the extensive nature of the work to be done.'"

It is improper to consider how long the ship was deactivated before the injury "because it makes Jones Act coverage depend on the timing of the plaintiff's injury. . . ." "If the project is extensive enough to take a vessel out of navigation, it matters not whether the claimant suffered his or her injury early or late in the process."

Here, the vessel could not navigate on her own, and was undergoing a major conversion in purpose. There are "various considerations for evaluating the extensiveness of any conversion: (a) the significance of the work performed; (b) the cost of conversion relative to the value of the ship; (c) whether contractors exercised control over the work; (d) the duration of the repairs; and (e) whether the repairs took the ship out of service." It is "inherently one of 'degree.'" But, "a major overhaul that renders a ship unable to self-navigate qualifies for out-of-navigation status." Duration of overhaul help evaluate its extent. Footnote 8: the "remainder of the project is material to our analysis. . . ."

The "Supreme Court rejected the validity of a 'snapshot' test when evaluating the type of 'activity in which a maritime worker was engaged while injured.'"

NN. Animals

No cases to report.

OO. Taxes

1. *Graphic Packaging Corporation v. Hegar*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Taxpayer conducted business in multiple states including Texas, and must apportion its revenue for franchise tax purposes. Taxpayer argued that TEX. TAX CODE § 171.106 did not govern apportionment because the franchise tax was an "income tax" under the Multistate Tax Compact, and that apportionment is therefore governed under TEX. TAX CODE § 141.001, which adopts the compact and provides a different method for apportioning "'business income'" for an "'income tax.'" The court of appeals held that the tax was not an income tax under Multistate Tax Compact. However, the Texas Supreme Court did not decide that issue, but instead addressed issues not considered by the court of appeals and held that the Legislature provided that later-enacted TEX. TAX. CODE § 171.106 "as the exclusive method for apportioning the Texas franchise tax," and that it was in its power to do so because Multistate Tax Compact was not intended to be a binding reciprocal agreement.

NOTE: In an apparent clerical error, the opinion's preamble states that the Supreme Court "agree[s]" with and "affirm[s]" the court of appeals' holding that "the franchise tax was not an income tax within the

Compact's meaning." However, while several pages of the opinion are devoted to discussion of this issue, the Supreme Court actually declines to decide this issue, and instead affirms the court of appeals on other grounds: "Even were we to agree with Graphic that its franchise tax for the years in question amounted to the same thing as chapter 141's income tax (an issue we do not decide), Graphic must still establish that the Legislature did not, or could not, make chapter 171's single-factor apportionment formula the exclusive means for apportioning the Texas franchise tax." The Court then turns to these issues, which were not considered by the court of appeals.

The alternative three-factor apportionment formula of chapter 141 and the Compact "creates an irreconcilable conflict with section 171.106," which mandates the use of its own formula "'except as provided by this section.'" The "limited exceptions" provided for by section 171.106 do not include theCompact's three-factor formula. Applying the traditional rules of statutory construction as codified by the Code Construction Act, section 171.106, as both the later-enacted and more specific legislation, controls. Thus, "[s]ection 171.106 continues to provide the exclusive formula for apportioning the franchise tax and, by its terms, precludes the taxpayer from using the Compact's three-factor formula."

Texas's membership in the Multistate Tax Compact did not prevent the Legislature from doing so because the "Compact is not a binding regulatory compact." "The United States Supreme Court has indicated that binding regulatory compacts typically share similar features, such as: (1) the establishment of a joint regulatory body; (2) state enactments that require reciprocal action to be effective; and (3) the prohibition of unilateral repeal or modification of their terms." "The Compact does not exhibit these characteristics." Also, the Compact did not require congressional consent under the Compacts Clause of the federal Constitution, and thus "does not have the force of federal law because it has not been ratified by Congress."

Finally, enforcement of the Compact was not mandated by the Contract Clause of the federal Constitutionbecause there was no unmistakable intent by the legislature to contractually bind future legislatures. TEX. CONST. art. VIII, § 4 provides that "'[t]he power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party,'" and a state's sovereign powers may not be contractually surrendered except in "unmistakable" terms.

2. *ETC Marketing, Ltd. v. Harris County Appraisal District*, 518 S.W.3d 371 (Tex. 2017)

Taxpayer was in the business of buying and selling gas, and transported gas through an affiliated pipeline company. Pipeline was entirely in Texas, but connects with interstate pipelines. Pipeline stored taxpayer's excess gas—gas exceeding the pipeline's capacity—in a reservoir in Texas. The gas in the reservoir may be sold in Texas, across state lines, or not at all. Appraisal district appraised and assessed taxes on the gas in the reservoir, and taxpayer protested, arguing that the gas is in interstate commerce and immune from state taxation under the "dormant Commerce Clause" of the federal Constitution.

To "withstand constitutional scrutiny" under the test set forth by the U.S. Supreme Court's in *Complete Auto Transit, Inc. v. Brady*, a state tax that "implicates interstate commerce . . . must: (1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state." While it "remains unclear" whether "the *Complete Auto* supplanted the traditional . . . 'in transit' test," the Texas Supreme Court follows a "synthesis of the frameworks" where "'the circumstances which make the goods "in transit" may inform a court's decision that the [substantial nexus and fair relation] requirements of *Complete Auto* are not met.'" The *Complete Auto* test requires "two distinct inquiries: (1) whether the tax implicates interstate commercial activity and, if so, (2) whether the tax satisfies all four prongs."

The gas was in interstate commerce under the U.S. Supreme Court's opinion in *Maryland v. Louisiana* that "'[g]as crossing a state line in any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.'"

However, the gas was properly taxable under the *Complete Auto* test. The gas "bore a substantial nexus to the state" because it was not "in transit"—it was stored and had no "precommitted destination." The tax was "fairly apportioned" because it was "'internally and externally consistent'" and did not subject taxpayer to the "risk of multiple taxation across other jurisdictions"—"Texas's tax reaches only property that is (1) located within a taxing unit of the state and (2)

present on a certain day of the year; the first of January." The ad valorem tax is "facially nondiscriminatory" because it "targets all qualifying personal property; it pays no attention to the property's intended destination." The tax is "reasonably related to the services provided by the state" because the gas "enjoys the 'opportunities and protections which the state has afforded in connection with' storage,'" even though it was being stored by a company other than the taxpayer.

3. *Valero Refining-Texas, L.P. v. Galveston Central Appraisal District*, 519 S.W.3d 66 (Tex. 2017)

Appraisal district divided refinery's property into multiple accounts. Refinery protested the appraisal of some, but not other, accounts, under the equal-and-uniform taxation clause of the Texas Constitution, arguing that the accounts were over-appraised

compared to the other two refineries in the county. District argued that an unequal appraisal challenge may only be made for entire tracts, not individual accounts. District also argued that refinery omitted the account containing its pollution control equipment, which exacerbated the difference in appraisal with the other refineries.

"The Tax Code prescribes the process for obtaining judicial review of a property appraisal." "Nothing in the applicable statutory provisions requires a taxpayer to challenge all the appraisal accounts used to appraise its property."

Under the Tax Code, "'a property is appraised unequally if [its] appraised value . . . exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted.'" "'[C]omparable' does not mean 'identical.'" While "no two refineries are really the same, . . . that uniqueness does not preclude similar properties from being compared." The jury found that a refinery with much less capacity and complexity was comparable, and there was some evidence to support the finding.

"Different aspects of real property may be appraised and taxed separately even though all are part of the same surface tract," and the district chose to do so here. "Having determined" that the three "refineries can be best appraised using different accounts for separate components, it cannot, as a matter of law, argue that the values cannot be compared for determining whether [refinery's] constitutional right to equal and uniform taxation has been violated."

4. *Oncor Electric Delivery Company, LLC v. Public Utility Commission of Texas*, 507 S.W.3d 706 (Tex. 2017)

Appeal of utility rate case. The Supreme Court ruled that a former section of PURA "did not require a utility to adopt a corporate structure so as to be part of" a federal tax consolidated group.

"The PUC was required to determine Oncor's projected expenses and set rates at a level that would allow Oncor a reasonable return on its investment. One expense was Oncor's future tax liability." PURA "requires that the tax savings from filing a consolidated return benefit ratepayers."

Footnote 8: "If an expense is not allowed to be included in utility rates or an investment is not included in the utility rate base, the related income tax benefit may not be included in the computation of income tax expense to reduce the rates. The income tax expense shall be computed using the statutory income tax rates."

"Under federal tax law, a parent corporation and certain of its subsidiary corporations are an affiliated group that is allowed to file a consolidated return." As a partnership, federal "tax law permitted Oncor to elect to be treated as a corporation, which would have allowed Oncor to be included in the affiliated group eligible for EFH's consolidated tax return." The test is whether a utility "is," not whether it "could be."

5. *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400 (Tex. 2016)

Corrected opinion issued after denial of rehearing. One word and one sentence added to pages 10–11 of slip opinion. Holding unchanged. See *Southwest Royalties*, below.

6. *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016)

School districts, individuals, and other entities sue the State alleging that the the school finance system violates the Texas Constitution in several respects, including by imposing a statewide ad valorem tax prohibited under Article VII, section 1. The Supreme Court rejected this argument.

"'An ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly,

that the authority employed is without meaningful discretion." However, "'if the State merely authorized a tax but left the decision whether to levy it entirely up to local authorities, *to be approved by voters if necessary*, then the tax would not be a state tax.' That is what the Legislature did here."

7. *Southwest Royalties, Inc. v. Hegar*, ___ S.W.3d ___ (Tex. 2016)(6/17/16)

[Note: opinion reissued on October 21, 2016 at 500 S.W.3d 400 (Tex. 2016); *see* above.]

Sales tax exemption case. Taxpayer, an oil exploration and production company, argued that its purchases of equipment used in extracting oil and gas were exempt from sales tax as property used in "processing" under TEX. TAX CODE § 151.318, which exempts from taxation the sale of certain tangible personal property when, among other requirements, it is "'used or consumed in or during the actual manufacturing, processing, or fabrication of tangible personal property for ultimate sale[.]'" The Comptroller denied the claim.

"Tax exemptions are narrowly construed and the taxpayer has the burden to 'clearly show' that an exemption applies." "Although statutory tax exemptions are narrowly construed, construing them narrowly does not mean disregarding the words used by the Legislature."

Here, "processing" is undefined by the statute, but is defined under the Comptroller's regulations as "'[t]he physical application of the materials and labor necessary to modify or change the characteristics of tangible personal property.'" "[A]n agency's construction of a statute may be taken into consideration by courts when interpreting statutes, but deferring to an agency's construction is appropriate only when the statutory language is ambiguous." Here, the Court held that the statute is not ambiguous, but that the "common meanings of 'processing' correlate with the definition adopted by the Comptroller," and that the "Legislature intended" the same meaning.

Applying this meaning, the Court held that taxpayer's equipment was not used in processing and was not exempt from sales taxation. While "hydrocarbons undergo physical changes as they move from underground reservoirs to the surface" during the extraction process, those changes are caused "not by the application of equipment and materials to them, but by the natural pressure and temperature changes."

8. *Hegar v. Texas Small Tobacco Coalition*, 496 S.W.3d 778 (Tex. 2016)

After the State settled its health care reimbursement claim against several of the largest tobacco manufacturers in the 1990s, the Legislature enacted a statute seeking to recover its smoking-related health care costs from the non-settling tobacco manufacturers by imposing a tax on those manufacturers. The non-settling manufacturers challenged the taxation scheme on the grounds that it violated the Equal and Uniform Clause of the Texas Constitution by taxing them while exempting the settling manufacturers.

The Equal and Uniform Clause's "succinct" mandate that "'[t]axation shall be equal and uniform,' . . . generally applies only *within* classes, not *between* classes." "[A] challenged statute is entitled to a 'strong presumption' of constitutional validity" that is "particularly robust where the constitutionality of taxation statutes is challenged," and "the Legislature need only have a rational basis in constructing tax classifications." "That is, the Legislature must 'attempt to group similar things and differentiate dissimilar things' in formulating rational classifications, and must show that the classifications reasonably relate to the purpose of the tax." "[A]bove all, 'the Legislature must have discretion in structuring tax laws.'"

The Supreme Court's "settled precedent" applying the Equal and Uniform Clause does not support a "constricted approach" requiring '"focus . . . on the subject of the tax, not the entity being taxed.'" "We have made clear that, '[a]t least where non-property taxes are concerned, the Equal and Uniform Clause generally only prohibits unequal or multiform taxes that are imposed on the same class *of taxpayers*.'" "[I]n the non-property context, the nature of the taxpayer necessarily lies at the heart of any Equal and Uniform Clause inquiry."

"The Legislature's distinction between settling manufacturers and [non-settling manufacturers] is rational on at least two grounds." First, the settling manufacturers make annual payments in perpetuity as part of the settlement, a "$500-million-per-year burden that [non-settling manufacturers] do not bear." "Second, the settling manufacturers function under operating restrictions [under the terms of the settlement] to which [non-settling manufacturers] are not subject." "Those distinctions establish sufficient differences in business operations to justify the non-settling-manufacturer and settling-manufacturer tax

classifications," and "the tax classifications are reasonably related to the goals of recovering health care costs and reducing underage smoking." Thus, the classification does not violate the Equal and Uniform Clause.

9. *Hallmark Marketing Company, LLC v. Hegar*, 488 S.W.3d 795 (Tex. 2016)

Taxpayer filed franchise-tax protest against state comptroller, arguing that comptroller's calculation of the apportionment of taxpayer's taxable margin conflicted with the statute. Taxpayer argued that comptroller improperly required taxpayer to deduct a net loss from the sale of investments from its total receipts, which had the effect of increasing its apportionment factor and, therefore its taxable margin.

The Texas franchise tax on businesses based or operating in Texas is calculated, in its simplest form, "by multiplying a business's taxable margin by the applicable franchise-tax rate." "Taxable margin is determined by multiplying a business's total margin by an apportionment factor designed to limit the franchise tax to revenue attributable to business conducted in Texas." The apportionment factor is calculated by dividing "receipts from business conducted in Texas" by "receipts from all business anywhere, including Texas." Thus, the lower the receipts from all business anywhere, the higher the apportionment factor and the higher the tax liability.

Under TEX. TAX CODE § 171.105(b), "'[i]f a taxable entity sells an investment or capital asset, the taxable entity's gross receipts from its entire business for taxable margin includes *only the net gain* from the sale.'" However, comptroller adopted and applied a rule, TEX. ADMIN. CODE § 3.591(e)(2), "providing that '[i]f the combination of net gains and losses results in a net loss, the taxable entity should net the loss against other receipts, but not below zero.'"

"The comptroller is charged with administering the franchise tax and has broad discretion to adopt rules for its collection as long as those rules do not conflict with state or federal law." "'If there is vagueness, ambiguity, or room for policy determinations' in the language of a statute, 'we normally defer to [an] agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute.'"

Here, "comptroller's reading would rewrite the statute to . . . include 'only the net gain *or net loss*.' Not only would this add to the statute's plain language, it would effectively write the word 'only' out of the statute." "We generally defer to an agency's 'reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; "an agency's opinion cannot change plain language."'" Because TEX. TAX CODE § 171.105(b) is unambiguous and because 34 TEX. ADMIN. CODE § 3.591(e)(2) "directly conflicts with" it, the rule "is not entitled to our deference."

PP. Utilities

1. *Oncor Electric Delivery Company, LLC v. Public Utility Commission of Texas*, 507 S.W.3d 706 (Tex. 2017)

Appeal of utility rate case. The Supreme Court ruled (1) that, under PURA, "electric utilities to [are not required to] discount charges for service provided to state college and university facilities . . . because they provide service to REPs, not to the REPs' customers;" (2) a former section of PURA did not "require a utility to adopt a corporate structure so as to be part of" a federal tax consolidated group; and (3) the evidence "establishes that franchise charges negotiated by the TDU with various municipalities were reasonable and necessary operating expenses under PURA."

"On January 1, 2002, the Public Utilities Regulatory Act . . . implemented a competitive retail market for electricity in [ERCOT]. . . . Each . . . vertically integrated electric utility . . . was required to 'unbundle' its business activities into three separate units: a power generation company, a transmission and distribution utility . . . , and a retail electric provider. . . . [O]nly TDUs continued to be regulated by the" PUC. "TDUs still deliver electricity directly to the retail consumer's meter and provide metering services, but the charges for TDUs' services are paid by REPs, which in turn charge the consumer."

PURA "requires an electric utility to 'discount charges for electric service provided to'" various state colleges.

"TDUs cannot discount rates to consumers but only to REPs."

Footnote 28: "'We defer to agency interpretations of statutes only if they are ambiguous, provided that the agency's interpretation is reasonable and does not conflict with the plain language of the statute.' . . . [The] Court [will] uphold the Commission's interpretation if it was reasonable and in accord with the plain language of the statute'."

"The PUC was required to determine Oncor's

projected expenses and set rates at a level that would allow Oncor a reasonable return on its investment. One expense was Oncor's future tax liability." PURA "requires that the tax savings from filing a consolidated return benefit ratepayers."

Footnote 8: "If an expense is not allowed to be included in utility rates or an investment is not included in the utility rate base, the related income tax benefit may not be included in the computation of income tax expense to reduce the rates. The income tax expense shall be computed using the statutory income tax rates."

"Under federal tax law, a parent corporation and certain of its subsidiary corporations are an affiliated group that is allowed to file a consolidated return." As a partnership, federal "tax law permitted Oncor to elect to be treated as a corporation, which would have allowed Oncor to be included in the affiliated group eligible for EFH's consolidated tax return." The test is whether a utility "is," not whether it "could be."

"Municipalities franchise to utilities the use of streets, alleys, and other public areas." PURA "does not restrict renegotiated franchise charges to *only* those agreed to on the expiration of franchise agreements existing on September 1, 1999. The provision simply precludes the inference that Section 33.008(b) is exclusive." "[M]unicipalities may continue to impose franchise charges after competition, . . . charges per kilowatt hour equal to the average amount charged in 1998 must be considered reasonable and necessary, and . . . utilities may continue to renegotiate franchise charges, though they must demonstrate that the charges are reasonable and necessary in order to pass them along to REPs."

IV. FILING SUIT

A. Texas Rules of Civil Procedure

1. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled the doctors were entitled to dismissal based upon the allegations in the original petition.

Plaintiff argued his amended pleading superseded his original petition. TEX. R. CIV. P. 65 "provides that when an 'instrument' is amended, 'the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause.'" But, TEX. R. CIV. P. 65's "instruction that an instrument, after it has been amended, is no longer regarded as part of the pleadings does not nullify the fact that it was filed. Amendments do not always avoid the consequences of filing. For example, filing a fictitious pleading is sanctionable under [TEX. R. CIV. P.] 13. . . . Sanctions cannot be avoided merely by amending pleadings."

Normally, "'when a rule of procedure conflicts with a statute, the statute prevails.'" Footnote 52: "An exception is when 'the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004.'"

If TEX. R. CIV. P. 65, which indicates that amended pleadings supersede prior ones, "is inconsistent with [TEX. CIV. PRAC. & REM. CODE §] 101.106(e), enacted in 2003, the statute must prevail."

2. *A.D. Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017)

After bench trial, judge was voted out of office. The issue was "whether a newly elected district-court judge or the former judge she replaced may file findings of fact." The Supreme Court ruled that "the new judge lacks authority to file the findings." The Court then abated the appeal and directed that "the former judge file findings." If he refuses, the court of appeals may reverse and remand.

In a bench trial, "'any party may request the court to state in writing its findings of fact and conclusions of law.' TEX. R. CIV. P. 296.1. The party must file its request within twenty days after the court enters its judgment, and the court clerk must 'immediately' bring the request 'to the attention of the judge who tried the case.' The court must file its findings within twenty days of the timely request. TEX. R. CIV. P. 297. If the court fails to file findings within twenty days, the requesting party may file a notice of past due findings within thirty days of the initial request. A timely past-due notice extends the judge's deadline to forty days from the party's initial request. If the court fails to file findings in response to a proper and timely request, the court of appeals must presume the trial court made all the findings necessary to support the judgment. A party may rebut the presumption by demonstrating that the record evidence does not support a presumed finding."

Footnote 3: Because the due date for filing findings of fact "was a Saturday, the last day to file findings was actually Monday. . . . *See* TEX. R. CIV. P. 4."

"Our error-preservation rules require litigants to make 'a timely request, objection, or motion that' provides the grounds for relief and complies with the Rules of Civil or Appellate Procedure. The Rules of Civil Procedure provide the mechanism for parties to preserve error regarding a trial court's findings of fact. . . . [A] party waives its right to challenge a failure to file findings if it does not file a notice of past due findings as rule 297 requires. . . . And as a result, filing a notice of past due findings is sufficient to preserve error for unfiled findings."

"'Words and phrases shall be read in context and construed according to the rules of grammar and common usage.'" "'In construing a [rule,] . . . a court may consider among other matters the . . . title (caption).'" "'May' creates discretionary authority or grants permission or a power.'"

TEX. R. CIV. P. 1 requires the liberal construction of a rule. "But 'liberally applying' a rule is one thing; rewriting it is another."

Footnote 5: TEX. GOV'T CODE § 30.002(a) "codifies the common-law rule as it existed before the rules of civil procedure: the judge who heard the case has authority to file findings even if that judge has been displaced by election."

3. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

TEX. R. CIV. P. 38(a) "states that a defendant may join a third party who may be liable to the defendant or to the plaintiff for all or part of the plaintiff's claims against the defendant."

4. *In re Red Dot Building System, Inc.*, 504 S.W.3d 320 (Tex. 2016)

Because venue facts were not specifically disputed, they "should therefore be taken as true." TEX. R. CIV. P. 87(3)(a).

5. *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016)

City filed a motion to dismiss pursuant to TEX. R. CIV. P. 91a a suit filed under the Texas Tort Claims Act. The Supreme Court held that, under TEX. R. CIV. P. 91a., whether "the dismissal standard is satisfied depends 'solely on the pleading of the cause of action.'"

A motion to dismiss under TEX. R. CIV. P. 91a. has "been analogized to a plea to the jurisdiction, which requires a court to determine whether the pleadings allege facts demonstrating jurisdiction."

6. *In re H.E.B. Grocery Company, L.P.*, 492 S.W.3d 300 (Tex. 2016)

Slip and fall case; plaintiff suffered subsequent injury. After defense doctor's deposition, defendant moved for a medical examination, which the trial court denied. The Supreme Court granted mandamus.

The trial court may grant a motion for a physical or mental examination under TEX. R. CIV. P. 204.1 "if the movant establishes that (1) 'good cause' exists for the examination, and (2) the mental or physical condition of the party the movant seeks to examine 'is in controversy.' These requirements cannot be satisfied 'by mere conclusory allegations of the pleadings—nor by mere relevance to the case.'"

"The purpose of Rule 204.1's good-cause requirement is to balance the movant's right to a fair trial and the other party's right to privacy. To show good cause, the movant must (1) show that the requested examination is relevant to issues in controversy and will produce or likely lead to relevant evidence, (2) establish a reasonable nexus between the requested examination and the condition in controversy, and (3) demonstrate that the desired information cannot be obtained by less intrusive means."

7. *In re DePinho*, 505 S.W.3d 621 (Tex. 2016)

In a per curiam opinion, the Texas Supreme Court follows *In re John Doe a/k/a "Trooper"*, 444 S.W.3d 603 (Tex. 2014), which holds that a party may not obtain a TEX. R. CIV. P. 202 deposition where the court does not "'have subject-matter jurisdiction over the anticipated action,'" and holds that "a court may not order TEX. R. CIV. P. 202 depositions to investigate unripe claims."

8. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a

temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus.

TEX. R. CIV. P. 276(a) relates to "the Rule," *viz*. the rule of sequestration: "the process of swearing in the witnesses and removing them from the courtroom, where they cannot hear the testimony of any other witness); see also TEX. R. EVID. 614. The Rule provides that trial courts 'shall' exclude witnesses upon the request of a party. However, three classes of witnesses are exempt from the operation of the Rule, including 'an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney.'" Here, however, plaintiff did not rely upon the Rule; it relied upon the Trade Secrets Act, TEX. CIV. PRAC. & REM. CODE §§ 134A.001-.008, to which the Rule does not apply. The Trade Secrets Act "requires trial courts to take reasonable measures to protect trade secrets and creates a presumption in favor of granting protective orders to preserve the secrecy of trade secrets, which may include provisions for, among other things, 'holding in camera hearings.'" The Trade Secrets Act "granted the trial court discretion to exclude [defendant's representative] from portions of the temporary injunction hearing involving alleged trade secret information. . . ."

TEX. R. CIV. P. 76a "only governs the sealing of 'court records.' It does not implicate oral testimony, and thus does not apply" here.

9. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

TEX. R. CIV. P. 94 lists "contract-avoidance defenses that are affirmative defenses—failure of consideration, fraud, illegality, and statute of frauds—and extending the affirmative-pleading requirement to 'any other matter constituting an avoidance or affirmative defense')."

10. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

"Our rules of civil procedure vest trial courts with broad authority to order new trials 'for good cause' and 'when the damages are manifestly too small or too large.' TEX. R. CIV. P. 320."

B. Jurisdiction (Other than Sovereign Immunity, located at III(F))

1. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate tort suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus. However, the Court refused to dismiss the underlying suit on a ripeness challenge.

"Ripeness is a component of subject-matter jurisdiction, and courts have a duty to determine their jurisdiction. We have recognized that issues affecting subject-matter jurisdiction, like ripeness, may be raised for the first time on appeal, including interlocutory appeal."

"This is not an appeal, however, but a mandamus proceeding. Due to the extraordinary nature of the remedy, the right to mandamus relief generally requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act."

2. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Courts "have jurisdiction to determine their own jurisdiction."

3. *Honorable Mark Henry v. Honorable Lonnie Cox*, 520 S.W.3d 28 (Tex. 2017)

Lack of "subject-matter jurisdiction can be raised for the first time on appeal."

4. *Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc.*, 518 S.W.3d 422 (Tex. 2017)

Rancher sues oil company for environmental contamination as well as resulting personal injury, and oil company successfully compels arbitration under the arbitration provision of a prior settlement agreement. The Railroad Commission (RRC) also investigates the contamination. Three-member arbitration panel refuses oil company's request to abate pending final rulings by the RRC, finds for rancher, and awards damages and declaratory relief to rancher. Oil company moves to

vacate the award on the grounds that the RRC has exclusive or primary jurisdiction over the claims.

The Supreme Court rejects oil company's argument that "the RRC has exclusive jurisdiction . . . foreclosing [rancher's] common-law contamination claims[.]" "Abrogation of a common-law right . . . 'is disfavored and requires a clear repugnance' between the common-law cause of action and the statutory remedy. A statute's 'express terms or necessary implications' must indicate clearly the Legislature's intent to abrogate common-law rights." Here, the statutes did not show a clear intent that the RRC's authority "is intended to be exclusive of common-law actions," so there was no exclusive jurisdiction.

The RRC also does not have primary jurisdiction, which, "[u]nlike exclusive agency jurisdiction . . . is a prudential doctrine," and requires "trial courts [to] allow an administrative agency to initially decide an issue when: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations." However, "[t]he doctrine of primary jurisdiction does not apply to claims that are 'inherently judicial in nature', such as trespass, . . . negligence, negligence per se, fraud, assault, intentional battery, and breach of contract," all claims asserted by rancher.

5. *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc*., 512 S.W.3d 878 (Tex. 2017)

Pepsi was owed indemnity by an entity and alleged that others conspired to leave it underfunded. The issue was whether suit could be maintained in Texas, and several nonresident corporate defendants filed special appearances. The Supreme Court ruled there was no specific personal jurisdiction.

"[S]pecific personal jurisdiction over a nonresident defendant requires the defendant's purposeful availment of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. It also requires a 'substantial connection' between those activities and the operative facts of the litigation. In negotiating, executing, and carrying out the settlement agreement, the Mafco defendants did not seek to do business in Texas, commit a tort in Texas, or allegedly cause injury to Pepsi in Texas. Further, to the extent the Mafco defendants purposefully directed activities toward Texas, Pepsi's causes of action do not arise from those contacts."

"We review determinations of personal jurisdiction de novo. 'When, as here, the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence.'"

Footnote 8: "We have jurisdiction over interlocutory appeals in which the court of appeals 'holds differently from a prior decision of' this Court, meaning that 'there is inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.' TEX. GOV'T CODE § 22.225(c), (e). . . . The Mafco defendants contend that this holding conflicts with this Court's opinion in *BMC Software Belgium, N.V. v. Marchand*, in which we held that evidence that the defendant 'planned to defraud' the plaintiff in Texas did not confer specific jurisdiction with respect to fraud and negligent misrepresentation claims where the alleged misrepresentation, and the plaintiff's reliance thereon, occurred elsewhere. We have jurisdiction to resolve the uncertainty resulting from this alleged inconsistency."

"Texas's long-arm statute 'extends Texas courts' personal jurisdiction 'as far as the federal constitutional requirements of due process will permit.' A state's exercise of jurisdiction comports with federal due process if the nonresident defendant has 'minimum contacts' with the state and the exercise of jurisdiction 'does not offend 'traditional notions of fair play and substantial justice.'"

"A defendant's contacts with the forum may give rise to either general or specific jurisdiction. General jurisdiction is established when a defendant's contacts 'are so 'continuous and systematic' as to render [it] essentially at home in the forum State.' 'It involves a court's ability to exercise jurisdiction over a nonresident defendant based on any claim, including claims unrelated to the defendant's contacts with the state.' However, . . . we are primarily concerned with whether the nonresident defendants' alleged minimum contacts gave rise to specific jurisdiction, which is triggered when the plaintiff's cause of action arises from or relates to those contacts. . . . Specific jurisdiction must be established on a claim-by-claim basis unless all the asserted claims arise from the same forum contacts."

Minimum contacts derive from purposeful availment of conducting activities within the state. "Three principles govern the purposeful availment

analysis: (1) 'only the defendant's contacts with the forum' are relevant, not the unilateral activity of another party or third person; (2) the defendant's acts must be 'purposeful' and not 'random, isolated, or fortuitous'; and (3) the defendant 'must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction'' such that it impliedly consents to suit there.' [*Michiana Easy Livin' Country, Inc. v.* Holten, 168 S.W. 3d 777 (Tex. 2005)] 'The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court.'"

A "nonresident's alleged conspiracy with a Texas resident does not confer personal jurisdiction over the nonresident in Texas."

Footnote 10: After the "plaintiff bears the initial burden to plead sufficient jurisdictional allegations against a nonresident defendant, the burden then shifts to the defendant to negate all alleged bases of personal jurisdiction, and the plaintiff may then respond with evidence that affirms its allegations."

6. *Morath v. Sterling City Independent School District*, 499 S.W.3d 407 (Tex. 2016)

School districts sued the Commissioner of Public Education for a declaratory judgment that he exceeded his authority and acted *ultra vires* in applying a "Clawback Provision" (since repealed) of TEX. EDUC. CODE § 42.2516, requiring him to recover excess aid to districts under the Foundation School Program. The statute, however, provides that the Commissioner's determinations are "'final and may not be appealed.'" This language precludes judicial review of the Commissioner's decision, and the trial court therefore "lacked jurisdiction to hear the *ultra vires* suit."

The Legislature has the "authority to limit judicial review of executive actions." This power is "not unlimited": "Judicial review of claimed violations of constitutional rights and infringement of vested property rights cannot be foreclosed. But in other instances the Legislature may make an executive's actions final."

7. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016)

County and college filed a petition under TEX. R. CIV. P. 202 to investigate a potential claim against city. The Supreme Court granted mandamus requiring the county court "to first determine its jurisdiction" over the potential claim.

"'[S]ubject-matter jurisdiction is essential to a court's power to decide a case,' thus, a court cannot render a binding judgment concerning matters over which it lacks subject-matter jurisdiction. Moreover, a party 'cannot obtain by Rule 202 what it would be denied in the anticipated action.' Therefore, 'for a party to properly obtain Rule 202 pre-suit discovery, 'the court must have subject matter jurisdiction over the anticipated action.'' 'County courts at law are courts of limited jurisdiction and many, including the county court at law in this case, lack jurisdiction over a 'matter in controversy' that exceeds $[2]00,000.'"

Footnote 1: "'[I]n the jurisdictional context,' the phrase 'amount in controversy' means 'the sum of money or the value of the thing originally sued for.' Usually, for . . . a county court at law, that sum 'includes all of the damages the plaintiff seeks to recover at the time suit is filed,' not merely what the plaintiff is likely to recover."

A "court is duty-bound to determine its jurisdiction regardless of whether the parties have questioned it."

Here, it was not clear if the amount in controversy was within the jurisdiction of the County Court at Law.

8. *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, 493 S.W.3d 710 (Tex. 2016)

Three nonresident limited partnership private-equity funds and their nonresident general partner invested in a newly created Texas subsidiary that purchased a Texas hospital chain from a Texas seller. Another Texas company sued the funds and general partner, alleging that its own executives had usurped the opportunity in breach of their fiduciary duty and funds and general partner conspired with the executives. Funds and general partner filed special appearances contesting personal jurisdiction.

Texas courts have personal jurisdiction over a nonresident defendant if it "has 'minimum contacts' with the state and the exercise of jurisdiction 'does not offend "traditional notions of fair play and substantial justice."'" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). "The 'touchstone' of a minimum-contacts analysis is purposeful availment." "Three primary considerations underlie the purposeful-availment analysis: (1) 'only the defendant's contacts with the forum' state are relevant, not the unilateral activity of another party or third person; (2) the defendant's acts must be 'purposeful' and not 'random, isolated, or fortuitous,' and (3) the defendant 'must

seek some benefit, advantage, or profit by availing itself of the jurisdiction such that it impliedly consents to suit there.'" *Michiana Easy Livin' Country, Inc. v.* Holten, 168 S.W. 3d 777 (Tex. 2005). Only specific jurisdiction is at issue in this case, which "arises when the plaintiff's cause of action 'arises from or relates to the defendant's contacts.'"

"[S]o long as a parent and a subsidiary maintain separate and distinct corporate entities, the presence of one in the forum state may not be attributed to the other." Thus, the contacts of funds' Texas subsidiary could not be used to confer jurisdiction on funds and general partner.

However, funds' creation of the Texas subsidiary was for the express purpose of purchasing the Texas hospitals and their capital contributions were contractually required to be used for that purpose. Also, the purchase money came directly from funds. The deal "did not stem from a third party's unilateral activity; it was the result of a transaction stemming from the activity of [funds] themselves."

Here funds and their general partner "specifically sought a Texas seller and Texas assets." Their "contacts with Texas were 'purposeful'" and they "sought 'some benefit, advantage, or profit by availing [themselves] of the jurisdiction' such that they impliedly consented to suit there."

9. *Searcy v. Parex Resources, Inc.*, ___ S.W.3d ___ (Tex. 2016)(6/17/16)

Nabors, a Bermudan company with operations in Texas, had entered an agreement, negotiated in Texas, with ERG, a Texas company to sell its shares in Nabors' Bermudan subsidiary, Ramshorn, which owns Columbian oil and gas operations. After the deal fell through, Parex Canada, a Canadian company, sought to purchase the shares, creating a new company, Parex Bermuda, a Bermudan company, as buyer for the shares. ERG sued Parex Canada and Parex Bermuda for tortious interference and sued Ramshorn for fraud. Each of these defendants filed a special appearance challenging personal jurisdiction.

Both "strains of personal jurisdiction,"—specific and general—"are at issue in this case." Specific personal jurisdiction "is based on whether a defendant's activities in the forum state themselves 'give rise to the liabilities sued on.'" General personal jurisdiction exists "where a defendant's 'continuous . . . operations within a state [are] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" Recent U.S. Supreme Court cases clarify that general jurisdiction exists "over a defendant only if its 'affiliations with the [s]tate are so continuous and systematic as to render it *essentially at home* in the forum [s]tate.'"

Texas does not have general jurisdiction over Parex Canada because "[i]ts contacts with Texas are not even continuous and systematic, let alone sufficient to deem it essentially at home in Texas." It "has no bank accounts, offices, property, employees, or agents in Texas," "does not sell products in Texas," and "does [not] pay taxes" in Texas."

Texas also does not have specific jurisdiction over Parex Canada, even though Parex Canada had "many interactions with Nabors" and its Texas-based personnel. Parex Canada "did not seek to launch operations in Texas or reap the benefits of the Texas economy," but was instead "on the hunt for Columbian assets, and Ramshorn—a Bermuda company—owned some." It "did not initiate the interactions that it eventually had with Nabors," but instead was notified of the opportunity by a Canadian bank that was "solicited" by Nabors. Also, while ERG argued that Parex Canada "attempted to harm ERG in Texas" through its tortious interference, "the alleged direction of a tort into Texas is not a valid basis for specific jurisdiction."

Texas has specific jurisdiction over Ramshorn. "Ramshorn is a Bermuda corporation solely owned by Nabors, a Bermuda company that directs Ramshorn's actions from Houston." Ramshorn allowed a Texas-based Nabors executive "to hold himself out as president for a period of years" and "consistently held him out as having the authority to sell its . . . shares." There was specific jurisdiction because Ramshorn's "actual and apparent president purposefully availed the company of the Texas jurisdiction by negotiating at relative length in Texas for sale of its shares to a Texas buyer" and "ERG's claims directly arise out of this contact[.]"

Texas did not have general jurisdiction over Ramshorn, however, because even though "Ramshorn's operations were managed and controlled from Houston, . . . these contacts were not pervasive enough to establish general jurisdiction[.]" "[A]n entity's mere ownership in the forum state is insufficient" to confer general jurisdiction.

ERG's argument for personal jurisdiction over Parex Bermuda "appears to rely exclusively on its theory that jurisdiction . . . exists through its purported ratification of Parex Canada's contacts with Texas." Because there is no personal jurisdiction over Parex

Canada, this "ratification theory is inapposite."

10. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

Tort Claims Act case. Law professor tripped on "an improperly secured extension cord." The Supreme Court ruled that the case was "a premises defect claim, and there is no evidence that UT had actual knowledge of the tripping hazard created by the cord's position over the retaining wall and across the sidewalk."

"Whether a court has subject matter jurisdiction is a question of law, properly asserted in a plea to the jurisdiction. 'Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*.' Generally, the standard mirrors that of a summary judgment. . . . '[I]f the plaintiffs' factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction.' When the evidence submitted to support the plea implicates the merits of the case, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor."

11. *Linegar v DLA Piper LLP (US)*, 495 S.W.3d 276 (Tex. 2016)

"A party's standing to sue is implicit in the concept of subject-matter jurisdiction and is not presumed; rather, it must be proved."

12. *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016)

School districts, individuals, and other entities sue the State alleging that the school finance system violates the Texas Constitution. The State argues that the claims are not justiciable under the political-question doctrine, because they "involve policymaking reserved to the Legislature and are nonjusticiable political questions."

The Supreme Court rejected this argument. "[T]he Constitution imposes standards that are not committed unconditionally to the Legislature, but are instead subject to judicial review." Because the terms in the relevant provisions of the Texas Constitution "'provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions,'" the claims in this case did not present nonjusticiable political questions.

13. *Clint Independent School District v. Marquez*, 487 S.W.3d 538 (Tex. 2016)

Parents sued school district seeking to enjoin what they argue is an unconstitutional distribution of funds among schools in the district. District filed a plea to the jurisdiction, arguing in part that parents failed to exhaust their administrative remedies. Parents argued that the exhaustion-of-administrative-remedies requirement does not apply.

"If the Legislature expressly or impliedly grants an agency sole authority to make an initial determination" in disputes that arise within its regulatory arena, "the agency has exclusive jurisdiction and a party 'must exhaust its administrative remedies before seeking recourse through judicial review.'" "If the party files suit before exhausting exclusive administrative remedies, the courts lack jurisdiction and must dismiss the case."

The Texas Education Code provides, with certain exceptions, that persons "'aggrieved by[] the school laws of this state; or actions or decisions of any school district board of trustees that violate[] the school laws of this state" may "appeal in writing" to the Commissioner of Education. "However, '[a] person is not required to appeal to the commissioner before pursuing a remedy under a law outside of [the school laws] to which [the school laws] make[] reference or with which [the school laws] require[] compliance.'"

Although the word "may" is used, the Supreme Court had "interpreted the statute to *require* a person who *chooses* to appeal to first seek relief through the administrative process." "However, we have also been clear that this exhaustion requirement applies only to complaints that the Legislature has authorized the Commissioner to resolve." Thus, parents must first exhaust their administrative remedies by an appeal to the Commissioner if their claims are within the scope of the statute, unless an exception applies.

Parents argued that because they only pled causes of action for violations of the Texas Constitution, their claims were not based on "the school laws of the state" and were thus not subject to the exhaustion-of-administrative-remedies requirement. However, while "the constitutional provisions are not 'school laws of the state,'" "[t]he nature of the claims, rather than the nomenclature, controls, and artful pleadings cannot circumvent statutory jurisdictional requirements." Parents' "petition as a whole reflects the true nature of

the parents' complaint: that the district defies the Constitution's mandates *by violating the requirements of the Education Code*." Moreover, because "the school district's obligation to provide a constitutionally adequate education derives not directly from the Constitution but from the Legislature's decision to 'rely heavily on school districts to discharge its [constitutional] duty,'" parents' claims were not in pursuit of "'under a law outside of [the school laws]'" and were thus not excepted from the administrative remedy requirement.

Because parents were required to exhaust their administrative remedies by appealing to the Commissioner and failed to do so, the courts lacked jurisdiction over their suit.

14. *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016)

Indigent litigants who sued for divorce in family district courts each file uncontested affidavits of indigency in lieu of paying costs, as permitted under TEX. R. CIV. P. 145. However, after the final divorce decrees allocated costs to "'the party who incurred them'" without stating the amount of the costs due or that litigants could afford them, the district clerk sent demands to each litigant for court costs and fees, "threaten[ing] that the sheriff would seize property to satisfy the debt."

Litigants sued the district clerk in civil district court (not the family district courts in which the costs were taxed) for mandamus, injunctive, and declaratory relief and obtained a temporary injunction enjoining the district clerk "from 'continuing his policy of collection of court costs from indigent parties who have filed an affidavit of indigency.'" In an interlocutory appeal, the district clerk argued that the TEX. CIV. PRAC. & REM. CODE § 65.023(b) deprived the civil district court of jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 65.023(b), which dates to 1846, "provides that '[a] writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.'" "The purposes of the statute . . . are 'to protect the judgments and processes of one court from interference by another by direct attack' and to 'prevent[] a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case.'" Thus, the "'test of jurisdiction in such cases is whether the relief sought may be granted independently of the judgment or its mandate sought to be enjoined.'"

Here, the civil district court's injunction met that test, because it did not disturb the judgments of the family district courts. "[T]he family courts here did not order costs," but "merely la[id] out the division of any costs, not an amount to be charged." Nor could they "order costs despite an affidavit of inability to pay," which would "fl[y] in the face of our Constitution and case law." TEX. R. CIV. P. 145 "is but one manifestation of the open courts guarantee that 'every person . . . shall have remedy by due course of law.'" "It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence."

In holding that TEX. CIV. PRAC. & REM. CODE § 65.023(b) did not apply, the Supreme Court overruled *Evans v. Pringle*, 643 S.W.2d 116 (Tex. 1982) (per curiam), which held that a civil district court lacked jurisdiction to enjoin the sheriff from enforcing writs of execution against bond sureties to collect post-judgment interest on a bond forfeiture judgment issued by a criminal district court. "*Evans* did not" correctly interpret the statute, and the sureties in that case "should [not] have been required to return to the court that issued the processes giving rise to their objections to post-judgment interest." "*Evans* must therefore be overruled."

15. *TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, 490 S.W.3d 29 (Tex. 2016)

Interlocutory appeal from denial of a special appearance, which presents the Supreme Court's "first opportunity to address specific jurisdiction in the context of defamation claims arising from media broadcasts." Mexican broadcasters ran allegedly defamatory news stories on celebrity who resided in Texas. Stories were broadcast over the air on signals that originate in Mexico but reached and were viewable in parts of Texas. Celebrity sued broadcasters for defamation in Texas.

The Texas long-arm statute "reaches 'as far as the federal constitutional requirements for due process will allow.'" Thus, a Texas court may only exercise personal jurisdiction over a nonresident defendant if "(1) the defendant has established 'minimum contacts' with the state and (2) the exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice.'"

The minimum-contacts test requires that "the defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its

laws,"' such that the defendant '"could reasonably anticipate being hauled into court there.'" The Court analyzed four cases—three from the U.S. Supreme Court cases and one from the Texas Supreme Court—on purposeful availment.

In *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), the U.S. Supreme Court held that a nonresident magazine that had defamed a nonresident plaintiff had minimum contracts where the magazine had "'continuously and deliberately exploited'" the forum state's market by distributing thousands of copies of its magazine in the forum state.

In *Calder v. Jones*, 465 U.S. 783 (1984), the U.S. Supreme Court held that the a nonresident reporter and editor had minimum contacts where they defamed a resident plaintiff in a tabloid article that concerned the plaintiff's activities in the forum state, was drawn from sources in the forum state, and caused the plaintiff to suffer "'the brunt of the harm'" in the forum state. Also, as in *Keeton*, the editor and publisher knew that the thousands of copies of the tabloid were distributed in the forum state.

In *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005), which applied *Calder* and *Keeton*, the Texas Supreme Court held that a nonresident RV dealer did not have minimum contacts with Texas based on misrepresentations made in a phone call with a Texas resident plaintiff who had contacted the dealer to purchase an RV. The *Michiana* Court rejected an argument based on *Calder* that the dealer knew that the "brunt of the injury" would be suffered by a Texas resident in Texas because the sale of a single RV in Texas was not the "substantial presence" the *Calder* defendants had in the forum state. The *Michiana* Court rejected the "'directed-a-tort'" test that was "'based solely upon the effects or consequences' in the forum state," concluding "that 'the important factor was the extent of the defendant's activities, not merely the residence of the victim.'"

In the case *Walden v. Fiore*, ___ U.S. ___ (2014), the U.S. Supreme Court "confirmed our understanding of *Calder* and *Keeton*," where it held that a nonresident police officer did not have minimum contacts with the forum state in a suit by resident plaintiffs for violation of their Fourth Amendment rights through the officer's filing of a false affidavit that resulted in the seizure of their property outside the forum state. The *Walden* Court "reaffirmed that the specific-jurisdiction inquiry 'focuses "on the relationship among the defendant, the forum, and the litigation."' Thus, 'the relationship must arise out of contacts that "the defendant *himself*" creates with the forum state,' and the 'analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there.'" "'[M]ere injury to a forum resident is not a sufficient connection to the forum,'" but instead "'an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.'"

Here, celebrity contended that broadcasters: (1) "'directed a tort' at [celebrity] in Texas;" (2) "broadcast allegedly defamatory statements in Texas;" (3) "knew the statements would be broadcast in Texas;" and (4) "intentionally targeted Texas through those broadcasts." The Court held that "the evidence of the first three contentions does not establish purposeful availment, but the evidence of the fourth one does."

The contention that broadcasters "directed a tort" at a Texas resident by directing defamatory statements at a plaintiff who lives in and suffered injuries in Texas was insufficient to establish specific jurisdiction. "There is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." "Under *Keeton*, *Calder*, *Walden*, and *Michiana*, the fact that the plaintiff lives and was injured in the forum state is not irrelevant to the jurisdictional inquiry, but it is relevant only to the extent that *the forum state* was 'the focus of the activities of the defendant.'"

The contention that broadcasters' "broadcasts, though originating in Mexico, reached Texas residents through their television sets in their Texas homes" was also insufficient to establish personal jurisdiction. Unlike the magazines distributed in the forum state in *Keeton* and *Calder*, over-the-air broadcast signals that happen to reach the forum state are not, by themselves, evidence of contacts that are "'purposeful rather than random, fortuitous, or attenuated.'"

The contention that broadcasters "*knew* their broadcasts would reach Texas homes" was likewise insufficient. As in "stream-of-commerce" cases "a broadcaster's mere knowledge that its programs will be received in another jurisdiction is insufficient to establish that the broadcaster purposefully availed itself of the benefits of conducting activities in that jurisdiction. Instead, evidence of 'additional conduct' must establish that the broadcaster had 'an intent or purpose to serve the market in the forum state.'"

However, there was evidence that broadcasters intentionally targeted Texas with their broadcasts. This evidence did not come from *Calder*'s "subject-and-sources" test, because there was no evidence that the broadcast was based on Texas sources and the broadcast concerned celebrity's activities outside

Texas. However, the "subject-and-sources" test is not the only "method of proving that a defamation defendant targeted the forum state, and it need not be met when evidence otherwise establishes that the defendant's statement was 'aimed at or directed to' the state."

Here, while the mere fact that the broadcast signals reached into Texas was insufficient, celebrity submitted evidence that broadcasters "made substantial and successful efforts to benefit from the fact that the signals travel into Texas." There was evidence that broadcasters "actually physically 'entered into' Texas to produce and promote their broadcasts": one opened a business office and production studio in Texas, another sent an employee to expand broadcasts in Texas through cable distribution, and their anchor (also a defendant) traveled to Texas to promote her books about the program on which the defamatory statements were aired. There was evidence that broadcasters "derived substantial revenue and other benefits by selling advertising time to Texas businesses." Finally, there was evidence that broadcasters "made substantial and successful efforts to distribute their programs and increase their popularity in Texas."

Thus, "the evidence supports the trial court's finding that through their broadcasts, [broadcasters] purposefully availed themselves of the benefits of conducting activities in Texas, such that they 'could reasonably anticipate being haled into court there.'"

Purposeful availment only supports specific jurisdiction over a claim that "'arises from or is related to [the defendants'] purposeful activities in the state,'" meaning that there must be "a 'substantial connection between those contacts and the operative facts of the litigation.'" This test does not require a "'but for'" cause or "'proximate cause'" between the contacts and the liability. "Instead, we consider what the claim is 'principally concerned with,' whether the contacts will be 'the focus of the trial' and 'consume most if not all of the litigation's attention,' and whether the contacts are 'related to the operative facts of the claim."' Here, celebrity's claims "arise directly out of" the broadcasts that were the subject of broadcasters' purposeful availment.

"Even when a nonresident has established minimum contacts with a state, due process permits the state to assert jurisdiction over the nonresident only if doing so comports with 'traditional notions of fair play and substantial justice.'" However, "rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice" where purposeful availment has been established.

The facts considered to evaluate "the fairness and justness of exercising jurisdiction over a nonresident defendant" are "(1) the burden on the defendant; (2) the interests of the forum in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the international judicial system's interest in obtaining the most efficient resolution of controversies; [] (5) the shared interest of the several nations in furthering fundamental substantive social policies; . . . (6) 'the unique burdens placed upon the defendant who must defend itself in a foreign legal system;' (7) the state's regulatory interests; and (8) 'the procedural and substantive policies of other nations whose interests are affected as well as the federal government's interest in its foreign relations policies.'" "'To defeat jurisdiction, [the defendant] must present "a compelling case that the presence of some consideration would render jurisdiction unreasonable."'"

Here, the Court rejected broadcaster's argument Texas "lacks a constitutionally sufficient interest in providing a forum for the adjudication" of a suit "by Mexican citizens 'against other Mexican citizens of Mexican news broadcasts about Mexican activities.'" "Fundamentally, '[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory,' and we have never conditioned that interest on the plaintiff's status as a Texas 'citizen,' as opposed to a Texas 'resident.'"

16. *Matthews v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016)

Cheerleaders sued district after it prohibited "banners containing religious signs." The issue was "whether the defendant's voluntary cessation of challenged conduct rendered the plaintiffs' claims for prospective relief moot." The Supreme Court said that it did not.

"The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events. It prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by Texas Constitution article II, section 1."

"A defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. If it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while

remaining free to return to their old ways."

C. Venue, Forum Selection Clauses, and Forum Non Conveniens

1. *Pinto Technology Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017)

Minority shareholders sue majority shareholder and executives for tort claims related to dilution of minority shareholders' interest in corporation. Majority shareholder and executives move to dismiss based on a Delaware forum-selection clause in the amended shareholders' agreement. The forum-selection clause applied to "'any dispute arising out of' [the] shareholders agreement."

One minority shareholder is a signatory of the amended shareholder agreement with the Delaware forum-selection clause. The other minority shareholder did not sign this version, but signed a prior version of the shareholder agreement that contained a Texas forum-selection clause, but that version also authorized written amendment of the agreement with the assent of corporation and a majority of the shareholders. Executives were not signatories of any shareholder agreement in their individual capacities.

The trial court dismisses the case with prejudice to re-filing in Texas, and minority shareholders appeal. At issue is whether the tort claims are within the scope of the forum-selection clause, which defendants may enforce the forum-selection clause, and which defendants are bound by it.

Whether "noncontractual claims fall within the forum-selection clause's scope depends on the parties' intent as expressed in their agreement and a 'common-sense examination' of the substantive factual allegations. Legal theories and causes of action are not controlling. Rather, we avoid 'slavish adherence to a contract/tort distinction,' because doing otherwise 'would allow a litigant to avoid a forum-selection clause with 'artful pleading.'" "[T]he words 'arising out of' have 'broad[] significance[.]'" "When a forum-selection clause encompasses all 'disputes' 'arising out of' the agreement, instead of 'claims,' its scope is necessarily broader than claims based on rights originating exclusively from the contract."

Here, the "statutory and common-law tort claims evidence a 'dispute arising out of' the shareholders agreement because (1) the existence or terms of the agreement are operative facts in the litigation and (2) 'but for' that agreement the shareholders would not be aggrieved." That a claim that "arises out of 'general obligations imposed by law' . . . cannot arise out of the contract . . . may or may not be true for a forum-selection clause that covers 'any *claim* arising from the Agreement,' which we need not decide, but it is assuredly not true for a clause that applies to 'any *dispute* arising from the Agreement.'"

The minority shareholder who did not sign the version of the shareholders' agreement containing the Delaware forum-selection clause was nonetheless bound by it, because he signed a prior version and consented to the provision allowing amendment by majority vote. When he signed that agreement, he "bound himself to any properly amended forum-selection clause."

Executives, as non-signatories, could not enforce the agreement, however, and the claims against them were not properly dismissed. "As a general proposition, a forum-selection clause may be enforced only by and against a party to the agreement containing the clause," and "the circumstances in which nonsignatories can be bound to a forum-selection clause are rare."

Executives could not enforce the forum-selection clause as "transaction participants." The Supreme Court has not adopted the "transaction-participant theory" and did not need to decide whether to adopt it here, because the shareholder agreement's "express terms preclude its application in this case." The agreement expressly disclaimed the intent "'*to confer upon any person, other than the parties and their permitted successors and assigns, any rights or remedies hereunder*.'"

The Supreme Court also declined to adopt the "concerted-misconduct doctrine," based on equitable estoppel, whereby nonsignatories accused of "'substantially interdependent and concerted misconduct by both non-signatories and . . . signatories'" may enforce a forum-selection clause, as it had previously done in the arbitration context in *In re Merrill Lynch Trust Co. FSB*.

The "major transaction" mandatory venue provision of TEX. CIV. PRAC. & REM. CODE § 15.020(c) also did not mandate dismissal, because it "applies only when 'the party bringing the action has agreed in writing that an action *arising from the transaction* must be brought . . . in another jurisdiction.'" [Emphasis in original.] The only "major transaction" cited arose from a contract separate from the shareholder's agreement.

2. *In re Red Dot Building System, Inc*., 504 S.W.3d 320 (Tex. 2016)

Supplier of materials sued building contractor for an unpaid invoice regarding materials in one county, after which contractor sued supplier in a different county. The court in the latter county did not abate the case. Following *In re J.B. Hunt*, the Supreme Court granted mandamus: "When two inherently interrelated suits are brought in different counties, the first-filed suit ordinarily acquires dominant jurisdiction and the second-filed suit should be abated."

A "trial court should transfer a case if venue is not proper in that court." "Venue is proper 'in the county in which all or a substantial part of the events . . . occurred." In breach of contract cases, courts consider "where the contract was made, performed, and breached." Venue is proper in the county where the buyer was solicited and the contract formed. Since those venue facts were not specifically disputed, they "should therefore be taken as true." TEX. R. CIV. P. 87(3)(a). Venue is also proper in the county where the materials are fabricated and shipped.

Here, transferring venue was not appropriate because venue existed in both counties, and the court would not grant mandamus for that, either. The Court did note that a "trial court may also transfer a case where maintenance of the action in that court would work an injustice based on the economic and personal hardships the movant would incur," but that was not alleged in this case.

But, the court in the second county "should have abated the suit pending in that court, and . . . mandamus relief is available to secure this result." When "inherently interrelated suits are pending in two counties, and venue is proper in either county, the court in which suit was first filed acquires dominant jurisdiction." The second court "*must* abate the suit." There is an exception to the general rule when due to a "'party's inability to join necessary parties because it is not feasible or is impossible,'" but that was not the situation here.

3. *In re Oceanografia, S.A.*, 494 S.W.3d 728 (Tex. 2016)

Mexican ship, sailing with Mexican flag and crew, caught fire and sank while ferrying Mexican workers to offshore drilling site from Mexican port. Plaintiffs sued several companies, most of whom were Mexican. One appealed the denial of a special appearance, and they moved from dismissal based upon *forum non conveniens*. Before seeking a rehearing, discovery and mediations were conducted, and a motion for summary judgment filed. The Supreme Court ruled that plaintiffs had not shown defendants lacked diligence in seeking a ruling, and that plaintiffs were not prejudiced. The Court further ruled that the trial court "abused its discretion in finding that the balance of the private interests of the parties and the public interest predominate in favor of maintaining this action in Texas."

"Whether a party's delay in asserting its rights precludes mandamus relief depends on the circumstances." "Oceanografia . . . cannot be faulted for the delay in seeking mandamus relief from the denial of its motion to dismiss for *forum non conveniens* when to press ahead might have compromised its appeal of the denial of its special appearance." A nine-month delay thereafter "was not unreasonable because of developing evidence that plaintiffs would have to be tried in groups and some of the plaintiffs would not even be allowed into the United States."

Plaintiffs failed to prove any prejudice from the delay. Litigation costs could possibly benefit the suit when pursued in Mexico, and there was no evidence of pre-trial costs.

There are "six factors to be considered in determining whether a claim should
be dismissed for *forum non conveniens*:

> (1) an alternate forum exists in which the claim or action may be tried;
>
> (2) the alternate forum provides an adequate remedy;
>
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
>
> (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
>
> (5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
>
> (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation."

Several here "weigh in favor of dismissal."

Claims that the defendant tried to threaten or bribe plaintiffs in other litigation were not sufficiently substantiated. Moreover, despite violence in Mexico generally, there is no evidence this case "could not be safely tried in Mexican courts in Ciudad del Carmen."

Moreover, there are concerns about compelling witnesses from Mexico to testify in Texas.

"An alternative forum is adequate if the defendant would be subject to the alternate forum's jurisdiction by consent or otherwise, and the substantive law in the alternate forum would not deprive the parties of a remedy. . . . Lesser remedies will not make a forum inadequate; a forum is inadequate if the remedies it offers are so unsatisfactory they really comprise no remedy at all." "A forum will not be inadequate simply because its laws are less favorable to plaintiffs."

While defendants have litigated in Texas, here "the repairs, accident, and rescue occurred in Mexican waters, aboard a ship controlled and operated by a Mexican company, and crewed by its Mexican employees."

4. *In re Nationwide Insurance Company of America*, 494 S.W.3d 708 (Tex. 2016)

Contractor sued employer for claims centered on his contract with employer, including fraud and breach of contract. Two years after suit is filed, employer files a motion to dismiss, asserting for the first time the contract's Ohio forum-selection clause. Contractor argued that employer had waived the forum-selection clause through its delay and invocation of litigation in Texas, and that he was prejudiced because the breach of contract claim would be time-barred under a shortened limitations period provided for under the contract, which was enforceable under Ohio law. Employer agreed to waive enforcement of the contractual-limitations clause, but the trial court denied the motion to dismiss, and employer petitioned for mandamus.

"Contractual forum-selection clauses are generally enforceable in Texas." Courts must generally enforce these clauses "by granting a motion to dismiss," and "appeal is inadequate to remedy the erroneous denial of such a motion." "Like other contractual rights, a forum-selection clause may be waived," and the issue here is whether employer's "conduct in the Texas litigation waived the clause."

The standard for waiver of a forum-selection clause is "borrowed . . . from the jurisprudence applicable to arbitration clauses, an analogous type of forum-selection clause." "'A party waives a forum-selection clause by substantially invoking the judicial process to the other party's detriment or prejudice.'" "Substantial invocation and resulting prejudice must both occur to waive the right."

Here, the Supreme Court noted that employer, during the two years before it filed the motion to dismiss, "served answers and a counterclaim, filed special exceptions and two Rule 91a motions to dismiss specific claims, served written discovery, and obtained an agreed confidentiality order," but also noted that the court never heard the dispositive Rule 91a motions because contractor amended his pleadings in response to them. The Court did not determine whether employer's conduct amounted to "substantial invocation," but instead focused on the element of prejudice.

While "delay alone is generally insufficient to establish waiver," contractor argued that the delay was prejudicial in this case because employer waited long enough for contractor's breach of contract claim to become time-barred in Ohio, relying on the Supreme Court's leading case on waiver in the arbitration context, *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008). However, "*Perry Homes* requires more than theoretical harm; it 'requires a showing of prejudice.'" "'In cases of waiver by litigation conduct, the precise question is not so much when waiver occurs as when a party can no longer take it back.'" "[T]he test for waiver in this context is 'quite similar' to estoppel," which requires "'induce[ment of] "action or forebearance of a definite and substantial character"'" and that "'"injustice can be avoided only by enforcement."'"

Employer's conduct failed to meet this test for waiver, because contractor "never actually suffered the prejudice of which he complains;" the "loss of his contract claim . . . does not exist because of" employer's "voluntary waiver of the contractual-limitations period." "The trial court accordingly abused its discretion in refusing to enforce the forum-selection clause on the basis of this alleged prejudice."

The Court also rejected contractor's argument, asserted for the first time in a post-submission brief, that he was prejudiced because his fraud claim had become time-barred in Ohio. The Ohio limitations period had "apparently" run after the trial court's denial of the motion to dismiss and after employer's mandamus petitions had been filed in the court of appeals as Supreme Court, but before oral argument in the Supreme Court. Contractor "had a reasonable

opportunity to preserve this claim" by filing in Ohio, but elected not to "[h]aving prevailed in the trial court."

The filing of the mandamus petitions did not constitute substantial invocation of the judicial process to contractor's detriment. "A party has a legal right to pursue relief based on the existence of a mandatory forum-selection clause and waiver of the underlying contractual right must be premised on something other than its assertion."

D. Parties and Standing

1. *City of Krum v. Rice*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Resident who pleaded to deferred adjudication for a sex offense was required to register and stay a certain distance from places where children gather. After "general law municipality" passed a local ordinance requiring (among other things) double the distance, resident sued challenging the validity of the ordinance. While the case was on appeal, the Legislature passed enabling law for the municipality, which differed in the distance, and the city amended its ordinance to comply with the statute. The Supreme Court ruled that the case became moot, and therefore "the courts lack jurisdiction over those claims."

"A case is moot when either no 'live' controversy exists between the parties, or the parties have no legally cognizable interest in the outcome. . . . When a case becomes moot, the parties no longer have standing, which requires the court to dismiss for lack of jurisdiction. In turn, the court should set aside all previous judgments in addition to dismissing the entire cause."

2. *Sommers v. Sandcastle Homes, Inc.*, 521 S.W.3d 749 (Tex. 2017)

While a case is on appeal, plaintiff files for Chapter 7 bankruptcy. Bankruptcy trustee continues the appeal, but the opposing parties challenge his standing because he was not a named party in the original action.

"Generally, only a named party to the suit may bring an appeal." However, the bankruptcy court had declared that the trustee was the proper plaintiff, and "[w]e have held that once claims clearly belong to the bankruptcy estate, 'then the trustee has exclusive standing to assert the claim[s].'"

3. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

By a general grant, in 1991 two people sold their rights in real property in a county. 20 years later, they deeded their rights to a landman. Landman sued original purchaser, claiming among other things adverse possession. The Supreme Court ruled that landman "has no standing to prosecute any claim for adverse possession" that sellers might have had.

4. *Honorable Mark Henry v. Honorable Lonnie Cox*, 520 S.W.3d 28 (Tex. 2017)

Trial court granted injunction when District Judge sued County Judge to reinstate a court administrative employee at a set salary. The Supreme Court ruled that the "Government Code divides power, letting commissioners set a salary range while letting local judges decide if compensation within that range is reasonable. The judicial branch may direct the Commissioners Court to set a new range, but it cannot dictate a specific salary outside that range."

"We review a trial court's order granting a temporary injunction for clear abuse of discretion. We limit the scope of our review to the validity of the order, without reviewing or deciding the underlying merits, and will not disturb the order unless it is 'so arbitrary that it exceed[s] the bounds of reasonable discretion.' No abuse of discretion exists if some evidence reasonably supports the court's ruling."

5. *RSL Funding, LLC v. Pippins*, ___ S.W.3d ___ (Tex. 2016)(7/1/16)

"[S]tanding may be challenged for the first time in this Court." However, "where jurisdiction is challenged for the first time on appeal, we have noted that plaintiffs do not have the same opportunities to replead, direct discovery to, or otherwise address the jurisdictional issue as they have when standing is raised in the trial court." "Thus, when an appellate court is the first to consider jurisdictional issues, it construes the pleadings in favor of the plaintiff and, if necessary, reviews the record for evidence supporting jurisdiction." "If standing has not been alleged or shown, but the pleadings and record do not demonstrate an incurable jurisdictional defect, the case will be remanded to the trial court where the plaintiff is entitled to a fair opportunity to develop the record relating to jurisdiction and to replead."

6. *Linegar v DLA Piper LLP (US)*, 495 S.W.3d 276 (Tex. 2016)

During merger of companies merged, individual owner loaned money through a controlled entity that managed his personal retirement. Lawyer failed to file UCC-1, and individual lost most of the loan. He sued lawyer and firm; jury found attorney-client relationship and malpractice. The Supreme Court ruled individual had no standing.

"A party's standing to sue is implicit in the concept of subject-matter jurisdiction and is not presumed; rather, it must be proved. Standing is a question of law for the court to determine, although facts necessary to the determination may need to be determined by the factfinder."

"'In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. . . . The plaintiff must be personally injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large) suffered the injury. . . . [The injury] must be concrete and particularized, actual or imminent, not hypothetical. . . . [T]he plaintiff's alleged injury must be fairly traceable to the defendant's conduct. . . . [And] the plaintiff's alleged injury [must] be likely to be redressed by the requested relief.'"

"The standing analysis begins with determining the nature of the wrong being alleged and whether there was a causal connection between a defendant's conduct and the injury caused by the alleged wrong. Standing is assessed on a claim-by-claim basis."

The general rule is that a "'corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong.' . . . [But that] does not preclude a stockholder from recovering damages for wrongs done to the stockholder individually, provided the wrongdoer violated a duty ''owing directly by [the wrongdoer] to the stockholder.'' 'However, to recover individually, a stockholder must prove a personal cause of action and personal injury.'"

In *Wingate*, "because Touche Ross counseled the individual stockholders directly and the tax consequences of the IRS ruling fell directly on them, they suffered a direct loss and had standing to assert a cause of action against Touche Ross. . . ."

"To have standing to bring such claims, [plaintiff] was required to allege and prove that [firm] owed him a duty individually and that he was personally and concretely aggrieved by the firm's breach of that duty." And, here, plaintiff alleged and the jury found, that the firm "wrongfully advised him in his individual capacity. . . ." The loss of the loan "fell substantively and directly on" plaintiff.

As a general rule, "ordinarily—but not always—the trustee is the proper plaintiff to bring suit for losses the trust suffers. However, . . . here . . . the case was not tried on claims that [firm] violated duties it owed to [entity] as trustee, nor on a claim that the trust assets for which [entity] was trustee suffered a loss." The case was tried on a breach of duties owed to plaintiff individually.

7. *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016)

School districts, individuals, and other entities sue the State alleging that the school finance system violates the Texas Constitution. The State argues that the plaintiffs lack standing because the relief sought, "namely legislative changes including changes in funding," cannot be granted by the courts.

"Generally, standing under Texas law 'requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.'" Here, "[w]hile the trial court could not write its own substitute legislation," the court can "enjoin the Legislature from funding the school system until the Legislature cured the constitutional infirmity." Because the Court "cannot say" such relief "could not possibly spur the Legislature to act, as it has done in the past in response to court decisions." Thus, "[t]he Plaintiffs have standing."

E. Assignments

No cases to report.

F. Presuit Depositions: Rule 202

1. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016)

County and college filed a petition under TEX. R. CIV. P. 202 to investigate a potential claim against city. The Supreme Court granted mandamus requiring the county court "to first determine its jurisdiction" over the potential claim.

TEX. R. CIV. P. 202 "allows a court to authorize depositions 'to investigate a potential claim or suit.'"

Subject-matter jurisdiction is "essential." And a "party 'cannot obtain by Rule 202 what it would be denied in the anticipated action.' Therefore, 'for a

party to properly obtain Rule 202 pre-suit discovery, 'the court must have subject matter jurisdiction over the anticipated action.'"

2. *In re DePinho*, 505 S.W.3d 621 (Tex. 2016)

In a per curiam opinion, the Texas Supreme Court follows *In re John Doe a/k/a "Trooper"*, 444 S.W.3d 603 (Tex. 2014), which holds that a party may not obtain a TEX. R. CIV. P. 202 deposition where the court does not "'have subject-matter jurisdiction over the anticipated action,'" and holds that "a court may not order TEX. R. CIV. P. 202 depositions to investigate unripe claims."

G. Initiating Suit

No cases to report.

H. Temporary Restraining Order / Temporary Injunctions

1. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus.

The "due–process right of a party to be present at a civil trial—much less the right of a party to have a designated representative present at a temporary–injunction hearing—is not absolute."

Courts balance the parties' interests with "'presumptively greater weight'" provided to participation in the process. "Because of the presumption in favor of participation, due process ordinarily will preclude courts from excluding parties or their representatives from proceedings, at least when they are able to understand the proceedings and to assist counsel in the presentation of the case. However, courts have discretion to exclude parties and their representatives in limited circumstances when countervailing interests overcome this presumption." Here, the trial court was required to balance the harm plaintiff would have suffered by exposing its trade secrets to defendant's representative. Footnote 3: "At this preliminary stage, the trial court need not determine that the information is, in fact, a trade secret. Rather, the trial court need only ascertain whether the information is entitled to trade-secret protection until the trial on the merits."

The trial court was required to consider "the degree to which [defendant's] defense of [plaintiff's] claims would be impaired by [the] exclusion [of its corporate representative]."

Here, the "trial court did not balance the competing interests." Footnote 4: "To decide the preliminary question of whether [defendant's representative] could be excluded from the temporary injunction hearing, the trial court could have conducted an *in camera* hearing with [him] absent or ordered the parties to provide affidavits for its *in camera* inspection."

"To the extent the open–courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests, such as the preservation of trade secrets."

TEX. R. CIV. P. 276(a) relates to "the Rule," *viz*. the rule of sequestration: "the process of swearing in the witnesses and removing them from the courtroom, where they cannot hear the testimony of any other witness); see also TEX. R. EVID. 614. The Rule provides that trial courts 'shall' exclude witnesses upon the request of a party. However, three classes of witnesses are exempt from the operation of the Rule, including 'an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney.'" Here, however, plaintiff did not rely upon the Rule; it relied upon the Trade Secrets Act, TEX. CIV. PRAC. & REM. CODE §§ 134A.001-.008, to which the Rule does not apply. The Trade Secrets Act "requires trial courts to take reasonable measures to protect trade secrets and creates a presumption in favor of granting protective orders to preserve the secrecy of trade secrets, which may include provisions for, among other things, 'holding in camera hearings.'" The Trade Secrets Act "granted the trial court discretion to exclude [defendant's representative] from portions of the temporary injunction hearing involving alleged trade secret information. . . . "

TEX. R. CIV. P. 76a "only governs the sealing of 'court records.' It does not implicate oral testimony, and thus does not apply" here.

2. *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016)

Indigent litigants who sued for divorce in family

district courts each file uncontested affidavits of indigency in lieu of paying costs, as permitted under TEX. R. CIV. P. 145. However, after the final divorce decrees allocated costs to "'the party who incurred them'" without stating the amount of the costs due or that litigants could afford them, the district clerk sent demands to each litigant for court costs and fees, "threaten[ing] that the sheriff would seize property to satisfy the debt."

Litigants sued the district clerk in civil district court (not the family district courts in which the costs were taxed) for mandamus, injunctive, and declaratory relief and obtained a temporary injunction enjoining the district clerk "from 'continuing his policy of collection of court costs from indigent parties who have filed an affidavit of indigency.'" In an interlocutory appeal, the district clerk argued that litigants had an adequate remedy at law, precluding injunctive relief.

The Supreme Court rejected the district clerk's argument that litigants could have filed a motion to retax costs and thus had an adequate remedy at law. "Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law will lead to a multiplicity of suits, 'that very fact prevents it from being complete and adequate.' '[T]he unlawful acts of public officials' are prime candidates for injunctions 'when [those acts] could cause irreparable injury or when such remedy is necessary to prevent a multiplicity of suits.'"

"A motion to retax costs confront[ed] the correctness of the clerk's ministerial calculations," and is properly used to correct such "fact-specific errors" as "miscalculating the cost of an item or billing an item that is not statutorily taxable," "made in individual cases that require a similarly individual approach to redress."

Here, by contrast, litigants were "complaining of . . . a systematic policy that contravenes the law," and "[i]t would be wasteful to force each individual [litigant] to file a motion to retax costs when a single injunction will do."

Also, the injunction, which enjoined the district clerk not just "from billing costs to the named parties, but to all litigants who qualify as indigent," was not overbroad. "An injunction must be broad enough to 'prevent repetition of the evil sought to be stopped.'" "When a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties." The injunction was not overbroad, because it "tracks the language of Rule 145" and "does not restrain the District Clerk from any lawful activity."

Finally, injunction, rather than mandamus, was the appropriate remedy. "When the purpose of the suit is to compel action, then mandamus is proper; conversely, when the purpose is to restrain action or threatened action, then an injunction is proper." Here, because "the true relief lies in enjoining the District Clerk from continuing his policy" of collecting costs from indigent litigants, injunction was proper.

I. Service of Process and Default Judgment

1. *In the Interest of J.Z.P. and J.Z.P., Minor Children*, 484 S.W.3d 924 (Tex. 2016)

In family law case, father moved to modify child support and mother's right to choose address. He used alternative service of process, posting citation on the door, and then obtained a ruling without mother's appearance. When she found out 57 days later, she filed a "Motion to Reopen and to Vacate." The court of appeals dismissed for want of jurisdiction. The Supreme Court ruled that, despite the title, the motion should have been treated as a motion to extend time: "Justice plainly required the trial court and court of appeals to treat [mother's] motion as extending post-judgment deadlines."

TEX. R. CIV. P. 71 states: "When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated." "We have stressed that 'courts should acknowledge the substance of the relief sought despite the formal styling of the pleading.' . . . 'We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it.'"

Here, mother's motion "plainly requested relief from the trial court's order on the grounds that she had not been served with citation and had not learned of the trial court's order until a few days before her motion was filed."

J. Collateral Attack

1. *Engelman Irrigation District v. Shields Brothers, Inc.*, 514 S.W.3d 746 (Tex. 2017)

Contractor sued district, a governmental entity, for breach of contract, and obtained a judgment after trial. The court of appeals affirmed the trial court's denial of district's assertion that governmental immunity

deprived the trial court of subject matter jurisdiction, relying on *Missouri Pacific Railroad Co. v. Brownsville Navigation District* and holding that "sue and be sued" language in district's enabling statute effects a waiver of sovereign immunity.

After the judgment becomes final, the Texas Supreme Court overruled *Missouri Pacific* in *Tooke v. City of Mexia* and holds that statutory "sue and be sued" language does not waive governmental immunity. District files the instant suit seeking a declaration that the original judgment is void for lack of subject matter jurisdiction based on the holding in *Tooke*.

The Texas Supreme Court holds that the change of law in *Tooke*, even though it had retroactive effect, does not disturb the application of res judicata to the original judgment. "A judicial decision generally applies retroactively," and this was expressly the case with *Tooke*. However, "retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted." "'That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata.'" However, "res judicata does not apply when the first tribunal lacked subject-matter jurisdiction," and "[a] judgment rendered without subject-matter jurisdiction is void and subject to collateral attack."

The "crux of this case" is whether sovereign immunity deprives a court of subject matter jurisdiction such that it renders a final judgment void, and the Supreme Court holds here that it does not. While the Supreme Court has "stated that sovereign immunity is a jurisdictional bar," it has "more recently . . . been more guarded in our description of the interplay of jurisdiction and sovereign immunity[,]" stating, "quite deliberately, that sovereign immunity 'implicates' the trial court's subject-matter jurisdiction. We did not hold that sovereign immunity equates to a lack of subject-matter jurisdiction for all purposes or that sovereign immunity so implicates subject-matter jurisdiction that it allows collateral attack on a final judgment."

"Holding that sovereign immunity so implicates subject-matter jurisdiction that [a] final judgment . . . can be challenged by collateral attack in a later proceeding would run counter to the trend of Texas law and of American jurisprudence generally . . . of 'reduc[ing] the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" "Sovereign immunity implicates a court's subject-matter jurisdiction, but their contours are not coextensive."

The Court followed the general rule set forth in section 12 of the Second Restatement of Judgments: "'When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation.'" This "general rule is particularly warranted where the issue of subject-matter jurisdiction was actually litigated in the first proceeding," and where the judgment was rendered by a "'court[] of record or of general jurisdiction [which is] presumed to have been based on proper subject matter jurisdiction.'"

The Court was "unpersuaded" by district's argument that failure to apply *Tooke* retroactively to the original judgment would "offend separation-of-powers principles by denying the Legislature its authority to waive sovereign immunity." While "the decision to waive sovereign immunity is largely left to the Legislature[,] . . . sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine." Here, the Court is "not depriving the Legislature of its role in waiving sovereign immunity so much as [it is] deciding the effect of a final judgment rendered by the judiciary," which is "very much a matter that should be left to the courts." Also, the Legislature itself would lack authority to reopen a final judgment by statute, which would violate separation of powers by "infring[ing] on the power of the judicial branch to render dispositive judgments[.]"

K. Intervention and Joinder

1. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Bennett sued Grant for slander after Grant had given to police photographs of Bennett selling a neighbor's cattle. Grant filed a counterclaim for malicious prosecution, and joined Bonham, Bennett's company. The jury awarded actual and punitive damages to Grant. The Supreme Court ruled the trial court did not abuse its discretion when permitting the joinder, and that any error was not preserved.

"Procedural matters, such as joinder and the consolidation of claims, are left to the discretion of the trial court. . . . An abuse of discretion occurs when the trial court 'acted without reference to any guiding rules and principles.'"

The trial court granted joinder without stating the grounds.

TEX. R. CIV. P. 38(a) "states that a defendant may join a third party who may be liable to the defendant or to the plaintiff for all or part of the plaintiff's claims against the defendant." That did not apply here.

"Because the trial court did not specify the rule on which it relied, and because there are several grounds on which joinder would be permissible, there was no abuse of discretion."

Bonham "waived this issue because it did not object to joinder before the trial court. Generally, an issue presented in a petition for review before this Court must have 'been preserved for appellate review in the trial court and assigned as error in the court of appeals.'" Here, Bonham first complained in the court of appeals.

2. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017)

Oil company cased paying royalties to lessor, arguing that lessor had conveyed his mineral interest to adjacent landowners. Lessor sues oil company for breach of contract. Oil company moved to abate and compel joinder under TEX. R. CIV. P. 39, arguing that the surrounding landowners have an interest in lessor's tract and are necessary parties.

Rule 39(a)(2) does not mandate joinder here because the nonparty landowners did not "'claim[] an interest relating to the subject of the action.'" While the adjacent landowners may have owned an interest in the subject mineral estates, there was no record evidence to show that any adjacent landowner had "ever demanded or asserted" such an interest. While the nonparties "did not need to actually 'c[o]me to court to assert an interest' . . . they needed to do *something*, and the adjacent landowners have done nothing."

L. Class Actions

No cases to report.

M. Declaratory Judgment

1. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Plaintiffs "could only recover attorneys [sic] fees under the Uniform Declaratory Judgments Act, which permits a trial court to 'award costs and reasonable and necessary attorney's fees as are equitable and just.' TEX. CIV. PRAC. & REM. CODE § 37.009. The determination of reasonable and necessary attorneys [sic] fees is an issue generally left to the trier of fact. A reviewing court may not simply substitute its judgment for a jury's. The party seeking recovery bears the burden of proof to support the award."

2. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Review of an award of attorney's fees under Ch. 27.

An award of attorney's fees in a declaratory judgment "is permissive and subject to four express limitations—that it be 'reasonable and necessary' and also 'equitable and just.'" This requires "a multi-faceted appellate review because the limitations involved both evidentiary and discretionary matters."

N. Bill of Review

No cases to report.

O. Quo Warranto

No cases to report.

V. DEFENSIVE ISSUES

A. Special Appearance

No cases to report.

B. Answer

No cases to report.

C. Special Exceptions

No cases to report.

D. Arbitration and Alternative Dispute Resolution

1. *Loya v. Loya*, 526 S.W.3d 448 (Tex. 2017)

Family law case in which ex-wife sought part of ex-husband's bonus that was paid the year following a Mediated Settlement Agreement (MSA). The Supreme Court ruled that the MSA awarded future income, including the bonus, to the ex-husband.

"Like any contract, the express terms of a mediated settlement agreement control. Moreover, the msa in this case dictates how the parties must resolve disputed interpretations of its terms. To the extent the msa did not clearly partition future income, the

arbitrator clarified that all of the parties' future income was partitioned as of June 13, 2010. Miguel's future income encompasses the 2011 discretionary bonus, which was neither owed nor paid to him until nine months after the MSA was signed."

MSA's are valuable to "amicably resolve contentious family-law disputes. These agreements further the express legislative policy . . . of 'encourag[ing] the peaceable resolution of disputes. . . .'"

Under the Family Code, "'If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on [the msa]. . . .'" The agreement is "'binding on the parties.'"

Here, it is irrelevant if the bonus might be community property because it was partitioned by the MSA.

"Because an MSA is a contract, we look to general contract-interpretation principles to determine its meaning. . . . When construing a contract, 'a court must ascertain the true intentions of the parties as expressed in the writing itself.' 'We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.'"

2. *Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc.*, 518 S.W.3d 422 (Tex. 2017)

Rancher sues oil company for environmental contamination as well as resulting personal injury, and oil company successfully compels arbitration under the arbitration provision of a prior settlement agreement. Three-member arbitration panel finds for rancher, and awards damages and declaratory relief to rancher. Oil company moves to vacate the award on the grounds of the evident partiality of the arbitrator appointed by rancher, the panel majority's manifest disregard of the law, and the parties' alleged agreement to expanded judicial review of the award.

Evidence that an arbitrator did not disclose that rancher had objected to his service as a mediator in another case did not establish evident partiality. "Evident partiality is established by the nondisclosure of 'facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality,' regardless of whether the nondisclosed information necessarily shows partiality or bias." The facts must be "material; an arbitrator need not disclose 'trivial' matters." Here, there was no evidence that the arbitrator knew of the objection to his service as a mediator, and it was "difficult to see" how this would make the arbitrator "partial *to*" rancher. [Emphasis in original.]

The panel did not manifestly disregard the law by exceeding its authority in awarding damages oil company argued were not permitted by Texas law and by issuing declarations "that imposed its own notion of economic justice." "In determining whether an arbitrator has exceeded his authority, the proper inquiry is not whether the arbitrator decided an issue correctly, but rather, whether he had the authority to decide the issue at all." Here, the panel's decision was within the broad scope of the arbitration provision, which covered claims regarding remediation of hazardous materials, gave "the arbitrators 'the authority to award punitive damages where allowed by Texas substantive law," and provided "that all 'disputes relating to his [sic] Agreement or disputes over the scope of this arbitration clause[] will be resolved by arbitration.'"

The arbitration agreement did not provide for expanded judicial review. "Generally, the Texas Arbitration Act restricts judicial review of arbitration awards, but parties can, by 'clear agreement,' contract for expanded judicial review." The agreement's authorization of an award of punitive damages "'where allowed by Texas substantive law'" was not such a clear agreement for expanded judicial review.

3. *RSL Funding, LLC v. Pippins*, ___ S.W.3d ___ (Tex. 2016)(7/1/16)

Purchaser entered sales contract to purchase annuities from beneficiaries. Sales contract included an arbitration clause. When the annuities' issuer refused to honor the sales contract, purchaser sued issuer and beneficiaries for a declaratory judgment. Beneficiaries were initially aligned with purchaser, but after suit was filed, beneficiaries informed purchaser that they were terminating their contracts and then sued purchaser for breach of contract. Purchaser initiated arbitration with beneficiaries and moves to stay litigation, but beneficiaries and issuer argued that purchaser has waived its right to arbitrate.

In a per curiam opinion, the Supreme Court held that purchaser had not waived arbitration. "The party asserting waiver bears a heavy burden of proof to show the party seeking arbitration has waived its arbitration right." Here, the delay between "the appearance of an arbitrable dispute" and the initiation of arbitration "was not so long as to establish" an intent to waive

arbitration. The discovery, motions practice, and other litigation conduct undertaken by purchaser related to its non-arbitrable dispute with issuer, which was not arbitrable, was "not relevant to the question" of whether purchaser waived its right to arbitrate with beneficiaries.

4. *Hoskins v. Hoskins*, 497 S.W.3d 490 (Tex. 2016)

Family members agreed to arbitrate a dispute regarding trust property "'pursuant to the provisions of the Texas General Arbitration Act." The arbitrator grants summary judgment for respondent dismissing claimant's claims based on statute of limitations and on claimant's lack of standing. Claimant filed a supplemental complaint adding additional claims, but the arbitrator held no more hearings and signed a final award dismissing all claims against respondent with prejudice. When respondent filed suit to confirm the award, claimant moves to vacated the award on the common-law ground that the arbitrator manifestly disregarded the law and on the statutory ground that the arbitrator "'conducted the hearing'" contrary to statute "'in a manner that substantially prejudiced [his] rights.'"

The Supreme Court addressed the "statutory-interpretation issue of first impression" on which "the courts of appeals are divided" of whether "a party seeking to vacate an arbitration award under the Texas General Arbitration Act (TAA) may invoke extra-statutory, common-law vacatur grounds," and held that a party cannot do so., and that "in proceedings governed by [the TAA], [TEX. CIV. PRAC. & REM. CODE §] 171.088 provides the exclusive grounds for vacatur of an arbitration award."

"When statutory text is clear and unambiguous, we construe that text according to its plain and common meaning unless a contrary intention is apparent from the statute's context." "'[B]ecause Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow.'"

"The TAA states that the court, on application of a party, 'shall confirm' an arbitration award '[u]nless grounds are offered for vacating, modifying, or correcting [it] under [TEX. CIV. PRAC. & REM. CODE §§] 171.088 or 171.091.'" Section 171.088 enumerates grounds on which "the court shall vacate an award," and section 171.091 provides for modification or correction of an award to correct clerical errors or if the award "involves 'a matter not submitted to' the arbitrators."

"The statutory text could not be plainer: the trial court 'shall confirm' an award unless vacatur is required under one of the enumerated grounds in section 171.088." "[T]he TAA leaves no room for courts to expand on those grounds, which do not include an arbitrator's manifest disregard of the law."

Claimant also argued, "[a]s his lone statutory ground for vacatur on appeal," that the award should be vacated under TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(D) because "the arbitrator 'conducted the hearing' contrary to section 171.047"—which entitles a party in an arbitration hearing to be heard, present evidence, and cross-examine witnesses—"'in a manner that substantially prejudiced [his] rights,'"—specifically, "that the arbitrator erred by issuing a final award without holding a hearing on [claimant's] supplemental complaint, which he filed after the arbitrator granted summary judgment."

Because the claims in the supplemental complaint "were encompassed by the arbitrator's grant of summary judgment based on [claimant's] lack of standing[,] . . . an additional hearing [on those claims] would have been redundant." "Accordingly, the arbitrator's failure to conduct a second hearing did not amount to a violation of the TAA's hearing requirements, nor did it substantially prejudice [claimant's] rights."

E. Ripeness and Mootness

1. *City of Krum v. Rice*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Resident who pleaded to deferred adjudication for a sex offense was required to register and stay a certain distance from places where children gather. After "general law municipality" passed a local ordinance requiring (among other things) double the distance, resident sued challenging the validity of the ordinance. While the case was on appeal, the Legislature passed enabling law for the municipality, which differed in the distance, and the city amended its ordinance to comply with the statute. The Supreme Court ruled that the case became moot, and therefore "the courts lack jurisdiction over those claims."

"A case is moot when either no 'live' controversy exists between the parties, or the parties have no legally cognizable interest in the outcome. 'Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests.' A case may become moot at any time, including while on appeal, and it may happen as a result of a change in the law. . . . [I]ntervening events like a repeal of or change

in the law may moot a challenge[]. When a case becomes moot, the parties no longer have standing, which requires the court to dismiss for lack of jurisdiction. In turn, the court should set aside all previous judgments in addition to dismissing the entire cause."

2. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate tort suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus. However, the Court refused to dismiss the underlying suit on a ripeness challenge.

"Ripeness is a component of subject-matter jurisdiction, and courts have a duty to determine their jurisdiction. We have recognized that issues affecting subject-matter jurisdiction, like ripeness, may be raised for the first time on appeal, including interlocutory appeal."

"This is not an appeal, however, but a mandamus proceeding. Due to the extraordinary nature of the remedy, the right to mandamus relief generally requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act."

3. *King Street Patriots v. Texas Democratic Party*, 521 S.W.3d 729 (Tex. 2017)

The Texas Democratic Party sued a political organization, King Street Patriots, claiming violation of provisions of the Texas Elections Code applicable to "political committees" as defined by statute. King Street Patriots argued it was not a "political committee" and also brings a facial challenge to the statute, arguing that it is unconstitutionally vague and overbroad. The parties agreed to sever the facial challenges, and the trial court entered summary judgment that the statute is facially valid.

The facial-overbreadth challenge is unripe here because King Street Patriots is not a "political committee" on the limited factual record before the Supreme Court. The Court would not "strike down provisions of a Texas statute with the 'strong medicine' of the 'disfavored' facial overbreadth doctrine by a party against whom those provisions likely do not apply." "'It is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.'" As a "prudential matter," the Supreme Court would not consider the facial challenge under these circumstances, and vacated "the portions of the lower courts' judgments upholding the facial constitutionality of these definitions" as "impermissible advisory opinions."

4. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

"'A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal.'"

5. *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016)

School districts, individuals, and other entities sue the State alleging that the school finance system violates the Texas Constitution. The State argues that the claims are not ripe "because school financing has changed over time," and changed during the course of the case before the trial court.

The Supreme Court rejected this argument. "Generally, the ripeness doctrine concerns whether there is sufficient development of the facts and issues to ensure that the court's judgment is not based on contingent or uncertain events." Here, "the inevitable changes in relevant factual circumstances do not place school finance cases completely beyond the decision-making of the courts; . . . holding otherwise would effectively overrule our longstanding recognition that the courts play a legitimate, constitutionally authorized rule in these disputes."

6. *Matthews v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016)

Cheerleaders sued district after it prohibited "banners containing religious signs or messages at school-sponsored events." The district subsequently adopted a resolution stating that it was not required to prohibit such banners but retained "the right to restrict the content of school banners." The issue was "whether the defendant's voluntary cessation of challenged conduct rendered the plaintiffs' claims for prospective relief moot." The Supreme Court ruled it did not because "the challenged conduct might reasonably be expected to recur."

The "mootness doctrine is reviewed de novo on appeal."

"The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events. It prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by Texas Constitution Article II, Section 1."

"A defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. If it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while remaining free to return to their old ways."

"[D]ismissal [due to mootness] may be appropriate when subsequent events make 'absolutely clear that the [challenged conduct] could not reasonably be expected to recur.' Persuading a court that the challenged conduct cannot reasonably be expected to recur is a 'heavy' burden."

Here, the district claimed its prohibition of banners was constitutional and that it has "unfettered authority to restrict the content of the cheerleaders' banners." It has refused to state that it would not reinstate the policy.

"[C]ases where the defendant's voluntary conduct yielded mootness . . . generally involved conduct that could not be easily undone, and thus foreclosed a reasonable chance of recurrence." By contrast, the district's "voluntary abandonment here provides no assurance that [it] will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future." Thus, "this case is not moot."

F. Affirmative Defenses

1) Affirmative Defenses Generally

1. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Footnote 1: "[W]e reject the dissent's implication that premises liability is simply an affirmative defense, requiring the defendant to bear the burden of ensuring submission of the proper theory of recovery to support a premises liability judgment in the plaintiff's favor."

2. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

"Tortious interference with a contract occurs when a party interferes with a contract willfully and intentionally and the interference proximately causes actual damages or loss. Justification is an affirmative defense to such a claim and 'is established as a matter of law when the acts the plaintiff complains of as tortious interference are merely the defendant's exercise of its own contractual rights.'"

3. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Tenant had habitually paid rent late, which landlord accepted; though commercial lease contained a "nonwaiver" provision, tenant argued landlord waived the nonwaiver provision. The Supreme Court ruled otherwise.

Footnote 26: "'[A]n affirmative defense 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions' and places 'the burden of proof [ ] on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.' 'Generally, an affirmative defense is waived if it is not pleaded.'"

4. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

After nurse reported a doctor to hospital for not obtaining informed consent for a c-section, nurse's employer no longer scheduled her to work at hospital. After a jury verdict for nurse, the Supreme Court reversed and rendered, saying nurse "failed to establish that [hospital] . . . tortuously interfered with her contract with" her employer.

"Legal justification is a defense to tortious interference when 'one is privileged to interfere with another's contract' either by 'a bona fide exercise of his own rights' or 'if he has an equal or superior right in the subject matter to that of the other party.'" Legal justification or excuse "'only protects good faith assertions of legal rights.'"

5. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen."

"[A]lthough truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern. Falsity is thus an element of Rosenthal's defamation claim. By contrast, an affirmative defense, such as the

statute of limitations, is 'based on a different set of facts from those establishing' the cause of action and 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.'"

Magazine failed to prove the "fair comment privilege." "The fair comment privilege is an affirmative defense to a defamation action extending to publications that are 'reasonable and fair comment[s] on or criticism[s] of . . . matter[s] of public concern published for general information.' This privilege applies only if the publication is 'fair, true, and impartial.'"

6. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Borrower "sent a usury demand letter to [lenders, and their] . . . attorneys responded with a usury cure letter and amended [lenders'] answer [in usury suit] to include the affirmative defense of usury cure and *bona fide* error. *See* TEX. FIN. CODE §§ 305.006(c), .101, .103."

7. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The Supreme Court ruled the tenant had the burden to prove the invalidity of the lease provision.

The tenant "carries the burden of pleading and proving the contract's invalidity as an affirmative defense." TEX. R. CIV. P. 94 lists "contract-avoidance defenses that are affirmative defenses—failure of consideration, fraud, illegality, and statute of frauds—and extending the affirmative-pleading requirement to 'any other matter constituting an avoidance or affirmative defense')."

An "affirmative defense 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions' and places 'the burden of proof [] on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.'"

TEX. PROP. CODE § 92.052(b) "does not include fault-based language, and the causal standard is not specified." Since "the causal standard in section 92.052(b) is not fault-based, [the tenant] bears the burden of proving facts in avoidance of contract enforcement. [The tenant] . . . cannot rely on the jury's negative finding to question one—inquiring whether her negligence caused the fire—as a substitute for an affirmative finding that the damages were not tenant caused. [The tenant's] . . . failure to submit a causation question . . . is the lynchpin for concluding she has failed to prove her affirmative defense."

"Despite the absence of an affirmative finding regarding the cause of the fire, [the tenant] could establish her affirmative defense if the record conclusively establishes the absence of the requisite causal relationship, either by negating [the tenant's] role in causing the damage or by establishing an alternative cause of the damage." But, here, the record does not do so.

8. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016)

If the transferee meets the requirements of TUFTA, it has "a *complete defense*." TUFTA includes an "affirmative defense in section 24.009(a)."

9. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch. 107, and then sued the Commission for damages. The trial court denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on the good-faith defense was error.

The legislative resolution granting permission to sue did not preclude the Commission from asserting a good-faith defense. TEX. CIV. PRAC. & REM. CODE § 107.002 does not permit the legislature to "waive any defense of law or fact 'except the defense of immunity from suit without legislative permission.'" While "[t]he Commission's immunity from suit is a jurisdictional component of its sovereign immunity and exists under common law unless expressly waived by

statute," the good-faith defense under TEX. NAT. RES. CODE § 89.045 "provides a statutory affirmative defense to liability" that is "distinct from and independent of the Commission's common-law immunity from suit."

Under TEX. NAT. RES. CODE § 89.045, "'[t]he commission and its employees and agents, the operator, and the non-operator are not liable for any damages that may occur as a result of acts done or omitted to be done by them or each of them in a good-faith effort to carry out' chapter 89" of the Natural Resources Code. The application of the good-faith defense is not limited to acts that involve discretion. The statute's "language is broad, foreclosing liability for 'any damages' resulting from acts or omissions 'in a good-faith effort to carry out' chapter 89." The common-law official immunity doctrine, which is limited to discretionary acts, "has no bearing on our interpretation of an independent, unrelated statute." Additionally, it "is not limited to tort actions," and applies to breach of contract actions.

The statutory good-faith defense does not include a standard of objective reasonableness. "The statute does not define 'good-faith' or 'good-faith effort.'" "An undefined statutory term is given its ordinary meaning unless 'a different or more precise definition is apparent from the term's use in the context of the statute.'" The common definitions of 'good-faith' "focus overwhelmingly on subjective state of mind." Thus "good-faith effort to carry out chapter 89 requires conduct that is honest in fact and is free of both improper motive and willful ignorance of the facts at hand." Here, there was a fact question as to whether the Commission's conduct was a "good-faith effort," and the trial court's failure to submit a jury question on this defense was error.

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

2) Pleading Affirmative Defenses

No cases to report.

3) Contributory Negligence and Comparative Fault

No cases to report.

4) Statute of Limitations and Statute of Repose

1. *Noble Energy, Inc. v. ConocoPhillips Company*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

A "'claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed and certain.'"

2. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories, including discrimination. The Supreme Court upheld summary judgment for all defendants, including, in part, that limitations barred certain theories. The Court held the "continuing tort" doctrine inapplicable here, and also reviewed equitable estoppel and misnomer.

A "'cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy' and the 'fact that damage may continue to occur for an extended period after denial does not prevent limitations from starting to run.'"

A "claim for tortious interference with a contract accrues at the time a contracting party knows the nature of the injury and the damages, regardless of whether the contract is terminated at that time." Here, limitations began to run when employee was placed on inactive status after the failed drug test.

The Court recognizes the "continuing tort" doctrine. "'A continuing tort involves wrongful conduct inflicted over a period of time that is repeated until desisted, and each day creates a separate cause of action.' A claim for a continuing tort does not accrue until the defendant's wrongful conduct ceases. The doctrine of continuing tort, with its extension of accrual date, is rooted in a plaintiff's inability to know that the ongoing conduct is causing him injury." Here, that was inapplicable because the "damages resulted from a single act."

"'A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.' Yet even when conclusively established, a plaintiff may invoke equitable estoppel as an affirmative defense in

avoidance of a defendant's limitations defense. In that situation, the non-moving plaintiff bears the burden of establishing its defense. Once the movant establishes that the action is barred, the non-movant must present summary-judgment evidence raising a fact issue on each element of his affirmative defense in avoidance. The movant has no burden to negate the non-movant's affirmative defense in avoidance."

"The elements of his estoppel defense are: (1) DISA made a false representation or concealed material facts; (2) with actual or constructive knowledge of those facts; (3) with the intent that [employee] act on DISA's representation; (4) to [employee], who had no knowledge or the means of knowledge of the facts; and (5) [employee] detrimentally relied on the representations."

Employee failed to establish his equitable estoppel claim that DISA would file an answer and that he should delay filing suit. There was no material misrepresentation, and employee had knowledge of DISA before limitations ran.

"'A misnomer differs from a misidentification.' 'Misidentification—the consequences of which are generally harsh—arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity.' If a 'plaintiff is mistaken as to which of two defendants is the correct one and there is actually existing a corporation with the name of the erroneously named defendant (misidentification), then the plaintiff has sued the wrong party and limitations is not tolled.' In contrast, a 'misnomer occurs when a party misnames itself or another party, but the correct parties are involved.' The courts of this state generally allow parties to correct a misnomer if it is not misleading."

Here, the "conclusive evidence shows [employee] knew about DISA well before limitations ran."

3. *Town of DISH v. Atmos Energy Corporation*, 519 S.W.3d 605 (Tex. 2017)

Residents and town sued owners of natural gas compressors due to the noise and smell they emitted. Because of prior complaints, a town meeting, and a report, the Supreme Court held that "the two-year statute of limitations bars their claims."

"Boilerplate language in [plaintiffs'] affidavits that each 'noticed a significant change in the noise being emitted' from the [compressor] station in late 2009 to early 2010 does not counteract Enterprise's evidence that it could not have contributed to that change. Nor can" the issuance of a certain report about emissions.

No evidence rebutted one defendant's contention that it was "not one of the alleged offenders. As the residents never responded to Enterprise's no-evidence point, the trial court properly granted Enterprise's summary-judgment motion. TEX. R. CIV. P. 166a(i) ('The court must grant the [no-evidence summary-judgment] motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.')."

Here, limitations was two years, and a "'defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.'" Moreover, a "defendant moving for summary judgment on limitations must negate the discovery rule 'if it applies and has been pleaded or otherwise raised.'"

"A cause of action accrues 'when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.' And '[a] permanent nuisance claim accrues when the condition first 'substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.'"

Accrual of a cause of action "may be deferred 'if the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.'" But, "'once a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it' . . . '[and knowledge] of facts that could cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action is in the law equivalent to knowledge of the cause of action for limitation purposes.'"

A "trespass claim accrues once 'known injury begins.'" The "'accrual date is not defined by statute, but is a question of law for the courts.'"

"Claims for nuisance 'normally do not accrue when a potential source is under construction,' but 'once operations begin and interference occurs, limitations runs against a nuisance claim just as any other.' Trespass claims are no different. And although completion of construction is not dispositive of an accrual date, it is a logical starting point. . . ." In this case, "if limitations did not begin to run when construction was completed, it began to run before," due to prior complaints, meetings, emails, and a report.

The commencement of trespass "'must be

determined based on an objective standard of persons of ordinary sensibilities, not on the subjective response of any particular plaintiff.'" The difference between this case and *Justiss* "is that in *Justiss* objective evidence corroborated the plaintiffs' claims that conditions worsened in 1997 and 1998. *Justiss* does not stand for the proposition that mere subjective affidavit evidence can defeat a limitations defense."

4. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen."

"[A]lthough truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern. Falsity is thus an element of Rosenthal's defamation claim. By contrast, an affirmative defense, such as the statute of limitations, is 'based on a different set of facts from those establishing' the cause of action and 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.'"

5. *ExxonMobil Corporation v. Lazy R Ranch, LP*, 511 S.W.3d 538 (Tex. 2017)

ExxonMobil left property after 60 years of production. Ranch sued asserting that ExxonMobil contaminated four fields. It first sought money damages, then later sought injunctive relief to compel ExxonMobil to remediate certain contamination. In an appeal after a motion for summary judgment, the Supreme Court ruled that limitations barred the suit regarding two of four fields.

"To obtain summary judgment on limitations, ExxonMobil must establish that the Ranch's claims for contamination accrued outside the limitations period. Generally, a cause of action accrues and limitations begins to run when facts exist that authorize a claimant to seek judicial relief." A "claim accrues when injury occurs, not afterward when the full extent of the injury is known."

Footnote 12: For a summary judgment on limitations, "'the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury. If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. . . . [A] party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.'"

"The discovery rule applies when a type of injury is objectively verifiable and inherently undiscoverable within the limitations period. Soil contamination from oil spills is unquestionably objectively verifiable, but it is not inherently undiscoverable within the limitations period. On the contrary, we have previously stated that application of the discovery rule in nuisance cases is rare. . . ."

"Fraudulent concealment requires showing that the 'defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.'" But, here, there "is no evidence that ExxonMobil was incorrect or deceptive in its reports. . . ."

6. *Southwestern Energy Production Co. v. Berry-Helfland*, 491 S.W.3d 699 (Tex. 2016)

Engineers sued oil company, asserting misappropriation of trade secrets and other claims relating to oil company's acquisition and use of information on well locations developed by engineers. The jury found for engineers and awards damages for misappropriation and breach of a confidentiality agreement. Oil company appealed on multiple issues.

Oil company had failed to carry its burden on appeal of showing that the trade secret claims were barred as a matter of law by the three-year statute of limitations. "A cause of action for trade-secret misappropriation accrues 'when the trade secret is actually use,'" meaning "'commercial use by which the offending party seeks to profit from the use of the secret.'"

The "discovery rule applies to trade-secret misappropriation claims, however," and so the limitations period did not begin to run until the plaintiff "knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the misappropriation." "[R]easonable diligence is an issue of fact," and a defendant can overcome a jury's findings on this affirmative defense only "with conclusive evidence." Here, oil company's evidence was of "mere surprise, suspicion, and

accusation." "Without more, subjective beliefs and opinions are not facts that in the exercise of reasonable diligence would lead to the discovery of a wrongful act."

7. *Christus Health Gulf Coast v. Carswell,* 505 S.W.3d 528 (Tex. 2016)

After patient died in hospital, hospital improperly obtained consent for an autopsy by an affiliate rather than the medical examiner. Jury did not find malpractice, but returned a verdict against the hospital for the improper autopsy. The Supreme Court held that "the claim is barred by the Act's two-year limitations period, as are the claims for breach of fiduciary duty and negligence that are based on the same underlying facts."

Ch. 74 provides a two-year statute of limitations. Though suit was timely filed, this claim was first pleaded three years afterwards. "TEX. CIV. PRAC. & REM. CODE § 16.068 [provides] that claims raised in a subsequent amended pleading relate back to a timely filed pleading and are not barred by limitations unless the amendment or supplemental pleading 'is wholly based on a new, distinct, or different transaction or occurrence.'" When "an amended petition 'sets up a distinct and different claim from that asserted in the previous petitions, the new claim does not relate back'.[]" Here, the claim related to the autopsy did not relate back and was thus barred by limitations.

8. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016)

Closing fees exceeded 3% on home-equity loan, and lenders did not timely attempt to cure. Homeowners brought suit to quiet title. The Supreme Court ruled that "liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations."

A "lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. . . . [T]herefore no statute of limitations applies to an action to quiet title on an invalid home-equity lien."

A "'void' act 'is one which is entirely null, not binding on either party, and not susceptible of ratification.' In comparison, 'a voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated and which may be subsequently ratified or confirmed.' When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it. 'When a deed is merely voidable, equity will not intervene as the claimant has an adequate legal remedy.'"

The Court ruled that "no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under section 50(c). 'We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred.'"

5) Laches

No cases to report.

6) Res Judicata and Collateral Estoppel

1. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

Suit against builder's CGL carrier after it failed to defend builder.

Footnote 10: "We recognize that, under the collateral-estoppel doctrine, 'prior adjudication of an issue will be given estoppel effect . . . if it was adequately deliberated and firm.' Further, collateral estoppel bars a third party insofar as privity exists with a party to the original suit. In *Block*, we held that the insurer was not collaterally estopped from relitigating coverage issues that had been resolved in the first suit, in part because the insurer's and insured's positions were in conflict on that issue. Similarly, when the plaintiff and insured defendant lack adversity in the underlying suit to determine the insured's liability, we cannot say that the insurer's and insured's positions are aligned with respect to those issues. For this reason, the doctrine of collateral estoppel does not preclude adjudication of liability and damages issues in this Insurance Suit."

2. *Engelman Irrigation District v. Shields Brothers, Inc.*, 514 S.W.3d 746 (Tex. 2017)

Contractor sued district, a governmental entity, for breach of contract, and obtained a judgment after trial. The court of appeals affirmed the trial court's denial of district's assertion that governmental immunity deprived the trial court of subject matter jurisdiction, relying on *Missouri Pacific Railroad Co. v. Brownsville Navigation District* and holding that "sue

and be sued" language in district's enabling statute effects a waiver of sovereign immunity.

After the judgment becomes final, the Texas Supreme Court overruled *Missouri Pacific* in *Tooke v. City of Mexia* and holds that statutory "sue and be sued" language does not waive governmental immunity. District files the instant suit seeking a declaration that the original judgment is void for lack of subject matter jurisdiction based on the holding in *Tooke*.

The Texas Supreme Court holds that the change of law in *Tooke*, even though it had retroactive effect, does not disturb the application of res judicata to the original judgment. "A judicial decision generally applies retroactively," and this was expressly the case with *Tooke*. However, "retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted." "'That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata.'" However, "res judicata does not apply when the first tribunal lacked subject-matter jurisdiction," and "[a] judgment rendered without subject-matter jurisdiction is void and subject to collateral attack."

The "crux of this case" is whether sovereign immunity deprives a court of subject matter jurisdiction such that it renders a final judgment void, and the Supreme Court holds here that it does not. While the Supreme Court has "stated that sovereign immunity is a jurisdictional bar," it has "more recently . . . been more guarded in our description of the interplay of jurisdiction and sovereign immunity[,]" stating, "quite deliberately, that sovereign immunity 'implicates' the trial court's subject-matter jurisdiction. We did not hold that sovereign immunity equates to a lack of subject-matter jurisdiction for all purposes or that sovereign immunity so implicates subject-matter jurisdiction that it allows collateral attack on a final judgment."

"Holding that sovereign immunity so implicates subject-matter jurisdiction that [a] final judgment . . . can be challenged by collateral attack in a later proceeding would run counter to the trend of Texas law and of American jurisprudence generally . . . of 'reduc[ing] the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" "Sovereign immunity implicates a court's subject-matter jurisdiction, but their contours are not coextensive."

The Court followed the general rule set forth in section 12 of the Second Restatement of Judgments: "'When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation.'" This "general rule is particularly warranted where the issue of subject-matter jurisdiction was actually litigated in the first proceeding," and where the judgment was rendered by a "'court[] of record or of general jurisdiction [which is] presumed to have been based on proper subject matter jurisdiction.'"

The Court was "unpersuaded" by district's argument that failure to apply *Tooke* retroactively to the original judgment would "offend separation-of-powers principles by denying the Legislature its authority to waive sovereign immunity." While "the decision to waive sovereign immunity is largely left to the Legislature[,] . . . sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine." Here, the Court is "not depriving the Legislature of its role in waiving sovereign immunity so much as [it is] deciding the effect of a final judgment rendered by the judiciary," which is "very much a matter that should be left to the courts." Also, the Legislature itself would lack authority to reopen a final judgment by statute, which would violate separation of powers by "infring[ing] on the power of the judicial branch to render dispositive judgments[.]"

7) Offset

No cases to report.

8) Statute of Frauds

1. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Footnote 44: A "lease of real estate for a term longer than one year, like the one here, comes within the statute of frauds."

9) Estoppel

1. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Tenant had habitually paid rent late, which landlord accepted; though commercial lease contained a "nonwaiver"

provision, tenant argued landlord waived the nonwaiver provision. The Supreme Court ruled that it did not. It further rejected tenant's argument that landlord was estopped because tenant had spent substantial sums improving the leasehold.

Here, tenant has not "identified any false or misleading representation supporting an equitable-estoppel bar to eviction. . . ."

"The doctrines of waiver and estoppel are often raised together, but they are distinct and separate doctrines. Estoppel 'prevents one party from misleading another to the other's detriment or to the misleading party's own benefit.' The elements of equitable estoppel are '(1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.'" In this case, tenant "fails to identify any false representations or undisclosed material facts."

2. *Kramer v. Kastleman,* 508 S.W.3d 211 (Tex. 2017)

Wife appealed from entry of a divorce decree incorporating a settlement agreement, arguing that the settlement was procured by fraud and coercion. Husband moved to dismiss the appeal, arguing that wife was estopped from challenging the decree because she accepted benefits under it. The Supreme Court used the opportunity to clarify the acceptance-of-benefits doctrine in the context of a divorce decree, which "has been applied irregularly and has become unmoored from its equitable underpinnings" in the 65 years since the Supreme Court's only prior application of the doctrine in a marital-dissolution case.

"The acceptance-of-benefits doctrine is . . . anchored in equity and bars an appeal if the appellant voluntarily accepts the judgment's benefits and the opposing party is thereby disadvantaged." "The burden of approving an estoppel rests on the party asserting it, and the failure to prove all essential elements is fatal." "Whether estoppel of the right to appeal is warranted involves a fact-dependent inquiry entrusted to the courts' discretion."

The Court noted the "trajectory toward a rigid and formulaic application of the doctrine" since the Court's last examination of the acceptance-of-benefits doctrine in *Carle v. Carle* 65 years ago. It clarified "that the acceptance-of-benefits doctrine doctrine is a fact dependent, estoppel-based doctrine focused on preventing unfair prejudice to the opposing party." "Under this doctrine, a merits-based disposition may not be denied absent acquiescence in the judgment to the opposing party's irremediable disadvantage." "[M]erely using, holding, controlling, or securing possession of community property awarded in a divorce decree does not constitute clear intent to acquiesce in the judgment and will not preclude an appeal absent prejudice to the nonappealing party."

Recognizing that "definitive, bright-line rules are hard to come by in matters of equity," the Court set forth "several nonexclusive factors" that "inform the estoppel inquiry, including:

- whether acceptance of benefits was voluntary or was the product of financial duress;
- whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment;
- whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified;
- whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession;
- whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one;
- if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted;
- whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment;
- whether the issue on appeal is severable from the benefits accepted;
- the presence of actual or reasonably certain prejudice; and
- whether any prejudice is curable."

Here, wife took ownership and control of property awarded to her under the decree, collected rent from property awarded to her under the decree, and sought the opportunity to retrieve personal property awarded to her. However, this "mere acceptance, possession, and control of community property does not equiate to acquiescence," and there was no evidence that any of these acts prejudiced husband. Thus, wife was not estopped from challenging the decree and her appeal should not have been dismissed.

10) New and Independent Cause

No cases to report.

11) Preemption

1. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

After a waitress was sexually assaulted at work by manager, she sued the restaurant and manager. The defense asserted that the Texas Commission on Human Rights Act preempted. The Supreme Court disagreed. Where "'the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts.' However, where the gravamen of the plaintiff's case is assault, we hold that the TCHRA does not preempt a common law assault claim. Because, on this record, the gravamen of B.C.'s claim is assault, we hold that Steak N Shake has not established, as a matter of law, that B.C.'s claim is preempted by the TCHRA."

"'[A]brogation of common-law claims [by statutes] is disfavored. However, we will construe the enactment of a statutory cause of action as abrogating a common-law claim if there exists 'a clear repugnance' between the two causes of action.'"

2. *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1 (Tex. 2016)

Home-rule city enacts an amended clean-air ordinance, regulating facilities already subject to Texas Commission on Environmental Quality (TCEQ) regulation under the Texas Clean Air Act (the Act). The ordinance incorporates TCEQ rules, provides for fines for violations of those rules after prosecution in municipal court, and requires facilities to register with the city and pay registration fees, even if they have already been approved by TCEQ. Facilities sue for a declaration that the ordinance's enforcement and registration schemes are pre-empted by state law and that the incorporation of TCEQ rules violates the non-delegation doctrine under the Texas Constitution.

"A home-rule municipality does not derive its power to enact ordinances from the Legislature" and "looks to the Legislature and Constitution only for limitations on its power to enact ordinances." Further, the Act allows a municipality to "'enact and enforce and ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with'" the Act or TCEQ rules. Preemption of "a home-rule municipality's power to enforce state air-quality standards by ordinance" occurs only if the "legislative limitation" on that power "appears with 'unmistakable clarity.'"

However, the Supreme Court held that the ordinance's enforcement provision was preempted by the Act, because it authorizes criminal prosecution of violations of the Act in circumvention of TCEQ's enforcement discretion, including TCEQ's discretion to determine "that civil or administrative remedies would appropriately address the situation." "[T]he Legislature expressed its clear intent to have the TCEQ determine the appropriate remedy in every case . . . favoring statewide consistency in enforcement." The ordinance's enforcement provisions "are inconsistent with the statutory requirements for criminal prosecution and the statutory scheme providing other enforcement options."

The Supreme Court also held that the ordinance's registration and fee requirements were preempted by the Act because it made it "'unlawful'" to operate a facility without a city registration even where the facility has a TCEQ permit, and thus "made unlawful an act approved by TCEQ."

The Supreme Court held, however, that the ordinance's "incorporation of TCEQ rules does not unconstitutionally delegate the city council's lawmaking power." "'The nondelegation doctrine should be used sparingly,' and 'courts should, when possible, read delegations narrowly to uphold their validity.'" Here, "when the City adopted the TCEQ rules as they currently exist and as they may be amended, the Ordinance complied with the Act's mandate that any ordinance must not be inconsistent with the TCEQ's rules."

12) Waiver

1. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer.

Appellate courts have "treated nonwaiver provisions inconsistently. We may therefore exercise jurisdiction over this appeal, despite its origin, because an opinion of this Court addressing the matter would 'remove unnecessary uncertainty in the law and unfairness to litigants.'" Footnote 16: "[A]bsent a conflict among the courts of appeals on a material legal question or a dissent in the case, no appeal to this Court is permitted in a 'case appealed from a county

court . . . when, under the constitution, a county court would have had original or appellate jurisdiction of the case.'"

"When neither party requests findings of fact and conclusions of law following a nonjury trial, all fact findings necessary to support the trial court's judgment are implied. If the reporter's record is filed on appeal, as it was here, implied findings may be challenged on factual- and legal insufficiency grounds in the same manner 'as jury findings or a trial court's [express] findings of fact,' but this Court only has jurisdiction over legal-sufficiency challenges." Footnote 22: A "statement of facts—now called the reporter's record—is necessary to challenge implied findings on evidentiary grounds after a non-jury trial."

"Evidence is legally insufficient to support a jury finding when (1) the record bears no evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. When determining whether legally sufficient evidence supports a finding, we must consider evidence favorable to the finding if the factfinder could reasonably do so and disregard evidence contrary to the finding unless a reasonable factfinder could not. When a party attacks the legal sufficiency of an adverse finding on an issue on which it bears the burden of proof, the judgment must be sustained unless the record conclusively establishes all vital facts in support of the issue."

2. *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017)

The government missed a 10-day deadline established by the Public Information Act to request an AG decision that an exception to disclosure applied, thus creating a presumption that the requested information should be disclosed. Some documents involved attorney-client confidential communications. The Texas Supreme Court ruled that "absent waiver, the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption. . . ."

"The attorney-client privilege reflects a foundational tenet in the law: ensuring the free flow of information between attorney and client ultimately serves the broader societal interest of effective administration of justice. The Legislature's choice to exempt information protected by the attorney-client privilege embodies the fundamental understanding that, in the public sector, maintaining candid attorney-client communication directly and significantly serves the public interest by facilitating access to legal advice vital to formulation and implementation of governmental policy. Full and frank legal discourse also protects the government's interest in litigation, business transactions, and other matters affecting the public. Depriving the privilege of its force thus compromises the public's interest at both discrete and systemic levels." Failing to meet the deadline does not constitute waiver.

The attorney-client privilege is the "oldest," most "venerated," and most "sacred" of the common law privileges. "The privilege's purpose could not be more evident: 'to encourage clients to make full disclosure to their attorneys' and, in return, to allow clients to obtain full, fair, and candid counsel."

"In addition to actual disclosure, the attorney-client privilege may be waived by 'offensive use' of the privilege. Offensive use occurs when a party seeking affirmative relief 'attempts to protect outcome-determinative information from any discovery.'"

Footnote 103: "[*S*]*ee* TEX. R. EVID. 511(b)(2) ('When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).')."

Footnote 104: "The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege.'[]"

Footnote 105: "*See* TEX. R. CIV. P. 193.3(d) ('A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence.')"

3. *RSL Funding, LLC v. Pippins*, ___ S.W.3d ___ (Tex. 2016)(7/1/16)

Purchaser entered sales contract to purchase annuities from beneficiaries. Sales contract included an arbitration clause. When the annuities' issuer refused to honor the sales contract, purchaser sued issuer and beneficiaries for a declaratory judgment. Beneficiaries were initially aligned with purchaser, but after suit was filed, beneficiaries informed purchaser that they were terminating their contracts and then sued purchaser for breach of contract. Purchaser initiated arbitration with beneficiaries and moves to stay litigation, but

beneficiaries and issuer argued that purchaser has waived its right to arbitrate.

In a per curiam opinion, the Supreme Court held that purchaser had not waived arbitration. "The party asserting waiver bears a heavy burden of proof to show the party seeking arbitration has waived its arbitration right." Here, the delay between "the appearance of an arbitrable dispute" and the initiation of arbitration "was not so long as to establish" an intent to waive arbitration. The discovery, motions practice, and other litigation conduct undertaken by purchaser related to its non-arbitrable dispute with issuer, which was not arbitrable, was "not relevant to the question" of whether purchaser waived its right to arbitrate with beneficiaries.

G. Responsible Third Parties

1. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate tort suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus: "ordinarily, a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion."

"The motion to designate, which was filed long after an initial trial date but more than sixty days before a new trial setting, was timely. *See* TEX. CIV. PRAC. & REM. CODE § 33.004. Trial courts have no discretion to deny a timely filed motion to designate absent a pleading defect and an opportunity to cure, which did not occur here."

A "'responsible third party' is 'any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought.'"

TEX. CIV. PRAC. & REM. CODE § 33.004 "permits a tort defendant to designate a person as a responsible third party by filing a motion 'on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.'" The statute is "applicable to tort and deceptive-trade-practices claims[]." "Even with a timely filed objection, the court must allow the designation unless the objecting party establishes (1) the defendant did not plead sufficient facts concerning the person's alleged responsibility and (2) the pleading defect persists after an opportunity to replead. The trial court may later strike the designation if, after adequate time for discovery, no legally sufficient evidence of responsibility exists."

Here, the trial court erroneously denied the motion. "We find nothing in the proportionate-responsibility statute supporting a construction of section 33.004(a) as limiting the phrase 'the trial date' to an initial trial setting rather than the trial date at the time a motion to designate is filed. Moreover, . . . nothing in the proportionate-responsibility statute precludes a party from designating an attorney as a responsible third party."

Also, "even if a deficiency [in the motion to designate a responsible third party] existed, the trial court lacked discretion to deny the motion to designate without affording them an opportunity to replead."

Neither "a section 33.004 designation nor a finding of fault against the person 'impose[s] liability on the person.'" And "neither can 'be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.'"

H. Counterclaims

No cases to report.

I. Election of Remedies

No cases to report.

VI. PRETRIAL PROCEDURE

A. Pleadings

1. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled the doctors were entitled to dismissal based upon the allegations in the original petition.

Plaintiff argued his amended pleading superseded his original petition.

Footnote 20: "'Assertions of fact, not pled in the

alternative, in the live pleadings of a party are regarded as formal judicial admissions.'"

Footnote 21: "'The vital feature of a judicial admission is its conclusiveness on the party making it. It not only relieves his adversary from making proof of the fact admitted but also bars the party himself from disputing it.'"

TEX. R. CIV. P. 65 "provides that when an 'instrument' is amended, 'the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause.'" But, TEX. R. CIV. P. 65's "instruction that an instrument, after it has been amended, is no longer regarded as part of the pleadings does not nullify the fact that it was filed. Amendments do not always avoid the consequences of filing. For example, filing a fictitious pleading is sanctionable under [TEX. R. CIV. P.] 13. . . . Sanctions cannot be avoided merely by amending pleadings."

If TEX. R. CIV. P. 65, which indicates that amended pleadings supersede prior ones, "is inconsistent with [TEX. CIV. PRAC. & REM. CODE §] 101.106(e), enacted in 2003, the statute must prevail."

2. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017)

Footnote 26: "'To the extent possible, we will construe the different [statutory] provisions in a way that harmonizes rather than conflicts.'"

3. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Creative "pleading does not change the nature of a claim. '[I]f a claim is properly determined to be one for premises defect, a plaintiff cannot circumvent the true nature of the claim by pleading it as general negligence.'"

4. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

Suit against builder's CGL carrier after it failed to defend builder. "'A plaintiff's factual allegations that potentially support a covered claim is [sic] all that is needed to invoke the insurer's duty to defend . . . .'"

5. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Footnote 26: "'Generally, an affirmative defense is waived if it is not pleaded.'"

6. *Town of DISH v. Atmos Energy Corporation*, 519 S.W.3d 605 (Tex. 2017)

Summary judgment on limitations in a trespass case. A "defendant moving for summary judgment on limitations must negate the discovery rule 'if it applies and has been pleaded or otherwise raised.'"

7. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

"Texas follows a fair-notice standard for pleading. Under that standard, courts consider whether the opposing party 'can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.' . . . [T]he fair-notice standard measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response. Claiming that Parker 'knowingly' participated in Lamb's breach of fiduciary duty does not give Parker information sufficient to understand that the church was asserting a claim for aiding and abetting. This is especially true because several of the other claims the church asserted—e.g. civil conspiracy and joint venture—required proof of knowing participation."

8. *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc.*, 512 S.W.3d 878 (Tex. 2017)

Appeal of a challenge to personal jurisdiction.

Footnote 10: After the "plaintiff bears the initial burden to plead sufficient jurisdictional allegations against a nonresident defendant, the burden then shifts to the defendant to negate all alleged bases of personal jurisdiction, and the plaintiff may then respond with evidence that affirms its allegations."

9. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

"The gravamen of a claim is its true nature, as opposed to what is simply alleged or artfully pled, allowing courts to determine the rights and liabilities of the involved parties."

10. *Centerpoint Builders GP LLC v. Trussway, Ltd.*, 496 S.W.3d 33 (Tex. 2016)

Footnote 3: "Our precedent consistently

determines seller or manufacturer status based on the evidence, and nothing in section 82.002(a) or the statute's purpose supports allowing the pleadings to dictate whether a party qualifies as a manufacturer or seller."

11. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved that he was]. . . . Coverage is therefore precluded as a matter of law."

"'An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy.'"

For exclusions, to "'avoid liability, the insurer then has the burden to plead and prove that the loss falls within an exclusion to the policy's coverage.'"

Here, though plaintiffs only pleaded generally that coverage existed, their "general pleading is sufficient in this case because we 'construe the pleadings liberally' in favor of coverage when reviewing a *Stowers* action."

12. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

A "plaintiff cannot plead around the heightened standard for premises defects, which requires proof of additional elements such as actual knowledge, by casting his claim instead as one for a condition or use of tangible personal property."

13. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

Medical malpractice case. The Supreme Court found that a claim for improper handling of an autopsy was a HCLC, and that it was barred by limitations. The Court also affirmed the reversal of discovery sanctions imposed upon the hospital.

"In determining [whether a claim is a health care liability claim governed by Ch. 74, we examine the underlying nature and gravamen of the claim, rather than the way it is pleaded."

Because the hospital's "actions in connection with . . . the autopsy are recast HCLCs, it follows that both the breach of fiduciary duty and negligence claims founded upon the same factual bases are likewise recast HCLCs."

When "an amended petition 'sets up a distinct and different claim from that asserted in the previous petitions, the new claim does not relate back'.[]"

Plaintiffs failed to prove their attorney's fees to support sanctions. "[Plaintiffs'] . . . pleadings contained various allegations as to [rate], but pleading allegations are not evidence."

14. *In the Interest of J.Z.P. and J.Z.P., Minor Children*, 484 S.W.3d 924 (Tex. 2016)

In family law case, father moved to modify child support and mother's right to choose address. He used alternative service of process, posting citation on the door, and then obtained a ruling without mother's appearance. When she found out 57 days later, she filed a "Motion to Reopen and to Vacate." The court of appeals dismissed for want of jurisdiction. The Supreme Court ruled that, despite the title, the motion should have been treated as a motion to extend time: "Justice plainly required the trial court and court of appeals to treat [mother's] motion as extending post-judgment deadlines."

TEX. R. CIV. P. 71 states: "When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated." "We have stressed that 'courts should acknowledge the substance of the relief sought despite the formal styling of the pleading.' . . . 'We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it.'"

Here, mother's motion "plainly requested relief from the trial court's order on the grounds that she had not been served with citation and had not learned of the trial court's order until a few days before her motion was filed."

Footnote 2: [M]other's "notice of appeal implied a motion for an extension of time. [Father] has not challenged that the notice of appeal was timely."

15. *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640 (Tex. 2016)

"'Artful phrasing of the pleadings to encompass

alleged design defects or any other theory of negligence does not affect the application of premises liability law.'"

B. Discovery

1. *In re National Lloyds Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a mandamus proceeding involving a discovery dispute in hail storm homeowners' insurance MDL, homeowner-plaintiffs sought production of insurer-defendants' attorney billing records and answers to interrogatories regarding insurer's attorney fees, arguing that this information was relevant to the reasonableness and necessity of homeowners' own attorney fees in support of their attorney fee claim. Insurers had not made a claim for attorney fees, but have made an offer of settlement under TEX. R. CIV. P. 167 that could give rise to an attorney fee claim. Insurer's counsel has been designated as an attorney fee expert to challenge the reasonableness and necessity of homeowners' fees.

The Supreme Court holds that, where a party "challenges an opposing party's attorney-fee request as unreasonable or unnecessary but neither uses its own attorney fees as a comparator nor seeks to recover any portion of its own attorney fees . . . , (1) compelling en masse production of a party's billing records invades the attorney work-product privilege; (2) the privilege is not waived merely because the party resisting discovery has challenged the opponent's attorney-fee request; and (3) such information is ordinarily not discoverable." Also, "[t]o the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish to tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred."

"[A] request to produce all billing records invades a party's work-product privilege because, cumulatively, billing records constitute a mechanical compilation of information that, at least incidentally, reveals an attorney's strategy and thought processes." "Billing records constitute 'communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives." Also, "[t]he attorney's entire litigation file is privileged per se, regardless of whether unprivileged information is included in the file."

Also, "redacting privileged information—such as the specific topics researched or the descriptions of the subject of phone calls—would be insufficient as a matter of law to mask the attorney's thought processes and strategies" and "would be inadequate to protect the work-product nature of the total billing information."

Thus, "requests for production of all billing invoices, payment logs, payment ledgers, payment summaries, documents showing flat rates, and audits invade the zone of work-product protection." This "does not prevent a more narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes." This also does not "preclude a party from seeking noncore work product" on a showing of "substantial need," and "an opposing party waive its work-product privilege through offensive use—perhaps by relying on its own billing records to contest the reasonableness of opposing counsel's attorney fees or to recover its own attorney fees."

"[S]ome or all of the information [contained in billing records] may also be protected from compelled disclosure by the attorney-client privilege," but insurer failed to establish that privilege through evidence.

Even though the billing records are privileged work product, "factual information is not exempt from discovery by mere inclusion within protected documents," and so information on "hourly rates, total amount billed, and total reimbursable expenses" contained in the records may not be privileged when sought by interrogatory. However, "even unprivileged information is not discoverable unless the information is relevant."

Information on a party's attorney's fees is "generally not relevant" to an opposing party's attorney fee claim. "However, when a party uses its 'own hours and rates as yardsticks by which to assess the reasonableness of those sought by [the requesting party]' or seeks to shift responsibility for those expenditures, the party places its own attorney-billing information at issue, making the information discoverable."

The Court summarized the "discovery guideposts . . . as follows: only relevant evidence is discoverable; relevant evidence that is privileged is not discoverable; relevant evidence that is not privileged is discoverable when (i) it is admissible or (ii) it is inadmissible by reasonably calculated to lead to the discovery of admissible evidence; and failing under either of those admissibility criteria, the request for

discovery may be denied even if the requested information is relevant and unprivileged."

Here, considering the *Arthur Andersen* factors, "an opposing party's hourly rates, total amount billed, and total reimbursable expenses do not, in and of themselves, make it any more probable that a requesting party's attorney fees are reasonable and necessary, or not, which are the only facts 'of consequence.'" "Evidence of an opposing party's fees lacks genuine probative value as a comparator for a requesting party's fees and, at best, would be merely cumulative or duplicative of other evidence directed to that inquiry." "A party can challenge another party's fee request as not 'customary' even though that party also paid a fee that was not 'customary,' as long as the challenger does not rely on its own fees to prove the point." Thus, information regarding fees paid by a party challenging an opposing party's fees "is generally not discoverable and, in the ordinary case, 'patently irrelevant.'"

Here, insurer designated its own attorney as an attorney fee expert, which, because of the discoverability of information on experts, "provides the opposing party with the means to access information and attorney work product not otherwise available under the general scope of discovery." However, "the requesting party must follow the discovery rules applicable to testifying experts," and TEX. R. CIV. P. 195 "does not provide for interrogatories or requests for production like the discovery requests at issue here."

2. *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)

In a windstorm suit, the homeowners sought electronically stored information (ESI) in the native format. Carrier objected and offered to produce records without the metadata. Both sides offered expert testimony at a hearing. The Supreme Court remanded the case for reconsideration based upon the principles set forth in the opinion, emphasizing that "neither party may dictate the form of electronic discovery," and that "proportionality is the polestar" when trial courts exercise discretion in ESI disputes.

"The scope of discovery is generally within the trial court's discretion, but the court 'must make an effort to impose reasonable discovery limits.' A writ of mandamus will issue only if the trial court reaches a decision 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law' and the relator has no adequate remedy by appeal. . . . [A]n appellate court may not substitute its judgment for the trial court's determination of factual . . . matters. . . . Mandamus relief is only appropriate in such cases when the relator establishes that the trial court could have reached only one conclusion and that a contrary finding is thus arbitrary and unreasonable. But with regard to questions of law and mixed questions of law and fact, ''a trial court has no 'discretion' in determining what the law is or applying the law to the facts,' even when the law is unsettled.'"

The scope of discovery extends to non-privileged matters relevant to a claim or defense. But, it is constrained under TEX. R. CIV. P. 192.4 by issues of cost and convenience.

Footnote 3: TEX. R. CIV. P. 196.4 provides "a request and object method for the form of ESI production."

"The requesting party must specify the desired form of production, but all discovery is subject to the proportionality overlay embedded in our discovery rules. . . ." "Reasonableness and . . . proportionality[] require a case-by-case balancing of jurisprudential considerations, which is informed by factors the discovery rules identify as limiting the scope of discovery and geared toward the ultimate objective of 'obtain[ing] a just, fair, equitable and impartial adjudication' for the litigants 'with as great expedition and dispatch at the least expense as may be practicable.'"

Footnote 1: *In re Weekley Homes* delineated the "parameters for assessing a request for direct access to electronically stored information."

"The opposing party must object and support proportionality complaints with evidence if the parties cannot resolve a discovery dispute without court intervention, but the party seeking discovery must comply with proportionality limits on discovery requests and 'may well need to . . . make its own showing of many or all of the proportionality factors.'"

The "discovery rules imbue trial courts with the authority to limit discovery based on the needs and circumstances of the case, including electronic discovery. Thus, . . . the trial court must balance any burden or expense of producing in the requested form against the relative benefits of doing so, the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the requested format in resolving the issues. . . . [E]vidence that a 'reasonably usable' alternative form is readily available gives rise to the need for balancing, and if these factors preponderate against production in the

requested form, the trial court may order production as requested only if the requesting party shows a particularized need for data in that form and 'the requesting party pay[s] the reasonable expenses of any extraordinary steps required to retrieve and produce the information.' Unless ordered otherwise, however, 'the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.'"

In re Weekley Homes sets for the "'proper procedure' under" TEX. R. CIV. P. 196.4. The parties must try to resolve disputes without court involvement. They should meet-and-confer because they ESI involves case-specific issues of which the parties have knowledge.

"Thus, if the responding party objects that electronic data cannot be retrieved in the form requested through 'reasonable efforts' and asserts that the information is readily 'obtainable from some other source that is more convenient, less burdensome, or less expensive,' the trial court is obliged to consider whether production in the form requested should be denied in favor of a 'reasonably usable' alternative form. In line with Rule 192.4, the court must consider whether differences in utility and usability of the form requested are significant enough—in the context of the particular case—to override any enhanced burden, cost, or convenience. If the burden or cost is unreasonable compared to the countervailing factors, the trial court may order production in (1) the form the responding party proffers, (2) another form that is proportionally appropriate, or (3) the form requested if (i) there is a particularized need for otherwise unreasonable production efforts and (ii) the court orders the requesting party to 'pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.'"

"Native format 'retains the file structure associated with and defined by the original creating application.'" "Static forms of ESI are created by converting native formats into static images, which removes metadata from the native files." Footnote 14 describes "three types of metadata," *viz*., substantive, system, and embedded.

Proportionality "requires case-by-case balancing" of the following issues discussed by the Court: 1) the likely benefit of the discovery; 2) the needs of the case (relevance of metadata "must be obvious or at least linked"); 3) the amount in controversy; 4) the parties' resources; 5) the importance of the issues at stake in the suit; 6) the importance of the discovery to resolve the litigation; and 7) any "other articulable factor bearing on proportionality."

Texas proportionality principles for ESI discovery align with the federal rules, even though the language may differ.

3. *In re National Lloyds Insurance Company*, 507 S.W.3d 219 (Tex. 2016)

During storm damage suit transferred to the MDL, the pretrial court granted plaintiffs filed a motion to compel "six categories of information" and ordered sanctions. The overbroad request sought "'all emails, reports attached to emails, and any follow-up correspondence and information'" concerning management reports. The Supreme Court ruled that one category "was not tailored with regard to time, place, or subject matter and was therefore overbroad." It then remanded to the pretrial court to determine the amount of sanctions attributable to the five items that were appropriately compelled.

The carrier did not waive its objection. An objection must be timely and "'state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.' TEX. R. CIV. P. 193.2(a). If an objection is not made within the time required, it 'is waived unless the court excuses the waiver for good cause shown.'" Here, though the carrier at one point withdrew its objection, it initially objected in writing and on time. It "continued to object through its motion for reconsideration. [Therefore, it] . . . did not waive its objection to the relevance or breadth of the discovery order."

""A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy.' 'Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.'' What is 'relevant to the subject matter' is to be broadly construed. . . . A request is not overbroad 'so long as it is 'reasonably tailored to include only matters relevant to the case.'' 'Discovery orders requiring document production from an unreasonably long time period or from distant and unrelated locales are impermissibly overbroad.'"

A prior opinion from a wind storm case involved a request for other claims. The Court stated there that "'we fail[ed] to see how National Lloyds'

overpayment, underpayment, or proper payment of the claims of unrelated third parties [was] probative of its conduct with respect to [the homeowner's] undervaluation claims at issue in [the] case.'" Scouring unrelated claims "'files in hopes of finding similarly situated claimants whose claims were evaluated differently from [the homeowner's] is at best an 'impermissible fishing expedition.''" "Here, the discovery order is not limited by location or weather event and exceeds the scope of [two prescribed] requests for production. . . ." The carrier, by affidavit, testified that the fifteen contested reports did not relate to a particular loss. "Therefore, the reports encompass claims in different counties, experiencing different causes of loss, on different dates from the Hidalgo County storms" at issue. "'A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.'"

It did not avail to assert that plaintiffs sought to prove bad faith and a pattern of defrauding policyholders. "This . . . does not entitle Plaintiffs to discover documents unrelated to the insurance event at issue." "Plaintiffs may discover reports and emails of National Lloyds that are limited as to time, place, or subject matter, but not indiscriminate reports and emails that lack any limitation."

Moreover, the "fact that this is an MDL case and not a single-plaintiff case does not entitle Plaintiffs to such broad discovery." The "same relevance standard used in all other cases" applies.

"If a motion to compel is granted, the trial court '*shall* . . . [order] reasonable expenses'" unless the objection was "'substantially justified.'" TEX. R. CIV. P. 215.1(d). A discovery sanctions "order 'shall be subject to review on appeal from the final judgment.' 'A trial court's ruling on a motion for sanctions is reviewed under an abuse of discretion standard.' The test for abuse of discretion is 'whether the court acted without reference to any guiding rules and principles.' To determine whether the sanctions imposed are just, we consider: 'First, . . . whether there is a direct relationship between the offensive conduct and the sanctions. . . . Second, . . . whether the sanctions are excessive.'" Here, the pretrial court's order compelling production of one category was overbroad, but the carrier failed to produce "five other categories." "The sanctions order does not specify the amount of attorney's fees attributed to each category of information compelled, and we cannot assume that reversal of one-sixth of the categories of information requires a one-sixth reduction of the sanctions." Thus, the pretrial court was directed to determine "whether the attorney's fees award remains appropriate in light of" this decision.

4. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016)

County and college filed a petition under TEX. R. CIV. P. 202 to investigate a potential claim against city. The Supreme Court granted mandamus requiring the county court "to first determine its jurisdiction" over the potential claim.

TEX. R. CIV. P. 202 "allows a court to authorize depositions 'to investigate a potential claim or suit.'"

Subject-matter jurisdiction is "essential." And a "party 'cannot obtain by Rule 202 what it would be denied in the anticipated action.' Therefore, 'for a party to properly obtain Rule 202 pre-suit discovery, 'the court must have subject matter jurisdiction over the anticipated action.''"

5. *In re Carolyn Frost Keenan*, 501 S.W.3d 74 (Tex. 2016)

In a deed restrictions suit, an issue arose over the validity of a vote of amendment. The trial court allowed only the homeowner's attorney to see the ballot results. The Supreme Court granted mandamus directing the trial court to permit the homeowner "to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial. The ballots should be included in the record. The court may order redaction of names of the voters or require the ballots to be filed under seal, or impose some other appropriate protective order to protect confidentiality."

The homeowner's "lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue." Thus, the trial court so restricted the ability to use the information that mandamus was warranted.

6. *In re H.E.B. Grocery Company, L.P.*, 492 S.W.3d 300 (Tex. 2016)

Slip and fall case; plaintiff suffered subsequent injury. After defense doctor's deposition, defendant moved for a medical examination. The Supreme Court granted mandamus, holding "the trial court abused its discretion in denying the motion and [defendant] lacks an adequate remedy by appeal."

The trial court may grant a motion for a physical

or mental examination under TEX. R. CIV. P. 204.1 "if the movant establishes that (1) 'good cause' exists for the examination, and (2) the mental or physical condition of the party the movant seeks to examine 'is in controversy.' These requirements cannot be satisfied 'by mere conclusory allegations of the pleadings—nor by mere relevance to the case.'"

"The purpose of Rule 204.1's good-cause requirement is to balance the movant's right to a fair trial and the other party's right to privacy. To show good cause, the movant must (1) show that the requested examination is relevant to issues in controversy and will produce or likely lead to relevant evidence, (2) establish a reasonable nexus between the requested examination and the condition in controversy, and (3) demonstrate that the desired information cannot be obtained by less intrusive means."

"First, as to relevance, the issues in controversy are the existence and extent of [plaintiff's] physical injuries . . . as well as the cause of those injuries."

Here, there was a "reasonable nexus between the requested examination and the condition in controversy." A nexus requires "more than 'mere conclusory allegations of the pleadings' and 'mere relevance to the case.'" Footnote 3: the affidavit of defendant's doctor "provides a description of the examination and proposed findings."

"Finally, [defendant] has shown that the desired information cannot be obtained by less intrusive means." A testifying doctor would be at a disadvantage compared to plaintiff's treating physician. Also, plaintiff had a subsequent injury.

TEX. R. CIV. P. 204.1 also "requires that the physical or mental condition of a party be in controversy." "Good cause" and "in controversy" are "necessarily related." If a "'plaintiff intends to use expert medical testimony to prove his or her alleged . . . condition, that condition is placed in controversy and the defendant would have good cause for an examination under Rule [204's predecessor].'"

Mandamus is appropriate because defendant "seeks to allow its expert the same opportunity as [plaintiff's] expert to fully develop and present his opinion, ensuring a fair trial."

7. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

During a medical malpractice case, doctor attempted to obtain peer review committee materials based upon an exception to their statutory protection. The Supreme Court granted mandamus, ruling that "the trial court abused its discretion in ordering the documents produced without a proper *in camera* inspection to determine whether the exception in section 160.007(d) applies."

"'Pleading and producing evidence establishing the existence of a privilege is the burden of the party seeking to avoid discovery. The party asserting the privilege must establish by testimony or affidavit a prima facie case for the privilege.' If the party asserting the privilege establishes a prima facie case for the privilege and 'tenders documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to compel production.' Once the party claiming privilege presents a prima facie case that the documents are privileged, the burden shifts to the party seeking production to prove that an exception to the privilege applies. . . . [The] crime–fraud exception to the attorney–client privilege applies only if a prima facie case of contemplated fraud is made by the party seeking discovery. . . ."

"Whether a discovery privilege applies is a matter of statutory construction. . . . Privileges are disfavored in the law because they 'contravene the fundamental principle that the public . . . has a right to every man's evidence,' and should, therefore, be strictly construed. 'Statutory construction is a question of law we review de novo.' When construing a statute, we look to the plain language to determine the intent of the Legislature. If the statute is unambiguous, we apply the words according to their common meaning, but we may consider the objective of the law and the consequences of a particular construction."

"In section 160.007 of the Texas Occupations Code, the Legislature provided a privilege for records made by a medical peer review committee in the course of its review." The "'overarching purpose of the [medical peer review committee privilege] is to foster a free, frank exchange among medical professionals about the professional competence of their peers.'" A "committee engages in 'medical peer review' when it evaluates 'medical and health care services'. . . ." Here, that occurred.

An exception requires "disclosure of the recommendation and decision to the affected physician . . . [but] this exception 'does not constitute waiver of the confidentiality requirements. . . .'"

"Because [hospital] presented a prima facie case for the privilege and tendered the allegedly privileged documents to the trial court, the trial court was obligated to review them before compelling

production." "Mandamus relief is appropriate when a trial court 'fails to conduct an adequate *in camera* inspection of documents when such review is critical to evaluation of a privilege claim.'"

"'Nothing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope.'"

"For the exception in section 160.007(d) to apply, the medical peer review committee must have taken some action that could have resulted in discipline beyond simply convening to review the physician's actions." On the record here, the Court cannot make that determination.

8. *In re DePinho*, 505 S.W.3d 621 (Tex. 2016)

In a per curiam opinion, the Texas Supreme Court follows *In re John Doe a/k/a "Trooper"*, 444 S.W.3d 603 (Tex. 2014), which holds that a party may not obtain a TEX. R. CIV. P. 202 deposition where the court does not "'have subject-matter jurisdiction over the anticipated action,'" and holds that "a court may not order TEX. R. CIV. P. 202 depositions to investigate unripe claims."

9. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

The hospital did not "properly disclose evidence during discovery." But the Supreme Court found that there was legally insufficient evidence to award attorney's fees as sanctions.

TEX. R. CIV. P. 215.2(b)(8) "authorizes a trial court to charge the party abusing the discovery process with the reasonable expenses, including attorney's fees, caused by the failure to obey discovery orders. These sanctions are designed to rectify discovery abuse by compensating the aggrieved party for expenses incurred. Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct. However, while properly proved bills showing attorney's fees [plaintiffs] incurred . . . might have been legally sufficient evidence to support a monetary sanction, no such evidence is present in the record. . . ."

Here, there were no bills nor "was there evidence as to the hourly rate or other evidence of an amount that would compensate for that time, even if the time had been proved. [Plaintiffs'] . . . pleadings contained various allegations as to both, but pleading allegations are not evidence."

TEX. R. CIV. P. 215.2 "allows a trial court to require the party who failed to obey a discovery order to pay 'the reasonable expenses, including attorney fees, caused by the failure' and to make such orders regarding the failure as are just. But to be just, a sanction must be based on a direct relationship between the particular offensive conduct and the sanction imposed, and the sanction must not be excessive vis-a vis that conduct."

A "party should be afforded an opportunity to present evidence in support of its claims," and that was done here.

Further, here "the trial court did not explain its rationale behind the amount imposed as monetary sanctions or the relationship between the sanctions and particular conduct of" the hospital. In *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), under Ch. 10 (related to frivolous pleadings), the Court "referenced a list of factors the American Bar Association recommended trial courts should consider in assessing the amount of monetary sanctions to impose."

Unlike federal court, Texas does "not provide for sanctions based on how much time courts spend on hearings. Trial courts have discretion to impose monetary sanctions within limits, but any sanctions must be directed toward remedying prejudice caused to the innocent party."

10. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus. The Court analyzed the "offensive use" doctrine and trade secrets concerning the production of the affidavit.

The "offensive use" doctrine did not apply here. "[C]ertain privileges may be waived by offensive use, but [the Court has] limited such waiver to instances where a party attempts to protect outcome–determinative information from any discovery." A "plaintiff engages in offensive use when it attempts to 'protect *from discovery* outcome determinative information'[]."

Plaintiff tendered an affidavit that the trial court ordered it produced, even though the trial court had not reviewed it. The "trial court had no choice but to review it *in camera* before ruling on whether to produce it over [plaintiff's] assertion that it contained trade secrets." When "privileged documents are the only evidence to substantiate the claim of privilege, the trial court must review them *in camera*."

TEX. R. EVID. 507(a) provides "that a party has a privilege to refuse to disclose its trade secrets 'if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'"

11. *Greer v. Abraham*, 489 S.W.3d 440 (Tex. 2016)

Defamation suit brought by former school district board member. Defendant filed a motion to dismiss under Ch. 27.

Plaintiff requested discovery. This was necessary because, when the defendant files a motion to dismiss under Ch. 27 that "typically suspends all discovery . . . until the court rules on the motion."

Here, the defendant asserted the "journalist's privilege" and refused to reveal his sources.

C. Affidavits

1. *KBMT Operating Company, LLC v Toledo*, 492 S.W.3d 710 (Tex. 2016)

Defamation case against TV station for report concerning a doctor's discipline by the Texas Medical Board.

Plaintiff's proof that "ordinary listeners were misled . . . was her affidavit which, besides being self-serving, was conclusory hearsay. Just last year we held that such "'[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the [Act].'" She did not identify any ordinary listener. Footnote 29: "Evidence of what an ordinary listener could have understood is not evidence of what the listener would have understood. The test for substantial truth and its application must be guided by the fact that 'since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive' . . . ,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."

2. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

Plaintiff tendered an affidavit that the trial court ordered it produced, even though the trial court had not reviewed it. The "trial court had no choice but to review it *in camera* before ruling on whether to produce it over [plaintiff's] assertion that it contained trade secrets." When "privileged documents are the only evidence to substantiate the claim of privilege, the trial court must review them *in camera*."

D. Rule 11 Agreements

No cases to report.

E. Court Orders; Docket Control Orders

1. *Noble Energy, Inc. v. ConocoPhillips Company*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

The Court was "reluctant" to treat part of the order from the bankruptcy court as "boilerplate," and construed the order's language as written: "we must assume the choices were intentional."

F. Motions for Summary Judgments

1. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017)

"[A] no-evidence motion that lists each element of the plaintiff's claim and then asserts that the plaintiff has no evidence to support 'one or more' or 'any of' those elements is insufficient to support summary judgment because this language does not clearly identify which elements, whether some or all, are challenged."

In this case, a no-evidence motion for summary judgment arguing that the plaintiffs "'have no evidence of any element of this cause of action'" and then listing two elements "[b]y way of example," is sufficient only to challenge the listed elements, not all elements of the cause of action.

2. *Helix Energy Solutions Group, Inc. v. Gold*, 522 S.W.3d 427 (Tex. 2017)

Plaintiff, an able-bodied seaman, was injured while he was assigned to a vessel that was being redesigned and was out of navigation for 20 months. The Supreme Court upheld a summary judgment that

the vessel was not in navigation for the purposes of the Jones Act.

"We review a trial court's grant of summary judgment de novo. To prevail on a traditional motion for summary judgment, 'a movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.' When a movant conclusively negates an essential element of a cause of action, the movant is entitled to summary judgment on that claim."

"Furthermore, 'we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor.' But we cannot disregard 'conclusive evidence'—that evidence upon which 'reasonable people could not differ in their conclusions.' Typically, evidence is conclusive when 'it concerns physical facts that cannot be denied' or 'when a party admits it is true.'"

Here, the employer "bore the burden to conclusively negate the 'seaman' element" of the Jones Act suit.

3. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

Footnote 38: "'A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.'" See *Wells Fargo Bank, N.A. v. Murphy*.

4. *Chavez v. Kansas City Southern Railway Company*, 520 S.W.3d 898 (Tex. 2017)

After a defense verdict, plaintiffs' attorney entered a settlement agreement with defendants. One plaintiff objected. Defendants moved for summary judgment, proving that the attorney represented plaintiff at trial; the court of appeals indulged a presumption that supported "'a settlement agreement made by an attorney hired by a client.'" The Supreme Court, however, ruled that, at "trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings."

"To obtain summary judgment, the 'movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.' If the movant meets this burden, 'the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements.' However, if the movant does not meet this burden, 'the burden does not shift and the non-movant need not respond or present any evidence.'"

Even if a lawyer hired for litigation is presumed to be authorized to enter a settlement, the "presumption may be rebutted. . . ."

A "summary judgment movant may not use a presumption to shift to the non-movant the burden of raising a fact issue of rebuttal. . . . [A] presumption cannot shift the burden to a non-movant in a summary judgment proceeding."

Accordingly, here, defendants failed to prove that plaintiff's attorney was actually authorized "to enter into a settlement agreement on her behalf."

5. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA, and Exxon under numerous theories. The Supreme Court upheld summary judgment for all defendants.

"We review the trial court's summary judgment de novo. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor."

"Even objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.'"

Footnote 4: "'The written answer or response to [a summary-judgment] motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.'" "'[I]ssues not expressly presented to the trial court may not be considered on appeal as grounds for reversal of a summary judgment.'"

"A defendant may defeat a tortious-interference claim on summary judgment by disproving at least one element of the claim as a matter of law."

When "reviewing summary judgment, appellate courts 'must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented.'"

"'A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.' Yet even when conclusively established, a plaintiff may invoke equitable estoppel as an affirmative defense in avoidance of a defendant's limitations defense. In that situation, the non-moving plaintiff bears the burden of

establishing its defense. Once the movant establishes that the action is barred, the non-movant must present summary-judgment evidence raising a fact issue on each element of his affirmative defense in avoidance. The movant has no burden to negate the non-movant's affirmative defense in avoidance."

6. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

Mineral owner (Lightning) sought injunction when surface owner leased to Anadarko the right to drill through subsurface to reach minerals Anadarko had leased under a neighboring surface. The case "concerns whose permission is necessary for an oil and gas operator to drill through a mineral estate it does not own to reach minerals under an adjacent tract of land." The Supreme Court ruled "that the loss of minerals Lightning will suffer by a well being drilled through its mineral estate is not a sufficient injury to support a claim for trespass. Accordingly, such a loss will not support injunctive relief."

"'Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property.' '[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight.' The owner of realty generally 'has the right to exclude all others from use of the property.' But ownership of property does not necessarily include the right to exclude *every* invasion or interference based on what might, at first blush, seem to be rights attached to the ownership."

"Although the surface owner retains ownership and control of the subsurface materials, a mineral lessee owns a property interest—a determinable fee in the oil and gas in place in the subsurface materials."

The law distinguishes "between the earth surrounding hydrocarbons and earth embedded with hydrocarbons." Although "the surface owner owns and controls the mass of earth undergirding the surface, those rights do not necessarily mean it is entitled to make physical intrusions into formations where minerals are located and remove some of the minerals. . . ." But the surface owner has "the right to inject and store non-native gas in the formation before all of the native gas was produced."

The mineral lessee's "interest includes 'the exclusive right to possess, use, and appropriate gas and oil.' The mineral estate is the dominant estate in the sense that the mineral owner has the right to use as much of the surface 'as is reasonably necessary to produce and remove the minerals' encompassed by the lease. [But, the] rights accruing to the dominant mineral estate are . . . not absolute."

The property owner's "right to exclude is both dictated and circumscribed by the scope of an owner's rights in the property." Thus, "a trespass is not just an unauthorized interference with physical property, but also is an unauthorized interference with one of the rights the property owner holds."

"When the owner of a fee simple estate severs the mineral estate by a conveyance, five rights are conveyed to the transferee or grantee: '(1) the right to develop, (2) the right to lease, (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments.' And an oil and gas lessee such as Lightning is generally only granted the right to develop under a lease."

The "rights conveyed by a mineral lease generally encompass the rights to explore, obtain, produce, and possess the minerals subject to the lease; they do not include the right to possess the specific place or space where the minerals are located. Thus, an unauthorized interference with the place where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights."

The "Railroad Commission monitors, and has rules closely controlling, the location and number of wells that may be drilled on a tract of land."

"The accommodation doctrine has long 'provided a sound and workable basis for resolving conflicts' between owners of mineral and surface estates that allows the mineral owner to use as much of the surface—and subsurface—as is reasonably necessary to recover its minerals."

The "rule of capture . . . vests title in whoever brings the minerals to the wellhead, even if the minerals flowed into the production area from outside the lease or property boundaries."

"Whether the small amount of minerals lost through that process will support a trespass action must, in the end, be answered by balancing the interests involved. . . ." To balance the interests, "we weigh 'the interests of society and the interest of the oil and gas industry as a whole against the interest of the individual operator.'" Drilling from "adjacent surface locations . . . allow[s] for recovering the most minerals while drilling the fewest wells. And this Court has always viewed waste-reducing innovations favorably." Here, the "individual interests in the oil and gas lost through being brought to the surface as part of drilling a well are outweighed by the interests of the industry

as a whole and society in maximizing oil and gas recovery."

Anadarko's rights here "extend only as far as those held by the owners of the surface estate. Lightning's mineral estate remains the dominant estate regarding use of the surface—and subsurface—for development of its mineral estate."

Finally, "the number of wells a pass-through driller might drill is not relevant with respect to claims in trespass against that driller."

7. *Town of DISH v. Atmos Energy Corporation*, 519 S.W.3d 605 (Tex. 2017)

Residents and town sued owners of natural gas compressors due to the noise and smell they emitted. Because of prior complaints, a town meeting, and a report, the Supreme Court held that "the two-year statute of limitations bars their claims."

"Boilerplate language in [plaintiffs'] affidavits that each 'noticed a significant change in the noise being emitted' from the [compressor] station in late 2009 to early 2010 does not counteract Enterprise's evidence that it could not have contributed to that change. Nor can" the issuance of a certain report about emissions.

No evidence rebutted one defendant's contention that it was "not one of the alleged offenders. As the residents never responded to Enterprise's no-evidence point, the trial court properly granted Enterprise's summary-judgment motion. TEX. R. CIV. P. 166a(i) ('The court must grant the [no-evidence summary-judgment] motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.')."

Here, limitations was two years, and a "'defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.'" Moreover, a "defendant moving for summary judgment on limitations must negate the discovery rule 'if it applies and has been pleaded or otherwise raised.'"

The difference between this case and *Justiss* "is that in *Justiss* objective evidence corroborated the plaintiffs' claims that conditions worsened in 1997 and 1998. *Justiss* does not stand for the proposition that mere subjective affidavit evidence can defeat a limitations defense."

8. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

The Supreme Court affirmed a summary judgment for lawyers in a legal malpractice suit because the plaintiff's proposed experts failed to establish the element of causation.

"We have long held that 'conclusory statements made by an expert witness are insufficient to support summary judgment.' In order to be competent summary-judgment evidence, an expert's opinion must have a 'demonstrable and reasoned basis on which to evaluate his opinion.' This basis must come in the form of an answer to the question 'Why': Why did the expert reach that particular opinion?"

"To avoid summary judgment Rogers needed to show that (1) alternative expert valuation testimony was available and (2) the testimony would have probably altered the verdict."

9. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

After law firm spent over $1M of church's money in its trust account, church sued attorney at firm who had handled its case, but not the money, and who learned of the theft afterwards. The Supreme Court reversed in part a summary judgment for attorney.

"'We review grants of summary judgment de novo. . . . [W]e take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve any doubts in the non-movant's favor.'"

"When a party moves for both traditional and no-evidence summary judgments, we first consider the no-evidence motion. If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion as it necessarily fails. Thus, we first review each claim under the no-evidence standard. Any claims that survive the no-evidence review will then be reviewed under the traditional standard."

"To defeat a no-evidence motion, the non-movant must produce evidence raising a genuine issue of material fact as to the challenged elements. A genuine issue of material fact exists if the evidence 'rises to a level that would enable reasonable and 6 fair-minded people to differ in their conclusions.' The evidence does not create an issue of material fact if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists."

"A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law."

For "the church to have defeated a no-evidence

motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. . . . On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought."

A "genuine issue of material fact is created when two admissions or statements by the same party conflict."

A "claim or allegation may not be raised for the first time on appeal. Further, '[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal' of a summary judgment."

"[E]vidence and statements must be considered in context."

10. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

"'We review a grant of summary judgment de novo.' . . . We review summary judgment evidence 'in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'"

Footnote 3: "'When a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious.'"

11. *ExxonMobil Corporation v. Lazy R Ranch, LP*, 511 S.W.3d 538 (Tex. 2017)

Plaintiffs sued ExxonMobil first for money damages, then they sought remediation of contamination. The Supreme Court "decline[d] to consider the availability of injunctive relief to remedy such contamination because the issue was not properly raised in the trial court."

"A motion for summary judgment must state the specific grounds entitling the movant to judgment, identifying or addressing the cause of action or defense and its elements. And while the availability of injunctive relief was discussed at the hearing on the motion, the motion itself did not 'present[]' the issue, as the rule requires." "Because the issue of the Ranch's entitlement to any injunctive relief was not properly presented to the trial court, we . . . must decline to address it."

12. *Laverie v. Wetherbe*, ___ S.W.3d ___ (Tex. 2016)(12/9/16)

"We review de novo a trial court's denial of a traditional motion for summary judgment."

13. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Suit alleging attorney malpractice. "To prevail on a legal malpractice claim, 'the plaintiff must prove the defendant owed the plaintiff a duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff suffered damages.' A defendant may obtain summary judgment by negating one of these elements or conclusively proving all of the elements of an affirmative defense. If the defendant produces evidence demonstrating summary judgment is proper, 'the burden shifts to the plaintiff to present evidence creating a fact issue.' In evaluating whether a fact issue precludes summary judgment, we take 'all evidence favorable to the nonmovant as true and indulge every reasonable inference in the nonmovant's favor.'"

14. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95. The Supreme Court ruled: "We decline the invitation to expand the harmless-error rule to summary-judgment appeals in the manner [defendant] requests. 'Summary judgments . . . may only be granted upon grounds expressly asserted in the summary judgment motion.'"

G. Sanctions and Contempt

1. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

TEX. R. CIV. P. 65 "provides that when an 'instrument' is amended, 'the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause.'" But, TEX. R. CIV. P. 65's "instruction that an instrument, after it has been amended, is no longer regarded as part of the pleadings does not nullify the fact that it was filed. Amendments do not always avoid the consequences of filing. For example, filing a fictitious pleading is sanctionable

under [TEX. R. CIV. P.] 13. . . . Sanctions cannot be avoided merely by amending pleadings."

2. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Bennett sued Grant for slander after Grant had given to police photographs of Bennett selling a neighbor's cattle. Grant filed a counterclaim for malicious prosecution. The jury awarded actual and punitive damages to Grant, and the trial court imposed sanctions on Bennett. The Supreme Court ruled that the sanctions, primarily for litigation costs, were proper.

"We review the imposition of sanctions for abuse of discretion."

"In *Low*, this Court articulated several factors for trial courts to consider when awarding sanctions. The courts need not consider every factor, but they should consider all relevant factors."

Here, *Nath* did not apply to limit sanctions, because Grant "could not have ended the litigation sooner because there was no determinative legal question. . . . Evaluating whether the litigation was frivolous required a factfinder to determine whether Bennett lied and the suit was brought in bad faith. In fact, the jury answered this very question in their jury charge."

3. *In re National Lloyds Insurance Company*, 507 S.W.3d 219 (Tex. 2016)

During storm damage suit transferred to the MDL, the pretrial court granted plaintiffs filed a motion to compel "six categories of information" and ordered sanctions. The overbroad request sought "'all emails, reports attached to emails, and any follow-up correspondence and information'" concerning management reports. The Supreme Court ruled that one category "was not tailored with regard to time, place, or subject matter and was therefore overbroad." It then remanded to the pretrial court to determine the amount of sanctions attributable to the five items that were appropriately compelled.

"If a motion to compel is granted, the trial court '*shall* . . . [order] reasonable expenses'" unless the objection was "'substantially justified.'" TEX. R. CIV. P. 215.1(d). A discovery sanctions "order 'shall be subject to review on appeal from the final judgment.' 'A trial court's ruling on a motion for sanctions is reviewed under an abuse of discretion standard.' The test for abuse of discretion is 'whether the court acted without reference to any guiding rules and principles.' To determine whether the sanctions imposed are just, we consider: 'First, . . . whether there is a direct relationship between the offensive conduct and the sanctions. . . . Second, . . . whether the sanctions are excessive.'" Here, the pretrial court's order compelling production of one category was overbroad, but the carrier failed to produce "five other categories." "The sanctions order does not specify the amount of attorney's fees attributed to each category of information compelled, and we cannot assume that reversal of one-sixth of the categories of information requires a one-sixth reduction of the sanctions." Thus, the pretrial court was directed to determine "whether the attorney's fees award remains appropriate in light of" this decision.

4. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

The hospital did not "properly disclose evidence during discovery." But the Supreme Court found that there was legally insufficient evidence to award attorney's fees as sanctions.

TEX. R. CIV. P. 215.2(b)(8) "authorizes a trial court to charge the party abusing the discovery process with the reasonable expenses, including attorney's fees, caused by the failure to obey discovery orders. These sanctions are designed to rectify discovery abuse by compensating the aggrieved party for expenses incurred. Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct. However, while properly proved bills showing attorney's fees [plaintiffs] incurred . . . might have been legally sufficient evidence to support a monetary sanction, no such evidence is present in the record. . . ."

Here, there were no bills nor "was there evidence as to the hourly rate or other evidence of an amount that would compensate for that time, even if the time had been proved. [Plaintiffs'] . . . pleadings contained various allegations as to both, but pleading allegations are not evidence."

TEX. R. CIV. P. 215.2 "allows a trial court to require the party who failed to obey a discovery order to pay 'the reasonable expenses, including attorney fees, caused by the failure' and to make such orders regarding the failure as are just. But to be just, a sanction must be based on a direct relationship between the particular offensive conduct and the sanction imposed, and the sanction must not be excessive vis-a vis that conduct."

A "party should be afforded an opportunity to present evidence in support of its claims," and that was done here.

Further, here "the trial court did not explain its rationale behind the amount imposed as monetary sanctions or the relationship between the sanctions and particular conduct of" the hospital. In *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), under Ch. 10 (related to frivolous pleadings), the Court "referenced a list of factors the American Bar Association recommended trial courts should consider in assessing the amount of monetary sanctions to impose."

Unlike federal court, Texas does "not provide for sanctions based on how much time courts spend on hearings. Trial courts have discretion to impose monetary sanctions within limits, but any sanctions must be directed toward remedying prejudice caused to the innocent party."

5. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Review of an award of fees under Ch. 27 to a defamation defendant who successfully moved to dismiss.

Under Ch. 27, a "successful motion to dismiss . . . entitles the moving party to an award of court costs, reasonable attorney's fees, and other expenses. . . ." The court can also award "sanctions 'sufficient to deter' future 'similar actions.'"

H. Abatement

1. *In re Red Dot Building System, Inc*., 504 S.W.3d 320 (Tex. 2016)

Supplier of materials sued building contractor for an unpaid invoice regarding materials in one county, after which contractor sued supplier in a different county. The court in the latter county did not abate the case. Following *In re J.B. Hunt*, the Supreme Court granted mandamus: "When two inherently interrelated suits are brought in different counties, the first-filed suit ordinarily acquires dominant jurisdiction and the second-filed suit should be abated."

A "trial court should transfer a case if venue is not proper in that court." "Venue is proper 'in the county in which all or a substantial part of the events . . . occurred." In breach of contract cases, courts consider "where the contract was made, performed, and breached." Venue is proper in the county where the buyer was solicited and the contract formed. Since those venue facts were not specifically disputed, they "should therefore be taken as true." TEX. R. CIV. P. 87(3)(a). Venue is also proper in the county where the materials are fabricated and shipped.

Here, transferring venue was not appropriate because venue existed in both counties, and the court would not grant mandamus for that, either. The Court did note that a "trial court may also transfer a case where maintenance of the action in that court would work an injustice based on the economic and personal hardships the movant would incur," but that was not alleged in this case.

But, the court in the second county "should have abated the suit pending in that court, and . . . mandamus relief is available to secure this result." When "inherently interrelated suits are pending in two counties, and venue is proper in either county, the court in which suit was first filed acquires dominant jurisdiction." The second court "*must* abate the suit." There is an exception to the general rule when due to a "'party's inability to join necessary parties because it is not feasible or is impossible,'" but that was not the situation here.

I. Bankruptcy

1. *Noble Energy, Inc. v. ConocoPhillips Company*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Noble bought interests from Alma, which had filed for bankruptcy. Long before the bankruptcy, Alma and Conoco had swapped properties; as part of that agreement, they had agreed to indemnify each other. That was not expressly disclosed in the asset purchase agreement by which Noble bought the interests. The Supreme Court said that the issue was "whether, under the terms of a bankruptcy court order confirming a plan of reorganization and an agreement for sale of the debtor's [Alma's] assets, the purchaser [Noble] was assigned an undisclosed contractual indemnity obligation of the debtor. We agree . . . that the answer is yes. . . ." So, Noble was required to provide indemnity to Conoco.

One issue was whether the agreement swapping properties was an "executory contract." In the bankruptcy context, an executory contract is "'a contract 'on which performance is due to some extent on both sides.'" The test: "'an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other part.'" "Courts have uniformly held that contracts imposing ongoing

indemnity obligations contingent on future events are executory." Unlike licensing agreements incidental to the sale of a business, "[t]he mutual indemnity obligations . . . were in no sense minor or unrelated to the property swap." The property swap agreement was thus executory.

"Executory contracts are specially treated under Section 365 of the Bankruptcy Code." "Section 365 of the Bankruptcy Code authorizes a bankruptcy trustee to assume or reject executory contracts and prescribes how that authority is to be exercised." The "'debtor (or trustee . . .) may elect to assume an executory contract, in which case § 365 mandates that the debtor accept the liability with the asset and fully perform his end of the bargain.'" "'[R]ejection [of an executory contract] is specifically subject to § 365 and as such requires 'actual consideration by the Court.' . . . [T]o approve the rejection of an unidentified contract results in purely fictitious compliance with the Code.'"

Though Noble claimed it did not know of the property swap agreement, it "was certainly associated with assets Noble bought . . . [and] was thus among the interests Noble purchased." In fact, Noble was actively involved in the bankruptcy, and had honored prior claims for indemnity by Conoco.

A "'claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed and certain.'"

The Court was "reluctant" to treat part of the order from the bankruptcy court as "boilerplate," and construed the order's language as written: "we must assume the choices were intentional."

The "issue before us is not whether the bankruptcy proceedings were conducted as they should have been. We decide what the [asset purchase agreement], the Plan, and the Order mean, and whether they are effective under Section 365." It is "critical that parties to bankruptcy proceedings and others have confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms."

2. *Sommers v. Sandcastle Homes, Inc.*, 521 S.W.3d 749 (Tex. 2017)

While a case is on appeal, plaintiff files for Chapter 7 bankruptcy. Bankruptcy trustee continues the appeal, but the opposing parties challenge his standing because he was not a named party in the original action.

"Generally, only a named party to the suit may bring an appeal." However, the bankruptcy court had declared that the trustee was the proper plaintiff, and "[w]e have held that once claims clearly belong to the bankruptcy estate, 'then the trustee has exclusive standing to assert the claim[s].'"

J. Severance

No cases to report.

K. Nonsuit

No cases to report.

L. Recusal

No cases to report.

M. Motion to Show Authority

No cases to report.

N. Settlements

1. *Chavez v. Kansas City Southern Railway Company*, 520 S.W.3d 898 (Tex. 2017)

After a defense verdict, plaintiffs' attorney entered a settlement agreement with defendants. One plaintiff objected. Defendants moved for summary judgment, proving that the attorney represented plaintiff at trial; the court of appeals indulged a presumption that supported "'a settlement agreement made by an attorney hired by a client.'" The Supreme Court, however, ruled that, at "trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings."

"To obtain summary judgment, the 'movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.' If the movant meets this burden, 'the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements.' However, if the movant does not meet this burden, 'the burden does not shift and the non-movant need not respond or present any evidence.'"

Even if a lawyer hired for litigation is presumed to be authorized to enter a settlement, the "presumption may be rebutted. . . ."

A "summary judgment movant may not use a presumption to shift to the non-movant the burden of raising a fact issue of rebuttal. . . . [A] presumption

cannot shift the burden to a non-movant in a summary judgment proceeding."

Accordingly, here, defendants failed to prove that plaintiff's attorney was actually authorized "to enter into a settlement agreement on her behalf."

2. *Texas Department of Insurance, Workers' Compensation Division v. Jones*, 498 S.W.3d 610 (Tex. 2016)

Worker's compensation claimant settled with carrier for "partial" eligibility for SIBs for a certain time period. TDI appealed the trial court's approval, arguing the evidence did not fit the statutory scheme. The Supreme Court reversed because the settlement did not adhere to the statutory terms.

"[C]ivil litigants are generally free to settle whenever, and on whatever terms, they wish. . . . But while Texas public policy generally favors the settlement of legal disputes, the workers' comp scheme imposes special rules." The "Legislature extensively reformed the workers' compensation framework in order to discourage opportunistic suits seeking small-money judgments. . . ."

O. Dismissal

No cases to report.

P. Continuance

No cases to report.

Q. Judicial Admissions

1. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled the doctors were entitled to dismissal based upon the allegations in the original petition.

Plaintiff argued his amended pleading superseded his original petition.

Footnote 20: "'Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.'"

Footnote 21: "'The vital feature of a judicial admission is its conclusiveness on the party making it. It not only relieves his adversary from making proof of the fact admitted but also bars the party himself from disputing it.'"

VII. TRIAL

A. Right to Jury

1. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

Suit based upon breach of fiduciary duty by two directors.

"A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust. . . . If 'contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.' But uncontroverted issues do not need to be submitted to a jury."

2. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Court protects "the constitutional right to a trial by jury by requiring trial courts to provide litigants with 'an understandable, reasonably specific explanation' for setting aside a jury verdict and ordering a new trial."

B. Trial Setting; Notice

1. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

"An appellate court is limited to the record that is before it on appeal and generally may take judicial notice only of (1) facts that could have been properly judicially noticed by the trial judge or (2) facts that are necessary to determine whether the appellate court has jurisdiction of the appeal."

C. Voir Dire

No cases to report.

D. Motion in Limine

1. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Supreme Court affirmed mandamus because the trial court granted a new trial on three facially invalid reasons and one that was not supported by the record.

One basis here for the new trial was the violation of a motion in limine. The Court determined "the trial court's order was 'specific' and a 'violation of an order in limine can serve as the basis of a new[-]trial order. . . .'" But, the record did not establish that the carrier violated the ruling on the limine motion.

Once evidence that may have been covered by a limine motion has been "admitted 'without objection or a request that it be stricken or that the jury be instructed to disregard—it was in [the record] for all purposes and a proper subject of closing argument.'"

E. Burden of Proof

1. *In re K.S.L.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Mother and father of child signed statutorily compliant affidavits relinquishing parental rights. The issue on appeal was whether the evidence established that terminating parental rights was in the child's best interest. The Supreme Court ruled that clear and convincing evidence supported the termination.

"In *Santosky*, the [U.S. Supreme] Court held, under the Due Process Clause of the Fourteenth Amendment, that when the State seeks to sever irrevocably the parent-child relationship, it must establish its grounds by clear and convincing evidence." In "the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child's best interest, would satisfy a requirement that the trial court's best-interest finding be supported under this higher standard of proof.

2. *Allen-Pieroni v. Pieroni*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

After divorce, husband was ordered to pay wife $500K in installments of $10K/month. Husband made payments, and later bought a house. Wife filed an abstract of judgment reflecting husband's obligation to her, which husband discovered years later when his sale of the house fell through. Husband sued the wife successfully for slander of title. The Supreme Court reversed and remanded, holding that trial court used the wrong measure of damages.

"The law does not presume damages as a consequence of slander of title; rather, the plaintiff must prove special damages."

Here, "no evidence exists that [husband's] property was worth less than the previous contract price at the time of trial or that [wife's] invalid lien had any continuing effect on the property's value or marketability following its removal. As the party seeking affirmative relief, [husband] had the burden to prove these damages."

3. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that plaintiff's experts provided legally sufficient evidence that the negligence of the child's treating doctors proximately caused her loss of sight.

"To satisfy a legal sufficiency review, plaintiffs in medical-malpractice cases 'are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence.'" The '"ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.'"

4. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

Suit based upon breach of fiduciary duty by two directors.

The "party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed."

The burden may shift to the defendant when

commingled funds are used to purchase an asset. The "tracing burden does not shift to the defendant until the plaintiff satisfies the initial burden of proving commingled funds were used to purchase specific property. Here, in contrast, the leases were separately identifiable, were not purchased with commingled funds, and were identified, lease by lease, in both the evidence and the judgment. Given those facts, Longview had the burden to prove that, as to each lease for which it sought equitable relief of disgorgement or imposition of a constructive trust, Riley-Huff acquired that lease as a result of Huff's or D'Angelo's breaches of fiduciary duties."

5. *Chavez v. Kansas City Southern Railway Company*, 520 S.W.3d 898 (Tex. 2017)

After a defense verdict, plaintiffs' attorney entered a settlement agreement with defendants. One plaintiff objected. Defendants moved for summary judgment, proving that the attorney represented plaintiff at trial; the court of appeals indulged a presumption that supported "'a settlement agreement made by an attorney hired by a client.'" The Supreme Court, however, ruled that, at "trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings."

6. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

"The party seeking recovery [of attorney's fees] bears the burden of proof to support the award."

7. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

"Agency is not presumed; a party alleging the existence of an agency relationship bears the burden of proving it."

"'A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.' Yet even when conclusively established, a plaintiff may invoke equitable estoppel as an affirmative defense in avoidance of a defendant's limitations defense." "The movant has no burden to negate the non-movant's affirmative defense in avoidance."

8. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer. Tenant had habitually paid rent late, which landlord accepted; though commercial lease contained a "nonwaiver" provision, tenant argued landlord waived the nonwaiver provision. The Supreme Court ruled otherwise.

Footnote 26: "'[A]n affirmative defense 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions' and places 'the burden of proof [ ] on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.' 'Generally, an affirmative defense is waived if it is not pleaded.'"

9. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Considering the likely harm to result from defendant's conduct for the purposes of punitive damages, the burden is on the plaintiff to show he would probably "suffer these damages."

10. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen."

"[A]lthough truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern. Falsity is thus an element of Rosenthal's defamation claim. By contrast, an affirmative defense, such as the statute of limitations, is 'based on a different set of facts from those establishing' the cause of action and 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.'"

11. *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc.*, 512 S.W.3d 878 (Tex. 2017)

Appeal of a challenge to personal jurisdiction.

Footnote 10: After the "plaintiff bears the initial burden to plead sufficient jurisdictional allegations against a nonresident defendant, the burden then shifts to the defendant to negate all alleged bases of personal jurisdiction, and the plaintiff may then respond with evidence that affirms its allegations."

12. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Brady sued newspaper and reporter for stories about his arrests and the conduct of his father, a chief deputy sheriff. The Supreme Court reversed a trial

court verdict for plaintiff, holding that the charge did not properly set the burden of proof: a "private individual who sues a media defendant for defamation over statements of public concern must prove the statements were false. Further, to recover punitive damages, such a plaintiff must prove the defendant acted with 'knowledge of falsity or reckless disregard for the truth.'"

The "First Amendment requires private individuals to prove that statements made by media defendants on matters of public concern are false," rather than requiring the defendant to prove truthfulness.

"The First Amendment also requires that a private plaintiff prove actual malice, that is, 'knowledge of falsity or reckless disregard for the truth,' before recovering anything more than actual damages for a statement on a matter of public concern. But here 'malice' in the jury charge referred only to an intent to cause injury or conscious indifference to the risk of injury; it was not tied to the truth or falsity of the statements. Because 'the constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff,' proof of bad motive or ill will is not enough. Thus, in addition to proving the traditional malice' required to obtain exemplary damages under Texas law, one seeking exemplary damages for speech on a public matter must also prove constitutional 'actual malice.'"

Here, media defendants objected that the charge did not require plaintiff to prove the falsity of defamatory statements, and to prove "actual malice before obtaining punitive damages."

13. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Suit alleging attorney malpractice. Footnote 3: "Usually, '[w]hen a legal malpractice case arises from prior litigation, the plaintiff has the burden to prove that, 'but for' the attorney's breach of duty, he or she would have prevailed on the underlying cause of action and would have been entitled to judgment.' [Here, plaintiffs] cannot satisfy this 'suit within a suit' requirement because they did prevail in the underlying action on appeal."

Once "a defendant presents evidence of a superseding cause, '[t]he burden then shifts to the plaintiff to raise a fact issue by presenting controverting evidence' that the intervening conduct was foreseeable."

14. *KBMT Op*erating Company, LLC v Toledo, 492 S.W.3d 710 (Tex. 2016)

Defamation case against TV station for report concerning a doctor's discipline by the Texas Medical Board. A "private individual who sues a media defendant for defamation over a report on official proceedings of public concern has the burden of proving that the gist of the report was not substantially true—that is, that the report was not a fair, true, and impartial account of the proceedings. That burden is not met with proof that the report was not a substantially true account of the actual facts outside the proceedings."

15. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95. The Supreme Court ruled that Chapter 95 "grants the property owner additional protection by requiring the plaintiff to prove that the owner 'had actual knowledge of the danger or condition,' so the owner is not liable based merely on what it reasonably should have known. If Chapter 95 applies, it is the plaintiff's 'sole means of recovery.'"

"Because evidence of actual knowledge triggers an exception to the protection that Chapter 95 otherwise provides, the plaintiff has the burden to prove the owner's actual knowledge. . . . [O]nce defendant proves the applicability of Chapter 95, the burden shifts back to the plaintiff to fulfill the requirements of section 95.003."

16. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved that he was]. . . . Coverage is therefore precluded as a matter of law."

"In a *Stowers* action, however, the burden is on the insured to prove coverage." "'An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy.'"

Regarding the burden of proving coverage, there "'is no 'right' of noncoverage that is subject to being waived by the insurer.'"

"Only by establishing each of these elements—that a covered injury or loss was incurred at a time covered by the policy and incurred by a person whose injuries are covered by the policy—can a plaintiff prove coverage, and only then does the burden shift to the insurer to prove that a coverage exclusion applies."

For exclusions, to "'avoid liability, the insurer then has the burden to plead and prove that the loss falls within an exclusion to the policy's coverage.'" Here, because plaintiffs "met their initial burden to prove coverage, the burden shifts to the *Stowers* Insurers to prove that [their] claim is excluded from coverage under the policy."

17. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The Supreme Court ruled the tenant had the burden to prove she did not cause fire.

A "party seeking to avoid liability under [an] agreement has the burden to plead and prove facts making it unlawful, unless the agreement is facially invalid."

The tenant "carries the burden of pleading and proving the contract's invalidity as an affirmative defense." An "affirmative defense 'defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions' and places 'the burden of proof [] on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.'"

TEX. PROP. CODE § 95.052 "defines the landlord's duty by both positive and negative references and imposes a repair obligation only if all its elements are satisfied. [This] . . . places the burden of proof on the party claiming the existence of a duty. . . . [W]hen one claims a duty owed by another, the party claiming the duty generally bears the burden of establishing it[]. But more importantly, it places the burden of proof on the party who controls the leased premises and is, therefore, in the best position to (1) avoid damage to the premises and (2) prove that another party is responsible for the damage." TEX. PROP. CODE § 95.053(a) "necessarily allocates the burden of proof under section 92.052 to the tenant."

"Taken together, sections 92.052 and 92.053 create a presumption that damage to premises under the tenant's control was caused by the tenant and the tenant must prove otherwise."

18. *The Staley Family Partnership, Ltd. v. Stiles*, 483 S.W.3d 545 (Tex. 2016)

Easement case involving landlocked property. "The party claiming a necessity easement has the burden to prove all facts necessary to establish it."

F. Evidence

1. *The University of Texas Health Science Center at Houston v. Rios*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Doctor in residency program complained about various issues, after which his residency was not renewed. He sued the residency center, part of a state university, and various doctors who ran it, alleging tort and contract theories. When the doctors moved to dismiss under the Texas Tort Claims Act, he amended and dropped the program. The Supreme Court ruled the doctors were entitled to dismissal based upon the allegations in the original petition.

Plaintiff argued his amended pleading superseded his original petition.

Footnote 20: "'Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.'"

Footnote 21: "'The vital feature of a judicial admission is its conclusiveness on the party making it. It not only relieves his adversary from making proof of the fact admitted but also bars the party himself from disputing it.'"

2. *Helix Energy Solutions Group, Inc. v. Gold*, 522 S.W.3d 427 (Tex. 2017)

"Typically, evidence is conclusive when 'it concerns physical facts that cannot be denied' or 'when a party admits it is true.'"

3. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

Suit against builder's CGL carrier after it failed to defend builder. "'In no event, however, is a judgment for plaintiff against defendant [builder], rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee.'"

4. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

By a general grant, in 1991 two people sold their rights in real property in a county. 20 years later, they deeded their rights to a landman. Landman sued original purchaser to quiet title. The Supreme Court ruled that evidence of original purchaser's "character is no reason to interpret the general grants in the 1991 deeds other than according to their plain terms."

5. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance." The Court further affirmed the finding of elderly woman's lack of capacity when she executed ranch sale and estate documents.

"Evidence of physical infirmities, without more, does not tend to prove mental incapacity. But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." Here, a forensic psychiatrist testified about her "dementia and cognitive impairment," and that she could not "transact business." Relatives further testified she was confused and forgetful. A voicemail was incoherent, and even the defendant had emails about her lack of lucidity. This constituted "sufficient evidence" to support the verdict. It "is not our place to weigh the testimony adduced at trial. That is the jury's province."

6. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

"Evidence is legally insufficient to support a jury finding when (1) the record bears no evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact."

7. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank caused lengthy delays in providing a loan to buyer of business. Business ultimately failed, and seller of business intervened in buyer's suit against bank, asserting that seller was a third-party beneficiary of the loan. The Supreme Court ruled that the contract did not unambiguously make the seller a third-party beneficiary. Further, "the trial court erred by submitting that issue to the jury and by instructing the jury that it could consider extrinsic evidence to add a third-party-beneficiary term to the unambiguous written agreement."

"When a written contract is unambiguous and does not clearly express the parties' intent to create a third-party beneficiary, extrinsic evidence is simply irrelevant and inadmissible on that issue." For a third-party beneficiary, "courts must look solely to the contract's language."

"When parties 'have a valid, integrated written agreement,' the parol-evidence rule 'precludes enforcement of prior or contemporaneous agreements.' As a result, 'extrinsic evidence cannot alter the meaning of an unambiguous contract.' . . . [The] parties may not rely on extrinsic evidence 'to create an ambiguity or to give the contract a meaning different from that which its language imports.'"

The "'parol-evidence rule 'does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.'" "'Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.'"

The "parol-evidence rule 'does not apply to agreements made *subsequent* to the written agreement,'" but here a purported oral agreement was made beforehand.

Just as "dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract's unambiguous language."

8. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

"[E]vidence and statements must be considered in context."

9. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Defamation case. Footnote 2: "At times, 'actual malice' may evidence traditional malice. . . . But evidence of actual malice alone does not relieve the plaintiff of proving traditional malice also to obtain punitive damages. . . ."

10. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse, holding that there was no evidence of negligent entrustment, and that there was no premises defect.

Here, there was no evidence of prior problems of electrician operating the forklift. Habit "'evidence has been offered to show that the driver was blatantly incompetent or reckless.'"

As here, a "claimant can prove that a defendant 'should have known' a fact by relying on evidence that the defendant should reasonably have inquired about that fact but failed to do so." But, plaintiff must prove that the failed inquiry "would have 'revealed the risk' that establishes liability for negligent entrustment." Plaintiff had to show that the warehouse would have learned electrician was incompetent or reckless, not just lacking formal training or a certificate. Plus, the "lack of formal training and certification does not establish that the operator was incompetent or reckless. Even the lack of a required legal license does not establish incompetence or recklessness."

"If Texas statutes required [electrician] to be legally licensed to operate the forklift, then permitting him to operate it without a legal license would constitute negligence per se."

11. *KBMT Operating Company, LLC v Toledo*, 492 S.W.3d 710 (Tex. 2016)

Defamation case against TV station for report concerning a doctor's discipline by the Texas Medical Board.

Plaintiff's proof that "ordinary listeners were misled . . . was her affidavit which, besides being self-serving, was conclusory hearsay. Just last year we held that such "'[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the [Act].'" She did not identify any ordinary listener. Footnote 29: "Evidence of what an ordinary listener could have understood is not evidence of what the listener would have understood. The test for substantial truth and its application must be guided by the fact that 'since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive' . . . ,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."

12. *Sampson v.* The University of Texas at Austin, 500 S.W.3d 380 (Tex. 2016)

Tort Claims Act case. Law professor tripped on "an improperly secured extension cord." The Supreme Court ruled that the case was "a premises defect claim, and there is no evidence that UT had actual knowledge of the tripping hazard created by the cord's position over the retaining wall and across the sidewalk."

"'Actual knowledge, rather than constructive knowledge of the dangerous condition is required.'" The "licensee must show that the owner actually knew of the 'dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time.' Hypothetical knowledge will not suffice. Additionally, that the owner could have done more to warn the licensee is not direct evidence to show that the owner had actual knowledge of the dangerous condition." Courts "'generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition.'" Here, the issue is not who initially placed the cord, it is "whether UT had

actual knowledge of the dangerous condition created by the cord's position at the time of Sampson's fall. . . ."

"While circumstantial evidence can establish actual knowledge, such evidence must ''either directly or by reasonable inference' support that conclusion.' An inference is not reasonable if premised on mere suspicion—'some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.'"

Evidence "'that an owner or occupier knew of a safer, feasible alternative design, without more, is not evidence that the owner knew . . . that a condition on its premises created an unreasonable risk of harm.' Despite the evidence of prior falls, employees in the area, and a feasible, safer alternative design, we held [in *City of Dallas v. Thompson*] that the plaintiff failed to present any evidence of the City's actual knowledge of the protruding coverplate."

"'Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time.'"

13. *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016)

"'Both the Fourth Amendment to the United States Constitution and Article I, section 9 of the Texas Constitution prohibit unreasonable searches and seizures and require the exclusion of evidence obtained in violation of *criminal* trials.'" In this case, the Supreme Court holds "definitively" that the exclusionary rule does not apply in civil-forfeiture proceeding under Chapter 59 of the Code of Criminal Procedure.

G. Witnesses At Trial

1. *In re National Lloyds Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

A party's designation of his own attorney as a testifying expert "provides the opposing party with the means to access information and attorney work product not otherwise available under the general scope of discovery." However, "the requesting party must follow the discovery rules applicable to testifying experts," and TEX. R. CIV. P. 195 "does not provide for interrogatories or requests for production like the discovery requests at issue here."

2. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus.

The "due–process right of a party to be present at a civil trial—much less the right of a party to have a designated representative present at a temporary–injunction hearing—is not absolute."

When courts adjudicate claims between private parties, "three competing factors are balanced to determine what process is due: (1) 'the private interest that will be affected by the official action,' (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,' and (3) 'the interest of the [opposing] party . . . with . . . due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.'"

Courts balance the parties' interests with "'presumptively greater weight'" provided to participation in the process. "Because of the presumption in favor of participation, due process ordinarily will preclude courts from excluding parties or their representatives from proceedings, at least when they are able to understand the proceedings and to assist counsel in the presentation of the case. However, courts have discretion to exclude parties and their representatives in limited circumstances when countervailing interests overcome this presumption."

The trial court was required to consider "the degree to which [defendant's] defense of [plaintiff's] claims would be impaired by [the] exclusion [of its corporate representative]."

Defendant claimed excluding its representative violated the Open Courts provision, which states that courts shall be open and every person "shall have remedy by due course of law." Footnote 6: while there is some reason to believe this applies to public access to courts, it has "traditionally [been] interpreted . . . as merely requiring courts to be in operation and available for redressing injury."

"To the extent the open–courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect

countervailing interests, such as the preservation of trade secrets."

TEX. R. CIV. P. 276(a) relates to "the Rule," *viz*. the rule of sequestration: "the process of swearing in the witnesses and removing them from the courtroom, where they cannot hear the testimony of any other witness); see also TEX. R. EVID. 614. The Rule provides that trial courts 'shall' exclude witnesses upon the request of a party. However, three classes of witnesses are exempt from the operation of the Rule, including 'an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney.'" Here, however, plaintiff did not rely upon the Rule; it relied upon the Trade Secrets Act, TEX. CIV. PRAC. & REM. CODE §§ 134A.001-.008, to which the Rule does not apply. The Trade Secrets Act "requires trial courts to take reasonable measures to protect trade secrets and creates a presumption in favor of granting protective orders to preserve the secrecy of trade secrets, which may include provisions for, among other things, 'holding in camera hearings.'" The Trade Secrets Act "granted the trial court discretion to exclude [defendant's representative] from portions of the temporary injunction hearing involving alleged trade secret information. . . . "

TEX. R. CIV. P. 76a "only governs the sealing of 'court records.' It does not implicate oral testimony, and thus does not apply" here.

The "offensive use" doctrine did not apply here. "[C]ertain privileges may be waived by offensive use, but [the Court has] limited such waiver to instances where a party attempts to protect outcome–determinative information from any discovery." A "plaintiff engages in offensive use when it attempts to 'protect *from discovery* outcome determinative information'[]."

TEX. R. EVID. 507(a) provides "that a party has a privilege to refuse to disclose its trade secrets 'if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'"

H. Expert Witnesses and Expert Testimony

1. *Starwood Management, LLC v. Swaim*, ___ S.W.3d ___ (Tex. 2017)(9/29/17)

In a *per curiam* opinion, the Texas Supreme Court reversed a summary judgment in a legal malpractice case, disagreeing with the trial court's and court of appeals' conclusions that the affidavit of the plaintiff's expert was conclusory. "[T]he relevant question when addressing the adequacy of expert opinion affidavits in legal malpractice cases is '"Why;" Why did the expert reach that particular opinion?'" "To demonstrate 'why,' the affidavit must explain the link between the facts the expert relied upon and the opinion reached."

Here, the "affidavit could have set out a more detailed basis for his opinion. But the extent of the detail into which the affidavit delved goes to quality, not adequacy." "The relevant inquiry regarding the question of whether an affidavit is an *ipse dixit*," and, thus, not probative, "turns on the inferences, if any, required to bridge the gap between the underlying data and the expert's rationale and conclusion," where the "testimony fails" if there is "'simply too great an analytical gap[.]'"

"Here, the gap is not great" because the expert explains the link between his opinion and other, similar cases. "It is unnecessary for an expert in a" legal malpractice case "to provide a legal analysis of every possible exigency, no matter how remote."

2. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that plaintiff's experts provided legally sufficient evidence that the negligence of the child's treating doctors proximately caused her loss of sight.

Plaintiff's expert witnesses had participated in studies on retinopathy. One testified that the defendants' negligence was "incremental," mentioning a delay in screening, a delay in laser treatment, and ultimately inadequate laser treatment. Had defendants not been negligent, more likely than not the baby would have had sight.

If "'there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.' . . . 'The expert must explain why the inferences drawn are medically preferable to competing inferences that are *equally consistent* with the known facts.'" But, "'a medical causation expert need not 'disprov[e] or discredit[] every possible cause other than the one espoused by him,'' absent evidence

that 'presents 'other plausible causes of the injury or condition that could be negated.'' Thus, a plaintiff need not 'speculate about other possible unknown causes and then disprove them.'"

Havner involved the sufficiency of causation evidence in the context of toxic-substance exposure, and epidemiological studies were used to support general causation. *Havner* did not apply to the use of the studies in this case. The experts here "based their causation opinions on their own clinical experience with [the disease] and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies. . . ." The studies supported their opinions.

"An expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation. If no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection. . . . 'The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury.'" An "expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts." Here, the plaintiff's experts explained the basis or their opinions, and "tied their conclusions to the facts." Though the expert could not say precisely when the baby developed the disease, based upon his experience and observation of the baby he "could estimate the critical dates beyond mere speculation."

An "expert's testimony is conclusory if the expert merely gives an unexplained conclusion or asks the jury to 'take my word for it' because of his or her status as an expert." However, in *Arkoma Basin*, the expert's opinions were not conclusory because the foundational data were in the record.

"In *Jelinek*, we held that *when equally* likely causes for an injury are present, an expert must explain why one cause and not the other was the proximate cause of the injury." There, the "expert conceded that the circumstantial evidence on which he relied to form his opinion that the patient suffered from the specific infection was 'equally consistent with two other infections cultured from' the patient's incision and blood—neither of which were treatable by the antibiotics in question." The expert failed to explain his opinion in the face of three equally likely causes. Here, though, the purported other possible causes were not causes, but rather "risk factors." The expert sufficiently negated alternative causes: the expert "expressly identified and ruled out" the defense theory.

"Dr. Good expressly addressed the[] cited causes for the impaired vision in D.B.'s left eye. . . . Thus, to the extent there were other plausible causes of D.B.'s impaired vision in her left eye, the record shows that Dr. Good expressly identified and ruled out those causes."

"We reject the contention that our holding in *Wal-Mart Stores, Inc. v. Merrell* . . . requires experts to exclude all other potential causes when opining on causation."

The "presence of smoking materials raised a plausible cause that the expert did not rule out. While we agree that an expert must exclude other plausible causes, *Merrell* does not require experts to exclude all other potential causes when testifying as to causation."

In *Havner*, the "'use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.'" *Havner* does not apply here because, in that case, the plaintiff could not demonstrate "specific causation." In *Young*, "plaintiffs relied solely on epidemiological studies to establish 'general causation.'" There, "plaintiffs could not establish a greater than 50% probability of recovery necessary to establish causation." *Young* is not applicable here.

Here, plaintiff's "experts gave their causation opinions based on their own clinical experience . . . and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies in which they participated personally."

Plaintiffs here "presented evidence that if [the child's condition] had been diagnosed and treated early enough, it is more likely than not that" she would not have gone blind.

Plaintiffs' expert "testified that the additional three-day delay 'incrementally increased' the likelihood of a poor outcome in D.B.'s particular case." Plaintiff showed that defendants "failed to ensure that D.B. received laser therapy at a time when it would have been effective by failing to communicate properly, screen timely, and treat timely."

The "court of appeals erred in not applying the substantial-factor test because the jury heard ample evidence supporting the combined negligence" of defendants.

3. *Columbia Valley Healthcare System, L.P. v. Zamarripa*, 526 S.W.3d 453 (Tex. 2017)

"'An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.'"

4. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

Rogers purchased interest in business and promised to perform certain functions. He did not, and transferred funds from business to himself. Jury found he committed fraud and awarded damages to sellers. Rogers then sued lawyer who drafted purchase agreement, and also lawyer who represented him through much of the pre-trial litigation for not designating a rebuttal damages expert and communicating a settlement offer. The Supreme Court affirmed a no-evidence summary judgment for lawyers, holding that "no summary-judgment evidence existed to raise a fact issue as to causation, an essential element of the clients' malpractice claim."

In legal malpractice suits, plaintiffs need "expert testimony to satisfy the causation requirement."

"'Incompetent opinion testimony is not evidence, and a finding supported only by such testimony cannot survive a no evidence challenge.'"

"We have long held that 'conclusory statements made by an expert witness are insufficient to support summary judgment.' In order to be competent summary-judgment evidence, an expert's opinion must have a 'demonstrable and reasoned basis on which to evaluate his opinion.' This basis must come in the form of an answer to the question 'Why': Why did the expert reach that particular opinion?" "An expert's familiarity with the facts is not alone a satisfactory basis for his or her opinion."

"'When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment.' And '[e]ven when some basis is offered for an opinion, if that basis does not, on its face, support the opinion, the opinion is still conclusory.'"

Relaying "the opinion of another witness without providing any basis for the borrowed conclusion is itself no evidence. . . . Said differently, repeating another's *ipse dixit* does not make it any less of an *ipse dixit*."

"Ultimately, '[e]ven when some basis is offered for an opinion, if that basis does not, on its face, support the opinion, the opinion is still conclusory.'"

The "assurance of familiarity and credibility is not a 'demonstrable and reasoned basis' upon which to evaluate [expert's] opinion. An *ipse dixit* is still an *ipse dixit* even if offered by the most trustworthy of sources."

5. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Plaintiffs were sued for usury in prior suit. Defendants served as their lawyers. They argued that no agency existed and asserted a counterclaim. The trial court denied the claim of lack of agency, and a jury awarded about $4M against plaintiffs and about $150K for plaintiffs on their counterclaim. Plaintiffs fired defendants, and appealed the judgment with new counsel, incurring about $140K of appellate costs. The court of appeals reversed the trial court's ruling on agency, so the judgment against plaintiffs for $4M was reversed, but they continued to prevail on their counterclaim of $150K. Then, plaintiffs sued defendants for attorney malpractice at trial seeking to recover their costs for the appeal. The Supreme Court ruled that the legal error by the trial court constituted a new an independent cause, breaking causation; so, no expert testimony was necessary on causation of damages.

"As a matter of law, the trial court's error of law on the agency issue was a new and independent cause of the adverse usury judgment and the ensuing appellate litigation costs. Because the trial court's legal error constituted a superseding cause as a matter of law, no expert testimony is necessary for the Attorneys to negate causation."

6. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Footnote 23: "An expert's opinion that relies on flawed methodology is unreliable, even if the underlying data is [sic] sound. Unreliable expert testimony is legally no evidence."

7. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in

both instances" and granted mandamus.

The "due–process right of a party to be present at a civil trial—much less the right of a party to have a designated representative present at a temporary–injunction hearing—is not absolute."

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The trial court was required to consider "the degree to which [defendant's] defense of [plaintiff's] claims would be impaired by [the] exclusion [of its corporate representative]."

Defendant claimed excluding its representative violated the Open Courts provision, which states that courts shall be open and every person "shall have remedy by due course of law." Footnote 6: while there is some reason to believe this applies to public access to courts, it has "traditionally [been] interpreted . . . as merely requiring courts to be in operation and available for redressing injury."

"To the extent the open–courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests, such as the preservation of trade secrets."

TEX. R. CIV. P. 276(a) relates to "the Rule," *viz.* the rule of sequestration: "the process of swearing in the witnesses and removing them from the courtroom, where they cannot hear the testimony of any other witness); see also TEX. R. EVID. 614. The Rule provides that trial courts 'shall' exclude witnesses upon the request of a party. However, three classes of witnesses are exempt from the operation of the Rule, including 'an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney.'" Here, however, plaintiff did not rely upon the Rule; it relied upon the Trade Secrets Act, TEX. CIV. PRAC. & REM. CODE §§ 134A.001-.008, to which the Rule does not apply. The Trade Secrets Act "requires trial courts to take reasonable measures to protect trade secrets and creates a presumption in favor of granting protective orders to preserve the secrecy of trade secrets, which may include provisions for, among other things, 'holding in camera hearings.'" The Trade Secrets Act "granted the trial court discretion to exclude [defendant's representative] from portions of the temporary injunction hearing involving alleged trade secret information. . . . "

TEX. R. CIV. P. 76a "only governs the sealing of 'court records.' It does not implicate oral testimony, and thus does not apply" here.

The "offensive use" doctrine did not apply here. "[C]ertain privileges may be waived by offensive use, but [the Court has] limited such waiver to instances where a party attempts to protect outcome–determinative information from any discovery." A "plaintiff engages in offensive use when it attempts to 'protect *from discovery* outcome determinative information'[]."

TEX. R. EVID. 507(a) provides "that a party has a privilege to refuse to disclose its trade secrets 'if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'"

I. Causation, Proximate Cause, Producing Cause

1. *Allways Auto Group, Ltd. v. Walters*, 530 S.W.3d 147 (Tex. 2017)

Dealership provided loaner vehicle to customer whose care was being serviced. Some evidence indicated he was drunk at the time, and he had multiple prior DWI convictions. Eighteen days later, customer caused a collision with plaintiffs. The Supreme Court affirmed a summary judgment in suit against dealership alleging negligent entrustment holding that there was no proximate cause.

"'For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment.' If [customer] were visibly intoxicated when he got the

loaner, Allways could reasonably have anticipated he might have a wreck before he sobered up. But Allways could not have foreseen that [customer] would get drunk eighteen days later (after repairs were delayed and he lost his job) and drive his vehicle into [plaintiff's] vehicle." The "'connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause,' which 'is not established if the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible.'"

2. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that plaintiff's experts provided legally sufficient evidence that the negligence of the child's treating doctors proximately caused her loss of sight.

"A plaintiff seeking to prevail on a negligence cause of action must establish the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. 'The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.'"

"To satisfy a legal sufficiency review, plaintiffs in medical-malpractice cases 'are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence.'" The "'ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.'"

A "plaintiff cannot show that a defendant's negligence was more likely than not a cause of injury 'where the defendant's negligence deprived the tort victim of only a 50% or less chance of avoiding the ultimate harm.'"

If "'there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.' . . . 'The expert must explain why the inferences drawn are medically preferable to competing inferences that are *equally consistent* with the known facts.'" But, "'a medical causation expert need not 'disprov[e] or discredit[] every possible cause other than the one espoused by him,'' absent evidence that 'presents 'other plausible causes of the injury or condition that could be negated.'' Thus, a plaintiff need not 'speculate about other possible unknown causes and then disprove them.'"

A "defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. There may be more than one proximate cause of an injury. 'While but for causation is a core concept in tort law, it yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible or such proof otherwise should not be required.'" Here, it was error to apply a but-for causation test rather than "the substantial factor test." "Thus, the court of appeals should have applied the substantial-factor test in assessing the acts of negligence by Dr. Ponte and Dr. Llamas rather than requiring proof that each independent act by each tortfeasor was a but-for cause of D.B.'s injury."

"*Havner*'s analysis of epidemiological principles does not govern this case. *Havner* involved the sufficiency of causation evidence in the context of toxic-substance exposure, not medical malpractice. There, the plaintiffs could not point to facts showing 'specific causation' (i.e., whether exposure to the substance caused the plaintiff's particular injury) and were forced to . . . [use] epidemiological studies for proof of 'general causation' (i.e., whether the toxic substance itself was capable of causing a particular injury in the general population). This was necessary because there was no direct proof that the substance was responsible for the plaintiff's injury." Under *Havner*, "a claimant must show that he or she is similar to those in the studies." Further, "'if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.'" Thus, *Havner* allows a plaintiff to "establish causation through an appropriately strong associational finding, but to do so, the plaintiff must show that he or she is similar to those

in the studies relied upon and offer evidence to rule out other plausible causes."

Havner did not apply to the use of the studies in this case. The experts here "based their causation opinions on their own clinical experience with [the disease] and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies. . . ." The studies supported their opinions.

"Dr. Good expressly addressed the[] cited causes for the impaired vision in D.B.'s left eye. . . . Thus, to the extent there were other plausible causes of D.B.'s impaired vision in her left eye, the record shows that Dr. Good expressly identified and ruled out those causes."

"We reject the contention that our holding in *Wal-Mart Stores, Inc. v. Merrell* . . . requires experts to exclude all other potential causes when opining on causation." The "presence of smoking materials raised a plausible cause that the expert did not rule out. While we agree that an expert must exclude other plausible causes, *Merrell* does not require experts to exclude all other potential causes when testifying as to causation."

"To establish proximate cause in a medical-malpractice case, there must be 'evidence of a 'reasonable medical probability' or 'reasonable probability' that [the plaintiff's] injuries were proximately caused by the negligence of one or more defendants.' In other words, 'the ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.'"

In *Havner*, the "'use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.'" *Havner* does not apply here because, in that case, the plaintiff could not demonstrate "specific causation." In *Young*, "plaintiffs relied solely on epidemiological studies to establish 'general causation.'" There, "plaintiffs could not establish a greater than 50% probability of recovery necessary to establish causation." *Young* is not applicable here.

Here, plaintiff's "experts gave their causation opinions based on their own clinical experience . . . and the particular medical procedures at issue, informed by photographs of D.B.'s eyes taken during each step of her screening and treatment, D.B.'s medical records, in-person examinations of D.B., and epidemiological studies in which they participated personally."

Plaintiff's expert "testified that the additional three-day delay 'incrementally increased' the likelihood of a poor outcome in D.B.'s particular case." Plaintiff showed that defendants "failed to ensure that D.B. received laser therapy at a time when it would have been effective by failing to communicate properly, screen timely, and treat timely."

The "court of appeals erred in not applying the substantial-factor test because the jury heard ample evidence supporting the combined negligence" of defendants. It also erred in rejecting plaintiffs' "study as no evidence of causation." There was legally sufficient evidence of defendant's negligence.

3. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

In all negligence actions, including premises liability, "'the foreseeability of the harmful consequences resulting from the particular conduct is the underlying basis for liability.'"

4. *Columbia Valley Healthcare System, L.P. v. Zamarripa*, 526 S.W.3d 453 (Tex. 2017)

Interlocutory appeal over adequacy of expert report in medical malpractice case. The Supreme Court ruled it must address proximate causation.

Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred.

5. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

Rogers purchased interest in business and promised to perform certain functions. He did not, and transferred funds from business to himself. Jury found he committed fraud and awarded damages to sellers. Rogers then sued lawyer who drafted purchase agreement, and also lawyer who represented him through much of the pre-trial litigation for not designating a rebuttal damages expert and communicating a settlement offer. The Supreme Court affirmed a no-evidence summary judgment for lawyers, holding that "no summary-judgment evidence existed to raise a fact issue as to causation, an essential

element of the clients' malpractice claim."

"[A]lthough causation is typically a question of fact, it may be determined as a matter of law when reasonable minds could not arrive at a different conclusion."

A "legal-malpractice plaintiff must prove that his or her lawyer's negligence was the proximate cause of cognizable damage. []'The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence case.'[] The components of proximate cause consist of cause in fact and foreseeability. Cause in fact (sometimes referred to as substantial factor) requires a showing that the act or omission was a substantial factor in bringing about the injury and without which harm would not have occurred. . . . 'Substantial' here is used in its popular sense 'to denote that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' On the other hand, foreseeability or legal cause addresses the proper scope of a defendant's legal responsibility for negligent conduct that in fact caused harm. The legal-cause component asks whether the harm incurred should have been anticipated and whether policy considerations should limit the consequences of a defendant's conduct." "[O]ur cause-in-fact standard already incorporates the substantial factor test." "[O]ur cause-in-fact standard requires not only that the act or omission be a substantial factor but also that it be a but-for cause of the injury or occurrence."

Plaintiffs "in multiple-exposure asbestos cases need not prove but-for causation because ''application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.''"

In legal malpractice suits, plaintiffs need "expert testimony to satisfy the causation requirement."

"To avoid summary judgment Rogers needed to show that (1) alternative expert valuation testimony was available and (2) the testimony would have probably altered the verdict."

The "standard for causation here is cause-in-fact, or but-for causation, not 'significant contributing factor.'"

"The plaintiff has the burden of presenting evidence that establishes with reasonable probability that cause in fact exists. . . . A plaintiff need not prove causation with absolute certainty, but the evidence must establish causation beyond mere possibility or speculation."

6. *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016)

City failed to reconnect with disconnected 911 caller reporting drug overdose of son, and then failed to arrive at scene, and plaintiff's son died. City filed a motion to dismiss under TEX. R. CIV. P. 91a. The Supreme Court held that "governmental immunity is not waived and dismissal is required because the requisite causal nexus between the alleged condition and [plaintiff's son's] injury is lacking."

"Proximate cause requires both 'cause in fact and foreseeability.' For a condition of property to be a cause in fact, the condition must 'serve[] as 'a substantial factor in causing the injury and without which the injury would not have occurred.'' When a condition or use of property merely furnishes a circumstance 'that makes the injury possible,' the condition or use is not a substantial factor in causing the injury. To be a substantial factor, the condition or use of the property 'must actually have caused the injury.' . . . Thus, the use of property that simply hinders or delays treatment does not
'actually cause[] the injury' and does not constitute a proximate cause of an injury."

Here, the "malfunction [of the 911 system] was too attenuated from the cause of [plaintiff's son's] death. . . . The alleged defect did not actually cause [his] death nor was his death 'hastened or exacerbated' by a telephone malfunction."

7. *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)

Plaintiffs were sued for usury in prior suit. Defendants served as their lawyers. They argued that no agency existed and asserted a counterclaim. The trial court denied the claim of lack of agency, and a jury awarded about $4M against plaintiffs and about $150K for plaintiffs on their counterclaim. Plaintiffs fired defendants, and appealed the judgment with new counsel, incurring about $140K of appellate costs. The court of appeals reversed the trial court's ruling on agency, so the judgment against plaintiffs for $4M was reversed, but they continued to prevail on their counterclaim of $150K. Then, plaintiffs sued defendants for attorney malpractice at trial seeking to recover their costs for the appeal. The Supreme Court ruled that the legal error by the trial court constituted a new an independent cause, breaking causation. "Because the unfavorable usury judgment was reversed on the basis of a trial-court error and the record bears

no evidence the Attorneys contributed to the error or that the error was reasonably foreseeable under the circumstances, any unrelated negligence of the Attorneys, as alleged, is not the proximate cause of the [plaintiffs'] appellate litigation costs as a matter of law."

"Breach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable. Cause in fact requires 'proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred.' If a negligent act or omission 'merely creat[es] the condition that makes the harm possible,' it is not a substantial factor in causing the harm as a matter of law. A plaintiff proves foreseeability of the injury by establishing that 'a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.' Conjecture, guess, and speculation are insufficient to prove cause in fact and foreseeability."

"Although there can be more than one proximate cause of an injury, . . . a new and independent, or superseding, cause may 'intervene[] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.' A new and independent cause thus destroys any causal connection between the defendant's negligence and the plaintiff's harm, precluding the plaintiff from establishing the defendant's negligence as a proximate cause. . . . In contrast, a concurring cause 'concurs with the continuing and co-operating original negligence in working the injury,' leaving the causal connection between the defendant's negligence and the plaintiff's harm intact. Thus, the crucial distinction between a superseding cause and a concurring cause is the intervening cause's effect on the chain of causation. In evaluating the existence of a superseding cause, '[t]he question always is, was there an unbroken connection? Would the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? (*Tex. & P. Ry. Co. v. Bigham,* 38 S.W.162 (Tex. 1896))'"

To determine an intervening cause, "we consider a variety of factors, including foreseeablity. If the intervening cause and its probable consequences are a *reasonably* foreseeable result of the defendant's negligence, the intervening cause 'is a concurring cause as opposed to a superseding or new and independent cause.'" But if "nothing short of prophetic ken could have anticipated the happening of the combination of events' by which the original negligence led to an intervening force that resulted in the plaintiff's injury, the harm is not reasonably foreseeable." "Other factors we consider are whether the original negligence caused the intervening force to occur and whether the negligence operated with the intervening force in creating the harm."

"An intervening cause can destroy the causal connection between the original negligence and the harm, even if the original negligence is the 'but for' cause of the intervening cause. . . . An intervening cause supersedes the original negligence when it 'alters the natural sequence of events,' causes injuries that would not otherwise have occurred, was not brought into operation by the original wrongful acts of the defendant, and operates entirely independently of the defendant's negligent act or omission."

"When a judicial error intervenes between an attorney's negligence and the plaintiff's injury, the error can constitute a new and independent cause that relieves the attorney of liability. To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable." "A judicial error is a reasonably foreseeable result of an attorney's negligence if 'an unbroken connection' exists between the attorney's negligence and the judicial error, such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of 'a continuous succession of events' that foreseeably resulted in the harm."

The "cause-in-fact element of proximate cause requires proof that negligence was a 'substantial factor' and 'but for' cause."

Here, there was "no evidence that the judicial error was reasonably foreseeable. . . ."

Once "a defendant presents evidence of a superseding cause, '[t]he burden then shifts to the plaintiff to raise a fact issue by presenting controverting evidence' that the intervening conduct was foreseeable." The "foreseeability analysis requires looking at all the circumstances in existence 'at the time.'"

Because the "the trial court's error of law on the agency issue was a new and independent cause . . . no expert testimony is necessary."

8. *Union Pacific Railroad Company v. Nami*, 498 S.W.3d 890 (Tex. 2016)

Railroad worker brought case under the FELA. Departing from common law, the causation element in an FELA case "'is as broad as could be framed.'" It is met when the employer's "'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'"

9. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The Supreme Court ruled the tenant had the burden to prove she did not cause fire.

TEX. PROP. CODE § 92.052(b) "does not include fault-based language, and the causal standard is not specified." Since "the causal standard in section 92.052(b) is not fault-based, [the tenant] bears the burden of proving facts in avoidance of contract enforcement. [The tenant] . . . cannot rely on the jury's negative finding to question one—inquiring whether her negligence caused the fire—as a substitute for an affirmative finding that the damages were not tenant caused. [The tenant's] . . . failure to submit a causation question . . . is the lynchpin for concluding she has failed to prove her affirmative defense."

Causation "does not inherently connote fault. . . ."

"Despite the absence of an affirmative finding regarding the cause of the fire, [the tenant] could establish her affirmative defense if the record conclusively establishes the absence of the requisite causal relationship, either by negating [the tenant's] role in causing the damage or by establishing an alternative cause of the damage." But, here, the record does not do so.

J. Comparative Fault and Contributory Negligence (*see* Section V(F)(3), above)

K. Damages

1. *Allen-Pieroni v. Pieroni*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

After divorce, husband was ordered to pay wife $500K in installments of $10K/month. Husband made payments, and later bought a house. Wife filed an abstract of judgment reflecting husband's obligation to her, which husband discovered years later when his sale of the house fell through. Husband sued the wife successfully for slander of title. The Supreme Court reversed and remanded, holding that trial court used the wrong measure of damages: when "the plaintiff still owns the property at the time of trial, the amount of actual damages caused by the slander is generally the difference between the contract price (the amount the plaintiff would have received but for the defendant's title disparagement) and the property's market value at the time of trial with the cloud removed."

"'Slander of title' consists of a 'false and malicious statement made in disparagement of a person's title to property which causes special damages.' . . . Special damages are simply economic damages."

"The law does not presume damages as a consequence of slander of title; rather, the plaintiff must prove special damages. Special damages exist when the plaintiff can show the loss of a specific, pending sale that was frustrated by the slander. But the seller's lost profit from the sale is not the relevant measure of those damages."

"In *Reaugh*, we adopted this measure [of damages], quoting in support a Restatement comment . . . :

> (d) Extent of loss, how proved. The extent of the pecuniary loss caused by the prevention of a sale is determined by the difference between the price which would have been realized by it and the salable value of the thing in question after there has been a sufficient time following the frustration of the sale to permit its marketing. The depreciation of the thing from any cause after such time has elapsed is immaterial."

Here, "no evidence exists that [husband's] property was worth less than the previous contract price at the time of trial or that [wife's] invalid lien had any continuing effect on the property's value or marketability following its removal. As the party seeking affirmative relief, [husband] had the burden to prove these damages."

2. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of fiduciary duty by two directors, the Supreme Court ruled that Here there was no evidence defendants "acquired any specific lease as result of the breaches of fiduciary duties."

Thus, LEC was not entitled to a constructive trust imposed upon the leases defendants acquired. Moreover, there was no jury finding of lost profits.

"Longview had the burden to prove its entitlement to any recovery on a lease-by-lease basis and failed to do so."

"Texas law . . . limits disgorgement to a fiduciary's profits." But no such question was submitted to the jury.

3. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company left and joined a competitor. Company sued former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury found for company and awards actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

The Texas Supreme Court analyzed the evidence and held that the evidence was legally insufficient to support the award of future lost profits damages. It is "well established" that recovery for lost profits "'does not require that the loss be susceptible of exact calculation,'" but the "'injured party must do more than show that [it] suffered some lost profits. The amount of the loss must be shown by competent evidence with a reasonable certainty,'" which "'is a fact intensive determination.'"

Here, company claimed lost profits from two sources: loss of a particular contract, and the lost future sales of one of the employee defendants who was solicited away by the other defendants. There was insufficient evidence that company "more likely than not" would have obtained the contract but for the defendants' misconduct, because it was based on an expert's unsupported assumption that company would have received the contract and it was "pure speculation to conclude that" company would have won the bid. Evidence of lost profits from the lost employee was insufficient because it was based on "testimony regarding the length of [his] future employee at [company] and the success he would have had during that time [which was] based on improper assumptions and was thus conclusory."

The Supreme Court rendered judgment that company took nothing for lost profits rather than remand for a new trial on damages. While the Court held in *ERI Consulting Engineers, Inc. v. Swinnea* that "courts should suggest remittitur on remand for a new trial on damages where 'competent evidence exists to establish *some* reasonably certain amount of lost profits,'" that case "has no applicability" here because there was no evidence that company "lost any amount of profits."

Defendants argued that there was insufficient evidence of malice to support the award of exemplary damages against the individual defendants. The Supreme Court disagreed. A party seeking to "recover exemplary damages based on malice" must "prove actual damages and submit clear and convincing evidence of outrageous, malicious, or otherwise reprehensible conduct," and "prove that the defendants specifically intended for [the plaintiff] to suffer substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action" Importantly, "circumstantial evidence is legally sufficient to support a finding of malice." Here, the Supreme Court analyzes the evidence against each defendant and holds that there was sufficient evidence to find malice as to each.

However, after the reversal of most of the actual damages awarded, the exemplary damages award was unconstitutionally excessive. Here, the jury awarded $4,253,049 in actual damages (of which $4,198,000 is the reversed lost profits award) and $1,750,00 in exemplary damages. The court of appeals held (as the Supreme Court does) insufficient evidence of lost profits, leaving only $55,049 in actual damages awarded jointly-and-severally against each defendant, held that the exemplary damages award was unconstitutionally excessive based on the reduced actual damages award, and remands with a suggested remittitur of the exemplary damages award to $220,196.96 for each individual defendant.

The Supreme Court held that even the suggested remitter "results in an award that violates due process because a 4:1 ratio of compensatory to exemplary damages is not appropriate in this case." exemplary damages are unconstitutionally excessive even with the suggested remittitur of the court of appeals. The court of appeals came to the remittitur amount by comparing the exemplary damages award to the actual damages awarded jointly and severally against the individual defendants.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'"

"Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court held that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-and-several liability for actual damages, the Supreme Court holds "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

The trial court improperly assessed exemplary damages jointly and severally against competitors for the individual employee defendants' conduct, where there was no jury finding against the competitors. Under TEX. CIV. PRAC. & REM. CODE § 41.006, "'an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.'" Because the plaintiff failed to obtain a finding of exemplary damages specifically against as the competitors, the Supreme Court reversed the award against them and rendered a take-nothing judgment as to their liability for exemplary damages.

4. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

Elderly woman owned portion of ranch. Plaintiffs were other relatives who owned remainder and were persuaded to sell when they believed her funds were depleted. As a result, the sales flowed into the trust which then passed to niece, rather than relatives who would have inherited. Jury found niece, and those with her, fraudulently induced the relatives to sell ranch. The Supreme Court refused to recognize the cause of action of "tortious interference with an inheritance," holding that a constructive trust imposed by the trial court sufficed.

Here, there was "an incorrect measure of damages for a fraud claim and the record contains no evidence of the correct measure. . . ."

"Out-of-pocket damages are measured by the difference between the value of what was given and received. . . . [T]hey are determined at the time of the sale or transaction induced by the fraud."

Plaintiffs sold their interest in land and were paid for it. There was no evidence of what the land was later worth. "Out-of-pocket damages are not designed to contemplate what the [plaintiffs] hoped to receive from Lesey's trust if she died without selling the ranch or changing her estate planning."

"The trial court's faulty [damages] instruction amounted to harmful error."

Footnote 3: "Undue influence itself is not an actionable tort; consequently, damages are not recoverable based solely on an undue-influence finding. . . . Rather, an undue-influence finding typically is grounds for setting aside an otherwise binding document, in this case a trust or deed."

5. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Bennett sued Grant for slander after Grant had given to police photographs of Bennett selling a neighbor's cattle. Grant filed a counterclaim for malicious prosecution. The jury awarded actual and punitive damages to Grant. The Supreme Court ruled that the mental anguish damages were supported by the evidence.

"An award for mental anguish must be supported by either (1) a substantial disruption in the plaintiff's

daily routine, or (2) evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. There must be evidence of the existence of compensable mental-anguish damages and evidence to justify the amount awarded."

"Non-economic damages, such as mental-anguish damages, 'cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment.'" Juries must "'be given a measure of discretion in finding damages, [though] that discretion is limited.'" It must be an amount that "'would fairly and reasonably compensate' for the loss.'" "Appellate courts must conduct a meaningful evidentiary review of these determinations."

Here, sufficient evidence supported the mental anguish damages. Grant's daily routine was disrupted, he had moved four times, he built a privacy fence, and had suffered "headaches, a weak stomach, a loss of appetite, and sleep deprivation."

6. *Town of DISH v. Atmos Energy Corporation*, 519 S.W.3d 605 (Tex. 2017)

Summary judgment on limitations in a trespass case. A "defendant moving for summary judgment on limitations must negate the discovery rule 'if it applies and has been pleaded or otherwise raised.'"

7. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen." Historically, "'defamation *per se* has involved statements that are so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish.'"

8. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Defamation case. "Compensatory damages in defamation cases must compensate for '*actual* injuries' and cannot merely be ''a disguised disapproval of the defendant.' But when the damages are for noneconomic losses, such as mental anguish or lost reputation, the jury must be given some latitude because these general damages are, by their nature, incapable of precise mathematical measure."

9. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)

Damages for a temporary nuisance is generally limited to "'lost use and enjoyment . . . that has already accrued'" at the time of trial, while an owner in a permanent nuisance claim "may recover the lost market value." The general calculation is "'the difference in the reasonable market value of the property immediately before and immediately after the injury,'" but "when the damage results from an ongoing condition rather than a single event that results in a permanent nuisance, courts apply a 'more flexible' rule." "The proper comparison in those circumstances is 'of market value with and without the nuisance.'"

10. *Southwestern Energy Production Co. v. Berry-Helfland*, 491 S.W.3d 699 (Tex. 2016)

Engineers sued oil company, asserting misappropriation of trade secrets and other claims relating to oil company's acquisition and use of information on well locations developed by engineers. The jury found for engineers and awards damages for misappropriation and breach of a confidentiality agreement. Oil company appealed on multiple issues.

"A 'flexible and imaginative' approach is applied to the calculation of damages in misappropriation-of-trade-secrets cases." "Absent proof of a specific injury, the plaintiff can seek damages measured by a 'reasonable royalty.'" Here, the jury's award was based on engineers' expert's testimony that a 3% overriding royalty based on the terms of a similar deal made by engineers and that 3% was an average royalty earned by engineers was "reasonable royalty." However, the exemplar deal actually had a "sliding scale" for royalty payment, and there was no evidence as to how that royalty structure would apply to the disputed wells.

"In trade-secret cases, a measure of uncertainty is tolerated, and to an extent, unavoidable. However, if there is objective evidence from which more certainty can be gleaned, it is incumbent on the plaintiff to produce that evidence." Thus, "legally sufficient evidence exists to support an award of actual damages, but insufficient evidence exists to support the entire amount the jury awarded," requiring reversal of the damages award and a remand for new trial. "Rendition is not proper . . . because an overstatement of damages does not entirely defeat recovery when there is legally sufficient evidence that damages exist."

11. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"Chapter 41 does not define 'damages' but uses the term broadly to include compensatory, economic, noneconomic, future, and exemplary damages, all of which are defined." "Chapter 41 applies to 'any action' in which exemplary damages are sought." "Chapter 41 does not refer to civil penalties."

"[C]ivil penalties are different from compensatory damages. . . ."

The "Act allows for a private suit for damages as well as enforcement by the Attorney General and the Board."

"We conclude that a private recovery of civil penalties under the Act is subject to Chapter 41."

12. *J&D Towing, LLC v. American Alternative Insurance Corporation*, 478 S.W.3d 649 (Tex. 2016)

Tow truck was struck by a car, rendering the truck a total loss. Towing company settled with the car's driver for the driver's liability policy limit, then sued its own insurer for compensation for loss of use of the truck under its underinsured motorist coverage. Insurer argued that loss-of-use damages are not available where property is totally destroyed. Overruling the opinions of most Texas courts of appeals on the issue, the Supreme Court held that loss-of-use damages are recoverable in total-destruction cases.

"Actual damages may be either direct or consequential." "Where [d]irect damages compensate for a loss that is the necessary and usual result of the tortious act, . . . consequential damages, also known as special damages, compensate for a loss that results naturally, but not necessarily, from the tortious act," so long as they are "both foreseeable and directly traceable to the act." Loss-of-use damages are a form of consequential damages.

"[L]oss-of-use damages compensate a property owner for damages that result from 'a reasonable period of lost use' of the personal property. The amount of damages may thus be measured according to the particular loss experienced, such as the amount of lost profits, the cost of renting a substitute chattel, or the rental value of the owner's own chattel."

Texas law has been "clear" that "the owner may recover loss-of-use damages" when "personal property has been only *partially* destroyed." "Where personal property has been *totally* destroyed, however, Texas law is less clear." While "the measure of direct damages is the fair market value of the property immediately before the injury at the place where the injury occurred," the Supreme Court had "not yet directly spoken on loss-of-use damages in total-destruction cases," and "some courts of appeals have held that loss-of-use damages are unavailable in total-destruction cases."

After examining the history of Texas cases on the subject, looking '"to other jurisdictions for guidance,'" and considering the principle of "full and fair compensation" as the appropriate measure of actual tort damages, the Supreme Court agreed with the "modern trend," and held that "the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury."

The Supreme Court cautioned that "[p]ermitting loss-of-use damages in total-destruction cases . . . is not a license for unrestrained raids of defendants' coffers." The damages must be "foreseeable and directly traceable to the tortious act," and the "must not be speculative." "Moreover, the damages may not be awarded for an unreasonably long period of lost use." Loss-of-use damages in total-destruction cases are limited to "a period [no] longer than that reasonably needed to replace the personal property."

L. Gross Negligence and Punitive Damages

1. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company left and joined a competitor. Company sued former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury found for company and awards

actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

Individual defendants argued that there was insufficient evidence of malice to support the award of exemplary damages against them. The Supreme Court disagreed. A party seeking to "recover exemplary damages based on malice" must "prove actual damages and submit clear and convincing evidence of outrageous, malicious, or otherwise reprehensible conduct," and "prove that the defendants specifically intended for [the plaintiff] to suffer substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action" Importantly, "circumstantial evidence is legally sufficient to support a finding of malice." Here, the Supreme Court analyzes the evidence against each defendant and held that there was sufficient evidence to find malice as to each.

However, after the reversal of most of the actual damages awarded, the exemplary damages award was unconstitutionally excessive. Here, the jury awarded $4,253,049 in actual damages (of which $4,198,000 is the reversed lost profits award) and $1,750,00 in exemplary damages. The court of appeals held (as the Supreme Court does) insufficient evidence of lost profits, leaving only $55,049 in actual damages awarded jointly-and-severally against each defendant, held that the exemplary damages award was unconstitutionally excessive based on the reduced actual damages award, and remands with a suggested remittitur of the exemplary damages award to $220,196.96 for each individual defendant.

The Supreme Court held that even the suggested remitter "results in an award that violates due process because a 4:1 ratio of compensatory to exemplary damages is not appropriate in this case." exemplary damages are unconstitutionally excessive even with the suggested remittitur of the court of appeals. The court of appeals came to the remittitur amount by comparing the exemplary damages award to the actual damages awarded jointly and severally against the individual defendants.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" "Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court held that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-and-several liability for actual damages, the Supreme Court holds "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

The trial court improperly assessed exemplary damages jointly and severally against competitors for the individual employee defendants' conduct, where there was no jury finding against the competitors. Under TEX. CIV. PRAC. & REM. CODE § 41.006, "'an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.'" Because the plaintiff failed to obtain a finding of exemplary damages specifically against as the competitors, the Supreme Court reversed the award against them and rendered a take-nothing judgment as to their liability for exemplary damages.

The reversal of the lost profits damages award mandated reversal of the award of attorney's fees for

company because they were the only damages for breach of contract, and the attorney's fee evidence did not segregate the fees incurred pursuing the breach of contract claim from those incurred pursuing the Texas Theft Liability Act claim. The Court remanded the case for a new trial on attorney's fees.

2. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

Bennett sued Grant for slander after Grant had given to police photographs of Bennett selling a neighbor's cattle. Grant filed a counterclaim for malicious prosecution. The jury awarded actual and punitive damages to Grant. The Supreme Court ruled that the punitive damages cap exception applied, but that the punitive damages were unconstitutionally excessive.

TEX. CIV. PRAC. & REM. CODE, ch. 41 "restricts the maximum amount of exemplary damages a trial court may award. But this cap does not apply when a plaintiff seeks exemplary damages based on certain felony criminal conduct." This "case falls under an exception to the cap, namely securing execution of a document (the indictment) by deception." The "pecuniary interest" element was met because the document affected the complainant's pecuniary interest.

But the amount awarded here, even after remittitur, was excessive. "Reviewing the constitutionality of an exemplary-damages award is a question of law we review de novo."

Exemplary "damages further the state's interest in punishing and deterring unlawful conduct. But this punishment should not be . . . grossly excessive. . . . Therefore, even if the Texas cap on exemplary damages is inapplicable, there remains a federal constitutional check on the award. . . ." Footnote 26: The "Due Process Clause of the Fourteenth Amendment prevents a state from granting a 'grossly excessive' punishment."

There are "three guideposts when reviewing an exemplary-damages award: (1) the degree of reprehensibility of the misconduct; (2) the disparity between the exemplary-damages award and the actual harm suffered by the plaintiff or the harm likely to result; and (3) the difference between the exemplary damages awarded and the civil or criminal penalties that could be imposed for comparable conduct."

"Evaluating reprehensibility requires consideration of whether: (1) the harm inflicted was physical rather than economic; (2) the tortious conduct showed an indifference to or reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions; and (5) the harm resulted from intentional malice, trickery or deceit." These are "nonexclusive" factors.

"Here, because there is no analogous civil penalty for Bennett's actions, we look to potential criminal penalties, although criminal penalties are viewed as less instructive than potential civil penalties."

There "is no bright-line rule for the ratio [of actual to punitive damages, but] . . . few awards exceeding a single-digit ratio satisfy due process standards. [A] . . . ratio above 4:1 'might be close to the line of constitutional impropriety.'"

Evaluating the likely harm from defendant's conduct "requires a three-part inquiry, looking at (1) the exemplary damages awarded, (2) the actual damages, defined as the harm that has likely occurred, and (3) 'potential damages,' defined . . . as the harm likely to result from defendant's conduct." The burden is on the plaintiff to show he would probably "suffer these damages."

The "'harm likely to result' [is] 'the harm to the victim that would have ensued if the tortious plan had succeeded.'" "Here, there was essentially zero likelihood of imprisonment because the statute of limitations barred the claim against Grant." Thus, the exemplary damages award was remanded.

3. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Brady sued newspaper and reporter for stories about his arrests and the conduct of his father, a chief deputy sheriff. The Supreme Court reversed a verdict for plaintiff and remanded.

"The First Amendment . . . requires that a private plaintiff prove actual malice, that is, 'knowledge of falsity or reckless disregard for the truth,' before recovering anything more than actual damages for a statement on a matter of public concern. But here 'malice' in the jury charge referred only to an intent to cause injury or conscious indifference to the risk of injury; it was not tied to the truth or falsity of the statements. . . . Thus, in addition to proving the traditional malice' required to obtain exemplary damages under Texas law, one seeking exemplary damages for speech on a public matter must also prove constitutional 'actual malice.'" Footnote 2: "At times, 'actual malice' may evidence traditional malice. . . . But evidence of actual malice alone does not relieve the plaintiff of proving traditional malice also to obtain punitive damages. . . ."

4. *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016)

By interfering with the hours of the optometrists who rented space from it, Wal-Mart violated the law. Though the statute contained punitive provisions, the Supreme Court, answering certified questions, ruled the optometrists could not recover. "Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). . . . Because the Optometrists recovered no [actual] damages, Chapter 41 bars recovery of the civil penalties as exemplary damages."

"The Attorney General and the Board may enforce this prohibition [in setting optometrists' hours] by a suit for injunctive relief, a civil penalty not to exceed $1,000 per day, and attorney fees. A person injured by a violation 'is entitled to' the same relief as well as damages. A violation is also actionable under the Texas Deceptive Trade Practices-Consumer Protection Act and is a misdemeanor. . . ."

"Chapter 41 does not define 'damages' but uses the term broadly to include compensatory, economic, noneconomic, future, and exemplary damages, all of which are defined." "Chapter 41 applies to 'any action' in which exemplary damages are sought." "Chapter 41 does not refer to civil penalties."

"[C]ivil penalties are different from compensatory damages. . . ."

"In interpreting a statute, we may also consider the 'object sought to be obtained' and the 'circumstances under which the statute was enacted'. Unquestionably, Chapter 41 was enacted to restrict and structure the recovery of exemplary damages. Among other things, it requires: proof by clear and convincing evidence of the elements for exemplary damages; proof that the defendant acted with certain prerequisite culpable mental states; consideration of evidence on certain prescribed factors; specific jury questions and instructions; a bifurcated trial; a unanimous verdict; and careful judicial review. Chapter 41 limits the amount of exemplary damages relative to compensatory damages, and, more importantly for our purposes here, precludes an award of exemplary damages unless other damages, besides nominal damages, are awarded."

Here, "is [the] possibility [under the statute] of a wide, standardless range of permissible penalties that makes civil penalties much like exemplary damages when they were limited only by constitutional and common-law principles. This uncertainty, verging on arbitrariness, is precisely what Chapter 41 addresses."

The Act caps civil penalties "at $1,000 per day. But there is no limit on the number of days that a violation can occur, and thus no limit on the amount of civil penalties that a claimant can receive for a single violation."

"We conclude that a private recovery of civil penalties under the Act is subject to Chapter 41."

M. Trial Amendment

1. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

County commissioner who had a concealed handgun license, carried guns into a meeting. After he was convicted of possession of weapon, the state moved to forfeit them. The Supreme Court determined that the matter was civil, and thus it had jurisdiction. But it further determined that a conviction for the possession of a weapon did not authorized "a forfeiture order under [TEX. CODE CRIM. PROC.] article 18.19(e)."

The "issues under [TEX. CODE CRIM. PROC.] article 18.19(d)(5) [were not] tried by consent because the State relied on article 18.19(e) in the motions seeking forfeiture of the handguns."

N. Jury Charge and Submission to Jury

1. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Plant worker was injured by defective scaffold that was supposed to be inspected by contractor. Plaintiff obtained a verdict at trial based upon a general-negligence theory, which defendant had urged in an earlier trial. The Supreme Court reversed and rendered. "Considering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability. Levine's failure to request or secure findings to support his premises liability claim, therefore, 'cannot support a recovery'. . . . Additionally, USI was under no obligation to object to Levine's submission of an improper theory of recovery, and USI preserved its improper-theory argument by raising it in a motion for judgment notwithstanding the verdict."

Before "a party is entitled to judgment, it must satisfy its burden of obtaining jury findings in its favor on every essential element of its claim." All "'independent grounds of recovery . . . not conclusively established under the evidence and no

element of which is submitted or requested are waived.'"

"A trial court must submit jury questions, instructions, and definitions that 'are raised by the written pleadings and the evidence.' In reviewing alleged error in a jury submission, we consider 'the pleadings of the parties and the nature of the case, the evidence presented at trial, and the charge in its entirety.' The alleged charge error 'will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment.'"

A "premises defect case improperly submitted to the jury under only a general-negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."

Footnote 1: "[W]e reject the dissent's implication that premises liability is simply an affirmative defense, requiring the defendant to bear the burden of ensuring submission of the proper theory of recovery to support a premises liability judgment in the plaintiff's favor."

Generally, a plaintiff need only submit a general-negligence question in support of its claim for a defendant's liability under a negligent-activity theory."

When submitting a premises liability case, "'a simple negligence question, unaccompanied by the *Corbin* elements as instructions or definitions, cannot support a recovery. . . .'"

General-negligence "questions submitted in premises liability cases were 'immaterial' because 'absent any determination that the factual predicates giving rise to a legal duty were satisfied, the defendants' failure to use reasonable care was of no legal consequence.'"

A "premises defect claim against a contractor who retained the right to control the premises at the time of the plaintiff's alleged injury must be submitted to the jury as a premises liability claim."

"A defendant has no obligation to complain about a plaintiff's omission of an independent theory of recovery; rather, the burden to secure proper findings to support that theory of recovery is on the plaintiff, and a plaintiff who fails to satisfy that burden waives that claim."

A "defendant must preserve error by objecting when an independent theory of recovery is submitted defectively. This includes when an element of that theory of recovery is omitted. But when, as in this case, the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object."

A "defendant may invite error and waive its argument on appeal when it persuades a trial court to adopt a jury charge that it later alleges supports an improper theory of recovery." "But here, once the trial court ordered a new trial, USI could invite error only in the second trial."

"USI preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict. . . . [B]ecause the defendant's argument was a purely legal issue, the defendant preserved error by asserting the argument in a post-verdict motion."

2. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of fiduciary duty by two directors, the Supreme Court ruled that defendants did not waive charge error. Defendants objected to a certain jury question on several grounds, including that there was no identification of the property that was wrongly obtained, and no tracing of specific property. "By those objections, the Huff Defendants clearly preserved error as to the legal sufficiency of the evidence to support tracing any specific lease Riley-Huff acquired to Huff's or D'Angelo's breaches of fiduciary duties."

The "elements of a ground of recovery are deemed found by the trial court in favor of its judgment if (1) an element of an independent ground of recovery was submitted to and found by the jury; (2) elements were omitted without objection; and (3) the submitted element was 'necessarily referable' to the same ground of recovery as the omitted elements."

3. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

"The trial court's faulty [damages] instruction amounted to harmful error."

4. *Green v. Dallas County Schools*, ___ S.W.3d ___ (Tex. 2017)(5/12/17)

Employee brought suit after being fired for an episode of incontinence on a school bus. The condition was related to his heart medications. The district claimed employee's disability was his heart condition. The Supreme Court ruled, "No one disputes that DCS fired Green because of his urinary incontinence, and based on the jury charge and the evidence presented, we conclude the jury could have found Green's

incontinence was itself a disability."

The "charge did not forbid the jury from finding that Green's urinary incontinence was itself a disability. To the contrary, . . . the charge referred to 'disabilities' in the plural, leaving it to the jury to determine which of his conditions was a disability, and if so, whether DCS terminated him 'because of' that disability."

Green had not waived his argument that his incontinence was a disability, in part because "the charge itself squarely presented that issue."

Employer argued the decision-maker did not know of the incontinence. But, some evidence shows he did. Moreover, the charge instructed that "DCS could act 'through its officers and employees,' not just through its 'decision makers.' DCS did not object to this instruction, so we must measure the sufficiency of the evidence in light of the jury instruction. ('The sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it.')".

5. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank preserved error about whether the trial court erred when it instructed the jury to consider extrinsic evidence to determine if a business seller was a third-party beneficiary to a purchase loan agreement. Footnote 11: "First Bank preserved its objection to the consideration of extrinsic evidence. At the charge conference, First Bank's counsel referred the court to the third-party-beneficiary question and specifically objected because it 'invites them to look at other evidence.' . . . First Bank's objection was sufficient to 'point out distinctly the objectionable matter and the grounds of the objection' and thus preserved the error of which First Bank now complains. [An] . . . objecting party must make 'the trial court aware of the complaint, timely and plainly, and obtain[ ] a ruling.'"

6. *BP America Production Company v. Red Deer Resources, LLC*, 526 S.W.3d 389 (Tex. 2017)

Plaintiff obtained a judgment based on the jury's answer to a question the Supreme Court holds is immaterial and cannot support the judgment. Plaintiff argued that defendant waived the issue by failing to object to the jury question. "Generally, to preserve error, a party must specifically object, clearly identify the error, and explain the grounds for the objection." However, "[a] party need not object to an immaterial question that should not have been submitted or cannot support a judgment to preserve error." "'A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict.'"

7. *BP America Production Company v. Laddex, Ltd.*, 513 S.W.3d 476 (Tex. 2017)

Top lessee sued bottom lessee alleging that the bottom lease terminated for failure to produce in paying quantities. At trial, the jury charge asked whether the lease failed to produce in paying quantities during a particular period which saw a slowdown of production, and the jury answered yes. The trial court rendered judgment on this verdict decreeing that the bottom lease terminated.

The Supreme Court held that the jury charge was erroneous because it limited the period of time over which the jury could consider whether the well was producing in paying quantities and thus "did not permit the jury to appropriately discharge its fact-finding duties[.]" "Whether a well is producing in paying quantities is a question of fact for the jury[.]" It is governed by a "two-pronged analysis": "(1) whether the well 'pays a profit, even small, over operating expenses,' . . . and (2) if not, whether, 'under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation,' continue to operate the well as it had been operated.'"

"'[T]here can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased.'" Here, the jury charge improperly limited the jury's consideration to the fifteen months of slowed production. While the parties may focus the jury on a particular period of time, "the *charge* may not ask or instruct the jury about a specific period without unduly influencing the jury and violating Clifton [*v. Koontz*]."

8. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Defamation case. Here, media defendants objected that the charge did not require plaintiff to prove the falsity of defamatory statements, and to prove "actual malice before obtaining punitive damages. The media defendants objected to the charge . . . [and submitted] in writing proposed questions requiring [plaintiff] to prove falsity and actual malice. The media defendants raised the same point before the court of appeals. . . . The media defendants have preserved

error, and the error is reversible." When "'a proper objection is made about the omission of an essential element, the failure to include it is reversible error'."

9. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved that he was]. . . . Coverage is therefore precluded as a matter of law."

"Our review is restricted to the jury charge as submitted when there was no objection to the instruction. . . . Even if another legal theory was argued to the jury and explained by the lawyers in argument, we are bound by the instructions given to the jury and presume that the jury followed those instructions. 'Statements from lawyers as to the law do not take the place of instructions from the judge as to the law.' It is the trial court's prerogative and duty to instruct the jury on the applicable law."

Here, the "the jury was not instructed on alter ego. . . . Therefore, we cannot consider those legal theories when reviewing the legal sufficiency of the jury's finding."

"When a party properly preserves error by objecting to an erroneous definition used in the jury charge, we measure the legal sufficiency of the evidence against the definition that should have been used in the charge." In this case, insurers objected to the definition of "leased-in worker."

"'Whether a definition used in the charge misstated the law is a legal question,' which we review de novo." "While trial courts have wide discretion in determining the necessity of explanatory instructions and definitions in the jury charge, the trial court must give definitions of legal and other technical terms. . . . 'An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence.'"

Here, the trial court was bound by a definition provided by the court of appeals. But, while the court of appeals used definitions in its opinion, the "inclusion of those definitions in Instruction No. 6 was completely unnecessary. Any error was harmless, however, because the proper definition was included in the instruction."

10. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch. 107, and then sued the Commission for damages. At trial, the trial court denied the Commission's request for a jury question on contract formation, holding as a matter of law that a contract was formed at the meeting. The trial court also denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on contract formation and the failure to submit a jury question on the good-faith defense were both error.

The Commission did not waive error by failing to request a definition of good faith in conjunction with their requested jury question. The Commission's requested jury question "generally tracked the pertinent statutory language," and thus complied with the requirements of Rule 278. "We are particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be."

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

Turning to the failure to submit a question on contract formation, there was conflicting evidence as to whether the parties intended to be bound by the initial

oral agreement, and thus contract formation was "a disputed fact issue that should have been presented to the jury."

O. Closing Argument

1. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"When an appellate court remands a case to the trial court, the trial court 'has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate.'" Thus, here, the trial court was bound by a definition provided by the court of appeals. But, while the court of appeals used definitions in its opinion, the "inclusion of those definitions in Instruction No. 6 was completely unnecessary. Any error was harmless, however, because the proper definition was included in the instruction."

2. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Court protects "the constitutional right to a trial by jury by requiring trial courts to provide litigants with 'an understandable, reasonably specific explanation' for setting aside a jury verdict and ordering a new trial."

P. Directed Verdict

No cases to report.

Q. Jurors and Jury Deliberation

1. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

There was "sufficient evidence" to support a finding that an elderly woman lacked mental capacity. It "is not our place to weigh the testimony adduced at trial. That is the jury's province."

2. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank preserved error about whether the trial court erred when it instructed the jury to consider extrinsic evidence to determine if a business seller was a third-party beneficiary to a purchase loan agreement. Footnote 11: "First Bank preserved its objection to the consideration of extrinsic evidence. At the charge conference, First Bank's counsel referred the court to the third-party-beneficiary question and specifically objected because it 'invites them to look at other evidence.' . . . First Bank's objection was sufficient to 'point out distinctly the objectionable matter and the grounds of the objection' and thus preserved the error of which First Bank now complains. [An] . . . objecting party must make 'the trial court aware of the complaint, timely and plainly, and obtain[ ] a ruling.'"

3. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017)

Here, the jury "found that Bartush's breach was not excused. To make the latter finding, the jury must have concluded that Cimco's prior breach was not material."

"Generally, materiality is an issue 'to be determined by the trier of facts.'" Materiality "may be decided as a matter of law only if reasonable jurors could reach only one verdict."

4. *Philadelphia Indemnity Insurance Company v. White*, 490 S.W.3d 468 (Tex. 2016)

Fire began in tenant's dryer, and caused damage to complex. Lease contained a provision making tenant liable if the incident was not caused by landlord. The Supreme Court ruled the tenant had the burden to prove she did not cause fire.

The tenant "bears the burden of proving facts in avoidance of contract enforcement. [She] . . . cannot rely on the jury's negative finding to question one—inquiring whether her negligence caused the fire—as a substitute for an affirmative finding that the damages were not tenant caused. [The tenant's] . . . failure to submit a causation question . . . is the lynchpin for concluding she has failed to prove her affirmative defense."

"Despite the absence of an affirmative finding regarding the cause of the fire, [the tenant] could establish her affirmative defense if the record conclusively establishes the absence of the requisite causal relationship, either by negating [the tenant's] role in causing the damage or by establishing an alternative cause of the damage." But, here, the record does not do so.

R. Mistrial

No cases to report.

S. Judgments, Costs, Interest, and Bonds

1. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

County commissioner who had a concealed handgun license, carried guns into a meeting. After he was convicted of possession of weapon, the state moved to forfeit them. The Supreme Court determined that the matter was civil, and thus it had jurisdiction. But it further determined that a conviction for the possession of a weapon did not authorized "a forfeiture order under [TEX. CODE CRIM. PROC.] article 18.19(e)."

The "issues under [TEX. CODE CRIM. PROC.] article 18.19(d)(5) [were not] tried by consent because the State relied on article 18.19(e) in the motions seeking forfeiture of the handguns."

2. *A.D. Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017)

After bench trial, judge was voted out of office. The issue was "whether a newly elected district-court judge or the former judge she replaced may file findings of fact." The Supreme Court ruled that "the new judge lacks authority to file the findings." The Court then abated the appeal and directed that "the former judge file findings." If he refuses, the court of appeals may reverse and remand.

In a bench trial, "'any party may request the court to state in writing its findings of fact and conclusions of law.' TEX. R. CIV. P. 296.1 The party must file its request within twenty days after the court enters its judgment, and the court clerk must 'immediately' bring the request 'to the attention of the judge who tried the case.' The court must file its findings within twenty days of the timely request. TEX. R. CIV. P. 297. If the court fails to file findings within twenty days, the requesting party may file a notice of past due findings within thirty days of the initial request. A timely past-due notice extends the judge's deadline to forty days from the party's initial request. If the court fails to file findings in response to a proper and timely request, the court of appeals must presume the trial court made all the findings necessary to support the judgment. A party may rebut the presumption by demonstrating that the record evidence does not support a presumed finding."

Footnote 1: "Fact findings and legal conclusions, however, reflect distinct types of court decisions, are subject to different requirements, and are reviewed under different standards."

Findings of fact are unnecessary for undisputed matters. "'But if a court fails to file findings when the facts are disputed, the burden of rebutting every presumed finding can be so burdensome that it effectively 'prevent[s the appellant] from properly presenting its'" appeal. So, a "trial court's failure to file findings in response to a timely and proper request is thus 'presumed harmful, unless 'the record before the appellate court affirmatively shows that the complaining party has suffered no injury.'" "When the trial court's failure is harmful, the preferred remedy is for the appellate court to direct the trial court to file the missing findings." "If the trial court still fails to file the findings, the appellate court must reverse the trial court's judgment and remand the case for a new trial."

Footnote 3: Because the due date for filing findings of fact "was a Saturday, the last day to file findings was actually Monday. . . . *See* TEX. R. CIV. P. 4."

"Our error-preservation rules require litigants to make 'a timely request, objection, or motion that' provides the grounds for relief and complies with the Rules of Civil or Appellate Procedure. The Rules of Civil Procedure provide the mechanism for parties to preserve error regarding a trial court's findings of fact. . . . [A] party waives its right to challenge a failure to file findings if it does not file a notice of past due findings as rule 297 requires. . . . And as a result, filing a notice of past due findings is sufficient to preserve error for unfiled findings."

An "order 'is void when a court has no power or jurisdiction to render it.'" Here, the new judge had no authority to file findings of fact. "Rule 18 expressly permits a successor judge to determine undisposed motions when the predecessor judge 'resigns.' Here, rule 18 does not apply because Judge Lowy did not die, resign, or become unable to hold court."

Footnote 5: TEX. GOV'T CODE § 30.002(a) "codifies the common-law rule as it existed before the rules of civil procedure: the judge who heard the case has authority to file findings even if that judge has been displaced by election."

Here, no authority granted the new judge power to file findings.

In this case, "because Judge Lowy's term of office expired on December 31, 2014, which was within the period for filing the findings Pak requested, [TEX. GOV'T CODE § 30.002(a)] granted Judge Lowy authority to file the findings even after his term expired."

The "'expiration of the trial bench's 'plenary power' over its judgment does not affect or diminish the trial court's ability to make and file amended

findings of fact and conclusions of law.'" Footnote 7: "While the rules create a deadline for the trial court to file findings, those deadlines do not bar late findings. Rather, they mark the point after which the party requesting findings may assert appealable error."

"Asking a former judge to file findings is an extraordinary solution. . . . The judge's end of term must fall within the 'prescribed' forty-day period to file findings."

3. *In re Norma Heredia*, 501 S.W.3d 70 (Tex. 2016)

Indigent litigant filed a pauper's affidavit for an appeal. Because she did not receive notice, the court reported did not timely challenge it. The Supreme Court ruled that TEX. R. APP. P. 20.1 "does not allow for an untimely challenge, even if the court reporter did not receive notice of the indigence claim."

TEX. R. APP. P. 20.1 is "'mandatory to protect the indigent appellant and uphold the principle that '[c]ourts should be open to all, including those who cannot afford the costs of admission.'"

A "person seeking to challenge an indigency affidavit must file a contest 'within 10 days after the . . . affidavit. . . .' If no one timely contests the affidavit, . . . 'the party will be allowed to proceed without advance payment of costs.' In other words, an affidavit of indigence filed in a trial court is operative unless challenged within ten days of its filing."

The clerk failed to comply with the rule requiring a copy to be sent to the court reporter. And the "rules do allow for suspension of a rule's operation when good cause exists." But this does not constitute "good cause" under TEX. R. APP. P. 20.1. Thus, the appellant "must be allowed to proceed on appeal without advance payment of costs."

4. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"'When a court makes fact findings but inadvertently omits an essential element of a ground of recovery or defense, the presumption of validity will supply by implication any omitted unrequested element that is supported by evidence.' . . . [W]e presume that the trial court made all implied findings necessary to the validity of the judgment."

5. *In re P.M., a Child*, 520 S.W.3d 24 (Tex. 2016)

Footnote 5: A "'civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals *process* for that underlying suit has been exhausted' (emphasis added), . . . citing RESTATEMENT (SECOND) OF TORTS § 674 cmt. j (1977) ('If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.')"

6. *Campbell v. Wilder*, 487 S.W.3d 146 (Tex. 2016)

Indigent litigants who sued for divorce in family district courts each file uncontested affidavits of indigency in lieu of paying costs, as permitted under TEX. R. CIV. P. 145. However, after the final divorce decrees allocated costs to "'the party who incurred them'" without stating the amount of the costs due or that litigants could afford them, the district clerk sent demands to each litigant for court costs and fees, "threaten[ing] that the sheriff would seize property to satisfy the debt."

Litigants sued the district clerk in civil district court (not the family district courts in which the costs were taxed) for mandamus, injunctive, and declaratory relief and obtained a temporary injunction enjoining the district clerk "from 'continuing his policy of collection of court costs from indigent parties who have filed an affidavit of indigency.'" In an interlocutory appeal, the district clerk argued that the TEX. CIV. PRAC. & REM. CODE § 65.023(b) deprived the civil district court of jurisdiction and that litigants had an adequate remedy at law, precluding injunctive relief.

TEX. CIV. PRAC. & REM. CODE § 65.023(b), which dates to 1846, "provides that '[a] writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.'" "The purposes of the statute . . . are 'to protect the judgments and processes of one court from interference by another by direct attack' and to 'prevent[] a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case.'" Thus, the "'test of jurisdiction in such cases is whether the relief sought may be granted independently of the judgment or its mandate sought to be enjoined.'"

Here, the civil district court's injunction met that test, because it did not disturb the judgments of the family district courts. "[T]he family courts here did not order costs," but "merely la[id] out the division of any costs, not an amount to be charged." Nor could they "order costs despite an affidavit of inability to pay," which would "fl[y] in the face of our Constitution and

case law." TEX. R. CIV. P. 145 "is but one manifestation of the open courts guarantee that 'every person . . . shall have remedy by due course of law.'" "It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence."

In holding that TEX. CIV. PRAC. & REM. CODE § 65.023(b) did not apply, the Supreme Court overruled *Evans v. Pringle*, 643 S.W.2d 116 (Tex. 1982) (per curiam), which held that a civil district court lacked jurisdiction to enjoin the sheriff from enforcing writs of execution against bond sureties to collect post-judgment interest on a bond forfeiture judgment issued by a criminal district court. "*Evans* did not" correctly interpret the statute, and the sureties in that case "should [not] have been required to return to the court that issued the processes giving rise to their objections to post-judgment interest." "*Evans* must therefore be overruled."

Having established that the civil district court had jurisdiction, the Supreme Court turned to the merits of the injunction and rejected the district clerk's argument that litigants could have filed a motion to retax costs and thus had an adequate remedy at law. "Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law will lead to a multiplicity of suits, 'that very fact prevents it from being complete and adequate.' '[T]he unlawful acts of public officials' are prime candidates for injunctions 'when [those acts] could cause irreparable injury or when such remedy is necessary to prevent a multiplicity of suits.'"

"A motion to retax costs confronts the correctness of the clerk's ministerial calculations," and is properly used to correct such "fact-specific errors" as "miscalculating the cost of an item or billing an item that is not statutorily taxable," "made in individual cases that require a similarly individual approach to redress."

Here, by contrast, litigants are "complaining of . . . a systematic policy that contravenes the law," and "[i]t would be wasteful to force each individual [litigant] to file a motion to retax costs when a single injunction will do."

Also, the injunction, which enjoined the district clerk not just "from billing costs to the named parties, but to all litigants who qualify as indigent," was not overbroad. "An injunction must be broad enough to 'prevent repetition of the evil sought to be stopped.'" "When a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties." The injunction was not overbroad, because it "tracks the language of Rule 145" and "does not restrain the District Clerk from any lawful activity.

Finally, injunction, rather than mandamus, was the appropriate remedy. "When the purpose of the suit is to compel action, then mandamus is proper; conversely, when the purpose is to restrain action or threatened action, then an injunction is proper." Here, because "the true relief lies in enjoining the District Clerk from continuing his policy" of collecting costs from indigent litigants, injunction was proper.

7. *McLean v. Livingston*, 486 S.W.3d 561 (Tex. 2016)

Inmate's suit was dismissed for want of jurisdiction. On appeal, he initially failed to file the required affidavits of inability to pay costs. The Supreme Court ruled that he must be afforded the opportunity to amend his appellate pleadings to cure this defect.

TEX. CIV. PRAC. & REM. CODE, ch. 14 governs an action brought by an appeal and it requires certain affidavits. The "inmate must make two required Chapter 14 filings: (1) a separate affidavit or declaration identifying prior actions filed pro se, and (2) a certified copy of the inmate's trust account statement showing any account activity in at least the prior six months."

At the trial court, a dismissal with prejudice for failure to file the affidavits is inappropriate because the defect "may be corrected through an amended pleading." Here, the Court ruled that "an inmate must be afforded the same opportunity to amend his appellate filings to cure Chapter 14 filing defects, prior to dismissal of the appeal."

An "appeal may not be dismissed for a formal procedural defect or irregularity in appellate procedure unless the party is provided a reasonable opportunity to correct the defect." The appellate rules "disfavor[] disposing of appeals based upon harmless procedural defects."

The two filings under § 14.004 involve "procedural requirements that have no bearing on the underlying lawsuit." The Court seeks to "safeguard[] inmates' 'access to the courts given their unique circumstances.'" Here, the inmate amended his notice of appeal "thereby correcting his defective filings."

T. Joint and Several Liability

No cases to report.

U. J.N.O.V.

No cases to report.

V. Motion for New Trial

1. *In re Dean Davenport*, 522 S.W.3d 452 (Tex. 2017)

Attorneys had contingency fee agreement with client concerning his monetary recovery. However, when client purchased opponent's interest in business after a trial, attorneys sought to receive interest in business. A suit with client ensued in which trial court granted new trial. The Supreme Court ruled that the trial court's finding that the fee agreement permitted attorneys an interest in business "was an abuse of discretion because the agreement unambiguously states that the lawyers were only entitled to attorney fees from a monetary recovery. Accordingly, we conditionally grant [client's] petition for writ of mandamus. . . ."

"A trial court has discretion to grant a new trial for 'good cause,' however this discretion has limits. An appellate court may by mandamus direct a trial court to vacate a new trial order in one of three ways: (1) when a merits-based review of the record establishes that the trial court abused its discretion, (2) when the trial court's order was void, or (3) when the trial court erroneously finds that the jury's answers to special issues are irreparably conflicting."

"'A new trial order must be understandable, reasonably specific, . . . cogent, legally appropriate, specific enough to indicate that the trial court did not simply parrot a pro forma template, and issued only after careful thought and for valid reasons.'" Here, the reasons were not valid.

2. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Plant worker was injured by defective scaffold that was supposed to be inspected by contractor. Plaintiff obtained a verdict at trial based upon a general-negligence theory, which defendant had urged in an earlier trial. The Supreme Court reversed and rendered. "Considering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability. Levine's failure to request or secure findings to support his premises liability claim, therefore, 'cannot support a recovery'. . . . Additionally, USI was under no obligation to object to Levine's submission of an improper theory of recovery, and USI preserved its improper-theory argument by raising it in a motion for judgment notwithstanding the verdict."

"In reviewing alleged error in a jury submission, we consider 'the pleadings of the parties and the nature of the case, the evidence presented at trial, and the charge in its entirety.' The alleged charge error 'will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment.'"

"Whether the condition that allegedly caused the plaintiff's injury is a premises defect is a legal question, which we review de novo."

Footnote 1: "'Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence.'"

A "premises defect case improperly submitted to the jury under only a general-negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."

Granting all of the relief USI requested foreclosed "consideration of additional issues that do not provide the greatest relief." "'Generally, when a party presents multiple grounds for reversal of a judgment on appeal, the appellate court should first address those points that would afford the party the greatest relief.'"

3. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

Trial court granted a motion for new trial in a homeowner's insurance dispute. The Supreme Court affirmed a grant of mandamus, ruling "that three of the trial court's bases for ordering a new trial fail to satisfy the facial requirements set forth in *Columbia* and *United Scaffolding*. On the remaining basis, . . . the record does not support the trial court's stated rationale."

The Court protects "the constitutional right to a trial by jury by requiring trial courts to provide litigants with 'an understandable, reasonably specific explanation' for setting aside a jury verdict and ordering a new trial. Generally, this requirement is satisfied when a trial court's stated reason is 'a reason for which a new trial is legally appropriate' and 'is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived

the articulated reasons from the particular facts and circumstances of the case at hand.' When a new-trial order satisfies these facial requirements, we have further empowered appellate courts to 'conduct a merits review of the bases for a new trial order' and grant mandamus relief '[i]f the record does not support the trial court's rationale for ordering a new trial.'"

"Our rules of civil procedure vest trial courts with broad authority to order new trials 'for good cause' and 'when the damages are manifestly too small or too large.' TEX. R. CIV. P. 320."

Because the constitution "guarantees that the right to trial by jury 'shall remain inviolate,'. . . trial judges cannot enjoy unfettered authority to order new trials."

A "trial court does not abuse its discretion in ordering a new trial 'so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.'"

Granting a new trial is an abuse of discretion "when (1) 'the given reason, specific or not, is not one for which a new trial is legally valid'; (2) 'the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's'; or (3) 'the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge's reasoning.'"

The "trial court 'need not provide a detailed catalog of the evidence' as long as it provides a 'cogent and reasonably specific explanation' of its reasoning." Mere recitation of a legal standard does not suffice.

To "be facially valid, a new-trial order based on a factual-sufficiency review 'must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings.'"

An appellate court may "'conduct a merits-based review of new[-]trial orders.'"

The trial court abuses its discretion to order a new trial if the reason given is not supported by the record.

The merits review of a new-trial order is conducted under "the abuse-of-discretion standard that is familiar and inherent to mandamus proceedings." "'If the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief.'"

When "liability turns on a specific event occurring on a specific date and the passage of a fixed amount of time after that event," the trial court must provide a reasonably specific explanation.

One basis here for the new trial was the violation of a motion in limine. The Court determined "the trial court's order was 'specific' and a 'violation of an order in limine can serve as the basis of a new[-]trial order. . . .'" But, the record did not establish that the carrier violated the ruling on the limine motion.

Separately, the grant of a new trial because the diminished-value damages seemed "arbitrary" failed to support the trial court's reasoning; no evidence was discussed.

The trial court failed to provide a facially sufficient explanation to grant a new trial due to the jury's failure to award appellate attorney's fees. That a party "may obtain" attorney's fees under TEX. INS. CODE § 541.152(a)(1) can render such an award "mandatory." But, they still must be proven as "reasonable and necessary." Here, the trial court failed to discuss evidence that showed that the attorney's fees were proven. Calling the evidence "overwhelming" is insufficient.

W. Motion to Modify Judgment

No cases to report.

X. Remittitur

1. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company left and joined a competitor. Company sued former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury found for company and awarded actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

The Texas Supreme Court analyzed the evidence and held that the evidence was legally insufficient to support the award of future lost profits damages. It is "well established" that recovery for lost profits "'does not require that the loss be susceptible of exact calculation,'" but the "'injured party must do more than show that [it] suffered some lost profits. The

amount of the loss must be shown by competent evidence with a reasonable certainty,'" which "'is a fact intensive determination.'"

Here, company claimed lost profits from two sources: loss of a particular contract, and the lost future sales of one of the employee defendants who was solicited away by the other defendants. There was insufficient evidence that company "more likely than not" would have obtained the contract but for the defendants' misconduct, because it was based on an expert's unsupported assumption that company would have received the contract and it was "pure speculation to conclude that" company would have won the bid. Evidence of lost profits from the lost employee was insufficient because it was based on "testimony regarding the length of [his] future employee at [company] and the success he would have had during that time [which was] based on improper assumptions and was thus conclusory."

The Supreme Court rendered judgment that company take nothing for lost profits rather than remand for a new trial on damages. While the Court held in *ERI Consulting Engineers, Inc. v. Swinnea* that "courts should suggest remittitur on remand for a new trial on damages where 'competent evidence exists to establish *some* reasonably certain amount of lost profits,'" that case "has no applicability" here because there was no evidence that company "lost any amount of profits."

Defendants argued that there was insufficient evidence of malice to support the award of exemplary damages against the individual defendants. The Supreme Court disagreed. A party seeking to "recover exemplary damages based on malice" must "prove actual damages and submit clear and convincing evidence of outrageous, malicious, or otherwise reprehensible conduct," and "prove that the defendants specifically intended for [the plaintiff] to suffer substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action" Importantly, "circumstantial evidence is legally sufficient to support a finding of malice." Here, the Supreme Court analyzes the evidence against each defendant and holds that there was sufficient evidence to find malice as to each.

However, after the reversal of most of the actual damages awarded, the exemplary damages award was unconstitutionally excessive. Here, the jury awarded $4,253,049 in actual damages (of which $4,198,000 is the reversed lost profits award) and $1,750,00 in exemplary damages. The court of appeals held (as the Supreme Court does) insufficient evidence of lost profits, leaving only $55,049 in actual damages awarded jointly-and-severally against each defendant, held that the exemplary damages award was unconstitutionally excessive based on the reduced actual damages award, and remands with a suggested remittitur of the exemplary damages award to $220,196.96 for each individual defendant.

The Supreme Court held that even the suggested remitter "results in an award that violates due process because a 4:1 ratio of compensatory to exemplary damages is not appropriate in this case." exemplary damages are unconstitutionally excessive even with the suggested remittitur of the court of appeals. The court of appeals came to the remittitur amount by comparing the exemplary damages award to the actual damages awarded jointly and severally against the individual defendants.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" "Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court held that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-

and-several liability for actual damages, the Supreme Court held "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

Footnote 19: The defendants did not waive an argument that comparing the exemplary damages award to the aggregate amount awarded against all defendants rendered it unconstitutionally excessive by failing to raise the argument in the court of appeals, because the "issue did not arise until the court of appeals revised its suggested remittitur on rehearing."

VIII. APPEALS

A. Restricted Appeal

No cases to report.

B. Mandamus

1. *In re Bertram Turner and Regulatory Licensing & Compliance, L.L.C.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

The Supreme Court granted mandamus directing the disqualification of a law firm.

"'Mandamus is available where a motion to disqualify is inappropriately denied as there is no adequate remedy on appeal.' We review a trial court's refusal to disqualify a law firm under an abuse of discretion standard."

2. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus: "ordinarily, a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion." However, the Court refused to dismiss the underlying suit on a ripeness challenge.

"Mandamus relief is warranted when the trial court clearly abused its discretion and the relator has no adequate appellate remedy."

The term "'adequate' is merely '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' and an 'adequate' appellate remedy exists when 'any benefits to mandamus review are outweighed by the detriments.'" Here, there was no adequate appellate remedy. "Allowing a case to proceed to trial despite erroneous denial of a responsible-third-party designation 'would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator's] defense in ways unlikely to be apparent in the appellate record.'"

Issues "affecting subject-matter jurisdiction, like ripeness, may be raised for the first time on appeal, including interlocutory appeal." "This is not an appeal, however, but a mandamus proceeding. Due to the extraordinary nature of the remedy, the right to mandamus relief generally requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act."

3. *In re Dean Davenport*, 522 S.W.3d 452 (Tex. 2017)

Attorneys had contingency fee agreement with client concerning his monetary recovery. However, when client purchased opponent's interest in business after a trial, attorneys sought to receive interest in business. A suit with client ensued in which trial court granted new trial. The Supreme Court ruled that the trial court's finding that the fee agreement permitted attorneys an interest in business "was an abuse of discretion because the agreement unambiguously states that the lawyers were only entitled to attorney fees from a monetary recovery. Accordingly, we conditionally grant [client's] petition for writ of mandamus. . . ."

"A trial court has discretion to grant a new trial for 'good cause,' however this discretion has limits. An appellate court may by mandamus direct a trial court to vacate a new trial order in one of three ways: (1) when a merits-based review of the record establishes that the trial court abused its discretion, (2) when the trial court's order was void, or (3) when the trial court

erroneously finds that the jury's answers to special issues are irreparably conflicting."

4. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Appellate "courts may 'conduct a merits review of the bases for a new trial order' in an original proceeding and grant mandamus relief '[i]f the record does not support the trial court's rationale for ordering a new trial.'" "Yet 'mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law when an adequate remedy by appeal does not exist.'"

5. *In re National Lloyds Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

"Mandamus relief is appropriate when . . . a trial court compels production of irrelevant information or information that is relevant but privileged." "[E]ither condition suffices to warrant mandamus relief[.]"

6. *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)

Mandamus resulting from discovery battle over the form in which electronically stored information would be produced.

"The scope of discovery is generally within the trial court's discretion, but the court 'must make an effort to impose reasonable discovery limits.' A writ of mandamus will issue only if the trial court reaches a decision 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law' and the relator has no adequate remedy by appeal. . . . [A]n appellate court may not substitute its judgment for the trial court's determination of factual . . . matters. . . . Mandamus relief is only appropriate in such cases when the relator establishes that the trial court could have reached only one conclusion and that a contrary finding is thus arbitrary and unreasonable. But with regard to questions of law and mixed questions of law and fact, ''a trial court has no 'discretion' in determining what the law is or applying the law to the facts,' even when the law is unsettled.'"

The Court ruled that, because "the trial court and the parties lacked the benefit of our views on the matter, neither granting nor denying mandamus relief on the merits is appropriate." Relator was permitted to seek reconsideration at the trial court.

7. *In re Red Dot Building System, Inc*., 504 S.W.3d 320 (Tex. 2016)

Plaintiff sued defendant and then defendant later sued plaintiff in a different county. Venue was appropriate in both. Here, transferring venue was not appropriate because venue existed in both counties, and the court would not grant mandamus for that, either.

But, the court in the second county "should have abated the suit pending in that court, and . . . mandamus relief is available to secure this result."

8. *In re Carolyn Frost Keenan*, 501 S.W.3d 74 (Tex. 2016)

In a deed restrictions suit, an issue arose over the validity of a vote of amendment. The trial court allowed only the homeowner's attorney to see the ballot results. The Supreme Court granted mandamus directing the trial court to permit the homeowner to have greater access to and use of the ballots.

Mandamus "will only issue if the trial court clearly abused its discretion and relator has no adequate remedy by appeal. The Court may consider whether mandamus can spare the litigants and public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" The trial court here so restricted the ability to use the information that mandamus was warranted.

9. *In re Oceanografia, S.A.*, 494 S.W.3d 728 (Tex. 2016)

Defendants delayed seeking a rehearing on a motion to dismiss based upon forum non conveniens. However, the Supreme Court ruled that the delay was not unreasonable and did not prejudice plaintiffs.

"Whether a party's delay in asserting its rights precludes mandamus relief depends on the circumstances."

"Oceanografia . . . cannot be faulted for the delay in seeking mandamus relief from the denial of its motion to dismiss for *forum non conveniens* when to press ahead might have compromised its appeal of the denial of its special appearance." A nine-month delay thereafter "was not unreasonable because of developing evidence that plaintiffs would have to be

tried in groups and some of the plaintiffs would not even be allowed into the United States."

Plaintiffs failed to prove any prejudice from the delay. Litigation costs could possibly benefit the suit when pursued in Mexico, and there was no evidence of pre-trial costs.

10. *In re National Lloyds Insurance Company*, 507 S.W.3d 219 (Tex. 2016)

During storm damage suit transferred to the MDL, the pretrial court granted plaintiffs filed a motion to compel "six categories of information" and ordered sanctions. The Supreme Court ruled that one category was "overbroad." It then remanded to the pretrial court to determine the amount of sanctions attributable to the five items that were appropriately compelled.

'"A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy.'"

"'Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and when there is no adequate remedy on appeal.'"

A discovery sanctions "order 'shall be subject to review on appeal from the final judgment.'"

11. *In re H.E.B. Grocery Company, L.P.*, 492 S.W.3d 300 (Tex. 2016)

Slip and fall case; plaintiff suffered subsequent injury. After defense doctor's deposition, defendant moved for a medical examination, which the trial court denied. The Supreme Court granted mandamus.

"Mandamus is an extraordinary remedy granted only when the relator shows that the trial court abused its discretion and that no adequate appellate remedy exists. The relator bears the burden of proving these two requirements."

A "'clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.' We will disturb the trial court's decision only if it amounts to a clear and prejudicial error of law, or if it fails to correctly analyze or apply the law to the facts. The relator must establish that the trial court could have reasonably reached only one conclusion."

Mandamus is appropriate because defendant "seeks to allow its expert the same opportunity as [plaintiff's] expert to fully develop and present his opinion, ensuring a fair trial."

12. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

During a medical malpractice case, doctor attempted to obtain peer review committee materials based upon an exception to their statutory protection. The Supreme Court granted mandamus, ruling that "the trial court abused its discretion in ordering the documents produced without a proper *in camera* inspection to determine whether the exception in section 160.007(d) applies."

"'Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal.' 'A trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'' Furthermore, the trial court abuses its discretion when it fails to adequately inspect documents tendered for an in camera inspection before compelling production 'when such review is critical to the evaluation of a privilege claim.'"

There is no "'adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error.' If the trial court issues an erroneous order requiring the production of privileged documents, the party claiming the privilege is left without an adequate appellate remedy. If the documents at issue are alleged to be privileged, 'mandamus is appropriate if we conclude that they are privileged and have been improperly ordered disclosed.'"

"'[G]enerally a writ will not issue against one judge for what another did.'"

"Mandamus relief is appropriate when a trial court 'fails to conduct an adequate *in camera* inspection of documents when such review is critical to evaluation of a privilege claim.'"

13. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

In case involving theft of trade secrets, the trial court overruled a request to conduct part of a temporary injunction hearing outside the presence of the defendant's corporate representative; it also agreed to provide to the defendant an affidavit about the trade secrets without an *in camera* review. The Supreme Court ruled that "the trial court abused its discretion in both instances" and granted mandamus.

"Mandamus relief is available when two conditions are met. First, the trial court abuses its discretion. Second, no adequate appellate remedy

exists."

"To constitute an abuse of discretion, the trial court's decision must be 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.' Thus, in an abuse–of–discretion challenge, 'the reviewing court may not substitute its judgment for that of the trial court,' but instead must only consider whether the trial court 'acted without reference to any guiding rules and principles.' A trial court 'has no 'discretion' in determining what the law is or applying the law to the facts,' even when the law is unsettled. 'A clear failure by the trial court to analyze or apply the law correctly,' therefore, constitutes an abuse of discretion."

A "reviewing court is generally bound by the record before the trial court at the time its decision was made. Because portions of the record were not before the trial court when its decisions were made, they will not be considered by this Court in determining whether the trial court abused its discretion."

14. *In re Steven C. Phillips*, 496 S.W.3d 769 (Tex. 2016)

Suit for compensation of a father who was wrongly incarcerated. The Supreme Court ruled that the Comptroller's duty to determine the compensation owed under the Tim Cole Act is ministerial. "An officer's duty is ministerial when the 'law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.' A mandamus action is a proper remedy to redress a failure to perform such a duty." Even though the law being applied is from Arkansas, an "official 'has no discretion or authority to misinterpret the law' or the rules of arithmetic." The Court granted relief "to direct the Comptroller to correct legal errors in his determination. . . ."

"The Comptroller's authority to determine compensation owed . . . remains subject to review."

15. *In re Stacey Bent*, 487 S.W.3d 170 (Tex. 2016)

The Supreme Court affirmed mandamus because the trial court granted a new trial on three facially invalid reasons and one that was not supported by the record.

The merits review of a new-trial order is conducted under "the abuse-of-discretion standard that is familiar and inherent to mandamus proceedings." "'If the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief.'"

C. Preserving or Waiving Error

1. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Plant worker was injured by defective scaffold that was supposed to be inspected by contractor. Plaintiff obtained a verdict at trial based upon a general-negligence theory, which defendant had urged in an earlier trial. The Supreme Court reversed and rendered. "USI was under no obligation to object to Levine's submission of an improper theory of recovery, and USI preserved its improper-theory argument by raising it in a motion for judgment notwithstanding the verdict."

"A defendant has no obligation to complain about a plaintiff's omission of an independent theory of recovery; rather, the burden to secure proper findings to support that theory of recovery is on the plaintiff, and a plaintiff who fails to satisfy that burden waives that claim."

A "defendant must preserve error by objecting when an independent theory of recovery is submitted defectively. This includes when an element of that theory of recovery is omitted. But when, as in this case, the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object."

A "defendant may invite error and waive its argument on appeal when it persuades a trial court to adopt a jury charge that it later alleges supports an improper theory of recovery." "But here, once the trial court ordered a new trial, USI could invite error only in the second trial."

"USI preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict. . . . [B]ecause the defendant's argument was a purely legal issue, the defendant preserved error by asserting the argument in a post-verdict motion."

2. *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 26 (Tex. 2017)

Appellees argued that an appellant failed to preserve a ratification argument for appeal by failing to present evidence supporting it in response to the appellees' motion for summary judgment. "Generally, to preserve a complaint for appellate review: (1) a party must complain to the trial court by a timely and specific request, objection, or motion that complies

with applicable evidentiary, procedural, and appellate rules; and (2) the trial court must rule or refuse to rule on the request, objection, or motion." TEX. R. CIV. P. 166a(c) provides, "'Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'"

Here, appellant "did not wait until after final judgment to assert the applicability of its affirmative defense 'for the first time,'" but "pleaded ratification as an affirmative defense in compliance with" TEX. R. CIV. P. 94, "raised it again in response to the motion for summary judgment on liability, and moved for summary judgment on its affirmative defense prior to final judgment." While appellant "did not present its summary-judgment proof until after the trial court rendered partial summary judgment" on the issue, it "did so in connection with a motion for reconsideration, before the [claim] had been finally adjudicated and prior to final judgment in the case."

The record shows that the trial court considered appellant's motion "as it had discretion to do, and specifically ruled on it," which "is sufficient to meet the preservation requirements of" TEX. R. APP. P. 33.1.

3. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

In a suit based upon breach of fiduciary duty by two directors, the Supreme Court ruled that defendants did not waive charge error. Defendants objected to a certain jury question on several grounds, including that there was no identification of the property that was wrongly obtained, and no tracing of specific property. "By those objections, the Huff Defendants clearly preserved error as to the legal sufficiency of the evidence to support tracing any specific lease Riley-Huff acquired to Huff's or D'Angelo's breaches of fiduciary duties."

The "elements of a ground of recovery are deemed found by the trial court in favor of its judgment if (1) an element of an independent ground of recovery was submitted to and found by the jury; (2) elements were omitted without objection; and (3) the submitted element was 'necessarily referable' to the same ground of recovery as the omitted elements."

4. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

Managerial employees of a health care management company left and joined a competitor. Company sued former employees and competitor for breach of fiduciary duty, breach of non-competition agreements, theft of trade secrets, and other causes of action, alleging that employees stole documents and engaged in other misconduct in preparing to leave and compete and that competitor ratified and participated in this conduct. The jury found for company and awarded actual damages (the great portion of which is for future lost profits), exemplary damages, and attorney's fees.

The Texas Supreme Court analyzed the evidence and held that the evidence was legally insufficient to support the award of future lost profits damages. It is "well established" that recovery for lost profits "'does not require that the loss be susceptible of exact calculation,'" but the "'injured party must do more than show that [it] suffered some lost profits. The amount of the loss must be shown by competent evidence with a reasonable certainty,'" which "'is a fact intensive determination.'"

Here, company claimed lost profits from two sources: loss of a particular contract, and the lost future sales of one of the employee defendants who was solicited away by the other defendants. There was insufficient evidence that company "more likely than not" would have obtained the contract but for the defendants' misconduct, because it was based on an expert's unsupported assumption that company would have received the contract and it was "pure speculation to conclude that" company would have won the bid. Evidence of lost profits from the lost employee was insufficient because it was based on "testimony regarding the length of [his] future employee at [company] and the success he would have had during that time [which was] based on improper assumptions and was thus conclusory."

The Supreme Court rendered judgment that company take nothing for lost profits rather than remand for a new trial on damages. While the Court held in *ERI Consulting Engineers, Inc. v. Swinnea* that "courts should suggest remittitur on remand for a new trial on damages where 'competent evidence exists to establish *some* reasonably certain amount of lost profits,'" that case "has no applicability" here because there was no evidence that company "lost any amount of profits."

Defendants argued that there was insufficient evidence of malice to support the award of exemplary damages against the individual defendants. The Supreme Court disagreed. A party seeking to "recover exemplary damages based on malice" must "prove actual damages and submit clear and convincing evidence of outrageous, malicious, or otherwise

reprehensible conduct," and "prove that the defendants specifically intended for [the plaintiff] to suffer substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action" Importantly, "circumstantial evidence is legally sufficient to support a finding of malice." Here, the Supreme Court analyzes the evidence against each defendant and holds that there was sufficient evidence to find malice as to each.

However, after the reversal of most of the actual damages awarded, the exemplary damages award was unconstitutionally excessive. Here, the jury awarded $4,253,049 in actual damages (of which $4,198,000 is the reversed lost profits award) and $1,750,00 in exemplary damages. The court of appeals held (as the Supreme Court does) insufficient evidence of lost profits, leaving only $55,049 in actual damages awarded jointly-and-severally against each defendant, held that the exemplary damages award was unconstitutionally excessive based on the reduced actual damages award, and remands with a suggested remittitur of the exemplary damages award to $220,196.96 for each individual defendant.

The Supreme Court held that even the suggested remitter "results in an award that violates due process because a 4:1 ratio of compensatory to exemplary damages is not appropriate in this case." exemplary damages are unconstitutionally excessive even with the suggested remittitur of the court of appeals. The court of appeals came to the remittitur amount by comparing the exemplary damages award to the actual damages awarded jointly and severally against the individual defendants.

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" "Whether an award comports with due process is measured by three guideposts: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (These are the "*Gore/Campbell* factors."). "'[T]he constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff[.]'"

The "reprehensibility" factor is determined "by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated accident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." Here, only one reprehensibility factor, "harm resulting from malice, trickery, or deceit," was present, and so a 4:1 ratio of exemplary damages to actual damages was unconstitutionally excessive.

The Supreme Court held that the ratio of exemplary damages to actual damages must be analyzed "on a per-defendant rather than a per-judgment basis" in order to be "consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the plaintiff." In performing this analysis in a case of joint-and-several liability for actual damages, the Supreme Court held "that in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct." Here, based on the jury's actual findings of which individual defendant caused which damages, as opposed to the total amount jointly and severally awarded, the ratio was between 11:1 and nearly 30:1. The Supreme Court remanded the case to the court of appeals to reconsider its remittitur.

Footnote 19: The defendants did not waive an argument that comparing the exemplary damages award to the aggregate amount awarded against all defendants rendered it unconstitutionally excessive by failing to raise the argument in the court of appeals, because the "issue did not arise until the court of appeals revised its suggested remittitur on rehearing."

5. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

Footnote 38: "'A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.'" See *Wells Fargo Bank, N.A. v. Murphy.*

6. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

Employee of contractor for Exxon was reported to have failed drug test by DISA, which had been hired by worker's employer; thus, he could no longer work for employer or at Exxon. Employee sued employer, DISA,

and Exxon under numerous theories. The Supreme Court upheld summary judgment for all defendants

"Even objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.'"

Footnote 4: "'The written answer or response to [a summary-judgment] motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.'" "'[I]ssues not expressly presented to the trial court may not be considered on appeal as grounds for reversal of a summary judgment.'"

"'A party who seeks to alter the court of appeals' judgment must file a petition for review.' That is, an issue raised for the first time in a respondent's brief on the merits is waived in the absence of a petition for review."

7. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017)

Bank preserved error about whether the trial court erred when it instructed the jury to consider extrinsic evidence to determine if a business seller was a third-party beneficiary to a purchase loan agreement. Footnote 11: "First Bank preserved its objection to the consideration of extrinsic evidence. At the charge conference, First Bank's counsel referred the court to the third-party-beneficiary question and specifically objected because it 'invites them to look at other evidence.' . . . First Bank's objection was sufficient to 'point out distinctly the objectionable matter and the grounds of the objection' and thus preserved the error of which First Bank now complains. [An] . . . objecting party must make 'the trial court aware of the complaint, timely and plainly, and obtain[ ] a ruling.'"

Seller did not file a cross-petition after the court of appeals' ruling on misrepresentation, a separate theory. "We agree that a 'party who seeks to alter the court of appeals' judgment must file a petition for review.' We also agree that [seller] is seeking to alter the court's judgment, asking us to reverse the part of the court of appeals' judgment that reversed the trial court's judgment in [his] favor on the misrepresentation claims." But, the issue was briefed in the court of appeals. So, TEX. R. APP. P. 53.4 allows seller, "even though he did not file a cross-petition for review, to request that we remand the issue or consider it ourselves because he properly raised it in his response brief." Accordingly, the matter was remanded.

8. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Footnote 22: A "statement of facts—now called the reporter's record—is necessary to challenge implied findings on evidentiary grounds after a non-jury trial."

9. *ETC Marketing, Ltd. v. Harris County Appraisal District*, 518 S.W.3d 371 (Tex. 2017)

Taxpayer protested a tax arguing that the tax violates the "dormant Commerce Clause," and the case proceeded to judicial review the district court. District court decided the case in appraisal district's favor on cross motions for summary judgment arguing the applicability of the dormant Commerce Clause. On appeal, taxpayer also argued that the property is not taxable under the Texas Tax Code. The Supreme Court held that taxpayer failed to preserve error on its arguments under the Tax Code, because taxpayer never presented this argument in its motion for summary judgment.

10. *BP America Production Company v. Red Deer Resources, LLC*, 526 S.W.3d 389 (Tex. 2017)

Plaintiff obtained a judgment based on the jury's answer to a question the Supreme Court holds is immaterial and cannot support the judgment. Plaintiff argued that defendant waived the issue by failing to object to the jury question. "Generally, to preserve error, a party must specifically object, clearly identify the error, and explain the grounds for the objection." However, "[a] party need not object to an immaterial question that should not have been submitted or cannot support a judgment to preserve error." "'A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict.'"

11. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

"'Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'"

12. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

The Supreme Court ruled the trial court did not abuse its discretion when permitting the joinder, and

that any error was not preserved.

Bonham "waived this issue [of improper joinder] because it did not object to joinder before the trial court. Generally, an issue presented in a petition for review before this Court must have 'been preserved for appellate review in the trial court and assigned as error in the court of appeals.'" Here, Bonham first complained in the court of appeals.

13. *A.D. Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017)

"Our error-preservation rules require litigants to make 'a timely request, objection, or motion that' provides the grounds for relief and complies with the Rules of Civil or Appellate Procedure. The Rules of Civil Procedure provide the mechanism for parties to preserve error regarding a trial court's findings of fact. . . . [A] party waives its right to challenge a failure to file findings if it does not file a notice of past due findings as rule 297 requires. . . . And as a result, filing a notice of past due findings is sufficient to preserve error for unfiled findings."

Footnote 7: "While the rules create a deadline for the trial court to file findings, those deadlines do not bar late findings. Rather, they mark the point after which the party requesting findings may assert appealable error."

14. *Green v. Dallas County Schools*, ___ S.W.3d ___ (Tex. 2017)(5/12/17)

Employee brought suit after being fired for an episode of incontinence on a school bus. The condition was related to his heart medications. The district claimed employee's disability was his heart condition. The Supreme Court ruled that he had waived any claim that his incontinence constituted his disability.

Employee did not waive argument that his incontinence was a disability because he argued the facts about the employer's awareness of his condition and need to take a pill, and that he was fired because of his incontinence on the bus. "Further, the charge itself squarely presented that issue. ('We do not consider issues that were not raised in the courts below, but parties are free to construct new arguments in support of issues properly before the Court.'). Last, Green did not waive this argument because DCS's appeal from this specific jury verdict necessarily presented that issue to the court of appeals."

15. *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017)

After nurse reported a doctor to hospital for not obtaining informed consent for a c-section, nurse's employer no longer scheduled her to work at hospital. After a jury verdict for nurse, the Supreme Court reversed and rendered, saying nurse "failed to establish that [hospital] . . . tortuously interfered with her contract with" her employer.

Jury rejected hospital's claim it acted in good faith. Hospital "has not challenged that finding here or in the court of appeals. Its failure to do so prevents us from reversing the trial court's judgment on this ground. 'It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error.'"

16. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017)

In a lessor's suit against an oil company regarding a lease, trial court granted oil company's motion to abate and compel joinder of other landowners under TEX. R. CIV. P. 39, and then dismisses the case after lessor refuses to join the other landowners. Lessor appealed, but oil company argued that lessor has waived its appeal.

Lessor did not waive appeal due to the lack of a reporter's record of the motion to abate and motion to dismiss hearings. "A reporter's record is necessary only for evidentiary hearings; 'for nonevidentiary hearings, it is superfluous.'" "[W]e generally presume that pretrial hearings are nonevidentiary unless 'the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court.'"

Lessor also did not waive appeal by failing to include a statement of issues in his brief as required by TEX. R. APP. P. 55.2. Lessor included a statement of issues in his petition for review, and there was no waiver by failing to include a statement in his brief on the merits "so long as his brief does not 'raise additional issues or points or change the substance of the issues or points presented in the petition.'"

17. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

"We generally hesitate to turn away claims based on waiver or failure to preserve the issue.

[We] . . . construe briefing 'reasonably, yet liberally, so that the right to appellate review is not lost by waiver.' . . . [C]ourts [should] treat the statement of an issue 'as covering every subsidiary question that is fairly included.'" Here, "equitable remedies were subsidiary questions fairly included in the briefing" below.

A "claim or allegation may not be raised for the first time on appeal. Further, '[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal' of a summary judgment."

The "church did not preserve a claim for aiding and abetting because its pleadings did not give him fair notice of it."

18. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

Appeal alleging a deficiency of a Certificate of Merit in a suit against an architect. The matter of the qualifications of the professional who signed it was preserved. The "issue of Payne's knowledge of the architects' area of practice was presented to the trial court and preserved for review."

19. *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98 (Tex. 2017)

The trial court ruled defendant had no duty to protect plaintiff from the criminal conduct of a robbery at defendant's apartment complex. By "failing to address unreasonableness [at the court of appeals], [plaintiff] failed to challenge a potential independent basis for the trial court's ruling."

20. *Kramer v. Kastleman,* 508 S.W.3d 211 (Tex. 2017)

Wife appealed from entry of a divorce decree incorporating a settlement agreement, arguing that the settlement was procured by fraud and coercion. Husband moved to dismiss the appeal, arguing that wife was estopped from challenging the decree because she accepted benefits under it. The Supreme Court used the opportunity to clarify the acceptance-of-benefits doctrine in the context of a divorce decree, which "has been applied irregularly and has become unmoored from its equitable underpinnings" in the 65 years since the Supreme Court's only prior application of the doctrine in a marital-dissolution case.

"The acceptance-of-benefits doctrine is . . . anchored in equity and bars an appeal if the appellant voluntarily accepts the judgment's benefits and the opposing party is thereby disadvantaged." "The burden of approving an estoppel rests on the party asserting it, and the failure to prove all essential elements is fatal." "Whether estoppel of the right to appeal is warranted involves a fact-dependent inquiry entrusted to the courts' discretion."

The Court noted the "trajectory toward a rigid and formulaic application of the doctrine" since the Court's last examination of the acceptance-of-benefits doctrine in *Carle v. Carle* 65 years ago. It clarified "that the acceptance-of-benefits doctrine is a fact-dependent, estoppel-based doctrine focused on preventing unfair prejudice to the opposing party." "Under this doctrine, a merits-based disposition may not be denied absent acquiescence in the judgment to the opposing party's irremediable disadvantage." "[M]erely using, holding, controlling, or securing possession of community property awarded in a divorce decree does not constitute clear intent to acquiesce in the judgment and will not preclude an appeal absent prejudice to the nonappealing party."

Recognizing that "definitive, bright-line rules are hard to come by in matters of equity," the Court set forth "several nonexclusive factors" that "inform the estoppel inquiry, including:

- whether acceptance of benefits was voluntary or was the product of financial duress;
- whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment;
- whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified;
- whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession;
- whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one;
- if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted;
- whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment;

- whether the issue on appeal is severable from the benefits accepted;
- the presence of actual or reasonably certain prejudice; and
- whether any prejudice is curable."

Here, wife took ownership and control of property awarded to her under the decree, collected rent from property awarded to her under the decree, and sought the opportunity to retrieve personal property awarded to her. However, this "mere acceptance, possession, and control of community property does not equiate to acquiescence," and there was no evidence that any of these acts prejudiced husband. Thus, wife was not estopped from challenging the decree and her appeal should not have been dismissed.

21. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016)

Worker injured by explosion sued plant and plant's employee, who asserted a defense under Ch. 95.

Footnote 2: All "issues not raised on appeal to this Court are waived."

Footnote 4: "At least as to their negligent-activity and negligent-undertaking claims, however, the [plaintiffs] were not required to file a cross-petition because the court of appeals reversed the trial court's summary judgment dismissing those claims and remanded them for further proceedings in the trial court. In response to [defendant's] petition for review, the [plaintiffs] may raise their evidentiary arguments . . . , without filing a cross-petition because they do not seek to 'alter the court of appeals' judgment' on those claims."

22. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"'When a court makes fact findings but inadvertently omits an essential element of a ground of recovery or defense, the presumption of validity will supply by implication any omitted unrequested element that is supported by evidence.' . . . [W]e presume that the trial court made all implied findings necessary to the validity of the judgment."

23. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

"'Appellate courts must treat the statement of an issue 'as covering every subsidiary question that is fairly included.'"

24. C.*S.F. v. Texas Department of Family and Protective Services*, 505 S.W.3d 618 (Tex. 2016)

Suit to terminate parental rights. Parent untimely filed pleadings pro se in the Supreme Court, including an indigence affidavit.

The Court has held that the "statutory right to counsel in parental-rights termination cases included, as a matter of due process, the right to effective counsel. And we have extended this holding to effective assistance of counsel in pursuing an appeal; procedural requirements, in some cases, may have to yield to constitutional guarantees of due process. . . . Not every failure to preserve error or take timely action, however, will rise to level of ineffective assistance of counsel."

25. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under Chapter 107 of the TEX. CIV. PRAC. & REM. CODE, and then sued the Commission for damages. At trial, the trial court denied the Commission's request for a jury question on contract formation, holding as a matter of law that a contract was formed at the meeting. The trial court also denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on contract formation and the failure to submit a jury question on the good-faith defense were both error.

The Commission did not waive error by failing to request a definition of good faith in conjunction with their requested jury question. The Commission's requested jury question "generally tracked the pertinent statutory language," and thus complied with the

requirements of Rule 278. "We are particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be."

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

Turning to the failure to submit a question on contract formation, there was conflicting evidence as to whether the parties intended to be bound by the initial oral agreement, and thus contract formation was "a disputed fact issue that should have been presented to the jury."

D. Perfecting, Briefing, and Time for Filing an Appeal; Costs on Appeal

1. *In re Bertram Turner and Regulatory Licensing & Compliance, L.L.C.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

The Supreme Court granted mandamus directing the disqualification of a law firm.

Footnote 1: "Cweren also contends that Vethan's brief is fatally defective because it (1) failed to support its statement of the case with references to the record, (2) contained arguments in its issues presented and statement of the facts, and (3) failed to provide a summary of the argument. To the extent these defects exist, they are not fatal. *See* TEX. R. APP. P. 55.2(d), 55.2(g), 55.9 ('If a brief does not conform with these rules, the Supreme Court may require the brief to be revised or may return it to the party who filed it and consider the case without further briefing by that party.') (emphasis added)."

2. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

The "Rules of Appellate Procedure allow [the state] to assert an independent ground for affirmance of the court of appeals' judgment. TEX. R. APP. P. 53.3(c)(2)."

3. *City of Magnolia 4A Economic Development Corporation v. Smedley*, ___ S.W.3d ___ (Tex. 2017)(10/27/17)

Governmental units filed plea to the jurisdiction which was overruled. Afterwards, they filed a motion for summary judgment, which was also overruled. The issue was "whether the twenty-day period to bring an interlocutory appeal ran from the petitioners' initial plea to the jurisdiction or from their later motion for summary judgment, both of which challenged the respondent's claims on similar jurisdictional grounds." The Supreme Court ruled "that the twenty-day period ran separately from each motion."

TEX. R. APP. P. 26.1(b) provides "that a timely interlocutory appeal must be filed within twenty days after the challenged order was signed."

"A party may appeal an interlocutory order that grants or denies a plea to the jurisdiction by a governmental unit. This Court considers 'plea to the jurisdiction' not to refer to a 'particular procedural vehicle,' but rather to the substance of the issue raised."

Here, the "original motion to dismiss and plea to the jurisdiction, as well as their subsequent hybrid motion for summary judgment, constitute 'pleas to the jurisdiction' for interlocutory-appeal purposes."

The governmental units "have the right to an interlocutory appeal of an order denying their plea to the jurisdiction. However, an interlocutory appeal is an accelerated appeal and must be filed within twenty days after the judgment or order is signed."

"In determining whether the City's amended plea was merely a motion to reconsider, we looked to the arguments in the City's two pleas."

"'[A]llowing interlocutory appeals whenever a trial court refuses to change its mind . . . would invite successive appeals and undermine the statute's purpose of promoting judicial economy."

In the *Jones* case, "While the City had asserted a new reason why it believed its immunity had not been waived, we determined that this new assertion was a change in 'form without substance,' as the City 'failed to address a contested issue or raise an issue' the City had not already asserted in its first plea." So, permitting an appeal "'under circumstances such as these would effectively eliminate the requirement that appeals from interlocutory orders must be filed within twenty days after the challenged order is signed.'" "Under *Jones*, the touchstone of our analysis was whether the later plea to the jurisdiction was a new and distinct motion or a mere motion to reconsider." Here, the motion for summary judgment was "distinct from the first [plea to the jurisdiction] and not a mere motion to reconsider."

In this case, the governmental units' "hybrid motion for summary judgment was not a mere motion

for reconsideration, but rather a distinct motion that merits an independent twenty-day interlocutory appeal period."

4. *In re Norma Heredia*, 501 S.W.3d 70 (Tex. 2016)

Indigent litigant filed a pauper's affidavit for an appeal. Because she did not receive notice, the court reported did not timely challenge it. The Supreme Court ruled that TEX. R. APP. P. 20.1 "does not allow for an untimely challenge, even if the court reporter did not receive notice of the indigence claim."

TEX. R. APP. P. 20.1 is "'mandatory to protect the indigent appellant and uphold the principle that '[c]ourts should be open to all, including those who cannot afford the costs of admission.'"

A "person seeking to challenge an indigency affidavit must file a contest 'within 10 days after the . . . affidavit. . . .' If no one timely contests the affidavit, . . . 'the party will be allowed to proceed without advance payment of costs.' In other words, an affidavit of indigence filed in a trial court is operative unless challenged within ten days of its filing."

The clerk failed to comply with the rule requiring a copy to be sent to the court reporter. And the "rules do allow for suspension of a rule's operation when good cause exists." But this does not constitute "good cause" under TEX. R. APP. P. 20.1. Thus, the appellant "must be allowed to proceed on appeal without advance payment of costs."

5. *Brown v. Jones*, 494 S.W.3d 727 (Tex. 2016)

Prisoner appealed dismissal of suit to the court of appeals, which itself dismissed his case. Prisoner had "failed to file an affidavit or declaration 'relating to previous filings' as required by Texas Civil Practice and Remedies Code chapter 14." That chapter requires an "'inmate who files an affidavit or unsworn declaration of inability to pay costs' to file both a declaration of previous filings and a certified copy of the inmate's trust account statement reflecting activity in at least the prior six months." The Supreme Court reversed. The "court of appeals must give an inmate an opportunity to cure a section 14.004 filing defect in an appellate proceeding, through an amended filing, before the court can dismiss the appeal."

6. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

"In a civil case, judicial economy generally requires that a trial court have an opportunity to correct an error before an appeal proceeds."

7. *Cardwell v. Whataburger Restaurants, LLC*, 484 S.W.3d 426 (Tex. 2016)

Trial court denied non-subscribing employer's motion to compel employee to arbitration, and employer appealed. The court of appeals overruled only the issues the trial court based its ruling upon, without reaching other issues briefed by the parties. The Supreme Court remanded, holding that worker "could argue these grounds on Whataburger's appeal without perfecting her own appeal. . . . The court of appeals 'must hand down a written opinion that . . . addresses every issue raised and necessary to final disposition of the appeal.'"

8. *In the Interest of J.Z.P. and J.Z.P., Minor Children*, 484 S.W.3d 924 (Tex. 2016)

In family law case, father moved to modify child support and mother's right to choose address. He used alternative service of process, posting citation on the door, and then obtained a ruling without mother's appearance. When she found out 57 days later, she filed a "Motion to Reopen and to Vacate." The court of appeals dismissed for want of jurisdiction. The Supreme Court ruled that, despite the title, the motion should have been treated as a motion to extend time: "Justice plainly required the trial court and court of appeals to treat [mother's] motion as extending post-judgment deadlines." Mother "was entitled to an extension of the time for appeal."

TEX. R. CIV. P. 71 states: "When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated." "We have stressed that 'courts should acknowledge the substance of the relief sought despite the formal styling of the pleading.' . . . 'We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it.'"

Here, mother's motion "plainly requested relief from the trial court's order on the grounds that she had not been served with citation and had not learned of the trial court's order until a few days before her motion was filed."

Footnote 2: [M]other's "notice of appeal implied a motion for an extension of time. [Father] has not challenged that the notice of appeal was timely."

E. Appellate Jurisdiction and Review

1. *In re Bertram Turner and Regulatory Licensing & Compliance, L.L.C.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

The Supreme Court granted mandamus directing the disqualification of a law firm.

"We review a trial court's refusal to disqualify a law firm under an abuse of discretion standard."

2. *In re K.S.L.*, ___ S.W.3d ___ (Tex. 2017)(12/22/17)

Mother and father of child signed statutorily compliant affidavits relinquishing parental rights. The issue on appeal was whether the evidence established that terminating parental rights was in the child's best interest. The Supreme Court ruled that clear and convincing evidence supported the termination.

"The parents argue that reading [TEX. FAM. CODE §] 161.211(c) to bar them from challenging the factual and legal sufficiency of the best-interest determination would violate their federal due process rights. We disagree."

As "we examine federal due process law in the area of appellate review, its requirements mainly concern the equal treatment of litigants."

The "needs of the child are not best served by a legal process that fosters delay and unrestrained second-guessing."

3. *City of Krum v. Rice*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

Resident who pleaded to deferred adjudication for a sex offense was required to register and stay a certain distance from places where children gather. After "general law municipality" passed a local ordinance requiring (among other things) double the distance, resident sued challenging the validity of the ordinance. Trial court and court of appeals denied city's plea to the jurisdiction. While the case was on appeal, the Legislature passed enabling law for the municipality, which differed in the distance, and the city amended its ordinance to comply with the statute. The Supreme Court ruled that the case became moot, and therefore "the courts lack jurisdiction over those claims."

Footnote 2: "Because one justice dissented in the court of appeals, we have jurisdiction over this interlocutory appeal under the applicable version of the Texas Government Code."

4. *Tafel v. The State of Texas*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

County commissioner who had a concealed handgun license, carried guns into a meeting. After he was convicted of possession of weapon, the state moved to forfeit them. The Supreme Court determined that the matter was civil, and thus it had jurisdiction. But it further determined that a conviction for the possession of a weapon did not authorized "a forfeiture order under [TEX. CODE CRIM. PROC.] article 18.19(e)."

Courts "have jurisdiction to determine their own jurisdiction."

TEX. CODE CRIM. PROC. article 18.19's "location within the Code of Criminal Procedure is not dispositive as to whether forfeitures under it are criminal matters."

Because "forfeiture proceedings are against property, the proceedings are civil in rem matters."

The "Rules of Appellate Procedure allow [the state] to assert an independent ground for affirmance of the court of appeals' judgment. TEX. R. APP. P. 53.3(c)(2)."

"An appellate court is limited to the record that is before it on appeal and generally may take judicial notice only of (1) facts that could have been properly judicially noticed by the trial judge or (2) facts that are necessary to determine whether the appellate court has jurisdiction of the appeal."

The "issues under [TEX. CODE CRIM. PRO.] article 18.19(d)(5) [were not] tried by consent because the State relied on article 18.19(e) in the motions seeking forfeiture of the handguns."

5. *In re Frank Coppola*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

In real estate tort suit, defendant sought to designate plaintiffs' transaction lawyers as responsible third parties prior to the third trial setting. The trial court denied the motion, but the Supreme Court granted mandamus. However, the Court refused to dismiss the underlying suit on a ripeness challenge.

"Ripeness is a component of subject-matter jurisdiction, and courts have a duty to determine their jurisdiction. We have recognized that issues affecting subject-matter jurisdiction, like ripeness, may be raised for the first time on appeal, including interlocutory appeal."

"This is not an appeal, however, but a mandamus proceeding. Due to the extraordinary nature of the remedy, the right to mandamus relief generally

requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act."

6. *In re Accident Fund General Insurance Company*, ___ S.W.3d ___ (Tex. 2017)(12/15/17)

"When an agency has exclusive jurisdiction and the plaintiff has not exhausted administrative remedies, the trial court lacks subject-matter jurisdiction and must dismiss any claim within the agency's exclusive jurisdiction."

7. *Bustamante v. Ponte*, 529 S.W.3d 447 (Tex. 2017)

Severely premature baby suffered from retinopathy, and ended up virtually blind. A jury found for the plaintiff, who argued that "had her retinopathy of prematurity been diagnosed and treated early enough, it is more likely than not that the blood-vessel growth in her eyes would have been slowed to the point that she would have enjoyed a sighted life." The jury found that "multiple actors, through multiple acts, contributed to one injury." The Supreme Court ruled that plaintiff's experts provided legally sufficient evidence that the negligence of the child's treating doctors proximately caused her loss of sight.

"'Evidence is legally insufficient to support a jury finding when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact.'"

All of the evidence in the record "'must be considered in the light most favorable to the party in whose favor the verdict has been rendered' . . . including evidence offered by the opposing party that supports the verdict. . . . Courts 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not' and '"every reasonable inference deducible from the evidence is to be indulged in that party's favor.'"

"To satisfy a legal sufficiency review, plaintiffs in medical-malpractice cases 'are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence.'" The "'ultimate standard of proof on the causation issue 'is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.''"

Havner allowed the use of epidemiological studies. But, under *Havner*, "a claimant must show that he or she is similar to those in the studies." Further, "'if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.'"

The "court of appeals erred in not applying the substantial-factor test because the jury heard ample evidence supporting the combined negligence" of defendants. It also erred in rejecting plaintiffs' "study as no evidence of causation." There was legally sufficient evidence of defendant's negligence.

8. *Pidgeon v. Turner*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

The Supreme Court had jurisdiction to review a court of appeals' interlocutory reversal of a temporary injunction against payment of benefits to same-sex spouses of city workers. The Supreme Court's jurisdiction over interlocutory appeals of temporary injunctions "'is limited.'" "We may only review the appellate court's interlocutory decision if (1) one or more justices dissented in the court of appeals, or (2) the court of appeals 'holds differently from a prior decision of another court of appeals or the supreme court.'" "One court 'holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'"

Here, the court of appeals' language instructing the trial court to proceed "consistent with" a Fifth Circuit opinion, which is not binding on a Texas state court, "gives rise to the type of 'unnecessary uncertainty in the law and unfairness to litigants' that our conflicts jurisdiction allows us to clarify." The Supreme Court therefore had jurisdiction.

9. *United Scaffolding, Inc. v. Levine*, ___ S.W.3d ___ (Tex. 2017)(6/30/17)

Plant worker was injured by defective scaffold that was supposed to be inspected by contractor.

Plaintiff obtained a verdict at trial based upon a general-negligence theory, which defendant had urged in an earlier trial. The Supreme Court reversed and rendered. "Considering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability. Levine's failure to request or secure findings to support his premises liability claim, therefore, 'cannot support a recovery'. . . . Additionally, USI was under no obligation to object to Levine's submission of an improper theory of recovery, and USI preserved its improper-theory argument by raising it in a motion for judgment notwithstanding the verdict."

"In reviewing alleged error in a jury submission, we consider 'the pleadings of the parties and the nature of the case, the evidence presented at trial, and the charge in its entirety.' The alleged charge error 'will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment.'"

"Whether the condition that allegedly caused the plaintiff's injury is a premises defect is a legal question, which we review de novo."

Footnote 1: "'Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence.'"

A "premises defect case improperly submitted to the jury under only a general-negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."

Granting all of the relief USI requested foreclosed "consideration of additional issues that do not provide the greatest relief." "'Generally, when a party presents multiple grounds for reversal of a judgment on appeal, the appellate court should first address those points that would afford the party the greatest relief.'"

10. *Pagayon v. Exxon Mobile Corporation*, ___ S.W.3d ___ (Tex. 2017)(6/23/17)

Fight between one convenience store worker and another's father injured father, and he later died. The Supreme Court reversed and rendered jury's verdict against employer.

"'The threshold inquiry in a negligence case is duty. . . . [T]he existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question.'"

11. *Helix Energy Solutions Group, Inc. v. Gold*, 522 S.W.3d 427 (Tex. 2017)

"We review a trial court's grant of summary judgment de novo."

12. *Longview Energy Company v. The Huff Energy Fund, LP*, ___ S.W.3d ___ (Tex. 2017)(6/9/17)

The "elements of a ground of recovery are deemed found by the trial court in favor of its judgment if (1) an element of an independent ground of recovery was submitted to and found by the jury; (2) elements were omitted without objection; and (3) the submitted element was 'necessarily referable' to the same ground of recovery as the omitted elements."

13. *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corporation*, 520 S.W.3d 887 (Tex. 2017)

Regarding a certificate of merit filed with a petition in a suit against an architect or engineer, an "'order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.'"

Footnote 1: "We have jurisdiction over interlocutory appeals in which the court of appeals 'holds differently from a prior decision of' this Court or of another court of appeals, meaning 'there is inconsistency in the [] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'"

14. *Bedford v. Spassoff*, 520 S.W.3d 901 (Tex. 2017)

Interlocutory appeal of failure to dismiss defamation case. This "Court limited its review to the 'appellate record[, which] consists of the clerk's record and, if necessary to the appeal, the reporter's record.' The clerk's record and reporter's record include documents that were filed in or presented to the trial court."

15. *Columbia Valley Healthcare System, L.P. v. Zamarripa*, 526 S.W.3d 453 (Tex. 2017)

Interlocutory appeal over adequacy of expert report in medical malpractice case.

Plaintiff's argument that defendant was not entitled to an interlocutory appeal because plaintiff had filed an expert report, though one arguable flawed,

failed. TEX. CIV. PRAC. & REM. CODE § 74.351(c) "recognizes that 'an expert report has not been served within the period specified by Subsection (a) [when] elements of the report are found deficient'." Thus, a "'motion to dismiss based on a timely but deficient report can be reviewed by interlocutory appeal'."

Moreover, "[w]e jurisdiction in interlocutory appeals 'when there is inconsistency in [Texas courts'] decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants,'" which exists here.

16. *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017)

Footnote 38: "'A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.'" See *Wells Fargo Bank, N.A. v. Murphy*.

17. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

There was "sufficient evidence" to support a finding that an elderly woman lacked mental capacity. It "is not our place to weigh the testimony adduced at trial. That is the jury's province."

18. *Exxon Mobil Corporation v. Rincones*, 520 S.W.3d 572 (Tex. 2017)

The Supreme Court upheld summary judgments arising from the employment context after the reporting of a disputed drug test.

"We review the trial court's summary judgment de novo. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor."

When "reviewing summary judgment, appellate courts 'must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented.'"

19. *Honorable Mark Henry v. Honorable Lonnie Cox*, 520 S.W.3d 28 (Tex. 2017)

Appeal of temporary injunction issued directing commissioners court to hire a court employee at a set salary.

"We review a trial court's order granting a temporary injunction for clear abuse of discretion. We limit the scope of our review to the validity of the order, without reviewing or deciding the underlying merits, and will not disturb the order unless it is 'so arbitrary that it exceed[s] the bounds of reasonable discretion.' No abuse of discretion exists if some evidence reasonably supports the court's ruling."

Lack of "subject-matter jurisdiction can be raised for the first time on appeal."

20. *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017)

Mineral owner sought injunction when surface owner leased the right to drill through subsurface to another operator so it could produce minerals under an adjacent tract. Both parties filed motions for summary judgment.

"We review grants of summary judgment de novo. When a trial court does not specify the grounds it relied upon in making its determination, reviewing courts must affirm summary judgment if any of the grounds asserted are meritorious. 'When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all of the issues presented, and render the judgment the trial court should have.'"

With a no-evidence motion for summary judgment, "the evidence is considered in the light most favorable to the non-movant, and every reasonable inference from the evidence is indulged in that party's favor."

"When reviewing a traditional motion for summary judgment, we review the evidence in the light most favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve any doubts against the motion."

21. *Green v. Dallas County Schools*, ___ S.W.3d ___ (Tex. 2017)(5/12/17)

Employment disability suit.

"'In construing Texas law on [employment discrimination], we consider federal civil rights law as well as our own case law.'"

"'The sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it.'"

22. *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017)

Appeal of forcible entry and detainer.

Appellate courts have "treated nonwaiver provisions inconsistently. We may therefore exercise jurisdiction over this appeal, despite its origin, because an opinion of this Court addressing the matter would 'remove unnecessary uncertainty in the law and unfairness to litigants.'" Footnote 16: "[A]bsent a conflict among the courts of appeals on a material legal question or a dissent in the case, no appeal to this Court is permitted in a 'case appealed from a county court . . . when, under the constitution, a county court would have had original or appellate jurisdiction of the case.'"

"When neither party requests findings of fact and conclusions of law following a nonjury trial, all fact findings necessary to support the trial court's judgment are implied. If the reporter's record is filed on appeal, as it was here, implied findings may be challenged on factual- and legal insufficiency grounds in the same manner 'as jury findings or a trial court's [express] findings of fact,' but this Court only has jurisdiction over legal-sufficiency challenges." Footnote 22: A "statement of facts—now called the reporter's record—is necessary to challenge implied findings on evidentiary grounds after a non-jury trial."

"Evidence is legally insufficient to support a jury finding when (1) the record bears no evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. When determining whether legally sufficient evidence supports a finding, we must consider evidence favorable to the finding if the factfinder could reasonably do so and disregard evidence contrary to the finding unless a reasonable factfinder could not. When a party attacks the legal sufficiency of an adverse finding on an issue on which it bears the burden of proof, the judgment must be sustained unless the record conclusively establishes all vital facts in support of the issue."

23. *University of the Incarnate Word v. Redus*, 518 S.W.3d 905 (Tex. 2017)

Family of student who was killed by university police officer off campus when suspected of DWI sued school and officer. After trial court denied a plea to the jurisdiction, school filed an interlocutory appeal. The issue was "whether a private university that operates a state-authorized police department is such a 'governmental unit.'" The Supreme Court ruled that the court of appeals had jurisdiction because "the university is a governmental unit for purposes of this interlocutory appeal."

Footnote 2: "Although interlocutory appeals are generally final in the court of appeals, . . . we always have jurisdiction to determine whether the court of appeals properly exercised its jurisdiction."

24. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017)

"Generally, materiality is an issue 'to be determined by the trier of facts.'" Materiality "may be decided as a matter of law only if reasonable jurors could reach only one verdict."

25. *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017)

When considering a motion to dismiss under the TTCA, "we may consider whether there are issues of material fact that should have precluded the trial court from granting the motion to dismiss."

When there "is a question of statutory construction, . . . our review is de novo."

Footnote 5: In an appeal of the denial of "sovereign immunity, and evidence was presented to the trial court, [the] appellate court addresses de novo whether evidence raises material issue of fact."

26. *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex. 2017)

"[A]lthough causation is typically a question of fact, it may be determined as a matter of law when reasonable minds could not arrive at a different conclusion."

27. *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017)

"Appellate courts must conduct a meaningful evidentiary review of these [non-economic and mental anguish damages] determinations."

"Reviewing the constitutionality of an exemplary-damages award is a question of law we review de novo."

"We review the imposition of sanctions for abuse of discretion."

28. *Pedernal Energy, LLC v. Bruington Engineering, Ltd*., ___ S.W.3d ___ (Tex. 2017)(4/28/17)

"We construe statutory language de novo."

"'Rather than remanding the case to the court of appeals for it [to consider an alternative argument asserted by appellee], . . . we address the issue in the interest of judicial economy.'"

29. *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318 (Tex. 2017)

Appeal from the Texas Alcoholic Beverage Commission's denial of a permit based on the statutes prohibiting "tied houses" where the same business owns interests in more than one "tier" of the industry. The appellant and amici, in addition to other arguments, sought "'clarity'" as to whether the statute would prohibit ownership of only one share in more than one tier, which was not the situation that was before the TABC or the courts.

The Texas Supreme Court, while "not unsympathetic toward the industry's desire for clarity," lacked jurisdiction to address the issue. "[G]oing beyond the limits of our jurisdiction 'is no trifling matter.' And our lack of jurisdiction to issue advisory opinions such as the amici seek could not be more certain." Addressing this issue "would unquestionably be advisory" because the "one share" situation was not part of the facts of the case.

30. *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017)

Prior opinion, dated 12/9/16 (*see below*), was reissued with some changes in phrasing, but with generally the same holding.

31. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

Defamation case against magazine which labeled plaintiff as a "welfare queen." The Supreme Court ruled it had jurisdiction of this interlocutory appeal. It also ruled that the court of appeals erroneously relied upon Wikipedia.

The "court of appeals' reliance on Wikipedia led to an unduly narrow interpretation of ["welfare queen"] that, in turn, impacted the court's analysis of the plaintiff's defamation claim." Wikipedia is an "'online open-content collaborative encyclopedia.'" Its contents can be edited by users and are impermanent. Therefore, "a bright-line rule [of its use] is untenable." It is "unlikely Wikipedia could suffice as the sole source of authority on an issue of any significance to a case. That said, Wikipedia can often be useful as a starting point for research purposes." Footnote 4: "The Harvard Journal of Law and Technology has introduced a citation form for Wikipedia that includes the specific time the page was accessed."

The court of appeals did have "jurisdiction to consider the magazine's appeal of the trial court's denial of its request for attorney's fees in connection with the partially granted motion to dismiss. . . ." The "trial court erred in awarding no fees."

"TEX. CIV. PRAC. & REM. CODE § 54.014(a)(12) [] authoriz[es] an interlocutory appeal from an order denying a TCPA motion to dismiss." Footnote 2: "We have jurisdiction over interlocutory appeals 'in which the justices of the courts of appeals disagree on a question of law material to the decision.' TEX. GOV'T CODE § 22.225(c)."

32. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)

"'We review grants of summary judgment de novo. . . . [W]e take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve any doubts in the non-movant's favor.'"

A "claim or allegation may not be raised for the first time on appeal. Further, '[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal' of a summary judgment."

33. *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc*., 512 S.W.3d 878 (Tex. 2017)

Interlocutory appeal of a challenge to personal jurisdiction.

"We review determinations of personal jurisdiction de novo. 'When, as here, the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence.'"

Footnote 8: "We have jurisdiction over interlocutory appeals in which the court of appeals 'holds differently from a prior decision of' this Court, meaning that 'there is inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to

litigants.' TEX. GOV'T CODE § 22.225(c), (e)."

34. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)

"'We review a grant of summary judgment de novo.' . . . We review summary judgment evidence 'in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'"

Footnote 3: "'When a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious.'"

"The TCHRA 'is modeled after federal law with the purpose of executing the policies set forth in Title VII of the federal Civil Rights Act of 1964.' Combating gender-based discrimination is one of those policies. Accordingly, 'Texas courts look to analogous federal law in applying the state Act.'"

35. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

Appeal alleging a deficiency of a Certificate of Merit in a suit against an architect.

TEX. CIV. PRAC. & REM. CODE § 150.002(f) "provides for an interlocutory appeal." But the Court's "jurisdiction does not ordinarily extend to such appeals." However, "we have jurisdiction over an interlocutory appeal when the appellate decision under review conflicts with a prior case, that is, when 'the court[]of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court.' Moreover, . . . a sufficient conflict exists . . . 'when there is inconsistency in [the] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'" Here, such inconsistency exists.

36. *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017)

Wife appealed from entry of a divorce decree incorporating a settlement agreement, arguing that the settlement was procured by fraud and coercion. Husband moved to dismiss the appeal, arguing that wife was estopped from challenging the decree because she accepted benefits under it. The Supreme Court used the opportunity to clarify the acceptance-of-benefits doctrine in the context of a divorce decree, which "has been applied irregularly and has become unmoored from its equitable underpinnings" in the 65 years since the Supreme Court's only prior application of the doctrine in a marital-dissolution case.

"The acceptance-of-benefits doctrine is . . . anchored in equity and bars an appeal if the appellant voluntarily accepts the judgment's benefits and the opposing party is thereby disadvantaged." "The burden of approving an estoppel rests on the party asserting it, and the failure to prove all essential elements is fatal." "Whether estoppel of the right to appeal is warranted involves a fact-dependent inquiry entrusted to the courts' discretion."

The Court noted the "trajectory toward a rigid and formulaic application of the doctrine" since the Court's last examination of the acceptance-of-benefits doctrine in *Carle v. Carle* 65 years ago. It clarified "that the acceptance-of-benefits doctrine is a fact-dependent, estoppel-based doctrine focused on preventing unfair prejudice to the opposing party." "Under this doctrine, a merits-based disposition may not be denied absent acquiescence in the judgment to the opposing party's irremediable disadvantage." "[M]erely using, holding, controlling, or securing possession of community property awarded in a divorce decree does not constitute clear intent to acquiesce in the judgment and will not preclude an appeal absent prejudice to the nonappealing party."

Recognizing that "definitive, bright-line rules are hard to come by in matters of equity," the Court set forth "several nonexclusive factors" that "inform the estoppel inquiry, including:

- whether acceptance of benefits was voluntary or was the product of financial duress;
- whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment;
- whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified;
- whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession;
- whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one;
- if a less favorable judgment is possible, whether there is no risk the appellant could

receive an award less than the value of the assets dissipated, wasted, or converted;
- whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment;
- whether the issue on appeal is severable from the benefits accepted;
- the presence of actual or reasonably certain prejudice; and
- whether any prejudice is curable."

Here, wife took ownership and control of property awarded to her under the decree, collected rent from property awarded to her under the decree, and sought the opportunity to retrieve personal property awarded to her. However, this "mere acceptance, possession, and control of community property does not equiate to acquiescence," and there was no evidence that any of these acts prejudiced husband. Thus, wife was not estopped from challenging the decree and her appeal should not have been dismissed.

37. *4Front Engineered Solutions, Inc. v. Rosales,* 505 S.W.3d 905 (Tex. 2016)

"When determining whether legally sufficient evidence supports a jury finding, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. The evidence is legally sufficient if it there is more than a scintilla of evidence on which a reasonable juror could find the fact to be true."

38. *Laverie v. Wetherbe,* ___ S.W.3d ___ (Tex. 2016)(12/9/16)

"We review de novo a trial court's denial of a traditional motion for summary judgment."

39. *City of Dallas v. Sanchez,* 494 S.W.3d 722 (Tex. 2016)

"We have jurisdiction over the City's petition for review [the denial of a motion to dismiss this suit under the Texas Tort Claims Act] because the court of appeals' decision is inconsistent with our decisions."

40. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)

The Supreme Court "has no jurisdiction to review the evidence for factual sufficiency" but "can review whether the court of appeals properly conducted that analysis." Where a court of appeals "reverses for factual insufficiency, it must detail the relevant evidence and clearly state why the evidence is factually sufficient." Here, while "the court of appeals' opinion may not be a model of clarity," it "adequately describes its reasoning" and the Supreme Court has "no jurisdiction to evaluate that reasoning."

41. *McIntyre v. El Paso Independent School District*, 499 S.W.3d 820 (Tex. 2016)

Home-schooling family sued school district and its employee for filing unfound criminal charges of truancy. After the school district filed an interlocutory appeal, the Supreme Court ruled that they did not fail to exhaust administrative remedies by appealing to the Texas Commissioner of Education because the claims were based upon the constitution; it also ruled that the employee had qualified immunity.

"The court of appeals' decision in an interlocutory appeal is generally final. There are exceptions, however, such as when 'one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court.' Courts hold differently from each other 'when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'" "This is such a case."

"Where the Legislature grants the Commissioner authority to resolve a dispute, parties to such disputes must seek relief from the Commissioner through an administrative appeal before resorting to the courts. [But] exhaustion is only required for 'complaints that the Legislature has authorized the Commissioner to resolve. . . .'"

42. *Centerpoint Builders GP LLC v. Trussway, Ltd.*, 496 S.W.3d 33 (Tex. 2016)

General contractor was sued after worker was injured when a truss broke. General contractor sought indemnity from maker under Ch. 82, claiming it was a seller. The Supreme Court ruled that, applying "chapter 82's definition of 'seller,' . . . the general contractor is not a seller" because it was not "'engaged in the business of' commercially distributing or placing trusses in the stream of commerce."

"The trial court certified its order for interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(d) (allowing a trial court to permit an interlocutory appeal of an otherwise unappealable order if certain

conditions are met)."

Footnote 2: "We have jurisdiction over interlocutory appeals in which the court of appeals 'holds differently from a prior decision of' this Court, meaning 'there is inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'"

43. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

Parents of oil field worker sued rig owner after he was killed. Rig owner demanded a defense from its CGL carrier, which refused, claiming no coverage. After parents obtained default judgment, rig owner assigned its *Stowers* action against carrier to them. The Supreme Court ruled that the "the parents failed to establish coverage, an essential element of any *Stowers* action. The evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker [and proved that he was]. . . . Coverage is therefore precluded as a matter of law."

The Supreme Court addressed whether a statement in a prior holding constituted dictum. "This Court has defined dictum as: 'An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; . . . an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point.' We have recognized two types of dicta: judicial dictum and obiter dictum. Obiter dictum is not binding as precedent. . . . Judicial dictum is 'a statement made deliberately after careful consideration and for future guidance in the conduct of litigation.' As such, "[i]t is at least persuasive and should be followed unless found to be erroneous.'"

"When determining whether a statement is dictum, we look to the language and structure of the opinion. . . ." Here, the Court observed that "we cannot say that the court of appeals held that [deceased] was a leased-in worker. . . . The court of appeals' statement . . . was made 'without argument, or full consideration of the point.'"

"'When a court makes fact findings but inadvertently omits an essential element of a ground of recovery or defense, the presumption of validity will supply by implication any omitted unrequested element that is supported by evidence.' . . . [W]e presume that the trial court made all implied findings necessary to the validity of the judgment."

"When reviewing the legal sufficiency of the evidence, we consider whether the evidence at trial would enable a reasonable and fair-minded juror to reach the verdict in question. 'Evidence is legally insufficient 'when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.'' Our review is restricted to the jury charge as submitted when there was no objection to the instruction. . . . Even if another legal theory was argued to the jury and explained by the lawyers in argument, we are bound by the instructions given to the jury and presume that the jury followed those instructions."

Here, the "the jury was not instructed on alter ego. . . . Therefore, we cannot consider those legal theories when reviewing the legal sufficiency of the jury's finding." But, the evidence was legally sufficient to prove deceased was not an employee of rig owner.

"When a party properly preserves error by objecting to an erroneous definition used in the jury charge, we measure the legal sufficiency of the evidence against the definition that should have been used in the charge." In this case, insurers objected to the definition of "leased-in worker."

"'Whether a definition used in the charge misstated the law is a legal question,' which we review de novo."

Here, the "inclusion of [certain] definitions [provided by the court of appeals] in Instruction No. 6 was completely unnecessary. Any error was harmless, however, because the proper definition was included in the instruction."

44. *Sampson v. The University of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016)

"Whether a court has subject matter jurisdiction is a question of law. . . . 'Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*.'"

"Whether a claim is based on a premises defect is a legal question."

45. *TIC Energy and Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016)

The trial court denied the subcontractor's motion for summary judgment that it was covered by general contractor's worker's compensation policy, but authorized an interlocutory appeal. Footnote 12: "TEX. CIV. PRAC. & REM. CODE § 51.014(f); TEX. R. APP. P. 28.3."

The Supreme Court has jurisdiction in interlocutory appeals "only if the lower court's opinion "holds differently" from a decision of another court of appeals or this Court. Decisions conflict when there is an 'inconsistency . . . that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'"

"The proper construction of a statute presents a question of law that we review de novo."

46. *Doctors Hospital at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545 (Tex. 2016)

TEX. CIV. PRAC. & REM. CODE § 51.014(d) provides: "On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if: (1) the order to be appealed 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 ultimate termination of the litigation."

47. *In re Christus Santa Rosa Health System*, 492 S.W.3d 276 (Tex. 2016)

"'Statutory construction is a question of law we review de novo.' When construing a statute, we look to the plain language to determine the intent of the Legislature. If the statute is unambiguous, we apply the words according to their common meaning, but we may consider the objective of the law and the consequences of a particular construction."

48. *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016)

"Whether an expert report [in a malpractice case] served concurrently with a pre-suit notice letter is timely under section 74.351(a) is a matter of statutory construction, a legal question we review de novo."

49. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016)

A "reviewing court is generally bound by the record before the trial court at the time its decision was made. Because portions of the record were not before the trial court when its decisions were made, they will not be considered by this Court in determining whether the trial court abused its discretion."

50. *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528 (Tex. 2016)

Medical malpractice case. The Supreme Court found that a claim for improper handling of a corpse was a HCLC, and that it was barred by limitations. The Court also affirmed the reversal of discovery sanctions imposed upon the hospital.

"Whether a claim is an HCLC under the Act is a question of law that we review de novo."

"'Generally, if an appellate court holds there is legally insufficient evidence to support a judgment after a trial on the merits, the proper disposition is to reverse and render judgment."

51. *In re Steven C. Phillips*, 496 S.W.3d 769 (Tex. 2016)

Suit for compensation of a father who was wrongly incarcerated.

The "Comptroller's authority to determine compensation owed [under the Tim Cole Act . . . is exclusive, ministerial, and subject to review." Footnote 14: "We have jurisdiction over the petition."

52. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

Review of an award of attorney's fees under Ch. 27.

An award of attorney's fees in a declaratory judgment "is permissive and subject to four express limitations—that it be 'reasonable and necessary' and also 'equitable and just.'" This requires "a multi-faceted appellate review because the limitations involved both evidentiary and discretionary matters."

"'Appellate courts must treat the statement of an issue 'as covering every subsidiary question that is fairly included.'"

53. *In the Interest of P.M., a Child*, ___ S.W.3d ___ (Tex. 2016)(4/1/16)

In a suit to terminate the parent-child relationship, the trial court granted an appointed attorney's motion to withdraw during an appeal after a second trial. The Supreme Court ruled that there was no abuse of discretion in granting that motion, and that mother was entitled to appointed counsel on appeal.

Footnote 14: Considering *Anders v. California*, the Court noted that, "in criminal appeals, the reviewing court must conduct an independent evaluation of the record to determine whether counsel is correct in determining that the appeal is frivolous. Petitions for review ordinarily come to this Court without the underlying record, but often with an appendix incorporating numerous exhibits from the record. Counsel should provide record citations, and, in a proper case, may choose to ask that the record be forwarded from the court of appeals."

54. *McLean v. Livingston*, 486 S.W.3d 561 (Tex. 2016)

Appeal of an inmate's case.

An "appeal may not be dismissed for a formal procedural defect or irregularity in appellate procedure unless the party is provided a reasonable opportunity to correct the defect." The appellate rules "disfavor[] disposing of appeals based upon harmless procedural defects."

55. *Cardwell v. Whataburger Restaurants, LLC*, 484 S.W.3d 426 (Tex. 2016)

Trial court denied non-subscribing employer's motion to compel employee to arbitration, and employer appealed. The court of appeals overruled only the issues the trial court based its ruling upon, without reaching other issues briefed by the parties. The Supreme Court remanded, holding that worker "could argue these grounds on Whataburger's appeal without perfecting her own appeal. . . . The court of appeals 'must hand down a written opinion that . . . addresses every issue raised and necessary to final disposition of the appeal.'"

56. *The Staley Family Partnership, Ltd. v. Stiles*, 483 S.W.3d 545 (Tex. 2016)

Easement case involving landlocked property. "Whether a property owner is entitled to an easement by necessity is a question of law, although underlying factual issues may need to be resolved in order to reach the legal question. . . . We review a trial court's conclusions of law de novo."

57. *Matthews v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016)

Cheerleaders sued district after it prohibited "banners containing religious signs or messages at school-sponsored events." The district appealed a denial of its plea to the jurisdiction and also asserted mootness due to a new policy.

"Interlocutory appeals . . . are generally final in the courts of appeals. Exceptions to this general rule exist . . . when the court of appeals holds differently from a prior decision of another court of appeals. Decisions that hold differently are defined to include those that have an 'inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'" Here, there is "such an inconsistency" among the courts of appeals because some require the defendant to "admit that their prior policies were unconstitutional in order to moot a case. . . ."

The "mootness doctrine is reviewed de novo on appeal."

58. *Blair v. Atlantic Industrial, Inc.*, 482 S.W.3d 57 (Tex. 2016)

In this motor vehicle collision suit, the defendants appealed after the trial court disregarded part of the verdict. The court of appeals issued an opinion that conflicted with its judgment. The Supreme Court "agree[d] that the opinion and judgment are inconsistent." Therefore, the Court "remand[ed] the case to the court of appeals for it to render judgment consistent with its opinion."

59. *Sloan v. Law Office of Oscar C. Gonzalez, Inc.*, 479 S.W.3d 833 (Tex. 2016)

In suit against attorneys, the court of appeals did not "address the effects of the [jury's] joint-enterprise and joint-venture findings in its opinion." The Supreme Court "conclude[d] that the court of appeals erred by failing to address these issues, which are necessary to the disposition of the appeal because they determine the amount of damages that the court of appeals' judgment may assign to each respondent."

"Under rule 47.1, a court of appeals is obligated to

hand down a written opinion that 'addresses every issue raised and necessary to final disposition of the appeal.' [This] . . . 'provision is mandatory, and the courts of appeals are not at liberty to disregard it.'" "Under rule 47.1, a court of appeals must address the parties' alternative theories of recovery if they are necessary to the disposition of the appeal."

F. Remand

1. *Great American Insurance Company v. Hamel*, 525 S.W.3d 655 (Tex. 2017)

In a suit by homeowners against a builder's CGL carrier, the Supreme Court ruled that their judgment against the builder was not binding on the carrier because an agreement rendered the trial not fully adversarial. The Court further that the suit against the carrier had to be remanded: "this insurance litigation may serve to determine the insurer's liability, although the parties in this case understandably focused on other issues during the trial."

Here, the parties did not effectively retry the damages case against the builder in the insurance suit against the builder's CGL carrier. "Accordingly, we believe a remand in the interest of justice is necessary." The Court may remand "'in the interest of justice '[i]n light of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case.'"

2. *Horizon Health Corporation v. Acadia Healthcare Company, Inc.*, 520 S.W.3d 848 (Tex. 2017)

The Supreme Court reversed an award of lost profits damages for legally insufficient evidence renders judgment that a plaintiff take nothing on that element of damages rather than remand for a new trial. While the Court held in *ERI Consulting Engineers, Inc. v. Swinnea* that "courts should suggest remittitur on remand for a new trial on damages where 'competent evidence exists to establish *some* reasonably certain amount of lost profits,'" that case "has no applicability" here because there was no evidence that company "lost any amount of profits."

3. *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)

Mandamus resulting from discovery battle over the form in which electronically stored information would be produced. The Supreme Court ruled that, because "the trial court and the parties lacked the benefit of our views on the matter, neither granting nor denying mandamus relief on the merits is appropriate." Relator was permitted to seek reconsideration at the trial court.

4. *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017)

"A failure to segregate attorneys [sic] fees does not preclude an attorneys-fees [sic] recovery. The issue may be remanded to the trial court for reconsideration with sufficiently detailed information for a meaningful review of the fees sought."

5. *A.D. Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017)

After bench trial, judge was voted out of office. The issue was "whether a newly elected district-court judge or the former judge she replaced may file findings of fact." The Supreme Court abated the appeal and directed that "the former judge file findings." If he refuses, the court of appeals may reverse and remand.

If, after directed by the court of appeals, "the trial court . . . fails to file the findings [of fact], the appellate court must reverse the trial court's judgment and remand the case for a new trial."

6. *BP America Production Company v. Red Deer Resources, LLC*, 526 S.W.3d 389 (Tex. 2017)

Suit by top lessee to terminate an oil and gas bottom lease for failure to properly invoke a shut-in royalty clause based on the argument that the well was not capable of producing in paying quantities when the well was shut in as required under the lease. The trial court entered judgment terminating the lease after the jury answers "Yes" to a question of whether the well was capable of producing in paying quantities on the date the shut-in royalty was tendered. The Texas Supreme Court held that the verdict failed to support the judgment because the operative date under the plain language of the lease was the last date gas was used or sold from the well, and reverses and renders a take-nothing judgment for the bottom lessee.

Footnote 6: "We render in favor of [bottom lessee] rather than remand for a new trial because [top lessee] submitted a theory upon which it could not recover."

7. *Pedernal Energy, LLC v. Bruington Engineering, Ltd.*, ___ S.W.3d ___ (Tex. 2017)(4/28/17)

"'Rather than remanding the case to the court of appeals for it [to consider an alternative argument asserted by appellee], . . . we address the issue in the interest of judicial economy.'"

8. *USAA Texas Lloyds Company v. Menchaca*, ___ S.W.3d ___ (Tex. 2017)(4/7/17)

In this suit for breach of an insurance policy and Insurance Code violations, the trial court entered judgment for damages on Insurance Code claims when the jury failed to find that the insurer did not comply with its obligations under the policy. Clarifying its earlier precedent, the Supreme Court reversed the judgment, but instead of rendering a take nothing judgment, it remanded for a new trial in the interest of justice because the parties proceeded under the wrong theory due to "obvious and understandable confusion over our relevant precedent[.]"

Under TEX. R. APP. P. 60.3, the Supreme Court "may 'remand the case to the trial court even if a rendition of judgment is otherwise appropriate.'" "Such a remand is particularly appropriate when it appears that one or more parties 'proceeded under the wrong legal theory,' especially when 'the applicable law has . . . evolved between the time of trial and the disposition of appeal.'" [Internal citations omitted.].

9. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017)

Appeal alleging a deficiency of a Certificate of Merit in a suit against an architect. The Court reversed and refused to remand because "[w]e merely conclude that the statute sets out several related but distinct qualifications a third-party expert must possess to render a certificate of merit and that this record fails as a matter of law to demonstrate that the expert met one of the required qualifications." The opinion dies not clarify uncertain law or overrule "precedent that litigants had every reason to view as reliable."

10. *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98 (Tex. 2017)

The trial court ruled defendant had no duty to protect plaintiff from the criminal conduct that resulted in a robbery at defendant's apartment complex. By "failing to address unreasonableness [at the court of appeals], [plaintiff] failed to challenge a potential independent basis for the trial court's ruling." "We render judgment in [defendant's] favor because [plaintiff] failed to offer evidence of the burden that would be imposed on [defendant] to prevent or reduce the risk from a crime like this one."

11. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017)

Defamation case. "'Ordinarily, we render judgment when we sustain a no evidence issue.'" Here, because "some evidence of actual damages exists, the court of appeals properly remanded the case for a new trial instead of rendering judgment."

12. *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016)

Warehouse hired electrician, who hired subcontractor, to fix sign. Warehouse supplied forklift, which was negligently operated by electrician when he drove off of sidewalk, and subcontractor was seriously injured. The jury found warehouse negligently entrusted forklift to electrician, and also found electrician and subcontractor were partially at fault. The Supreme Court reversed and rendered judgment in favor of the warehouse.

"Judicial efficiency might compel us to simply reapportion the jury's responsibility findings between [electrician] and [subcontractor] and place sixty percent (15/25s) on [electrician]. . . . But the possibility that the jury would have assigned different percentages to [electrician] and [subcontractor] had it found that [warehouse] bears no responsibility might compel a different result." Thus, the Court remanded to the trial court.

13. *Seger v. Yorkshire Insurance Company, Ltd.*, 503 S.W.3d 388 (Tex. 2016)

"When an appellate court remands a case to the trial court, the trial court 'has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate.'" Thus, here, the trial court was bound by a definition provided by the court of appeals. But, while the court of appeals used definitions in its opinion, the "inclusion of those definitions in Instruction No. 6 was completely unnecessary. Any error was harmless, however, because the proper definition was included in the instruction."

14. *Southwestern Energy Production Co. v. Berry-Helfland*, 491 S.W.3d 699 (Tex. 2016)

Engineers sued oil company, asserting misappropriation of trade secrets and other claims relating to oil company's acquisition and use of information on well locations developed by engineers. The jury found for engineers and awards damages for misappropriation and breach of a confidentiality agreement. Oil company appealed on multiple issues.

Here, there was "legally sufficient evidence . . . to support an award of actual damages, but insufficient evidence exists to support the entire amount the jury awarded," requiring reversal of the damages award and a remand for new trial. "Rendition is not proper . . . because an overstatement of damages does not entirely defeat recovery when there is legally sufficient evidence that damages exist."

15. *Greer v. Abraham*, 489 S.W.3d 440 (Tex. 2016)

In an appeal involving TEX. CIV. PRAC. & REM. CODE, ch. 27, the Supreme Court reversed and remanded to the court of appeals to review appellee's "unaddressed issues."

16. *Cardwell v. Whataburger Restaurants, LLC*, 484 S.W.3d 426 (Tex. 2016)

Trial court denied non-subscribing employer's motion to compel employee to arbitration, and employer appealed. The court of appeals overruled only the issues the trial court based its ruling upon, without reaching other issues briefed by the parties. The Supreme Court remanded, holding that worker "could argue these grounds on Whataburger's appeal without perfecting her own appeal. . . . The court of appeals 'must hand down a written opinion that . . . addresses every issue raised and necessary to final disposition of the appeal.'"

17. *Railroad Commission of Texas v. Gulf Energy Exploration Corporation*, 482 S.W.3d 559 (Tex. 2016)

Railroad Commission ordered operator to plug several inactive offshore oil wells, and then took over responsibility to plug the wells because operator lacked sufficient assets to carry out the order. At a meeting between lessee and the Commission, Commission agreed to delay plugging some of the wells, and the parties later executed a formal written agreement. However, after the meeting but before the written agreement was executed, the Commission mistakenly plugged one of the wells.

Lessee obtained legislative consent to sue the Commission under TEX. CIV. PRAC. & REM. CODE, ch. 107, and then sued the Commission for damages. At trial, the trial court denied the Commission's request for a jury question on contract formation, holding as a matter of law that a contract was formed at the meeting. The trial court also denied the Commission's request for an instruction on its asserted statutory good-faith defense under TEX. NAT. RES. CODE § 89.045. The jury found for lessee on its breach of contract claim. The Supreme Court reversed and remanded for a new trial, holding that the failure to submit a jury question on contract formation and the failure to submit a jury question on the good-faith defense were both error.

The Commission did not waive error by failing to request a definition of good faith in conjunction with their requested jury question. The Commission's requested jury question "generally tracked the pertinent statutory language," and thus complied with the requirements of TEX. R. CIV. P. 278. "We are particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be."

Additionally, the error was harmful and, thus, was reversible under TEX. R. APP. P. 61.1. "Charge error 'is generally considered harmful' and thus reversible 'if it relates to a contested, critical issue.'" "The good-faith defense qualifies as such an issue."

Turning to the failure to submit a question on contract formation, there was conflicting evidence as to whether the parties intended to be bound by the initial oral agreement, and thus contract formation was "a disputed fact issue that should have been presented to the jury."

18. *Blair v. Atlantic Industrial, Inc.*, 482 S.W.3d 57 (Tex. 2016)

In this motor vehicle collision suit, the defendants appealed after the trial court disregarded part of the verdict. The court of appeals issued an opinion that conflicted with its judgment. The Supreme Court "agree[d] that the opinion and judgment are inconsistent." Therefore, it "remand[ed] the case to the court of appeals for it to render judgment consistent with its opinion."

19. *Sloan v. Law Office of Oscar C. Gonzalez, Inc.*, 479 S.W.3d 833 (Tex. 2016)

In suit against attorneys, the Supreme Court remanded after the court of appeals erred by failing to address "the sufficiency of the evidence of a joint enterprise or joint venture, or the legal implications of those findings." The Court remanded so that the court of appeals could address the issue of the proportionate-responsibility scheme on this case "in the first instance."

TABLE OF AUTHORITIES

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