



## Opinion Summaries May 13, 2022

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### OPINIONS

#### CONSTITUTIONAL LAW

##### Takings

*City of Baytown v. Alan Schrock*, — 623 S.W.3d 394 — (Tex. May 13, 2022) [[20-0309](#)].

This case examines whether a city's wrongful refusal to connect utility service to a landlord's property was a constitutional taking requiring just compensation. Alan Schrock was a landlord in the City of Baytown who lost a tenant after the city refused to connect utility services to Schrock's property due to past-due utility bills for services provided to other tenants. The city's enforcement ordinance authorizing the withholding of services conflicted with Texas Government Code Section 552.0025, which prohibits municipalities from conditioning service on payment of outstanding utility bills incurred by other customers residing at the same address. Schrock sued the city for inverse condemnation and other claims. After lengthy proceedings, only Schrock's regulatory takings claim remained. The trial court directed a verdict for the city, concluding that Schrock had failed to adduce evidence of a regulatory taking. The court of appeals reversed, concluding that fact issues existed as to whether a regulatory taking existed under *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The Supreme Court of Texas reversed the court of appeals' judgment and reinstated the trial court's directed verdict.

Following its recent decision in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), the Court held that Schrock adduced no evidence of a *Penn Central* regulatory taking because the city's enforcement action did not regulate land use in a manner that constituted a taking or permanently deprive Schrock of his property. The city's ordinance was unrelated to land use, and it provided a means to redress the enforcement actions related to the past-due bills.

In a concurrence, Justice Young wrote to address the scope of takings under the Texas Constitution and suggest lack of causation as an additional reason for reversing the court of appeals' judgment.

## STATUTE OF LIMITATIONS

### Discovery Rule

*Berry v. Berry*, — *S.W.3d* — (Tex. May 13, 2022) [[20-0687](#)]

This case concerned the statute of limitations and several issues of trust law. Laura and Marvin Berry owned a contracting company called Berry Contracting. They also owned a ranch called Flying Bull Ranch (Ranch). Berry Contracting and Berry family members used the Ranch for business and pleasure. Marvin and Laura had four sons—Kenneth, Dennis, Marvin G., and Allen. The parents transferred ownership of the Ranch to a limited partnership (Partnership). Each parent owned a 49% interest as limited partners. FB Ranch was the general partner, and the parents were managers of FB Ranch. The parents later transferred their limited partnership interest to the Berry Dynasty Trust (Trust). The four brothers were trustees of the Trust. The Trust Agreement states that the sons and their issue are “demand beneficiaries” of the Trust. After Marvin died Laura became the sole manager of FB Ranch. Laura also owned a company called Berry Ranches.

Kenneth was the president of Berry Contracting but resigned in 1998. For many years, Berry Contracting paid rent to the Partnership under an oral lease, but there was evidence that lease payments were not made in some years or were not made to the Partnership but were instead made to Berry Ranches. In March 2007 Berry Contracting and the Partnership executed a written lease for the first time. The lease was for an initial term of 25 years, renewable for up to 99 years. In December 2008, the lease was summarized in a Memorandum of Lease that was filed in the courthouse records.

For many years Kenneth had a hostile relationship with other family members and many lawsuits followed. In the pending suit, filed in 2016, Kenneth and his daughter Chelsea sued Kenneth’s three brothers, FB Ranch, Berry Contracting, Berry Ranches, and Bay Limited, a subsidiary of Berry Contracting. The plaintiffs alleged that Berry Contracting did not pay for its use of the Ranch, that lease payments were wrongfully sent to the Berry Ranches and then re-routed to the brothers as “kick-backs;” that the rent under the lease was set at a below-market amount; and that the term of the lease was excessively long and in violation of the Partnership Agreement, which stated that leases could not exceed three years. The suit alleged that Kenneth’s brothers, as trustees of the Trust, breached their fiduciary duties and that the other defendants aided and abetted such breaches. Kenneth sued as a beneficiary and trustee of the Trust and sued in a derivative capacity on behalf of the Partnership. Chelsea sued as a beneficiary of the Trust.

After the suit was filed, the defendants and other family members executed a Consent Agreement which provided for payment of \$440,000 in unpaid rent to the Partnership, a modification of the lease to a three-year term, and a statement that the claims in this suit were not in the best interest of the Trust and should not be further pursued.

The defendants filed a plea to the jurisdiction/motion to dismiss/motion for summary judgment asserting that Chelsea lacked standing to seek relief, and that Kenneth lacked standing to seek relief as a trustee or in a derivative capacity. The defendants also filed a motion for summary judgment asserting that all claims related to the lease were barred by limitations. The trial court granted the standing motion and granted summary judgment against Kenneth on the limitations motion. The court of appeals affirmed the rulings on standing and reversed the ruling on limitations.

The Supreme Court affirmed in part and reversed in part. It held that Kenneth’s claims against his co-trustees for breach of fiduciary duty were barred by limitations, reasoning as follows. The suit was filed in 2016 and concerned inadequate lease payments during the 2000 to 2007 period. The statute of limitations is four years for breach of fiduciary duty and bars the claims unless they were tolled by the discovery rule. The discovery rule is a rare exception and tolls the limitations period 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 injury. Whether the plaintiff “should have known” of facts is an objective inquiry as to whether the injury is “inherently undiscoverable.” Under the facts presented, Kenneth’s claims for breach of fiduciary duty were time-barred. The evidence showed that for many years he was aware that Berry Contracting had leased the Ranch. As a trustee of the Trust, he had a duty to stay informed about the assets of the Trust. He knew or should have known that lease payments were not being made to the Partnership. Further, he was charged as a matter of law with knowledge of the recorded Memorandum of Lease under section 13.002(1) of the Property Code. Although his status as a fiduciary is relevant to the discovery rule inquiry, that status did not altogether absolve him of an obligation to use reasonable diligence to discover an injury. His status as trustee, the highly adversarial nature of his relationship with his brothers, his actual knowledge of the oral lease, and the recorded instrument all compel the conclusion that Kenneth was not somehow lulled into inaction that should toll the running of limitations.

The Court separately held that Chelsea was authorized to bring suit under the Property Code. She was a beneficiary of the Trust with a sufficient interest in the outcome of the suit to qualify as a “interested person” entitled to maintain an action under the Property Code sections 111.004(2), 111.004(6), 111.004(7), and 115.011(a). Under terms of the Trust Agreement, Chelsea had a present financial interest in a share of contributions to the Trust, as well as a contingent interest in distributions should she outlive her father.

The Court held that Kenneth, as one of four trustees, did not have authority to sue on behalf of the Trust. The record was clear that the other trustees—Kenneth’s brothers—did not wish to pursue the claims Kenneth was making on behalf of the Trust. The brothers and others provided in the Consent Agreement that they did not wish to pursue such claims. Relying on section 113.085(a) of the Property Code and other authority, the Court concluded that one trustee could not pursue claims on behalf of the Trust that the other trustees did not wish to pursue. The Court also held that Kenneth had no legal authority to bring a derivative claim on behalf of the Partnership. While Texas law sometimes permits a limited partner to bring a derivative claim on behalf of a limited partnership, Kenneth was not a limited partner of the Partnership.

## **EXPUNCTION OF ARREST RECORDS**

### **Statutory Requirements**

*Ex parte K.T., consolidated for oral argument with Ex parte C.F.*, — S.W.3d — (Tex. May 13, 2022) [[20-0977](#), [21-0075](#)]

The issue in this case is whether a defendant is entitled to expunge records relating to an acquittal when he has one prior conviction of the same or similar offense. More specifically, the issue is whether an acquittal and conviction can form a criminal episode, which would bar expunction of records under the expunction statute.

The material facts in each case are undisputed and essentially identical: Respondents K.T. and C.F. each has one misdemeanor DWI conviction and, more than three years later, one subsequent misdemeanor DWI acquittal. Both respondents filed petitions in the relevant trial court requesting expunction of the arrest records pertaining to their acquittals. Separate trial courts ordered expunction of each respondent's records over the Department of Public Safety's (the state) objections. The court of appeals in each case affirmed—over dissenting colleagues—but for different reasons.

The *K.T.* court of appeals held that an acquittal cannot constitute “commission” of an offense; thus, one conviction and one acquittal could not form a criminal episode. The *C.F.* court of appeals held that C.F. was entitled to expunction because C.F.'s two DWI offenses shared no common or continuing fact pattern, did not lend themselves to joint prosecution, and could not share a concurrent sentence. So, they did not form a criminal episode. The state petitioned the Supreme Court for review in both cases, arguing that respondents were not entitled to expunction because (1) an acquittal, for purposes of expunction, constitutes a committed offense that can form a criminal episode and that (2) same or similar offenses do not need to be temporally proximate to form a criminal episode. Respondents argued that they were entitled to expunction because two convictions are required to form a criminal episode.

The Supreme Court held that respondents were entitled to expunction because an acquittal does not constitute a “commission of an offense” and so cannot form a criminal episode. Accordingly, the Court did not reach the issue of whether offenses separated by a few years could still form a criminal episode. The Court held an acquittal cannot be a part of a criminal episode because only committed offenses can be part of a criminal episode. It reasoned the plain meaning of “commission” requires the act of “committing, doing, performing, or perpetrating” and that an acquittal illustrates the state failed, rather than succeeded, in showing such a “commission.” The Court concluded that to interpret an offense resulting in acquittal as a commission would contradict the plain meaning of “commission.” The Court also rejected respondents' argument that “commission of an offense” only included convictions. The Court looked to a nearby statutory provision for context and concluded it contemplated offenses subject to prosecution as eligible to forming a criminal episode. The Court thus held that a criminal episode could include more than just convictions. The Court affirmed the judgments of both courts of appeals.

Justice Boyd filed a dissent, stating he would have reversed the courts of appeals' judgments. He would have held that acquittals could be part of a criminal episode. He also would have held that two offenses could form a criminal episode even if they were committed years apart from each other because offenses do not need to be temporally related to form an episode. Thus, in Justice Boyd's view, respondents were not entitled to expunction because their acquittal and conviction formed a criminal episode.

## **CONSTITUTIONAL LAW**

### **Due Course of Law**

*Mitchell v. MAP Resources, Inc.*, — S.W.3d — (Tex. May 13, 2022) [[21-0124](#)]

At issue in this case was whether service by posting in a 1999 tax delinquency suit violated a defendant's procedural due process rights and rendered the subsequent default judgment and sale of her mineral interest void.

Elizabeth Mitchell, who died in 2009, was the owner of a mineral interest in property in Reeves County. In 2015, her heirs sued challenging a 1999 default judgment foreclosing a tax lien on Elizabeth's interest. They alleged that the 1999 judgment was void because Elizabeth was not properly served with notice of the underlying suit, and thus the judgment violated her constitutional right to procedural due process. The Mitchells argued that the taxing authorities did not attempt to serve Elizabeth personally in the suit, despite the fact that her name and address were available in publicly recorded warranty deeds, and this violated her due process rights. Respondents, MAP Resources and other current owners of the mineral interest who purchased the property at a tax sale or later acquired an interest in it, argued that those deeds and records could not be properly considered in the Mitchells' collateral attack because they were evidence extrinsic to the record of the underlying suit. The trial court granted summary judgment for MAP and ordered that the Mitchells take nothing. A divided court of appeals affirmed.

The Mitchells appealed to the Supreme Court, which reversed the court of appeals' judgment. First, the Court held that in a collateral attack on a default judgment, contact information available in deed and tax records may be considered in deciding whether service by posting satisfied due process. Following its and the Supreme Court of the United States' due process cases, the Court concluded that Rule 117a of the Texas Rules of Civil Procedure, which governs service of citation on defendants in suits for delinquent ad valorem taxes, requires that a party seeking to serve a defendant by publication must conduct a diligent inquiry into the defendant's whereabouts first, and a diligent inquiry would include a search of relevant public records. Accordingly, when public records contain the address of a defendant served by publication or posting, a court hearing a collateral attack on a judgment may consider that evidence in deciding whether service complied with the constitutional demands of due process.

The Court then considered whether the record established a jurisdictional defect and concluded that it did. The record showed that the taxing authorities did not comply with the requirements of Rule 117a or the constitutional requirements of due process because Elizabeth was not personally served, despite the availability of her address in public records. The Court held that the record underlying the 1999 judgment demonstrated that the taxing authorities' service of Elizabeth was insufficient to satisfy the requirements of due process. The Court reversed the court of appeals' judgment for MAP and rendered partial summary judgment that the court hearing the tax foreclosure suit did not acquire personal jurisdiction over Elizabeth. It remanded the remaining issues in the case, including some of MAP's defenses that were not properly on appeal, to the trial court for further proceedings.

## **MEDICAL LIABILITY**

### **Sufficiency of the Evidence**

*Pediatrics Cool Care v. Thompson*, — S.W.3d — (May 13, 2022) [[21-0238](#)]

At issue in this case is whether there was legally sufficient evidence to support a jury's finding that a doctor's negligence caused a teen's suicide.

Accompanied by her mother, A.W. visited her pediatrician to address feelings of depression. After a brief consultation, a physician assistant prescribed Celexa, an anti-depressant. Five months later, A.W. committed suicide. A.W.'s parents sued the

pediatrician and the physician assistant for negligence and presented evidence that the care A.W. received fell below the standard. On the issue of causation, the parents presented a psychiatric expert, who testified that, had the physician assistant asked A.W. additional questions and interviewed A.W. outside her mother's presence, A.W.'s answers "would have created pathways towards treatment options." If the providers had followed up with A.W., as they should have, and if A.W. had accepted further treatment, the expert testified that A.W. more likely than not would still be alive.

The jury found that the pediatrician and the physician assistant had proximately caused A.W.'s death. The court of appeals affirmed, holding that the providers' negligence was a substantial factor in bringing about A.W.'s death. Though the jury charge gave the standard proximate cause instruction, the court of appeals declined to assess whether the providers' negligence was a cause in fact, or but-for cause, of A.W.'s death, citing *Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017).

The Court reversed, holding that *Bustamante* did not eliminate but-for causation. *Bustamante* stands for the proposition that, when the negligent acts of multiple providers are so concurrent that they cannot be examined in isolation, the correct approach is to consider whether each provider's individual negligence is a substantial factor in the injury *and* whether the combined negligence was a but-for cause of the injury. The Court reaffirmed the causation standard it set forth in two earlier cases holding that medical negligence was not a but-for cause of a patient's suicide.

Applying the correct standard, the Court held that the parents did not provide legally sufficient evidence that the providers' combined negligence was a but-for cause of A.W.'s death. The expert's testimony relied on assumptions not found or contradicted by facts in the record, including about whether A.W. had suicidal thoughts at the time of her visit and would have disclosed such thoughts had she been asked the right questions, despite the evidence that A.W. had never disclosed suicidal thoughts to anyone. The expert also assumed that A.W. would have accepted treatment, despite evidence that A.W. had declined counseling. The expert conceded that even if the providers had not been negligent, A.W. might still have committed suicide. Finally, the expert did not exclude the possibility suggested by the providers' expert—that A.W.'s suicide, like many teenage suicides, was a spontaneous, impulsive, and thus unpreventable act. The Court rendered judgment that the parents take nothing.

Justice Busby joined the majority opinion and issued a concurring opinion suggesting that plaintiffs in future suicide cases might request that the ordinary causation standard be tailored to account for the limitations of psychiatric science and highlighting the administrative and criminal remedies available to address medical negligence.

Justice Boyd dissented, joined by Justice Lehrmann. The dissent agreed on the causation standard but argued that the parents' expert testimony was legally sufficient evidence that A.W. would still be alive but for the providers' negligence, based on the expert's 30-plus years of successfully treating adolescent patients presenting with depression as sufficient basis for his statements about what A.W. would have said or done if her care had been different.



## APPELLATE PROCEDURE

### Appellate Deadlines, TRAP 41.3, *stare decisis*

*Mitschke v. Borromeo & Blackjack Ranch L.L.E., LLC*, — S.W.3d — (Tex. May 13, 2022) [[21-0326](#), [21-0331](#)].

This case answers two questions about appellate procedure. First, it answers a question about transferred cases. The Supreme Court can equalize dockets by transferring cases. *See* Tex. Gov't Code § 73.001. In transferred cases, Texas Rule of Appellate Procedure 41.3 directs transferee courts to use transferor-court case law. If there is a conflict within transferor-court case law, how does the transferee court resolve it? The Court directs a transferee court to follow the rule of orderliness and apply the earlier decision in the conflict. Second, it answers a question about appellate deadlines. After a trial court severs a case, there are now two cause numbers. If a party files a motion for new trial in the incorrect cause number but the motion is otherwise proper, does that motion extend the appellate deadlines under Rule 26.1? Under the facts here, the Court answers yes.

Mitschke's son died in an all-terrain vehicle accident. Later Mitschke sued Borromeo, Blackjack, and several other defendants for negligent entrustment, negligent training and supervision, and negligent undertaking. Opposing those claims, Borromeo and Blackjack successfully moved for summary judgment, then moved to sever. The trial court granted the severance motion. Severing made the prior summary judgment order a final, appealable order. Mitschke moved for a new trial to extend the appellate deadlines.

When Mitschke moved for a new trial, he did so in the original cause rather than the severed cause. In an effort to save the cases, Mitschke filed a notice of appeal in both causes three days before the would-be extended deadlines. On appeal, the Supreme Court transferred the case under Texas Rule of Appellate Procedure 41.3 from the Third Court of Appeals to the Seventh. The Seventh asked the parties to brief the possible jurisdictional defect of a late appeal. In addressing timeliness, the parties revealed conflicting case law in the Third Court. The Seventh Court dutifully decided later Third Court precedent should control and dismissed the case for want of jurisdiction.

The Supreme Court of Texas granted review, then reversed and remanded for proceedings on the merits. The Court first gave guidance for how courts of appeals should handle conflicting precedent under Rule 41.3. The court held that normal *stare decisis* principles apply, so the Seventh Court ought to have picked the earlier Third Court precedent unless there was some intervening change in the law by a higher court—including the Third Court sitting en banc—or legislative change.

Next, the Court held Mitschke's motion for new trial extended both the trial court's plenary power under Texas Rule of Civil Procedure 329b and the appellate timelines under Rule 26.1(a). The Court recognized a long line of cases that require reading the rules of appellate and civil procedure to find jurisdiction and reach the merits. It also recognized *Philbrook v. Berry*, 693 S.W.2d 378 (Tex. 1985) (orig. proceeding) (per curiam) to be contrary to that line of cases. It then undertook a *stare decisis* analysis of *Philbrook* and decided that the case should be overruled. Still, the Court appreciated the Seventh Court's candor and analysis.

## FAMILY LAW

### Investigation of Child Abuse

*In re Abbott*, — S.W.3d — (Tex. May 13, 2022) [[22-0229](#)]

At issue in this case was the extent of a court of appeals' authority to protect parties' interests during an interlocutory appeal under Texas Rule of Civil Procedure 29.3.

On February 18, 2022, the Texas attorney general issued an opinion letter concluding that certain “sex change” procedures and treatments . . . when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.” The governor then sent a letter to the Texas Department of Family and Protective Service (DFPS) stating that “a number of so-called ‘sex change’ procedures constitute child abuse under existing Texas law” and instructed “DFPS and all other state agencies” to “follow the law as explained in” the attorney general’s opinion. DFPS issued a media statement that it would follow the governor’s instructions.

Parents of a child diagnosed with gender dysphoria and a doctor who treats such children sued the governor, the DFPS commissioner, and DFPS, challenging the governor’s and DFPS’s statements. The district court granted plaintiffs a temporary injunction that restrained the defendants from: “(1) taking any actions against plaintiffs based on the governor’s and DFPS rule . . . as well as Attorney General Paxton’s opinion;” “(2) investigating reports in the state of Texas against any and all persons based solely on alleged child abuse . . . where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment;” “(3) prosecuting or referring for prosecution such reports;” and “(4) imposing reporting requirements on persons in the state of Texas who are aware of others who facilitate” the above actions.

The state filed an interlocutory appeal, which automatically superseded the district court’s injunction. The court of appeals reinstated the injunction under its authority in Texas Rule of Appellate Procedure 29.3 to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.” The state petitioned the Supreme Court for mandamus relief from the injunction.

The Supreme Court granted partial relief. The Court first clarified that neither the governor nor the attorney general could bind DFPS’s investigatory authority. The Court then granted mandamus relief as to the parts of the court of appeals’ order that purported to bind nonparties, reasoning such an injunction was outside of the court of appeals’ authority to protect parties’ rights under rule 29.3. The Court also granted mandamus relief as to the parts of the court of appeals’ order binding the governor, as the governor does not have authority to investigate, prosecute, or impose reporting requirements regarding child abuse allegations. Lastly, the Court denied the state relief as to the order’s impact on the plaintiffs.

Justice Lehrmann filed a concurring opinion. The concurrence agreed with the Court’s opinion and judgment but highlighted the narrow scope of the Court’s partial grant of mandamus relief, particularly its lack of effect on the merits of the underlying suit. The concurrence also viewed the scope of the court of appeals’ order as narrower than the state presented. The concurrence viewed the injunction as returning DFPS’s investigative policies to the status quo which the concurrence reasoned implicated



whether the state indeed has an adequate remedy by appeal.

Justice Blacklock filed a partially dissenting opinion, in which Justice Boyd and Justice Devine joined. The partial dissent would have granted the state mandamus relief as to the part of the court of appeals' order regarding the plaintiffs. The dissent reasoned that the plaintiffs did not establish that they were entitled to an injunction against DFPS beginning an investigation of potential child abuse. According to the dissent, the proper time for courts to review DFPS's actions is after the investigation stage when DFPS tries to act based on the investigation.