Case Summaries
March 11, 2022

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OPINIONS

NEGLIGENCE
Premises Liability

Energen Res. Corp. v. Wallace, — S.W.3d —, 2022 WL — (Tex. Mar. 11, 2022) [20-0451]

At issue in this case was whether Chapter 95 of the Civil Practice and Remedies Code applies when alleged negligence at an improvement other than the one on which the plaintiff was working contributed to the plaintiff's injuries. Energen Resources Corporation began drilling an oil well on its mineral leasehold. To facilitate the oil well operations, Energen hired Dubose Drilling, Inc. to construct a water well nearby; Dubose subcontracted with Elite Drillers Corporation to complete the water well. One day, a "gas kick" occurred at the oil well, causing gas to migrate from the reservoir to the wellbore. Three days later, Bryce J. Wallace, Elite's president, was supervising work at the water well when he noticed an increase in air pressure. An explosion followed, damaging Elite's equipment and leaving Wallace severely injured.

Elite, Wallace, and Elite's insurers (collectively, "plaintiffs") sued Energen for negligence, gross negligence, and trespass to chattels. Energen moved for traditional summary judgment, asserting that Chapter 95—which limits a property owner's liability when an independent contractor, hired to work on an improvement to real property, brings a negligence claim "aris[ing] from the condition or use" of that improvement—applied to plaintiffs' claims. The trial court granted Energen's motion and rendered a take-nothing judgment. After determining that Energen failed to conclusively establish Chapter 95's applicability, the court of appeals reversed and remanded.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's take-nothing judgment. First, the Court held that Energen conclusively established that Chapter 95 applies to plaintiffs' claims. Although plaintiffs argued that it was negligent activity at the oil well—rather than a dangerous condition of

the water well—that caused their injuries, the Court concluded the characterization of the claim was not dispositive. Instead, in determining Chapter 95's applicability, the relevant question is whether negligence involving the "condition or use" of the improvement on which the plaintiff was working caused the plaintiff's damages. And even if negligence elsewhere contributed to the plaintiff's injuries, the Court reiterated that negligence at the improvement need not be the "*only* cause" of the plaintiff's damages.

The Court also held that Energen conclusively established that it neither exercised nor retained control over plaintiffs' work. The summary judgment record demonstrated that Dubose had contracted with Elite, and Wallace testified that he had never spoken to anyone at Energen. Plaintiffs argued that Energen's senior geologist had made recommendations about the water well, but such suggestions were not enough to establish control. As a result, Energen could not be liable under Chapter 95.

Justice Blacklock, joined by Justice Young, filed a concurring opinion. The concurrence agreed that Chapter 95 applied but disagreed with the Court's analysis. In particular, the concurrence would have used the plain text of the statute to conclude that the presence of natural gas (a condition) in the water well (the relevant improvement) caused plaintiffs' injuries. According to the concurrence, the Court overcomplicated Chapter 95 by examining whether the negligence that caused the plaintiff's damages "involved" the improvement on which the plaintiff was working.

NEGLIGENCE
Premises Defects

In re Eagleridge Operating, LLC, ___ S.W.3d ___ (Tex. Mar. 11, 2022) [20-0505]

This mandamus proceeding challenged a trial-court order striking a responsible-third-party designation in a negligence suit arising from a burst pipeline on an oil-and-gas wellsite. The issue was whether a former minority working-interest owner bears continuing responsibility for defective premises conditions despite conveyance of its ownership interest if (1) the condition was constructed while the former owner was serving as the wellsite operator of record and (2) the former owner received a fee to serve as the operator.

When the pipeline was constructed, Aruba Petroleum was a minority working-interest owner who was receiving a fee while serving as the wellsite operator of record. But before the pipeline burst and injured a worker, Aruba had conveyed its ownership interest to the majority working-interest holder, USG Properties, and ceased serving as operator of record. The injured worker and his nuclear family members sued USG and the new operator of record, Eagleridge Operating, for negligence and gross negligence. Eagleridge, in turn, designated Aruba as a responsible third party, but on the plaintiffs' motion, the trial court struck the designation. The plaintiffs had argued that, as a former property owner, Aruba had

no post-conveyance responsibility for premises defects even as to conditions it had created.

Eagleridge sought mandamus relief, urging that, in constructing the pipeline, Aruba had acted in a dual capacity as both owner and independent contractor and remained responsible in the latter capacity under general negligence principles even after relinquishing ownership and control of the property. In a split decision, the court of appeals denied mandamus relief based on *Occidental Chemical Corp. v. Jenkins*, 478 S.W.3d 640 (Tex. 2016), which (1) "reject[s] the notion that a property owner acts as both owner and independent contractor when improving its own property" and (2) holds that, after the creator of a dangerous premises condition has conveyed ownership of real property, the property's new owner "ordinarily assumes responsibility for the property's condition with the conveyance." *Id.* at 644 & 648. The dissent concluded that the responsible-third-party designation was proper because Eagleridge produced some evidence that Aruba was "working under a third party contract" with USG when it allegedly constructed a hazardous condition and, if the jury so found, Aruba would remain responsible in its capacity as an independent contractor

The Supreme Court denied mandamus relief, agreeing with the lower courts that *Occidental* precludes the dual-role analysis central to Eagleridge's designation theory. Applying *Occidental*, the Court held that Aruba's responsibility for premises defects did not survive conveyance of its ownership interest to USG. As the Court explained, *Occidental* holds that a property owner, when making improvements on its own property, acts solely in its capacity as an owner and not as an independent contractor. The Court was not persuaded that Aruba's minority-interest status or receipt of an operations fee gave rise to an exception. Aruba and USG were tenants-in-common, and as Eagleridge acknowledged, each could construct improvements on the property without the other's consent. The Court concluded that an agreement strictly between tenants in common to allocate expenses, assign responsibilities, and compensate for disparate efforts in a joint endeavor does not create an exception to *Occidental* as to improvements each party would otherwise have been free to construct. *Occidental*'s core holding is based on ownership, and Aruba was a property owner exercising its possessory right to develop its property when it allegedly installed the gas line.

The Court declined to consider additional issues raised for the first time on petition for writ of mandamus because those issues had not been presented to the respondent trial court. The extraordinary nature of the mandamus remedy almost always requires a predicate request to the respondent and a refusal to act, which did not occur here as to the new issues. The Court also did not reach the plaintiffs' alternative argument that Eagleridge produced no evidence that Aruba had actually constructed the pipeline.

ADMINISTRATIVE LAW
Enforcement

Whole Woman's Health v. Jackson, — S.W.3d —, 2022 WL — (Mar. 11, 2022) [22-0033]

This case answered a certified question from the United States Court of Appeals for the Fifth Circuit asking whether Texas law authorizes certain state officials to directly or indirectly enforce the state's abortion-restriction requirements.

The Texas Legislature passed Senate Bill 8 (labeled the "Texas Heartbeat Act") in 2021. Section 3 of the Act added a new subchapter H to chapter 171 of the Texas Health and Safety Code, which prohibits physicians from knowingly "perform[ing]" or "induc[ing]" an abortion unless they first perform an "appropriate" test and do not detect a "fetal heartbeat." The plaintiffs provide and fund abortions and support women who obtain them in Texas. They filed suit in federal court requesting a declaration that the Act unconstitutionally restricts their rights and an injunction prohibiting the defendants from enforcing its requirements. The defendants include the executive directors and commissioners of various state agencies.

These state-agency executives moved to dismiss the lawsuit, asserting jurisdictional challenges, including that they are immune from the plaintiffs' federal suit because Texas law does not grant them any authority to enforce the Act's requirements. The federal district court disagreed and denied their dismissal motions. The United States Supreme Court also disagreed, affirmed the denial of the state-agency executives' dismissal motions, and remanded the case to the Fifth Circuit. At the state-agency executives' request, the Fifth Circuit then certified the following question to the Court:

> Whether Texas law authorizes the Attorney General, [the] Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission, directly or indirectly, to take disciplinary or adverse action of any sort against individuals or entities that violate the Texas Heartbeat Act, given the enforcement authority granted by various provisions of the Texas Occupations Code, the Texas Administrative Code, and the Texas Health and Safety Code and given the restrictions on public enforcement in sections 171.005, 171.207, and 171.208(a) of the Texas Health and Safety Code.

The Court concluded that Texas law does not authorize the state-agency executives to enforce the Act's requirements, either directly or indirectly. First, it determined that the statute's language unambiguously confirms that the state-agency executives cannot directly bring a civil action under that section to enforce the Act's requirements. The statute unequivocally provides that the Act's testing and no-heartbeat requirements may be enforced by a private civil action under section 171.208, and that no state official may bring or participate as a party in any such action.

The Court then concluded that the state-agency executives also cannot *indirectly* enforce the Act's requirements through "administrative and public civil enforcement actions" against Texas physicians, nurses, pharmacists, and other professional licensees. Those laws grant the state agencies broad authority to enforce other state laws through the professional-disciplinary process, unless other laws provide otherwise, and the Heartbeat Act expressly provides otherwise. The Court reached this conclusion for three reasons. First is the Act's emphatic, unambiguous, and repeated provisions declaring that the civil action section 171.208 provides is the "exclusive" method for enforcing the Act's requirements.

Next, the Court considered the savings clause in section 171.207(b), which states that section 171.207(a) "may not be construed to . . . limit the enforceability of any other laws that regulate or prohibit abortion." The plaintiffs contended that the laws that authorize agencies to take disciplinary actions against licensees who perform "criminal abortions" are laws that "regulate or prohibit abortion." The Court disagreed, reasoning that laws that "regulate or prohibit abortion" must do more than relate to or have an impact on abortions but must be specifically directed at abortions and must substantively control, forbid, preclude, or hinder them.

Finally, the Court considered the plaintiff's argument regarding the Act's statement that "[n]o enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by" any government actor. The plaintiffs argued that to read the Act as broadly prohibiting all indirect enforcement actions would render this clause mere surplusage. The Court first stated that the clause is not surplusage because it confirms that although the Act is a civil statute, prosecutors cannot pursue criminal charges based on an abortion that violates the Act's requirements. But even if the clause were surplusage, such a redundancy would not alter the clear terms of the exclusive-enforcement provisions. The clause cannot be given the full effect the plaintiffs propose without rendering other language in the Act superfluous. The Court determined that to stay truest to all of the Act's language, it must conclude that the legislature included the clause not to prohibit indirect enforcement that would be permitted in the clause's absence, but to emphasize and make it unmistakably clear that by prohibiting all enforcement methods other than a section 171.208 civil action, even criminal prosecutions. The Court therefore answered the Fifth Circuit's certified question No.

GRANTS

GOVERNMENTAL IMMUNITY
Ultra Vires Claims

Hartzell v. S.O., 613 S.W.3d 244 (Tex. App.—Austin 2020) [20-0811], consolidated for oral argument with *Trauth v. K.E.*, 613 S.W.3d 222 (Tex. App.—Austin 2020), *pet. granted*, — Tex. Sup. Ct. J. — [20-0812]

These cases address whether public universities can revoke degrees of former students.

In *Hartzell*, S.O. received a PhD from the University of Texas at Austin in 2008. In 2012, UT initiated an investigation into whether S.O. engaged in scientific misconduct and academic dishonesty in connection with her doctoral research. After determining S.O. violated its academic standards, UT informed S.O. it intended to revoke her PhD. S.O. filed this suit, seeking declaratory relief that UT could not revoke her degree. UT filed a plea to the jurisdiction, asserting sovereign immunity and urging that S.O.'s claims were not yet ripe because it has not revoked S.O.'s degree. In response, S.O. moved for summary judgment. The trial court denied UT's plea, but granted S.O.'s motion for summary judgment, concluding that UT lacks authority to revoke S.O.'s degree and thus acted *ultra vires* in attempting to do so. The court of appeals affirmed.

In *Trauth*, K.E. graduated from Texas State University with her PhD in 2011. K.E.'s former faculty advisor later raised concerns about K.E.'s university data collection related to her dissertation. After an administrative investigation, Texas State found that K.E. engaged in academic misconduct and revoked her PhD. K.E. filed suit, seeking declaratory and injunctive relief to restore her PhD.

In the trial court, Texas State filed a plea to the jurisdiction, asserting sovereign immunity because Texas State had the authority to revoke K.E.'s degree and that the relief she sought was retrospective, thus barred by sovereign immunity. The trial court denied the plea, and Texas State appealed. The court of appeals affirmed.

Both universities petition this court, arguing that public universities have the authority to revoke degrees. UT also argues that S.O.'s claims are not ripe, and Texas State urges that K.E.'s remedy is retrospective and barred by sovereign immunity. The Supreme Court has granted review and consolidated these cases for argument. Oral argument has not yet been set.

GOVERNMENTAL IMMUNITY
Texas Tort Claims Act

The Gulf Coast Center v. Curry, No. 01-18-00665-CV, 2020 WL 5414983 (Tex. App.—Houston [1st Dist.] Sept. 10, 2020) *pet. granted*, — Tex. Sup. Ct. J. — (Mar. 11, 2022) [20-0856]

The issues in this case are whether a party's characterization as a "unit of local government" as classified by the Texas Tort Claims Act (TTCA) is a question of law or fact, and further, whether the TTCA's damages caps limit the Act's waiver of immunity from suit.

Petitioner, The Gulf Coast Center, provides mental health services to patients in Galveston and Brazoria Counties. Respondent, Daniel Curry, Jr., was hit by a bus while walking in a pedestrian crosswalk in Texas City. He sued Gulf Coast, the bus's owner and operator, for the injuries he allegedly sustained as a result of the accident. At the trial court, Curry alleged that Gulf Coast is a "governmental unit" and that his claims were within the limited waiver of immunity under Title 5, Chapter 101 of the Texas Civil Practice & Remedies Code. Gulf Coast affirmatively pleaded its status as a governmental unit, and that its liability is limited by the TTCA. A jury eventually found Gulf Coast 100 percent responsible for Curry's injuries and awarded Curry $216,000 in damages. Curry moved for entry of judgment on the full amount of the award with prejudgment interest. Gulf Coast filed a motion for new trial, a motion to correct and modify the judgment, and a motion for judgment notwithstanding the verdict. The trial court denied all three of Gulf Coast's motions and signed a judgment against Gulf Coast for the full amount of the verdict.

Gulf Coast appealed, challenging, among other things, the judgment in excess of the $100,000 statutory cap. The court of appeals affirmed the trial court's judgment. The appellate panel reasoned the final judgment was permissible because "Gulf Coast failed to conclusively establish its status as a unit of local government and failed to obtain an affirmative finding from the jury on that issue." Gulf Coast moved for rehearing and reconsideration *en banc* requesting the court of appeals to correct its error in failing to apply the $100,000 cap on liability, which the court denied.

The Texas Tort Claims Act waives immunity from suit and liability for a "governmental unit." The TTCA imposes damages caps for governmental units whose immunity has been waived under the Act. The Act contains different damages caps, and determining which cap applies hinges on the category into which a governmental unit fits. The four categories are: (1) "the state government"; (2) a "municipality"; (3) a non-municipal "unit of local government"; and (4) an "emergency service organization. State governments and municipalities are subject to a higher damages cap, while units of local government and emergency service organizations are subject to the lower cap.

Gulf Coast argues that the determination of whether an entity constitutes a "unit of local government" for TTCA damages caps purposes is a question of law for courts to decide. Gulf Coast reasons that this determination involves a

straightforward application of unambiguous statutes. Likewise, Gulf Coast contends that the TTCA's damages caps waive immunity from suit only to the extent of the liability that the TTCA creates. Curry, on the other hand, argues that a party's TTCA categorization is a question of fact, and Gulf Coast's failure to seek a jury finding on the issue renders Gulf Coast unable to conclusively establish its status as a "community center" for the first time on appeal. Additionally, Curry argues that Gulf Coast's purported immunity from liability defense is not jurisdictional but instead must be raised as an affirmative defense rather than by jurisdictional plea.

The Court granted Gulf Coast's petition for review on March 11, 2022. Oral argument has yet to be scheduled.