



## Opinion Summaries May 20, 2022

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### OPINIONS

#### CONTRACTS

##### Substantial Compliance

*James Constr. Grp., LLC v. Westlake Chem. Corp.*, —S.W.3d—, 2022 WL (Tex. May 20, 2022) [[20-0079](#)]

This case arises out of a construction contract dispute between an owner and contractor; the principal issues are: (1) whether the owner was required to strictly (or only substantially) comply with a written-notice condition precedent to recover damages in a termination for default; (2) whether the owner could substantially comply with the written-notice requirement absent a writing; and (3) whether a provision barring recovery of consequential damages merely waived liability for such damages or constituted a covenant not to sue.

Westlake, the owner, replaced James, the contractor, for safety violations following a fatal accident involving a James employee. The contract allowed Westlake to assign work to James and other contractors at Westlake's discretion. Westlake was entitled under Section 17.2 to intervene and require James to improve its safety at James's cost if James was performing work unsafely. And Westlake was entitled to terminate the contract with James for convenience or default. To terminate for default based on safety violations under Section 21.3 and recover associated costs, Westlake was required to give James three notices in writing: (1) that Westlake had reasonably determined there were serious safety violations (triggering a 72-hour window for James to begin remediation efforts); (2) that Westlake was not reasonably satisfied with the pace and quality of James's remediation efforts; and (3) that James was terminated for default. The contract also included an indemnity provision (Section 19.1) and a waiver of consequential damages (Section 26).

Westlake sued James for breach of contract to recover the costs of hiring a replacement contractor. James counterclaimed, alleging Westlake breached by improperly terminating James for default and seeking contractually prohibited consequential damages. The jury found that Westlake substantially complied with all three of Section 21.3's notice conditions, and that James violated both Section 17.2 and Section 21.3 by failing to pay Westlake's costs associated with transferring the work. It also found that James violated Section 19.1 by failing to indemnify Westlake in litigation following the worksite fatality and that Westlake violated Section 26 by suing

James for consequential damages. The trial court rendered judgment largely on the jury's verdict, awarding both parties damages and attorney's fees.

The court of appeals affirmed the judgment as to the award of damages and attorney's fees to Westlake and reversed as to the award to James on its counterclaim. The court held that the doctrine of substantial compliance applied to the notice requirements and that the evidence was legally sufficient to support the jury's findings that Westlake substantially complied. The court also held that Westlake did not breach the contract by seeking consequential damages because the provision barring such damages was merely a liability waiver, not a covenant not to sue.

The Supreme Court affirmed in part, reversed in part, and remanded to the trial court for further proceedings on Westlake's attorney's fees. The Court first held that substantial compliance was the appropriate standard when evaluating compliance with a contractual notice condition. However, the Court explained that without a writing in some form, a party does not comply, substantially or otherwise, with a written-notice condition. The Court concluded that at a minimum, Westlake failed to provide two of the three required written notices. To the extent there were writings from Westlake to James, they failed to provide the requisite notice, and it was undisputed that there was no writing whatsoever giving the final notice terminating James. The Court therefore held Westlake did not substantially comply with the written-notice conditions precedent to termination for default and was not entitled to contract damages under that provision. The Court further rejected Westlake's argument that Section 17.2, which had no notice requirement, served as an independent ground for the same damages award, holding that Section 17.2 could not be used as an end-run around the more stringent requirements under the contract's termination-for-default section.

However, the Court affirmed as to James's failure to comply with its indemnity obligations under Section 19.1. The Court rejected James's argument that Westlake's failure to provide the requisite notices under Section 21.3 constituted a material breach that excused those obligations because the written-notice requirement was a condition precedent to termination for default, not a covenant. The Court further affirmed the take-nothing judgment on James's counterclaim for breach of contract under Section 26, interpreting the provision to constitute a waiver of liability for consequential damages, not a covenant not to sue. Construing the provision's language as a whole and considering the nature of the waiver—which bars only a type of damages—the Court held that the provision did not subject a party to liability merely for seeking damages that are ultimately classified as consequential rather than direct. Accordingly, while James could not be held liable for Westlake's consequential damages, Westlake did not breach Section 26 by seeking them.

Chief Justice Hecht, joined by Justice Devine, Justice Busby, and Justice Bland, dissented in part, opining that Westlake substantially complied with Section 21.3's written-notice requirements. The dissent would have held that a writing was not required to substantially comply in light of evidence of actual notice. The dissent also would have held that there were writings supplying notice from Westlake as to the first two requisite notices and that a writing from James supplied the final required notice. Finally, the dissent argued that Section 17.2, the intervention clause, independently supported Westlake's award.

Justice Boyd, joined by Justice Blacklock and Justice Huddle, dissented as to James's Section 26 counterclaim, opining that the provision unambiguously created a covenant not to sue and that the trial court's judgment in James's favor on that claim should be reinstated.

## CONTRACTS

### Procuring-cause doctrine

*Perthuis v. Baylor Miraca Genetics Laboratories, LLC*, —S.W.3d—, (Tex. May 20, 2022) [[21-0036](#)]

This breach-of-contract action addresses whether a former at-will employee was entitled to commissions on sales that closed after his termination. The parties disagree about the applicability of the procuring-cause doctrine, which the Court concluded governs their dispute.

Respondent Baylor Miraca Genetics Laboratories, LLC (or BMGL) hired petitioner Perthuis as its Vice President of Sales and Marketing in 2015. BMGL drafted the employment agreement, which Perthuis signed without alteration. That agreement gave Perthuis an annual base salary, provided that Perthuis's employment would be at-will, and stated that Perthuis's commission would "be 3.5% of your net sales." The employment agreement did not define "net sales" or place any other parameters on the commission obligation.

BMGL terminated Perthuis days after he had completed negotiations for a large contract. BMGL then refused to pay Perthuis commissions on any sales finalized after his termination regardless of whether Perthuis had secured the sale. Perthuis sued BMGL for breach of contract, asserting that BMGL had wrongly refused to pay him commissions. The case went to trial, and the court instructed the jury on the procuring-cause doctrine. The jury found for Perthuis but did not award him the full amount he sought. The court of appeals reversed, holding that the procuring-cause doctrine did not apply and that the parties' contract unambiguously entitled Perthuis to commissions only for sales made during his employment.

The Supreme Court reversed the court of appeals and remanded the case to that court. The Supreme Court clarified that the procuring-cause doctrine is nothing more than a default rule of construction: if a contract promises a commission, the broker is entitled to a commission if the broker proves that the sale was the direct and proximate result of the broker's efforts unless the parties' contract provides otherwise. Parties remain free to displace the default rule of the procuring-cause doctrine with different contract terms. But if the parties did not do so, the broker's entitlement to a commission vests upon his having procured the sale, not upon involvement in a sale's execution or the broker's continued employment.

The contract in this case was silent about any exceptions to the obligation to pay commissions. The Court therefore found the procuring-cause doctrine applied. The Court then remanded the case for the court of appeals to assess any further challenges that BMGL preserved, including BMGL's sufficiency challenge.

Justice Huddle, joined by Justice Boyd, dissented. The dissent would have limited the procuring-cause doctrine to seller-broker relationships in the real-estate context and would have found the doctrine inapplicable in the employment-at-will context. The dissent would have held that the commission provision was ambiguous, and therefore would have remanded the case for a jury to determine whether the parties intended Perthuis to receive commissions on post-termination sales.

## ADMINISTRATIVE LAW

### Jurisdiction

*Pape Partners v. DRR Fam. Props., LP*, — S.W.3d —, — 2022 WL — (Tex. May 20, 2022) [[21-0049](#)].

The issue in this case is whether the Texas Commission on Environmental Quality has jurisdiction to adjudicate conflicting claims to ownership of surface-water rights. Pape Partners and related parties bought a 1,086-acre farm in McLennan County from Lola Robinson. The purchase included the right to divert water from the Brazos River for irrigation under a permit that TCEQ issued to Robinson years prior. Robinson had also owned an adjacent tract with appurtenant water rights, and that tract was eventually sold to DRR Family Properties. TCEQ updated its records in response to chain-of-title documentation submitted by Pape, DRR, and other nearby landowners. The updated records reflected Pape’s right to irrigate only 821 acres, which was less than the full acreage of the farm.

Pape filed suit in district court, seeking a declaration that it possessed surface-water rights to the entire farm. DRR filed a plea to the jurisdiction, arguing that TCEQ has exclusive jurisdiction to determine water-ownership rights. The trial court granted the plea, and the court of appeals affirmed.

The Supreme Court began its analysis with the presumption in favor of district court jurisdiction and the corresponding rule that an administrative agency may only exercise those powers that the Legislature has given to it in clear and express statutory language. The Court then turned to Chapters 5 and 11 of the Water Code. DRR argued that TCEQ’s exclusive jurisdiction is provided for in Section 5.013(a), which grants TCEQ “general jurisdiction” over certain enumerated items, including “water rights adjudication.” But the Court explained that the inclusion of “water rights adjudication” in Section 5.013(a) is a reference to the Water Rights Adjudication Act in Chapter 11. The provisions of Chapter 11, in turn, demonstrate that water rights adjudication is a term of art for TCEQ’s process of allocating the rights to the water of a particular source through permits. That process, which is outlined in Chapter 11, requires a district court to determine all issues of law and fact independently of TCEQ. By contrast, nothing in the statute’s plain text gives TCEQ the authority to decide conflicting claims to water rights acquired with the title to land.

The Court held that TCEQ lacks jurisdiction to decide conflicting claims of ownership to surface-water rights. It reversed the court of appeals’ judgment and remanded the case to the trial court for further proceedings.

## MUNICIPAL LAW

### Solid Waste Regulation

*Builder Recovery Services, LLC v. Town of Westlake*, — S.W.3d —, — WL — (Tex. May 20, 2022) [[21-0173](#)].

The primary issue in this case was whether a general-law municipality could impose a percentage-of-revenue license fee on a solid waste hauling company. Builder Recovery Services (BRS) collects and removes solid waste from residential construction sites in the Town of Westlake, a general-law municipality. Westlake has a “franchise agreement” with another company, Republic, that provides regular residential and commercial trash collection for the whole town. BRS provides waste-hauling services

for individual customers who are building or remodeling homes. BRS believed it was permitted by law to provide this service despite the town's exclusive franchise agreement with Republic. After negotiations, the town adopted an ordinance that permitted BRS to operate its waste-hauling business, but BRS was required to obtain a license, follow certain rules pertaining to waste haulers (such as rules related to vehicle maintenance and identification, insurance, and reports), and pay a fee equal to 15% of the revenue generated from the operations.

BRS sued, claiming that the regulation exceeded the town's regulatory authority. The district court held that the regulation was preempted by section 361.0961 of the Health and Safety Code, which regulates certain waste-management containers. But the court rejected BRS's other arguments as to why the ordinance was allegedly invalid.

The court of appeals held that the ordinance was permitted under section 363.111 of the Health and Safety Code, which authorizes municipalities to "adopt rules for regulating solid waste collection, handling, transportation, storage, processing, and disposal." The court held that the ordinance was not preempted under section 361.0961. The court also held that insofar as BRS was challenging the 15% fee as an unconstitutional occupation tax, this issue was moot because the town had lowered the 15% fee to 3%.

The Supreme Court reversed the court of appeals' judgment. It held that the validity of the fee was not moot because BRS was challenging any fee based on a percentage of revenue and because it had paid fees based on the 15% rate into an escrow account and was seeking return of these fees. The court held that general-law municipalities only have powers expressly or impliedly conferred upon them. Implied powers are limited to those reasonably necessary to make effective the powers expressly granted and must be "indispensable" to carrying out expressly granted powers. Under this standard, the town had no authority under Texas law to impose a percentage-of-revenue license fee on BRS.

As to the other aspects of the ordinance including the license requirement, the Court noted that the parties had not briefed the severability of the other provisions. Further, the town was unclear in its briefing as to whether it contends the other provisions survive if the fee is declared invalid and whether it wishes to retain them, and BRS in its briefing was unclear as to whether it objected to being subject to other rules set out in the ordinance. The Court remanded the case to the court of appeals to consider these other provisions if the parties wished to argue them.