Case Summaries
November 19, 2021

OPINIONS

PROCEDURE—PRETRIAL

Discovery

In re ExxonMobil Corp., — S.W.3d —, 2021 WL — (Tex. Nov. 19, 2021) [20-0849]

The issue presented in this case is whether the trial court abused its discretion by denying ExxonMobil's discovery requests to medical providers, and whether ExxonMobil lacked an adequate remedy on appeal. Because the facts closely paralleled those of *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021), the Court held that its holding in *K & L Auto* was dispositive of this case.

After a fire at ExxonMobil's Baytown Olefins Plant, nearly sixty plaintiffs sued ExxonMobil, seeking, in part, millions of dollars in reimbursement for past medical expenses. Many were treated by the same medical providers, pursuant to "letters of protection" provided by the plaintiffs' attorneys. ExxonMobil served subpoenas on nine providers whose charges represented the bulk of the medical expenses claimed, seeking discovery for the amounts and rates these providers accepted in the past from a majority of their patients for the same procedures performed around the same time. ExxonMobil filed a motion to enforce compliance, and the providers filed motions for protection, arguing that the requests sought irrelevant information, were unduly burdensome, and sought trade secrets and confidential information.

While ExxonMobil's motion to enforce was pending, it supplemented its motion to substantially narrow its requests to limit discovery to the same services the plaintiffs received and the same time period during which those services were provided. It eliminated requests for rate information beyond the services the plaintiffs received.

The trial court denied ExxonMobil's motion to enforce and granted the providers' motions for protection. ExxonMobil sought mandamus relief from the court of appeals, which denied the petition.

On appeal, the Court conditionally granted mandamus relief. Applying its holding in *K & L Auto*, the Court held that evidence of the providers' rates was relevant to determining whether they were reasonable, and thus recoverable. Because the requests were narrowly tailored to focus on rates for the same services at the same times, and given ExxonMobil's effort to limit the requests in its supplemented motion, the requests were not overbroad and were not unduly burdensome. Additionally, the Court held that ExxonMobil demonstrated it lacked adequate remedy on appeal because the denied discovery was necessary to develop a defense critical to ExxonMobil's case—that the providers' rates were unreasonable.

Because the Court concluded that ExxonMobil demonstrated the trial court abused its discretion and that it lacked an adequate remedy on appeal, it found ExxonMobil was entitled to mandamus relief. It conditionally granted mandamus relief directing the trial court to vacate its orders granting the motion for protection and denying ExxonMobil's motion to enforce, and to reconsider its opinion in light of the Court's holding in *K & L Auto*.

CONTRACTS
Future Damages
Pura-Flo Corp. v. Clanton, — S.W.3d —, 2021 WL — (Tex. Nov. 19, 2021) [20-0964]

The issue presented in this case is whether a jury's future-damages award for breach of a terminable-at-will contract was based on reasonable certainty.

Pura-Flo is in the business of renting water coolers. In 1994, Pura-Flo contracted with Donald Clanton's predecessor-in-interest to sell fifty "units" (defined in the contract as "income producing water coolers rental customers") for about $50,000. Pura-Flo agreed to service the equipment and pay Clanton's predecessor $1,750 per month in rental income. After its initial period expired, the contract included an option to renew "for an indefinite length of time." Clanton purchased the contract three months after the initial period had expired. Pura-Flo sent Clanton monthly payments without incident until it ceased abruptly in December 2016, after which Clanton sued Pura-Flo for breach of contract.

In the trial court, Clanton argued that, in addition to past payments accruing since Pura-Flo ceased payments, he was owed future damages for the remainder of the contract, which he understood to be of indefinite duration. The jury found that Pura-Flo breached a valid contract of indefinite duration that had not been terminated. It awarded $19,500 in past losses and future damages of $50,000. Pura-Flo appealed, arguing only the insufficiency of the evidence supporting the future-damages award.

A divided court of appeals affirmed. Although it agreed the contract was terminable-at-will by either party, the court held that Pura-Flo's cessation of payments to Clanton did not terminate the contract, and that the evidence established future damages with reasonable certainty.

On appeal, Pura-Flo argued that the evidence did not support the jury's future-damages award, and that breach of a contract of indefinite duration may never support an award of future damages. The court of appeals affirmed the trial court's judgment. The Supreme Court reversed in part. The Court held that no reasonable basis existed to support the jury's finding that the contract would have continued after trial, and thus, there was no basis for its award of future damages. Pura-Flo sought to end its relationship with Clanton at the time of its breach, stopped paying him, and claimed his water coolers were no longer producing any rental income. No evidence demonstrated any reason Pura-Flo would have opted to continue the contract for any length of time after trial. Because no evidence indicated Clanton was reasonably certain to incur damages in the future, the Court reversed that portion of the court of appeals' judgment affirming the award of future damages and rendered judgment that Clanton take nothing on his claim for future damages.

PROCEDURE—PRETRIAL

Pleading

Reynolds v. Sanchez Oil & Gas Corp. et al., — S.W.3d —, 2021 WL — (Tex. Nov. 19, 2021) [21-0106]

Sanchez Oil & Gas Corporation, Sanchez Energy Corporation, and Sanchez Production Partners LP (Sanchez) are affiliates in the oil and gas industry. This dispute began when three of Sanchez's employees (Former Employees) resigned and went to work for Terra Energy Partners, a business competitor. An investigation within Sanchez allegedly revealed that the three employees stole thousands of files containing proprietary information and gave that information to their new employer.

Sanchez's original and first amended petitions assert fives causes of action: (1) misappropriation of trade secrets against all defendants, (2) breach of fiduciary duties against the Former Employees, (3) aiding and abetting breaches of fiduciary duties against all defendants, (4) breach of contract against the Former Employees, and (5) violation of the Harmful Access by computer Act against two Former Employees. Two years later, Sanchez filed a second amended petition, which included different causes of action. Within sixty days of service of the second amended petition, the Former Employees and Terra filed a joint motion to dismiss the new claims under the Texas Citizens Participation Act (TCPA). The trial court denied the dismissal motion, and Terra and the Former Employees appealed.

The court of appeals held Sanchez's second amended petition did not assert a new legal action under the TCPA because amended petitions only assert new legal actions if they assert "new claims based upon new factual allegations." Because this case preceded and conflicts with the Texas Supreme Court's recent opinions in *Montelongo* and *Kinder Morgan*, the Court vacated the judgment below and remanded the case to reconsider its holding in light of those cases.

GRANTS

ADMINISTRATIVE LAW

Texas Water Code

Dyer v. TCEQ, 2019 WL 5090568, *pet. granted*, __ Tex. Sup. Ct. J. __ (Nov. 12, 2021) [19-1104].

The principal issue in this case is whether the recission of a Railroad Commission (RRC) no-harm letter before Texas Commission on Environmental Quality (TCEQ) granted an injection-well permit rendered the application deficient or void at its issuance.

This case arises out of a dispute relating to the Injection Well Act (Act) which governs the permitting process for underground injection wells in Texas. The general purpose of the Act is to maintain the quality of fresh water for the public and existing industries, while trying to prevent underground injections that may pollute fresh water. Under the Act, a business seeking to operate an injection well must apply for a permit from TCEQ and submit a no-harm letter from the RRC asserting that the injection well will not harm an existing oil or gas reservoir.

TexCom Gulf Disposal, LLC. Sought to construct and operate a commercial non-hazardous industrial wastewater disposal facility. It submitted an application to TCEQ in August 2005. As part of its application, TexCom provided TCEQ with a no-harm letter issued by the RRC dated September 16, 2005. A hearing was held on TexCom's permit in December 2007. The existing lessee-operator of the mineral interest underlying the proposed application site did not participate. The Administrative Law Judge (ALJ) issued a proposal for decision in April 2008 recommending that the permits be granted with special conditions. Following this proposal, TCEQ issued an interim order with the additional concerns for a later hearing.

In December 2009, Denbury Onshore, LLC (Denbury) subsequently became the lessee-operator of the mineral interest underlying TexCom's proposed site. It filed a motion to intervene in the contested case in March 2018, contending that it was actively producing oil and gas form the formation which was incompatible with this purpose. The ALJ denied Denbury's request to postpone the original permit proceeding and issued an amended proposal recommending the TexCom permit application be denied because they found the facility posed a risk. However, TCEQ considered the application at an open meeting in January 2011, issuing and reissued the order approving the application.

After TCEQ closed the administrative record, the RRC rescinded its 2005 no-harm letter when a nearby mineral rights owner argued that the wells might harm the reservoir. TCEQ reissued its order after the RRC rescinded its no-harm letter but before the recission went into effect. The suits leading up to this case were filed and consolidated. The litigation includes multiple individually named parties, as well as Montgomery County and the City of Conroe (collectively "Consolidated Parties"). The trial court held a hearing, ultimately affirming TCEQ's order.

On appeal, the Consolidated Parties argued first that the order should have been reversed and declared void because it was issued in absence of a valid no-harm letter from the RRC. They also argued that even if the statutory requirements did not preclude TCEQ from issuing the permits, it acted outside of its regulatory scope. Second, they argued the RRC's conclusions on the potential effect of an injection well on oil and gas resources should be determinative. Third, they argued that TCEQ improperly rewrote many of the ALJ's finding and made changes not based solely on the record.

Taking into consideration the timing of the hearing and the recission of the no-harm letter, the Court of Appeals affirmed the dismissal of a challenge to TexCom's approved permit. The Court of Appeals construed the Texas Administrative Procedure Act, which generally provides the minimum standards of uniform practice and procedure for state agency proceedings to allow parties to rely on the finality of agency decisions. Therefore, the Court of Appeals held that the rescinded no-harm letter did not have any impact on the administrative proceedings before TCEQ.

The Court granted the petition for review and set oral argument for January 12, 2022.

CIVIL PROCEDURE

Youval Zive v. Jeffrey R. Sandberg and Palmer & Mauel, P.L.L.C., 610 S.W.3d 44 (Tex. App.—Dallas 2020, *pet. granted*, __ Tex. Sup. Ct. J. ___ (Nov. 19, 2021)[20-0922]).

The issue is: When a legal malpractice plaintiff does not seek discretionary review himself, does the statute of limitations on his legal malpractice claim toll under *Hughes*-legal-malpractice tolling while his co-party in the underlying litigation seeks discretionary review? *See Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) (holding that the statute of limitations was tolled until the legal malpractice plaintiffs exhausted all their appeals in the underlying action).

A foreclosure sale led to litigation about Zive's loan guaranties. During that litigation, Zive alleges his former attorneys, Jeffrey Sandberg and his firm, committed legal malpractice and breached fiduciary duties. Zive's co-defendant in the

guaranty litigation petitioned the United States Supreme Court but Zive did not. Less than two years from the United States Supreme Court denying review but more than two years from the Texas Supreme Court denying review, Zive sued Sandberg for the alleged malpractice and breach of fiduciary duties. Which of these two denials of review ended *Hughes* tolling determines whether Zive's lawsuit is timely. Both the trial and appellate court picked the Texas Supreme Court's denial and declared Zive's suit time-barred.

Zive petitioned the Texas Supreme Court. Here he argues the rule should be if any appeal is pending then *Hughes* tolling occurs. Or, in the alternative, when the co-party's appellate relief would undo the negative consequences—and therefore the malpractice damages—to the legal malpractice plaintiff, then *Hughes* tolling should apply. Meanwhile Sandberg argues the party seeking *Hughes* tolling must appeal to keep the clock stopped.

The Texas Supreme Court granted review on November 19, 2021. Oral argument will be January 13, 2022.

EXPUNCTION OF ARREST RECORDS
Statutory requirements

Ex parte K.T.
612 S.W.3d 111 (Tex. App.—Fort Worth 2020), *pet. granted*, --- Sup. Ct. J. ---, Nov. 12, 2021[20-0977].
Consolidated with *Ex parte Ferris*, 613 S.W.3d 276 (Tex. App—Dallas 2020), *pet. granted*, --- Sup. Ct. J. ---, Nov. 12, 2021[21-0075].

The sole issue in this petition is whether a defendant is entitled to expunction of his arrest records after acquittal when he has one prior conviction for an offense that is the same as or similar to the one for which he has been acquitted. The facts in these consolidated cases are virtually identical: The defendants, K.T. and Ferris, were each convicted of DWI; each fully discharged the resulting sentence. Four years after their respective convictions, each defendant was arrested and charged with a second DWI offense. Each was acquitted, resulting in one DWI conviction and one DWI acquittal for each defendant. Both K.T. and Ferris filed petitions for expunction of the arrest records pertaining to their acquittals, and each trial court granted the petitions. In both cases, the Texas Department of Public Safety (DPS) filed motions for new trials, contending that neither K.T. nor Ferris qualified for expunction due to an exception for acquittal expunctions. Both trial courts denied the motions for new trial; DPS appealed in both cases.

Both courts of appeals affirmed their respective trial courts, but for different reasons. An acquitted defendant is not entitled to expunction if (1) the acquittal "arose out of a criminal episode" and (2) the defendant was "convicted of or remains subject to prosecution for at least one other offense occurring during the criminal

episode." The pertinent definition of "criminal episode" requires repeated commission of two or more offenses that are the same or similar. The *K.T.* court of appeals held that an acquittal cannot constitute commission of an offense; thus, one conviction plus one acquittal cannot count as "repeated commission" of the same offense. No criminal episode could therefore exist. The *Ferris* court of appeals held that Ferris was entitled to expunction because Ferris's two DWI charges shared no common or continuing fact pattern, did not lend themselves to joint prosecution, and could not share a concurrent sentence.

DPS petitioned the Supreme Court for review in both cases. As noted above, the exception for acquittal expunctions requires that, if the acquitted offense arose from a criminal episode, the defendant must have been "convicted of or remain[] subject to prosecution for at least one other offense occurring during the criminal episode." This language, DPS argues, leads to the conclusion that a "criminal episode" may consist of only one prior conviction if it is for the same or a similar offense as the acquittal. In response, K.T. and Ferris contend that no criminal episode exists here: One conviction plus one acquittal cannot qualify as "repeated commission" of the same or similar offense because an acquittal is, by definition, a determination that the defendant did not commit that offense.

The Court granted the petition for review; oral argument has been set for January 13, 2022.

ARBITRATION
Enforcement of Arbitration Agreement

In re Whataburger, 2021 WL 50412 (Tex. App.—El Paso 2021), *argument granted on pet. for writ of mandamus*, -- Tex. Sup. Ct. J. -- (November 19, 2021) [21-0165]

The issues in this case are (1) whether Whataburger has an adequate remedy available on appeal when it can no longer take an interlocutory appeal from a denial of a motion to compel arbitration because it had no notice of the order denying the motion until after the deadline for an appeal expired, and (2) whether the trial court abused its discretion in denying Whataburger's motion to reconsider its motion to compel arbitration.

Yvonne Cardwell, a former Whataburger employee, sued Whataburger for an injury sustained at work in 2012. Whataburger moved to compel arbitration under the arbitration policy in its employee handbook. The trial court denied the motion and Whataburger appealed. The court of appeals reversed the judgment of the trial court, but the Supreme Court reversed again, holding that the court of appeals must address all issues necessary to a final disposition on appeal. The court of appeals remanded for consideration of whether the arbitration policy at issue was illusory.

Before the trial court again, Whataburger filed a supplemental motion to compel arbitration. The trial court denied the motion on August 23, 2018. However, the clerk of the court did not notify Whataburger until more than ninety days later.

Consequently, Whataburger could no longer take an interlocutory appeal from the denial of the motion. Whataburger then filed a motion for reconsideration of the motion to compel arbitration and a motion to establish the date that notification of the order was received under Texas Rule of Civil Procedure 306a. The trial court denied the motion to reconsider and granted the motion to establish the date, which it found was more than ninety days after the order was issued.

Whataburger sought a writ of mandamus in the court of appeals, but it was denied. The court of appeals held that Whataburger had an adequate remedy on appeal because it could appeal the denial of the motion to compel arbitration when the case is resolved on the merits. One justice dissented.

Whataburger now seeks mandamus relief in the Supreme Court, arguing that it has no adequate remedy on appeal because the benefits of arbitration will be lost by waiting to appeal a final order. Whataburger further argues that the arbitration policy was a binding contract between the parties and not illusory. Cardwell argues that Whataburger had an adequate remedy by interlocutory appeal and the fact that Whataburger was notified late does not change the outcome. Cardwell further maintains that the arbitration policy is illusory because it was provided alongside an acknowledgement sheet that states that the contents of the employee handbook, in which the arbitration policy is found, are unilaterally modifiable.

The Court granted argument on Whataburger's petition on November 19, 2021.