SUPREME COURT OF TEXAS UPDATE
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I. SCOPE OF THIS PAPER

This paper surveys cases that were decided by the Supreme Court of Texas from May 1, 2021, through June 30, 2022. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to amy.starnes@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Enforcement

a) *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (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.

2. Judicial Review

a) *Tex. Comm'n on Env't Quality v. Maverick County*, 642 S.W.3d 537 (Tex. Feb. 8, 2022) [19-1108]

The Texas Commission on Environmental Quality (TCEQ) granted Dos Repúblicas Coal Partnership (DRCP) a permit to discharge wastewater from its surface mining operations. Several local governments, environmental groups, and landowners (collectively, the Permit Contestants) challenged the permit. The central issue in this case was whether DRCP is the mine's "operator" and thus the proper permit applicant.

DRCP owns a coal mine in Maverick County. It hired a contractor to run the day-to-day operations at the mine. DRCP needed a permit to discharge wastewater from the mine. TCEQ regulations require the mine's owner and operator to apply for the permit (unless they are the same entity). The rules further define "operator" as "[t]he person responsible for the overall operation of a facility." Permit Contestants challenged the application, so TCEQ referred the application to the State Office of Administrative Hearings. The assigned Administrative Law Judges held a contested case hearing, after which they issued a Proposal for Decision finding that DRCP is the mine's operator and recommending that TCEQ approve DRCP's application with additional environmental requirements. TCEQ accordingly approved the permit but modified the proposal's environmental suggestions. Permit Contestants challenged the permit in district court, arguing that DRCP was not the mine's operator and that the TCEQ erred on other technical issues. The district court reversed TCEQ's finding that DRCP was the mine's operator but affirmed TCEQ's modifications. The court of appeals affirmed on the operator issue, but it held that it lacked jurisdiction to reach the other issues. So the court of appeals vacated the district court's judgment on those issues. TCEQ and DRCP petitioned for review in the Supreme Court.

The Supreme Court reversed. The Court held that the plain text of TCEQ's definition of operator and not the court of appeal's previously determined definition of "operator" from *Heritage on San Gabriel Homeowners Association v. Texas Commission on Environmental Quality*, 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied), applied. Under the plain text of the rule, there was substantial evidence to support TCEQ's finding that DRCP was the mine's operator.

The Court further held that the court of appeals had jurisdiction to address the remaining issues even after it affirmed the reversal of the permit on the operator issue. The Court explained that a court's prudential decision to decline to reach certain issues not necessary to the disposition of a case is not the same as the constitutional prohibition on advisory opinions.

The Court declined to address the remaining issues without the court of appeals having addressed them first. Accordingly, the Court reversed and remanded the case for further proceedings consistent with the opinion.

3. Jurisdiction

a) *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149 (Tex. June 30, 2021) [19-0777]

The issue in this case was whether the Public Utilities Commission (PUC) has exclusive jurisdiction to adjudicate questions of duty and breach underlying a negligence claim brought against an electric utility. Glenn Higgins was driving when he saw a car hit a CenterPoint Energy utility pole. Higgins got out of his car and walked over to help but stepped on a downed power line and was badly burned. He later died from these injuries. His family sued CenterPoint in probate court for negligence, negligence per se, and gross negligence, asserting that CenterPoint used too large a fuse size and that had CenterPoint used a smaller fuse, Higgins would not have been injured. CenterPoint argued in a plea to the jurisdiction that the PUC had exclusive jurisdiction to adjudicate claims regarding fuse size, which CenterPoint argued involves its core operations and services as an electric utility. The probate court denied the plea, and the court of appeals denied mandamus relief.

The Court denied mandamus relief. A plurality of the Court held that the PUC does not have jurisdiction to adjudicate the negligence claims brought by Higgins' family, who are not eligible to seek relief from the PUC and whose negligence claims do not complain of a statutory or regulatory violation affecting their utility rates or services. It was therefore not an abuse of discretion for the trial court to deny CenterPoint's plea to the jurisdiction.

Chief Justice Hecht dissented, joined by Justice Blacklock. The dissent argued that the Higgins family was eligible to seek relief from the PUC and that their negligence claims involve CenterPoint's electric utility operations, bringing these claims within the PUC's exclusive jurisdiction to adjudicate disputes. Justice Boyd delivered a concurring opinion concluding that mandamus relief must be denied because the Higgins family is not eligible to seek relief from the PUC under the Court's reasoning in *In re Oncor Elec. LLC*, 630 S.W.3d 40 (Tex. 2021). Justice Huddle did not participate in the Court's decision.

b) *In re Oncor Electric LLC*, 630 S.W.3d 40 (Tex. June 25, 2021) [19-0662]

At issue in this case was whether the Public Utility Commission had exclusive jurisdiction over personal injury claims brought by a customer. The customer suffered an electric shock injury after undertaking to trim trees growing near powerlines that crossed his property but did not provide service to his house. The customer claimed that the utility had a duty to maintain the line and its failure to do so caused his injuries. The utility claimed that the "exclusive jurisdiction" provision of the Public Utility Regulatory Act required the customer to exhaust his administrative remedies before the Commission. The trial court denied the utility's plea to the jurisdiction, and the utility sought mandamus relief.

The Court held that the Public Utility Commission does not have jurisdiction over personal injury claims

unrelated to the utility's rates or its provision of electrical service. The Commission's jurisdiction over disputes between "affected persons" as defined by the Act and utilities extends only to disputes that implicate rate-making or the provision of electricity. Because none of the utility's alleged wrongdoing related to rates or the adequate and efficient provision of electrical service, the Court denied mandamus relief.

Chief Justice Hecht dissented, joined by Justice Boyd and Justice Blacklock. The dissent argued that the outcome should have been controlled by *Oncor Electric Delivery Co. v. Chaparral Energy*, 546 S.W.3d 133 (Tex. 2018), in which the Court held that a customer suing a utility for failing to timely provide electrical service must exhaust administrative remedies before the Commission.

c) *In re Tex.-N.M. Power Co.*, 625 S.W.3d 42 (Tex. June 25, 2021) [19-0656]

At issue in this petition for writ of mandamus was whether a plaintiff must exhaust the Public Utility Commission's administrative remedies before bringing a tort claim involving an electric utility's rates, operations, or services. Several plaintiffs sued Texas-New Mexico Power Company (TNM), alleging Water Code violations and common-law negligence, strict liability, and nuisance. TNM's contractor had laid out a temporary roadway while undertaking a project to set a new power substation. During Hurricane Harvey, the roadway washed into a bayou, allegedly exacerbating the flooding that damaged the plaintiffs' homes. The plaintiffs argued TNM was vicariously liable for its contractor's actions. TNM moved to dismiss for want of jurisdiction, arguing the PUC had exclusive jurisdiction and the plaintiffs were required to exhaust administrative remedies. The trial court denied the motion, and the court of appeals denied mandamus relief.

TNM petitioned the Supreme Court for mandamus relief, arguing that the plaintiffs' suit was based on TNM's "operations" and "services," so the PUC had exclusive jurisdiction. TNM relied on *Oncor Elec. Delivery Co. v. Chaparral Energy, LLC*, 546 S.W.3d 133 (Tex. 2018), where the Court held that in light of the comprehensive regulatory scheme the Public Utility Regulatory Act creates, the Act grants the PUC exclusive jurisdiction over all matters involving an electric utility's rates, operations, and services. TNM contended that although *Chaparral* was a contract case, the Court did not limit its holding to only contract cases. The plaintiffs responded that no "service" or "operation" was underway, so the PUC did not have jurisdiction. Further, they argued that the Legislature has not granted the PUC subject matter jurisdiction over tort suits.

The Court agreed with the plaintiffs. It recognized that the Act's definition of *services* and *operations* are broad and inclusive terms. In *Chaparral*, the broadness of *services* was decisive in finding that the PUC had exclusive jurisdiction since that case involved a breach of contract to provide electricity. However, this case stood in contrast to *Chaparral*. Specifically, the Court reasoned that the plaintiffs' Water Code and common-law tort claims

were not about TNM's services or operations. Further, the limitation-of-liability and force majeure provisions in TNM's tariff were insufficient to transform the plaintiffs' claims into ones about TNM's services or operations. Because the plaintiffs' claims did not involve TNM's services or operations, the PUC did not have exclusive jurisdiction over their claims.

d) *Pape Partners v. DRR Fam. Props., LP,* — S.W.3d —,2022 WL 1592723 (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.

4. School District Grievances

a) *Davis v. Morath*, 624 S.W.3d 215 (Tex. May 28, 2021) [19-1035]

The case presented several issues relating to grievances that teachers filed with their school district. In 2014, the Dallas Independent School District adopted a procedure called the Teacher Excellence Initiative, or TEI. TEI included a comprehensive set of rules and protocols used to evaluate teacher performance and determine teacher compensation. Under TEI, teachers would receive a final scorecard that rated teachers in three categories. The scorecards for the 2014–2015 school year were distributed in September 2015. A group of teachers were unhappy with their scorecards and TEI in general and brought a grievance with the District. Under District rules, a grievance must be brought "no later than ten [business] days from the date the employee first knew or, with reasonable diligence, should have known of the decision or action giving rise to the grievance or complaint." The grievance was filed ten business days after the teachers received their scorecards. The District, through its formal hearing process, concluded that the grievance was not timely filed. The teachers appealed the District's decision to the Commissioner of Education under section 7.057(a) of the Education Code. The petition to the Commissioner made general allegations that the entire TEI process was inequitable, arbitrary, capricious, and unlawful. The petition also complained that the scorecards were not distributed "during" the school year as allegedly required by section 21.352(c) of the Education Code. An administrative law judge issued a Proposal for Decision recommending dismissal of the petition for lack of jurisdiction because the grievance was untimely. The Commissioner then rendered a decision agreeing with the Proposal for Decision. The teachers appealed to the trial court, which affirmed the Commissioner's decision without a written opinion. The teachers appealed, and the court of appeals addressed various issues. The court of appeals held that the Commissioner had jurisdiction to hear the appeal. It held that the grievance was untimely insofar as it presented a "components grievance" related to the components of the TEI system. But the court of appeals held that the "appraisal grievance," including the complaint that the scorecards should have been distributed during the school year for which they applied, was timely.

The Supreme Court affirmed in part and reversed in part. The Court agreed with the court of appeals that the Commissioner had jurisdiction to hear the grievance. The Commissioner had jurisdiction to hear the appeal whether or not the teachers met the ten-day deadline under District rules for filing a grievance. The Commissioner's jurisdiction is set by the legislature under section 7.057(a) and extends to appeals if a person "is aggrieved by . . . actions or decisions" of a school district that allegedly violate "the school laws of this state" or "a provision of a written contract" between the school district and its employee. The teachers' appeal fell within this grant of jurisdiction.

The Court then considered whether, on the merits, the grievance

filed at the district level was filed within the District's ten-day deadline. The Court concluded that all complaints about TEI, whether characterized by the Commissioner or the court of appeals as a "components grievance" or an "appraisal grievance," were timely because they were filed within ten days of the relevant "action" of the District. The Court reasoned that the distribution of the scorecards was an "action" that gave rise to the grievance. The ten-day rule turns on the action of the District, not the reasons why the action is allegedly illegal or whether the alleged illegality originated in earlier policy decisions. Further, the teachers were not aggrieved by the District's action or decision until they received their scorecards. They might have been pleased with their scorecards, and many teachers apparently were pleased as they did not join the suit.

The Court also rejected the Commissioner's argument that the teachers filed inadequate exceptions to the Proposal for Decision as required by regulation. The exceptions filed by the teachers were lengthy and adequately put the agency on notice of arguments the teachers later made.

5. Texas Civil Commitment Office

a) *Matzen v. McLane*, — S.W.3d —, 2021 WL 5977218 (Tex. Dec. 17, 2021) [20-0523]

This case concerned rulemaking under the Sexually Violent Predators Act (Act). In 2014, a jury found Gerard Matzen to be a sexually violent predator under the Act. Pursuant to the Act's procedures at the time, the trial court issued a civil commitment order placing Matzen in outpatient treatment. In 2015, the Legislature amended the Act. The amendments required the trial court to issue a new commitment order. The trial court issued a new commitment order after a hearing. Matzen received notice of the hearing and actively participated in it. Under the amended Act and amended commitment order, Matzen was placed in a more restrictive inpatient facility. The amended Act also required Matzen to pay for his treatment to the extent he was able. Under new rules, Matzen was ordered to pay a portion of his military pension and other income to cover some of the costs of his treatment, housing, and tracking.

The Act is administered by the Texas Civil Commitment Office (TCCO) under provisions of the Government Code and the Health and Safety Code. Matzen objected to the new conditions imposed on him. He sued the TCCO and its director for numerous constitutional, statutory, and common-law violations. The State defendants filed a plea to the jurisdiction. The trial court dismissed all of these claims except for two alleged constitutional violations under the federal and state Constitutions: a procedural due process violation and a violation of the Takings Clauses. On interlocutory appeal, the court of appeals affirmed the district court ruling. Both sides appealed.

The Supreme Court affirmed in part and reversed in part, holding that all of Matzen's claims against the State defendants should be dismissed. One of Matzen's principal arguments was that, under the Act, only the TCCO

"Office" was authorized to make regulations relevant to his commitment, and the regulations were invalid because they were promulgated by the TCCO Board instead of the Office. The Court held that Matzen was misreading the relevant statutory provisions, and that the TCCO Board, as the apex governing authority of the agency, was authorized to promulgate regulations. The Court further held that Matzen received all the process he was due because he received notice and a hearing when his commitment order was amended. Further, when the legislature enacts a law or an agency adopts a regulation that affects a general class of persons, those persons have received procedural due process by the legislative process itself.

The Court also held that Matzen had not stated a cognizable takings claim. The requirement under the new statute that Matzen pay a portion of his income to cover the costs of his treatment, housing, and tracking was not an unconstitutional taking, because the State is permitted to charge user fees for its services, including fees covering the costs of services provided to incarcerated persons.

The Court further held, in reviewing Matzen's petition, that the courts below had not erred by dismissing some of Matzen's claims. Again, insofar as these claims were premised on his argument that the TCCO Board lacked authority to adopt regulations, these claims failed because the Board was so authorized.

Matzen argued that the new payment and confinement requirements imposed on him by the amended Act were unconstitutional retroactive laws. The Court held that the new requirements were not unconstitutional because the new requirements were imposed prospectively after a hearing, and because Matzen's original commitment order and the original Act informed Matzen that the conditions of his confinement were subject to change. Thus, for purposes of a retroactivity analysis, Matzen could not claim that the original terms of his commitment were "vested" in the sense that Matzen had a reasonable expectation that they could not be altered in the future. Matzen also made arguments that his commitment must be subjected to a "strict scrutiny" analysis, and that an alleged unwritten rule governing his commitment created an illegal "debtor's prison." The Court rejected these claims because they were not properly preserved below.

6. Texas Water Code

a) Dyer v. Tex. Comm'n on Env't Quality, — S.W.3d —, 2022 WL 2082193 (Tex. June 10, 2022) [19-1104]

The main issues in this case concern the Texas Commission on Environmental Quality's authority to grant an injection-well permit after a final order from the Railroad Commission rescinding the statutorily required no-harm letter, and the extent of TCEQ's authority to alter and add findings of fact following a contested case hearing.

TexCom Gulf Disposal, LLC, sought to develop a commercial waste disposal facility in Montgomery County. TexCom applied for TCEQ permits to operate one existing Class I injection well and three others it planned

to construct. The Injection Well Act (IWA) requires the application be accompanied by a letter from the Railroad Commission verifying that the well would not harm any known oil or gas reservoirs. The Railroad Commission issued this no-harm letter and TCEQ preliminarily approved the application. Montgomery County, the City of Conroe, affected individuals, and other parties challenged this approval, arguing the wells would harm their sole source of underground drinking water.

The State Office of Administrative Hearings (SOAH) held a contested case hearing on the matter. SOAH submitted a proposal for decision to TCEQ recommending it conditionally grant TexCom's permits, but TCEQ remanded, instructing SOAH to consider new evidence.

Around this time, Denbury Onshore acquired a mineral interest underneath the proposed site and intervened in the process in opposition to the permits. SOAH conducted another hearing, with Denbury as a party, and issued an amended proposal for decision. It now recommended denying TexCom's applications, reasoning that Denbury's future operations would pump disposed waste back to the surface. Two months later, at Denbury's request, the Railroad Commission issued a final order rescinding its previous no-harm letter. But that rescission would not become effective for ninety days. Before those ninety days passed, TCEQ issued a revised final order granting TexCom's application. TCEQ changed some of SOAH's findings of fact.

The County, City, individuals, and Denbury sought judicial review of TCEQ's order, arguing primarily that the recission of the no-harm letter voided the proceedings and that TCEQ did not have the authority to change the findings of fact that it did. The trial court affirmed TCEQ's order. The parties appealed, but before a decision was made Denbury filed a motion to dismiss its appeal, which was granted. A divided court of appeals affirmed the trial court. The remaining parties filed a petition for review with the Supreme Court.

The Court first examined two issues arising out of the Railroad Commission's recission of the no-harm letter: (1) whether the Railroad Commission's rescission of its no-harm letter voided TCEQ's final order for lack of jurisdiction, and (2) whether TCEQ acted arbitrarily, capriciously, or abused its discretion by deciding not to reopen the record after that rescission. The Court held that the Railroad Commission's rescission of its no-harm letter did not void TCEQ's final order. The rescission was not yet effective when TCEQ issued its final order, meaning that TCEQ made its decision with an active no-harm letter before it. Since TCEQ followed the statutory requirements, the not-yet-effective recission could not void the order. The Court next held that TCEQ did not act arbitrarily, capriciously, or abuse its discretion by deciding not to reopen the record and undergo more proceedings after the Railroad Commission's rescission. TCEQ had all of the relevant evidence before it, including the Railroad Commission's final order and the evidence that made

the Railroad Commission change its mind.

The Court then held that TCEQ had the authority to make its changes to SOAH's findings of fact. The Legislature specifically granted TCEQ broad authority to amend the proposal for decision, including any finding of fact. This specific grant governed over the general grant provided to other agencies. TCEQ accordingly did not overstep its statutory authority by adding to and changing SOAH's findings, so long as the changes were supported by substantial evidence. The Court held that in this case, they were. TCEQ also adequately explained its changes by providing the basis for its decision and allowing the petitioners to prepare their appeal.

The Court also addressed various other arguments raised by the petitioners. The Court held that certain changes made in a revised final order were clerical in nature, made to conform the memorialized order to the decision reached by TCEQ. It also agreed with the court of appeals that the respondents' failure to give a mineral-interest-owner the statutorily required notice did not provide a basis for reversal of TCEQ's order in this case. Accordingly, the Court affirmed the judgment of the court of appeals.

B. ANTITRUST

1. Evidence of Agreement

b) *AMC Ent. Holdings, Inc. v. iPic-Gold Class Ent., LLC*, 638 S.W.3d 198 (Tex. Jan. 14, 2022) [20-0014]

This case concerned an allegation by boutique-theater chain iPic that megaplex-theater chain AMC conspired with another megaplex-theater chain under Section 15.05(a) of the Texas Free Enterprise and Antitrust Act to put iPic out of business. The evidence turned on a film-industry practice in which a theater asks a film's distributor to grant it a "clearance"—an exclusive license to show the film in the theater's geographic market for a period of time. The evidence showed that on the same day in July 2014, AMC asked several film-distribution companies to grant it clearances against an iPic theater that was planned in Frisco, while AMC's rival, Regal Entertainment Group, asked the same distribution companies to grant it clearances against an iPic under construction in Houston. iPic alleged that AMC and Regal conspired to assert clearances against these iPic theaters in order to put iPic out of business in Frisco and Houston. After iPic and Regal settled, the trial court granted summary judgment for AMC, but the court of appeals reversed.

The main issue in the Supreme Court of Texas was whether iPic had raised a fact issue on the existence of a conspiratorial agreement between AMC and Regal. The Court explained that the Texas statute is construed in accordance with federal law construing Section 1 of the Sherman Antitrust Act and that decisions of the Supreme Court of the United States limit what inferences can reasonably be drawn from circumstantial evidence of a conspiracy. Specifically, the jurisprudence of the Supreme Court of the United States teaches that (1) parallel business conduct, alone, is insufficient evidence of conspiracy, (2) when the conspiracy alleged is implausible, more

persuasive evidence is needed to survive summary judgment, and (3) the plaintiff's evidence must tend to exclude the possibility that the defendants acted independently.

The Supreme Court of Texas first held that the factual context of the case rendered iPic's conspiracy claim implausible. The Court pointed out the undisputed evidence that a Regal executive had informed an iPic executive that Regal planned to "clear" iPic's Houston theater several months before iPic began planning a theater in Frisco. The Court also observed that AMC and Regal did not need to work together in order to seek the clearances that each sought.

The Court went on to examine the evidence in light of the "plus factors" that federal courts have found to suggest an agreement. The Court characterized iPic's evidence as resting on parallel business conduct and suspicion and concluded that it did not tend to exclude the possibility that AMC acted independently of Regal. Accordingly, the Court reversed the court of appeals and rendered judgment for AMC and Regal.

C. ARBITRATION

1. Enforcement of Arbitration Agreement

a) *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. May 28, 2021) [20-0290]

At issue in this case was whether plaintiffs' testimony—that arbitration agreements bearing their electronic signatures were not part of their pre-employment application paperwork—was sufficient to create a genuine fact issue as to whether the plaintiffs agreed to arbitrate their claims. Aerotek, Inc., a staffing-services company, provided supplemental staffing for a construction project in Plano, Texas. Lerone Boyd, Michael Marshall, Jimmy Allen, and Trojuan Cornett (collectively, the Employees) were each furnished by Aerotek to work on the project. The Employees were all eventually and separately terminated. They then sued Aerotek, among others. Aerotek moved to compel arbitration. Among other evidence, it cited the Electronic Disclosure Agreement that each Employee electronically signed, agreeing to conduct his hiring paperwork electronically. It also cited the mutual arbitration agreement (MAA) each Employee purportedly signed electronically as part of his pre-employment application using Aerotek's online hiring application. The Employees, who did not dispute that they each used Aerotek's online hiring application, denied ever signing or seeing the MAA and submitted sworn declarations to that effect. The trial court held a hearing to determine whether the Employees agreed to arbitrate their claims. Aerotek's program manager testified that it was a "physical impossibility" for the Employees to have completed the online hiring application without electronically signing the MAA. Aerotek also submitted verified evidence (for example, activity logs and date-and-time stamped records) in support of that testimony. The trial court denied the motion.

Aerotek filed an interlocutory appeal. A split court of appeals affirmed, holding that the evidence was legally sufficient to support the trial court's refusal to compel arbitration. Specifically, the court of appeals

concluded that Aerotek's evidence did not conclusively establish that it was physically impossible to complete its online hiring application without electronically signing the MAA. A dissent would have held that the program manager's testimony was sufficient to authenticate the Employees' signatures under the Texas Uniform Electronic Transactions Act (the Act). Aerotek moved for en banc reconsideration. The court denied its request. Four justices dissented and would have held that the majority opinion crafted a special rule for enforcing arbitration contracts in violation of the Supremacy Clause.

Aerotek petitioned the Supreme Court for review, arguing that its evidence of the hiring application's "security procedures" conclusively showed that the Employees had electronically signed their MAAs. The Employees disagreed, arguing that their sworn denials created a fact issue that the trial court resolved in their favor. Chief Justice Hecht, writing for the Court, agreed with Aerotek. Under the Act, when the Employees and Aerotek agreed to conduct the hiring process electronically, they opted in to the Act's framework for electronic-signature attribution. Under that framework, parties may attribute an electronic signature to a person "if it was the act of that person." TEX. BUS. & COM. CODE § 322.009(a). The person's act "may be shown in any manner," including by showing "the efficacy of any security procedure[s]" used to attribute the electronic signature to that person. *Id.* Applying the Act to Aerotek, the Court held that Aerotek's security-procedure evidence conclusively showed that the Employees could not have completed the online hiring application without electronically signing their MAAs. Among other things, the online hiring application used secret information—like Employee-generated passwords—to prevent anyone but the Employees from attaching their signatures to hiring paperwork. Aerotek lacked the ability to change the Employees' signatures once they submitted them. And Aerotek's online hiring application's "business rules" prevented the Employees from completing it without electronically signing their MAAs. The Employees' bare denials did not change that result because the denials did not affirmatively show how their electronic signatures could have wound up on their MAAs without the Employees placing them there themselves.

Justice Boyd dissented. He would have affirmed the court of appeals' judgment. In his view, the Employees' sworn denials created a fact issue for the trial court to decide and Aerotek's evidence was not conclusive. Under a legal-sufficiency review, therefore, Justice Boyd would have deferred to the trial court's finding that the Employees had not signed their MAAs.

a) *Baby Dolls Topless Saloons, Inc. v. Sotero*, 642 S.W.3d 583 (Tex. Mar. 18, 2022) (per curiam) [20-0782]

At issue in this case is whether three terms in a written contract—"relationship," "license," and "this agreement"—are so unclear as to render the contract and the arbitration agreement contained therein unenforceable. And further, if the contract is valid and

enforceable, whether arbitration is appropriate.

This dispute arose from the tragic death of Stephanie Sotero Hernandez. Hernandez was killed in a high-speed crash while riding in a car driven by Mayra Naomi Salazar in the early morning hours after the two adult entertainers had left work at Baby Dolls Topless Saloons (the Club). Hernandez's family sued the Club for wrongful death and survival damages, alleging that the Club served Salazar alcohol after knowing she was clearly intoxicated. Almost two years prior to the accident, Hernandez and the Club had signed a 12-page contract—referred to throughout the written contract as "this Agreement"—giving Hernandez a "revocable license (the License) and non-exclusive right to use and occupy the designated portions of the [Club's premises]" for "the performing of live erotic dance entertainment and related activities." The contract contained a broad arbitration provision "pursuant to the Federal Arbitration Act[.]" Once the Family sued the Club, the Club moved to compel arbitration. A divided court of appeals affirmed the trial court's denial of the Club's motion to compel arbitration. The court of appeals held that "the parties' minds could not have met regarding the contract's subject matter and all its essential terms such that the contract is not an enforceable agreement."

In a per curiam opinion, the Supreme Court reversed and directed the trial court to grant the Club's motion to compel arbitration. The Court resolved the contract's alleged ambiguities using well-established principles of contract construction. Additionally, because the contract's arbitration provision clearly and unmistakably delegated threshold arbitrability questions to an arbitrator, the Court compelled arbitration for the arbitrator to decide any gateway issues the parties had agreed to arbitrate. Finally, addressing the Family's alternative argument—that even if a valid contract existed at some point, it had expired by the time of Hernandez's accident—the Court held that, based on the separability doctrine, such a question is for an arbitrator to decide because it does not call the contract's formation or validity into question.

b) *CHG Hospital Bellaire, LLC v. Johnson*, — S.W.3d —, 2022 WL 1194354 (Tex. Apr. 22, 2022) (per curiam) [21-0441])

This case concerns whether an employee's sworn testimony that she did not recall acknowledging an electronic arbitration agreement is sufficient to create a fact issue as to its validity. Seketa Johnson was injured on the job and sued her employer, CHG Bellaire, LLC, for negligence, gross negligence, and premises liability. CHG moved to compel arbitration, arguing that the parties had consented to an enforceable arbitration agreement. The trial court denied the motion. The court of appeals affirmed, holding that Johnson's sworn testimony that she did not recall acknowledging the arbitration agreement at issue created a fact question as to its validity.

After the court of appeals issued its opinion, the Supreme Court decided *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021). CHG appealed, and the

parties agreed that under *Aerotek*, Johnson failed to raise a fact issue as to whether she consented to the arbitration agreement. Accordingly, the Court reversed the court of appeals' judgment and remanded the case so it could consider Johnson's alternative argument that her claims do not fall within the scope of the arbitration agreement.

c) *Wagner v. Apache Corp.*, 627 S.W.3d 277 (Tex. Apr. 9, 2021) [19-243, 19-0244]

At issue in this case was whether a valid arbitration agreement existed between Apache Corporation and Wagner Oil Company, Bryan Wagner, Trade Exploration Corporation, and Wagner & Cochran (collectively, plaintiffs) and if so, whether Apache's claims for indemnity against plaintiffs fell within the scope of the arbitration clause. Also at issue was whether Apache was entitled to a transfer of venue. Wagner Oil Company purchased oil and gas assets from Apache in 2001. The sale was made pursuant to a Purchase and Sale Agreement (PSA) and an assignment (the Apache Assignment). The PSA contained an arbitration clause and an indemnification provision. Wagner Oil assigned the assets to Bryan Wagner, Trade Exploration, and Wagner & Cochran (collectively, the Wagner Oil assignees). This assignment was governed by a third document, the Wagner Oil Assignment. In 2011, Apache incurred legal expenses related to the defense of claims arising from the oil-and-gas assets at issue. Apache filed a demand for arbitration against plaintiffs for indemnity and defense. The plaintiffs filed a declaratory judgment action seeking a declaration that, among other things, the Wagner Oil assignees were not subject to the arbitration provision. Wagner Oil also sought a declaration that Apache's underlying claim was not subject to mandatory arbitration because it was exempted by a carve-out. Apache filed a motion to compel arbitration and a motion to transfer the case to Harris County. The trial court denied the motions. Apache appealed, and the court of appeals reversed, concluding that the trial court abused its discretion by denying Apache's motion to compel arbitration.

The Supreme Court affirmed. The Court first considered whether the claims for indemnification fell within the scope of the arbitration agreement. The agreement contained a carve-out providing that if a third party brought a claim regarding the assets, Wagner Oil and Apache "shall not be subject to mandatory arbitration under this section and . . . shall each be entitled to assert their respective claims, if any, against each other in such third party action." The Court held that under this language, mandatory arbitration did not apply and the option to bring suit applied only if the claims were brought in a third-party action. The carve-out did not permit plaintiffs to bring the claims here in a separate suit. The Court next addressed whether the Wagner Oil assignees, as nonsignatories, were bound by the arbitration clause in the PSA. The Court held that the Wagner Oil assignees were bound to the PSA under the theory of assumption because in the Wagner Oil Assignment they "assume[d] and agree[d] to be bound by and perform their proportionate parts" of "all obligations

imposed upon Wagner Oil." The Court rejected the Wagner Oil assignees' claim that they did not agree to assume all obligations in the Apache Assignment but that they only agreed to assume their proportionate share of divisible obligations. The Court held that the assignees assumed and agreed to be bound by "all" obligations imposed on Wagner Oil. Finally, the Court rejected Apache's claim that even if the Court ordered arbitration, it should also order a transfer of the underlying case from Tarrant County to Harris County. Apache did not seek a writ of mandamus in the Court regarding the trial court's denial of its motion to transfer venue, and it did not cite any authority in support of its position that it was entitled to relief on the venue issue on interlocutory appeal. The Court, therefore, did not address the trial court's ruling on the motion to transfer venue.

d) *In re Whataburger Restaurants LLC*, — S.W.3d —, 2022 WL 1194373 (Tex. Apr. 22, 2022) [21-0165]

There are two issues in this mandamus proceeding: (1) whether a party who does not receive notice of an order in time to appeal because of a trial court clerk's error may appeal; and (2) whether an arbitration agreement between Whataburger Restaurants LLC (Relator) and Yvonne Cardwell (Real Party in Interest) is illusory. On both issues, the Supreme Court held in Whataburger's favor.

In February 2013, Cardwell sued her employer, Whataburger, alleging that she had been injured while working as a dishwasher at one of Whataburger's El Paso restaurants. Whataburger moved to compel arbitration based on its mandatory arbitration policy. The trial court denied Whataburger's motion, holding that the policy was unconscionable. The court of appeals reversed the trial court's order and remanded with instructions to the trial court to grant Whataburger's motion and order arbitration, but the court of appeals failed to adjudicate Cardwell's cross-points. The Supreme Court granted Cardwell's petition for review, and without hearing oral argument, issued a short per curiam opinion reversing and remanding to the court of appeals to either address Cardwell's alternative arguments or remand the case to the trial court to address them. On remand, the court of appeals rejected all of Cardwell's remaining arguments but one: that the policy was illusory because Whataburger could revoke it at any time. The court declined to resolve the issue and instead remanded the case to the trial court because (1) neither party had entered the entire handbook into the record and (2) it was unclear to the court of appeals whether the trial court had passed on the illusoriness issue when it denied Whataburger's motion to compel initially.

From there, Whataburger filed a supplemental motion to compel arbitration addressing Cardwell's illusoriness argument. A month later, the trial court denied the motion with a one-sentence order (the August 2018 order). However, the clerk failed to give Whataburger or Cardwell notice of the order denying the supplemental motion to compel arbitration. Whataburger received notice of the order 153 days after

it had been issued—long after both the twenty-day deadline to appeal and the ninety-day deadline extension allowed by Texas Rule of Civil Procedure 306a. Eight days after learning of the denial of its supplemental motion to compel, Whataburger moved for reconsideration and for a determination of the date it received notice of the order. The trial court denied the motion to reconsider. It then issued an order establishing that Whataburger had not received notice of its order denying the supplemental motion to compel within ninety days of its issuance. Whataburger sought mandamus relief in the court of appeals, and without hearing argument, a divided court denied relief in January 2021.

The Supreme Court first held that Whataburger lacked an adequate appellate remedy by appeal. The Court reasoned that Whataburger was deprived of its right to appeal an interlocutory order by the trial court clerk's failure to give the required notice of the August 2018 order, and then by the trial court's refusal to vacate the August 2018 order and decide Cardwell's illusoriness challenge anew. The Court explained that counsel should have some right to rely on the text of Rule 306a, which imposes a duty on clerks to provide notice of trial court orders. Further, the Court noted that Whataburger acted promptly to protect is right to appellate review upon learning of the August 2018 order, and as a result, it had not slept on its rights.

Second, the Court held that the trial court abused its discretion in denying Whataburger's motion to compel arbitration. Here, the Court addressed Cardwell's illusoriness argument, noting that the policy contains detailed restrictions on Whataburger's ability to change the policy. Pointing to a case with similar arbitration policy language, the Court concluded that the policy's restrictions on Whataburger's ability to modify or revoke the policy rendered it not illusory. The Court then turned to Cardwell's additional illusoriness argument: the policy's language conditions the parties' promises to arbitrate on Cardwell's continued, at-will employment. The Court noted a prior case with substantially similar policy language that the Court had upheld. The Court explained that the policy here makes clear that the parties' agreement to arbitrate was not dependent on Cardwell employment status, and as a result, the policy is not illusory. For these reasons, the Court conditionally granted mandamus relief.

D. ATTORNEYS

1. Attorney Immunity / Judicial-Proceedings Privilege

a) *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40 (Tex. May 21, 2021) [19-0036]

At issue was whether either the attorney-immunity doctrine or judicial-proceedings privilege apply to an attorney's pre-suit efforts to publicize allegedly defamatory statements. Landry's, Inc. owns Houston Aquarium, Inc., which operates the Downtown Aquarium in Houston. Four white Bengal tigers live at the aquarium. In March 2015, Cheryl Conley, a radio station owner, asked Landry's for a behind-the-scenes tour of the tiger habitat. Landry's obliged, allowing Conley to photograph the tigers and their

environs and answering her questions about the animals.

In October 2015, Conley contacted the Animal Legal Defense Fund (ALDF) about the tigers. On September 19, 2016, Carney Nasser, an attorney at ALDF, along with a law firm, sent Landry's a 60-day notice of intended suit under the Endangered Species Act (ESA). The notice letter, written on behalf of ALDF and Conley, informed Landry's of their "intent to sue" under the ESA's citizen-suit provision. The same day, ALDF posted a press release on its website describing the service of the notice letter and criticizing the tigers' conditions. A link directed readers to the notice letter. ALDF also sent a copy of the notice letter to media outlets. Additionally, Nasser and ALDF posted about the tigers on social media. On November 17, 2016, Landry's sued Conley, Nasser, and ALDF for defamation, business disparagement, tortious interference, abuse of process, trespass, and civil conspiracy. Landry's sought actual damages, exemplary damages, declaratory relief, an order that the defendants retract the allegedly defamatory statements, and an injunction prohibiting the defendants from "further defaming or disparaging Landry's." ALDF, Nasser, and Conley sought dismissal based on the judicial-proceedings privilege. ALDF and Nasser also sought dismissal based on attorney immunity. The trial court dismissed the case and ordered Landry's to pay $450,000 in TCPA sanctions.

The court of appeals held the judicial-proceedings privilege immunized the defendants from liability for the challenged statements. Although the court of appeals observed in passing that some of the allegedly defamatory statements seemed to be mere opinions or otherwise non-actionable, it assumed that Landry's met its burden to establish by clear and convincing evidence each essential element of its defamation claim. The court of appeals then concluded the judicial-proceedings privilege shielded the defendants from liability for the challenged statements, whether or not the statements were otherwise actionable. The court affirmed dismissal of Landry's tortious interference and business disparagement claims for the additional reason that Landry's failed to make a prima facie case that ALDF's statements caused Landry's damages. The court affirmed the dismissal of all of Landry's other claims as well. Finally, the court of appeals suggested a remittitur of the sanctions.

Landry's sought Supreme Court review of the dismissal of its defamation, business disparagement, and tortious interference claims, as well as the sanctions award. The Supreme Court affirmed in part and reversed in part. It affirmed the dismissal of the business disparagement and tortious interference with prospective business relations claims. But it held that neither the judicial-proceedings privilege nor attorney immunity barred the defamation claims. It explained that the defendants lost the judicial-proceedings privilege's protection when they repeated the notice letter's allegations for publicity purposes outside of the judicial proceeding itself. The Court also determined that the attorney-immunity doctrine did not apply because although the notice letter was itself the product of lawyerly work for a client

involving the office, professional training, skill, and authority of an attorney, the publicity statements to the media were not. The Court remanded the defamation claims and sanctions issue to the court of appeals for further consideration in light of its ruling.

2. Fees

a) *Sunchase IV Homeowners Ass'n, Inc. v. David Atkinson*, 643 S.W.3d 420 (Tex. Apr. 8, 2022) (per curiam) [20-0682]

The issue in this case is whether a defendant condominium association is entitled to attorney's fees after obtaining a take-nothing judgment on claims by a plaintiff unit owner.

David Atkinson, a unit owner, sued the homeowners association of Sunchase IV, a condominium complex in South Padre, Texas. Following hurricane damage, Atkinson alleged that Sunchase, among other things, created a fraudulent scheme tokeep insurance monies from, and shift repair obligations to, individual owners. He also argued that Sunchase violated its governing documents by making changes to individual units, failing to repair common elements, and violating settlement terms involving preferential parking. Sunchase responded with a declaratory judgment counter claim and a request for attorney's fees under the Uniform Condominium Act and the Uniform Declaratory Judgments Act. The trial court granted Sunchase's motion for summary judgment on twelve declaratory issues and the jury found against Atkinson on his remaining claims. The jury also concluded that Sunchase was entitled to reasonable attorney's fees.

The court of appeals affirmed the trial court's take-nothing judgment but heldthat Sunchase was not entitled to attorney's fees under either ground argued at trial. As to the UDJA, the court concluded that Sunchase did not state a claim for affirmative relief because its request for declaratory relief was a mirror image of Atkinson's claims. Regarding the Condominium Act, the court of appeals concluded that Sunchase was not a prevailing party because (1) it was not adversely affected by a violation of Chapter 82 or the condominium's declaration or bylaws, and (2) it did notseek affirmative relief.

Because the Court previously held that a party may qualify as a "prevailing party" by "successfully defending against a claim and securing a take-nothing judgment," the Court held that Sunchase is entitled to attorney's fees as a prevailing party under the Condominium Act. Contrary to the court of appeals' conclusion, Sunchase—a defendant—need not have shown that it was adversely affected by a violation of the Condominium Act or that it obtained affirmative relief. A party that successfully defends against a plaintiff's main issues and obtains a take-nothing judgment qualifies as a prevailing party because it obtains actual and meaningful relief that materially alters the parties' legal relationship. Because Atkinson alleged that his damages were due to violations of Sunchase's governing documents, his suit was an "action to enforce" the condominium's declaration and bylaws, and Sunchase obtained a take-nothing judgment on all of Atkinson's claims, Sunchase is a prevailing party and

entitled to attorney's fees under Chapter 82. The Court did not reach Sunchase's Declaratory Judgment Act ground.

Without hearing oral argument, the Court granted Sunchase's petition for review, reversed the court of appeals' judgment as to attorney's fees, and reinstated the trial court's judgment awarding fees to Sunchase.

3. Liability to Non-clients

a) *Haynes and Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65 (Tex. May 21, 2021) [20-0066]

This case concerns the scope of the attorney-immunity defense. In 2009, the owners of Bernardo brand footwear hired attorney Arthur "Arty" Howard, then a partner at Haynes and Boone, to represent the company in all of its "business, financial and legal matters," including removing the company's manager from his position. Through his work for Bernardo, Howard learned that the former manager had previously concluded that five of the company's patents were invalid because Bernardo's patent attorneys had missed filing deadlines.

In 2010, the owners decided to sell the Bernardo brand assets. Howard prepared a "Confidential Business Profile," describing the company and its assets. The profile asserted that Bernardo consistently developed, protected, and defended its intellectual property and that its patents bore "significant" value, specifically listing the five "worthless" patents.

NFTD bought the Bernardo brand. NFTD's principals claim that Howard made several misrepresentations to them regarding the Bernardo brand assets and regarding other interested buyers. They also assert that Howard improperly convinced them to hire Howard to register the patents once NFTD purchased the assets, even though he was then still representing the former owners.

In 2014, NFTD sold Bernardo to a company called JPT Group, LLC. NFTD signed an agreement expressly representing that all of the Bernardo patents were "valid and enforceable." Seven months later, JPT Group filed suit against a competitor for infringing the Bernardo patents, only to conclude that the patents were invalid. JPT Group sued NFTD for breaching their asset-purchase agreement and the warranties provided in that agreement.

In response to JPT Group's suit, NFTD added Howard and Haynes and Boone as third-party defendants, alleging that they too knew that the patents were invalid and asserting claims for negligence, gross negligence, negligent misrepresentation, breach of fiduciary duty, fraud, and fraud in the inducement. Howard and Haynes and Boone then moved for summary judgment, arguing that the attorney-immunity defense applies and bars all of the remaining claims. Citing this Court's opinion in *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015), they argued that attorney immunity bars NFTD's claims because the claims are based on actions Howard and Haynes and Boone took within the scope of their representation of the original owners, in opposition to NFTD's interests. The trial court granted summary judgment in favor of Howard and Haynes and Boone and dismissed all the claims against them. The court of

appeals reversed the trial court's summary judgment, holding that attorney immunity does not "extend . . . beyond the litigation context" and "should not be extended to a business transaction."

The Supreme Court reversed the court of appeals' judgment and held that attorney immunity applies in all contexts in which an attorney has a duty to zealously and loyally represent a client, including a business-transactional context, but only when the claim against the attorney is based on the "kind" of conduct attorney immunity protects. Summarizing the history of the attorney-immunity defense, the Court held that attorney immunity protects an attorney against a non-client's claim when the claim is based on conduct that (1) constitutes the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests. And whether the defense applies depends on whether the claim is based on this "*kind*" of conduct, not on the nature of the conduct's alleged wrongfulness. The Court confirmed that attorney immunity applies to claims based on conduct outside the litigation context because it saw no meaningful distinction between the litigation context and the non-litigation context when it comes to the reasons it recognized attorney immunity in the first place. Attorneys are duty-bound to competently, diligently, and zealously represent their clients' interests while avoiding any conflicting obligations or duties to themselves or others. Attorney immunity exists to promote such "loyal, faithful, and aggressive representation" by alleviating in the mind of the attorney any fear that he or she may be sued by or held liable to a non-client for providing such zealous representation. An attorney's duty to provide such loyal representation does not arise only in a litigation context. Zealous representation must occur not just in litigation but in "all professional functions" of an attorney.

Because the court of appeals concluded that attorney immunity does not apply in the non-litigation context, it did not reach arguments made by NFTD that at least some of Howard's allegedly fraudulent conduct was not the kind of legal services to which the defense applies. The Court therefore remanded the case to the court of appeals to consider these issues it did not reach.

b) *Taylor v. Tolbert*, 644 S.W.3d 637 (Tex. May 6, 2022) [20-0727]

The issue in this case is whether attorney immunity applies to nonclient civil suits alleging an attorney has engaged in conduct criminalized by statute.

In this case, nonclients filed a civil suit alleging a lawyer violated state and federal law by improperly "using" and "disclosing" electronic communications illegally "intercepted" by the lawyer's client and others during a child-custody modification proceeding. At some point during that proceeding, an iPad belonging to the client's sister-in-law began receiving text messages and emails between the client's ex-wife and other individuals. The

client shared his ex-wife's messages and emails with his attorney for use in the modification proceeding. The iPad was also turned over to a forensic expert for back-up imaging.

The attorney moved for summary judgment on the pleadings, arguing that attorney immunity precludes her liability as a matter of law. The trial court agreed, but a divided court of appeals reversed and remanded.

The Supreme Court held that immunity attached to the state wiretapping claims but not to the federal claims. The attorney conclusively established that the conduct at issue occurred within the scope of her representation and was not foreign to the duties of an attorney. But, the Court explained, conduct prohibited by statute is neither categorically excepted from the attorney-immunity defense nor categorically immune from liability. Rather, whether an attorney may claim the privilege depends on the particular statute at issue.

Here, the attorney was entitled to immunity on the state claims because the Texas wiretap statute has not abrogated the common-law attorney-immunity defense, either expressly or by necessary implication. The Court reached a different result as to the federal claims because the federal wiretap statute is worded differently and because informative federal authority persuaded the Court that federal courts would not apply Texas's common-law attorney-immunity defense to a claim under that statute. The Court reaffirmed that when the defense applies, counsel is shielded only from liability in a civil suit, not from other mechanisms that exist to discourage and remedy bad-faith or wrongful conduct, including sanctions, professional discipline, or criminal penalties, as appropriate.

The Court affirmed in part, reversed and rendered in part, and remanded the case to the trial court for further proceedings on the federal wiretap claims.

E. CONTRACTS

1. Damages

a) *Pura-Flo Corp. v. Clanton*, 635 S.W.3d 637 (Tex. Nov. 19, 2021) (per curiam) [20-0964]

The issue presented in this case was 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.

The Supreme Court reversed in part in a per curiam opinion. 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.

b) *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179 (Tex. Jan. 14, 2022) [20-0396]

The principal issue in this case is whether the plaintiff was entitled to recover consequential damages for breach of contract. Signature Industrial Services had a contract with International Paper (IP) to upgrade equipment at an IP paper plant. Signature claimed it was owed an additional $2.4 million for the work performed, documented in invoices it sent to IP. The dispute resulted in a jury trial in which the jury awarded $2.4 million in direct damages for breach of contract as requested by Signature. The jury also awarded about $56 million in consequential damages. The consequential damages were based on expert testimony that a $42 million sale of Signature as a company to a suitor named Primoris had fallen through as a result of IP's breach, and that Signature had also suffered a loss of about $12 million in "book value" as a result of the breach and about $2 million in penalties for non-payment of payroll taxes.

The trial court awarded all of these damages as found by the jury. The court of appeals held that the $2.4 million in direct damages and the $12 million in lost book value could be awarded, but that the evidence in support of the $2 million and the $42 million figures were not supported by legally sufficient evidence under Texas law governing consequential damages.

Both sides appealed to the Supreme Court. As to consequential

damages, Signature sought reinstatement of the $42 million amount for the lost sale of the company, while IP argued that none the consequential damages were recoverable.

The Court affirmed in part and reversed in part. It held that about $600,000 of the $2.4 million in direct damages could not be awarded because this amount reflected overhead costs that could not be billed to IP under the terms of the parties' contract. The Court affirmed a judgment for the remainder of the direct damages.

The Court held that none of the consequential damages could be awarded. Under Texas law, consequential damages are not available unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. Consequential damages must also be proved with reasonable certainty. The Court held that the $42 million in damages that reflected the loss of the sale of the company could not be awarded because IP was unaware of the pending sale of Signature to Primoris. Signature argued that the $42 million could be viewed as part of the decline in Signature's "market value," but assessing the award in these terms did not overcome the bar that such damages were not foreseeable at the time the agreement was made. The $12 million figure allegedly reflecting the loss in Signature's "book value" was also not recoverable because this figure was not established with reasonable certainty. Signature's expert had arrived at this figure by simply looking at balance sheets before and after the breach and attributing all of the difference in book value to the breach, a method that did not provide the requisite proof with reasonable certainty of damages attributable to the breach.

The Court addressed other issues. It held that (1) Signature's president Jeffry Ogden was not entitled to recover on his contract claims against IP, and (2) under the contract and the Insurance Code, IP was not entitled to indemnification from Signature of IP's expenses incurred in defending the suit brought by Ogden.

2. Formation

a) *Cadence Bank, N.A. v. Roy J. Elizondo III*, 642 S.W.3d 530 (Tex. Mar. 18, 2022) [20-0273]

The issue in this breach of contract dispute is whether a bank's wire transfer request form created a contractual duty on behalf of the bank to "verify" funds before completing the wire transfer as requested by a banking customer.

Petitioner Cadence Bank, N.A., is a regional banking franchise. Respondent, Roy J. Elizondo III, is a Houston-based lawyer. In 2014, Elizondo was scammed. The scammer sought Elizondo's representation in a debt-collection action. Once Elizondo agreed to the representation, the scammer informed Elizondo that the debtor had agreed to settle and would mail Elizondo a cashier's check in the amount of the settlement. The scammer instructed Elizondo to deposit the check into his IOLTA account—which he held with Cadence Bank—and then wire a

portion of the funds to a third party in Japan. After receiving a cashier's check that appeared to be drawn from an account at Chase Bank, Elizondo deposited the check into his account. After contacting Cadence to execute the wire transfer, a Cadence Bank employee emailed Elizondo a one-page form titled International Outgoing Wire Transfer Request. The form contains, among other fields, a listed transfer fee of $55 and blanks for administrative information to be filled in by Cadence after receiving Elizondo's signature and before initiating the transfer. It also contains this preprinted admonishment to any Cadence employee who handles a wire transfer: "Before signing off, be sure you 'know your customer' and have verified the collected balance and documented any exception approvals." Pursuant to Elizondo's instructions, Cadence wired a large portion of the deposited funds to the Japanese bank account Elizondo had identified on the form. Chase dishonored the cashier's check the very next day and returned it to Cadence unpaid. Cadence notified Elizondo that the check was returned, charged the provisionally deposited amount back to this account, and demanded that he pay the overdrawn funds. Elizondo refused.

Cadence sued Elizondo for breach of the deposit agreement, breach of warranty under Section 4.207 of the Uniform Commercial Code (UCC), and common-law torts. Elizondo raised various defenses and counter-claimed for breach of contract, fraud, and negligent misrepresentation. Cadence moved for summary judgment on its affirmative claims, and Elizondo filed a counter-motion for summary judgment on his breach-of-contract claim. The trial court denied Cadence's motion, granted Elizondo's, and signed a final judgment that each party take nothing. A split panel of the court of appeals affirmed.

Elizondo claims that Cadence's damages were caused by its breach of a superseding contractual duty as expressed in the wire transfer request form. Elizondo argues that by signing the top part of the wire-transfer form and emailing it back to a Cadence employee, Elizondo made an offer to pay Cadence $55 to transfer money from the "collected balance" of his account, which, according to Elizondo, is the remaining balance once provisionally credited funds are excluded. That the transfer only be made from Elizondo's "collected balance" was a material term of the agreement established by the administrative field with that phrasing in the bottom half of the form. Cadence accepted Elizondo's offer by completing the form and initiating the transfer. If Cadence had fulfilled its duty to ensure that Elizondo's "collected balance" was sufficient before making the transfer, then Cadence would have seen that Elizondo's collected balance was insufficient, it would not have made the transfer, and it would not have any damages.

The Supreme Court disagreed with Elizondo's argument, holding that the wire-transfer form fails to create an enforceable contract at all. The Court reasoned that the form's title is "International Outgoing Transfer *Request*," and the form has all the indicia of a form whose purpose is to facilitate Cadence's internal processing of the wire transfer. Contrary to Elizondo's view, the mere presence of the phrases

"Collected Balance/Cash" and "Employee Who Verified Collected Balance" on a form created by Cadence cannot have the effect of implicitly imposing on Cadence a contractual duty that superseded its rights under the UCC and the deposit agreement. Were that the case, a bank's routine administrative forms could potentially override the UCC's default rules. Thus, the Court reversed the court of appeals' judgment, remanding the case to the trial court to consider Elizondo's remaining claims and defenses.

3. Implied Revocation of Offer

a) Angel v. Tauch, 642 S.W.3d 481 (Tex. Jan. 14, 2022) [19-0793]

This contract dispute involved the seldom invoked doctrine of implied revocation. The issue was whether an offer to settle a debt was revoked when the offeree learned from a third party that the offeror had assigned the debt for collection.

South State Bank held a $4.6 million judgment against Kyle Tauch, which the bank purportedly offered to settle for $2 million while admonishing Tauch that he needed to act "quickly" because the bank would "likely be look[ing] at other collection alternatives." Two days later, the Bank executed an agreement assigning the judgment to another of Tauch's creditors, the Gobsmack Gift Trust, for collection. Almost immediately thereafter, the trust's attorney emailed Tauch's attorney, notifying him about the assignment and demanding payment in full on the judgment. At Tauch's request, the trustee's attorney forwarded a copy of the assignment agreement, which bore a stated effective date of the following day. On receipt of the assignment agreement, Tauch promptly emailed the bank to accept the settlement offer.

The bank and the trust rejected Tauch's assertion that a binding contract to settle the debt for $2 million had been formed by his acceptance before the assignment agreement's effective date. Cross actions for declaratory and other relief ensued, and on cross motions for summary judgment, the trial court held that any offer was revoked on Tauch's receipt of the assignment agreement. The court of appeals reversed in a split decision, holding that the assignment did not render the bank unable to go forward with the offer at the time of acceptance because its stated effective date was the following day. The dissent opined that the effective date was immaterial because precedent set the standard for an implied revocation as requiring only "some act inconsistent with the offer," not an act precluding the offer from materializing into a contract.

The Supreme Court reversed and rendered judgment that no contract to settle the debt was formed. More than 75 years ago, in *Antwine v. Reed*, 199 S.W.2d 482, 485 (Tex. 1947), the Court held that an offer could be revoked without express words of revocation, so long as the offeree had knowledge that the offeror had acted inconsistently with the offer. *Antwine* was the first and last time the Court

applied the doctrine. Because *Antwine* involved a land transaction and information communicated to the offeree by the offeror's agent, the parties disputed whether other types of offers can be impliedly revoked and whether the doctrine is applicable when the offeree learns about the offeror's inconsistent action indirectly rather than directly from the offeror or its agent.

The Court held that the doctrine is not constrained to land transactions and the touchstone is inconsistent action manifesting the offeror's unwillingness to enter the proposed bargain. The assignment agreement's effective date did not preclude its execution from manifesting the bank's unwillingness to enter the settlement. The dispositive issue is not the offeror's ability to enter the proposed bargain but continued willingness to do so, and assigning the judgment for collection was inconsistent with an intent to release the judgment. Tauch's receipt of the assignment agreement was sufficiently reliable information about the bank's action to effectuate a revocation of the settlement offer.

4. Procuring-cause Doctrine

a) *Perthuis v. Baylor Miraca Genetics Lab'ys*, LLC, — S.W.3d —, 2022 WL 1592587 (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.

Respondent Baylor Miraca Genetics Laboratories, LLC (BMGL) hired petitioner Perthuis as its Vice President of Sales and Marketing in 2015. BMGL drafted the employment agreement, which 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. It 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.

5. Releases and Reliance Disclaimers

a) *Transcor Astra S.A. v. Petrobras America, Inc.*, — S.W.3d —, 2022 WL 1275238 (Tex. April 29, 2022) [20-0932]

This case arises from the breakup of a joint venture between two international petroleum corporations. In 2006, Petrobras and Astra entered into a stock purchase and sale agreement that created the joint venture to own and operate a Texas oil refinery. By 2009, the parties became embroiled in numerous disputes, which were adjudicated in arbitration. The arbitration award terminated their joint venture and required Astra to sell its 50-percent interest in the refinery to Petrobras. Petrobras accepted the interest but failed to pay Astra the $640 million purchase price. The parties continued litigating and arbitrating issues until 2012 when the parties reached a comprehensive settlement agreement. At the time, Astra had obtained over $750 million in judgments against Petrobras and had other pending claims demanding $400 million more. As part of this settlement agreement, Petrobras agreed to pay Astra more than $820 million to satisfy the judgments against Petrobras.

After the settlement agreement was signed, Petrobras alleged that it later discovered that Astra had engaged in substantial corruption to convince Petrobras to accept the 2006 stock-purchase agreement and 2012 settlement agreement. Upon discovering Astra's alleged misconduct, Petrobras sued Astra and also initiated an arbitration proceeding.

Astra filed a series of summary-judgment motions based on the settlement agreement's release and disclaimer of reliance. The trial court granted those motions and issued a final judgment that the 2012 settlement agreement bars Petrobras's claims, including the claims asserted in arbitration. The judgment also awarded Astra $1.3 in attorney's fees and costs.

Petrobras appealed the final judgment, and the court of appeals reversed. The court held that Petrobras released its fiduciary-duty claims to the extent they relate to the 2006 settlement agreement but not to the claims related to the negotiation and

signing of the 2012 settlement agreement. The court of appeals also held that the settlement agreement's reliance disclaimer bars Petrobras's fraud claims against the Astra entities but not against the individual defendants named in this suit. Finally, the court held that the release bars Petrobras's remaining claims to the extent they are derivative of the fraud claims. The court then reversed Astra's award of attorney's fees and remanded for further proceedings. Both Astra and Petrobras petitioned this Court for review.

The Supreme Court concluded that the settlement agreement bars all of Petrobras's claims in both this suit and the arbitration proceeding. In doing so, the Court held that Petrobras's claims relating to fiduciary duties were barred by the settlement agreement's release because the claims fell outside of the release's exception clause. Next, the Court held that the settlement agreement's reliance disclaimer was enforceable under the *Forest Oil* factor test. The Court also held that the settlement agreement and its reliance disclaimer extended protection to the individual defendants, and it held that Petrobras's fraud claims against the individuals were also barred. Related to the ongoing arbitration proceeding, the Court held that the stock purchase agreement's arbitration clause was superseded by the 2012 settlement agreement, and thus, the claims Petrobras asserted in arbitration were also barred by the settlement agreement. And finally, the Court reinstated the trial court's attorney's fee award under section 37.009 of the Texas Civil Practice and Remedies Code.

6. Substantial Compliance

a) James Constr. Grp., LLC v. Westlake Chem. Corp., — S.W.3d—, 2022 WL 1594955 (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 the intervention clause 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 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 and a waiver of consequential damages.

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 the safety-violation-section's notice conditions, and that James violated both the intervention clause and the safety-violation section by failing to pay Westlake's costs associated with transferring the work. It also found that James violated the indemnity provision by failing to indemnify Westlake in litigation following the worksite fatality and that Westlake violated the consequential-damages waiver 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 the intervention clause, which had no notice requirement, served as an independent ground for the same damages award, holding that the intervention clause 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. The Court rejected James's argument that Westlake's failure to provide the requisite notices under the safety-violation section 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 the consequential-damages waiver, 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 the consequential-damages waiver by seeking them.

Chief Justice Hecht, joined by Justice Devine, Justice Busby, and Justice Bland, dissented in part, opining that Westlake substantially complied with the safety-violation section's written-notice requirements. Chief Justice Hecht would have held that a writing was not required to substantially comply in light of evidence of actual notice. He 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 the intervention clause, independently supported Westlake's award.

Justice Boyd, joined by Justice Blacklock and Justice Huddle, dissented as to James's the consequential-damages 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.

F. CONSTITUTIONAL LAW

1. Due Course of Law

a) *Mitchell v. MAP Resources, Inc.,* — S.W.3d —, 2022 WL 1509745 (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.

b) *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899 (Tex. Apr. 16, 2021) [19-0440]

At issue in this case was whether a state university's dismissal of a student for poor academic performance implicates a liberty or property interest protected by the Texas Constitution's guarantee of due course of law. Texas Southern University's Thurgood Marshall School of Law dismissed Ivan Villarreal after one year because he did not maintain the required 2.0 grade point average. Villarreal sued the School, alleging claims for breach of contract and deprivation of his liberty and property without due course of law. The School filed a plea to the jurisdiction, invoking sovereign immunity. The trial court granted the plea. The court of appeals reversed in part, holding that Villarreal had alleged viable procedural and substantive due course of law claims.

The Court held that an academic dismissal from higher education carries insufficient stigma to implicate a protected liberty interest. And the Court held, assuming without deciding that Villarreal had a protected property right in his continuing education, the procedures followed by the School

in connection with Villarreal's dismissal were constitutionally adequate. The Court reversed the court of appeals' judgment with respect to Villarreal's constitutional claims and rendered judgment dismissing the case.

2. Legislative Quorum

a) *In re Abbott*, 628 S.W.3d 288 (Tex. Aug. 17, 2021) [21-0667]

This case concerned the constitutional authority of the Texas House of Representatives to order its own members back to the House chamber to vote on pending legislation. Nineteen Members of the Texas House left the State in order to "break quorum" and prevent the House from enacting legislation during a special session. After leaving the State, these members brought suit in Travis County district court, seeking injunctive relief to prohibit the Governor and Speaker of the House from invoking House Rule 5 to compel their attendance. Under TEX. CONST. art. III, § 10, two-thirds of House members constitute a quorum, and a smaller number "may compel the attendance of absent members, in such manner and under such penalties as each [legislative chamber] may provide." Under this constitutional authority, the House enacted House Rule 5, which provides that, by order of a majority of House members present, members absent without sufficient excuse may "be sent for and arrested . . . by the sergeant-at-arms or an officer appointed by the sergeant-at-arms for that purpose, and their attendance shall be secured and retained."

The plaintiffs brought their suit 27 days after leaving the State. The district court granted an *ex parte* temporary restraining order prohibiting the defendants from compelling the plaintiffs' attendance by arrest or other confinement or restraint for the next 14 days, when an injunction hearing was scheduled. The next day, the defendants brought a mandamus action in the Supreme Court, seeking emergency relief and a writ of mandamus directing the district court to withdraw the TRO.

The Supreme Court conditionally granted mandamus relief directing the district court to rescind the TRO. The Court reviewed the language and history of the constitutional provision and concluded that it granted authority to the House to enact House Rule 5 and thereby physically compel the attendance of House members who are absent from the floor without excuse. The language of the constitutional provision indicates the House may physically compel attendance to achieve a quorum. Since it authorizes the House to "compel" attendance, that language itself means the House can do more than engage in persuasion and dialogue. Constitutional language further authorizes compelling attendance "in such manner and under such penalties" as each chamber may provide, confirming that the methods of compelling attendance are left to the legislature to devise. The Court noted that House rules since the middle of the nineteenth century had authorized the arrest of absent members of the legislative chambers. Constitutional authority was granted to legislative chambers to "compel" attendance by absent members in the 1836 and 1845 constitutions. Well-known treatises likewise confirm the legislative authority to

arrest absentee members and force their attendance.

The Court also discussed United States Supreme Court precedent, which long ago recognized similar authority granted to the chambers of Congress under the federal constitution's quorum provision, U.S. CONST. art. I, § 5, cl. 1. The U.S. Supreme Court held that, whatever constitutional limitations might apply to the arrest and imprisonment of private citizens under the Bill of Rights, these limitations do not apply to the power of Congress to regulate its own members under the quorum provision. *Kilbourn v. Thompson*, 103 U.S. 168 (1860).

The Court further held that the district court in this case had, as a matter of Texas procedural law, abused its discretion. The district court should not have granted the TRO without giving the defendants a chance to respond to the request. The delay in seeking relief was a delay of the plaintiffs' own making, Texas law strongly discourages *ex parte* dispositions, and there was nothing in this record that justified *ex parte* relief.

3. Property Interests

a) Tex. Dep't of State Health Servs. v. Crown Distrib., — S.W.3d —, 2022 WL 2283170 (June 24, 2022) [21-1045]

The question in this case was whether the plaintiffs had a constitutionally protected interest in processing and manufacturing of smokable hemp products.

The plaintiffs in this case (the Hemp Companies) are Texas-based entities that manufacture, process, distribute, and sell hemp products—including smokable hemp products—in Texas. They sued the Department of State Health Services and its commissioner to challenge the constitutionality of Health and Safety Code section 443.204(4), which requires that the Department's rules regulating the sale of consumable hemp products prohibit "the processing or manufacturing of a consumable hemp product for smoking," and the validity of the Department's rule 300.104, which prohibits the "manufacture, processing, distribution or retail sale of consumable hemp products for smoking."

The trial court issued a final judgment declaring the statute unconstitutional, declaring the rule invalid in its entirety, and permanently enjoining the Department from enforcing the statute and rule.

The Department filed a direct appeal in the Supreme Court. The Department argued that the due-course clause does not protect the Hemp Companies' interest in manufacturing or processing smokable hemp products. The Hemp Companies asserted that the state's ban against the manufacturing and processing of smokable hemp products in Texas violates the Constitution's due-course clause because the ban has no rational connection to any possible government interest and its real-world effect is so burdensome as to be oppressive in light of any governmental interest.

The Court held that the Texas Constitution's due-course clause does not protect the Hemp Companies' asserted interest. The Court noted that the due-course clause is not so broad as to protect every form and method in which one may choose to work or earn

a living, and some work-related interests do not enjoy constitutional protection at all. And some occupational interests exist only because the government has created them or made them available. Furthermore, a person's property interest in that occupation is only constitutionally protected when it is "vested." A property interest is not vested when a person has a mere unilateral expectation that his occupation will remain legal.

The Hemp Companies argued that their right had vested because it has always been legal to manufacture and process products from certain parts of hemp plants. But the Court noted that the Hemp Companies do not make products from the historically legal part of hemp plants, but from the flowers, buds, and leaves, which were considered to be "marihuana" and therefore illegal under prior law. Neither did the Court consider it relevant that the Hemp Companies legally manufactured smokable hemp products for a few months before section 443.204(4) became effective. Such a brief window of legality existed only by a temporary administrative quirk in the process of the substance's partial decriminalization. Such a fleeting "right" was in no sense "vested" in the Companies, which had, at most, a mere anticipation that the government would allow a right it created to continue in existence. Nor would the uncertain state of the law for a few months transform the long-prohibited manufacture of smokable cannabis flower into the kind of "lawful calling" to which courts have afforded constitutional protection.

The Court therefore held that the manufacture and processing of smokable hemp products is neither a liberty interest nor a vested property interest the due-course clause protects. The Court therefore reversed the trial court's judgment.

Justice Young filed a concurring opinion, in which Chief Justice Hecht, Justice Devine, and Justice Blacklock joined. Justice Young agreed that the due-course clause does not protect the Hemp Companies' interests as they asserted them. But he expressed concern that the state of the jurisprudence on the due-course clause was muddled. He thus provided a textual, historical, and structural analysis of the clause that he hoped would aid future inquiry.

4. Religion Clauses

a) *In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. June 11, 2021) [20-0127]

The issue in this case was whether the ecclesiastical abstention doctrine barred adjudication of a deacon's claims when a church publicly disclosed inside information about that deacon outside the confines of the church. Jesus Guerrero is a deacon of the Diocese of Lubbock who had his diaconal faculties permanently suspended in 2008. Guerrero sued the Diocese for allegedly defaming and intentionally inflicting emotional distress upon him. The accusations underlying both claims concerned the appearance of Guerrero's name on a Diocese publication entitled "Names of All Clergy with a Credible Allegation of Sexual Abuse of a Minor." The list was posted on the Diocese's website, and Diocese representatives discussed its publication with local media outlets. Guerrero's name appeared because of

allegations that he twice engaged in sexual misconduct with a 40-year-old woman "deemed vulnerable due to a health or mental condition." Canon Law defines such people as minors. Guerrero, however, claimed that non-Catholic observers would define "minor" strictly as those under the age of consent; thus, the Diocese's publication was defamatory.

The Diocese moved to dismiss Guerrero's claims based on its free speech rights. The Diocese also filed a plea to the jurisdiction in the trial court, contending that the court lacked jurisdiction to entertain the cause due to the ecclesiastical abstention doctrine. The court denied both motions. The Diocese then sought review of the motion to dismiss via an interlocutory appeal of the denial of the plea to the jurisdiction and through a writ of mandamus. The court of appeals affirmed the trial court's rulings, except as to Guerrero's intentional infliction of emotional distress claim. The court of appeals also determined that the ecclesiastical abstention doctrine did not apply to Guerrero's suit and therefore denied the Diocese's petition for writ of mandamus.

The Supreme Court concluded that the ecclesiastical abstention doctrine barred Guerrero's claims and conditionally granted mandamus relief directing the trial court to dismiss the case for want of jurisdiction. To the extent the substance and nature of Guerrero's claims directly called into question the conclusion the Diocese reached under the application of Canon Law, the First Amendment prohibits courts from evaluating whether a church properly applied its doctrine. Additionally, the Supreme Court held that the substance and nature of Guerrero's claims were inextricably intertwined with a Diocese's policy to investigate its clergy. Such investigations are inherently ecclesiastical, and courts may not become involved in such disputes.

Justice Blacklock filed a concurring opinion. The concurrence concluded that claims brought against a church that relate to or are involved with a church's ability to manage its affairs, practice its faith, or publicly proclaim its doctrine are barred under the First Amendment. Because Guerrero's claims were based on public statements made on ecclesiastical or spiritual issues, Guerrero's suit could not proceed.

Justice Boyd filed a dissenting opinion. The dissent concluded that neutral principles of tort law could apply to Guerrero's claims without evaluating whether the Diocese properly applied Canon Law. According to the dissent, applying neutral principles to the public statements about the list would not require a court to become involved with the Diocese's investigation into its own clergy.

5. Retroactivity

a) Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc., — S.W.3d —, 2022 WL 1815046 (Tex. June 3, 2022) [21-1088]

At issue in this case is whether a statute that requires good cause for the termination of certain agreements between equipment suppliers and dealers is unconstitutionally retroactive when applied to an at-will agreement entered into before the statute took effect.

Fire Protection Service (FPS)

orally agreed to be an authorized dealer of life rafts manufactured by Survitec Survival Products. FPS and Survitec agreed that either of them could terminate their agreement at any time for any reason or for no reason. Several years later, the Legislature enacted the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act. Among other things, the Act prohibits an equipment supplier from terminating a dealer agreement without good cause. The Act states that it applies to an agreement existing before the Act takes effect if the agreement has no expiration date and is a continuing contract.

Nearly six years after the Act took effect, Survitec terminated the agreement without providing a reason. FPS sued, alleging Survitec violated the Act, and the case was removed to federal court. The district court entered judgment for Survitec as a matter of law, concluding that application of the Act to the parties' preexisting at-will agreement violated the prohibition on retroactive laws in Article I, Section 16 of the Texas Constitution. FPS appealed, and the Fifth Circuit certified to the Texas Supreme Court the question of whether the Act's application violated the Constitution's retroactivity clause.

The Supreme Court held that application of the Act to the parties' agreement did not violate the constitutional prohibition against retroactive laws. The retroactivity clause protects only settled expectations. Because FPS and Survitec's agreement was open-ended and at-will, Survitec had no reasonable settled expectation that it could continue to operate under the terms of that agreement in perpetuity. And Survitec had sufficient time between the Act's enactment and effective date to take whatever actions it thought necessary to avoid or defer the Act's application to its contractual relationship with FPS but instead chose to continue operating under the agreement.

6. Second Amendment

a) *Ferguson v. Tex. Dep't of Pub. Safety*, 629 S.W.3d 903 (Tex. June 25, 2021) [20-0452]

In this case, the petitioner argued that his Second Amendment right to carry a handgun was taken without due process of law. Todd Ferguson was charged by information with trespass while openly carrying a handgun, a Class A misdemeanor under Texas law. Under section 411.187(a)(1) of the Texas Government Code, the Department of Public Safety "shall suspend" a license to carry a handgun "if the license holder . . . is charged with . . . a Class A or Class B misdemeanor." The Department suspended Ferguson's license to carry. Ferguson did not argue that the State cannot suspend his license after he is convicted, nor did he challenge the State's right to suspend his license while charges are pending. However, he argued that he had only been accused of a misdemeanor and he was entitled to a meaningful hearing to contest whether probable cause supported the charges before he could be deprived of his right to carry. Because he was charged by information, there was no grand jury proceeding that made an initial probable cause determination. The Court denied Ferguson's petition for review.

Justice Blacklock, joined by Justice Devine, dissented from the denial of the petition, believing that the petition raised significant constitutional questions that the Court should decide. The dissent also concluded that Ferguson had adequately preserved his argument in the trial court and the court of appeals.

Justice Busby, joined by Justice Boyd, concurred in the denial of the petition, concluding that Ferguson had not adequately preserved his substantive due process argument in the trial court. The concurrence also believed that denial of the petition was warranted because the legislature had recently passed a law permitting persons to carry a handgun in most places without a license, and the effect of this statute on Ferguson's plans to carry a handgun in the future were unclear in this case.

7. Separation of Powers

a) *In re Turner*, 627 S.W.3d 654 (Tex. Aug. 9, 2021) [21-0538]

The issue in this case was whether the Governor's veto of the Legislature's appropriation for its own operations violated the constitutional separation of powers. On the day before the 87th Legislature adjourned, Democratic members of the House of Representatives left the House chamber, thereby breaking quorum and preventing passage of election legislation that had been one of the Governor's priorities for the session. In response, the Governor vetoed Article X of the General Appropriation Act, which contained appropriations for the operation of the Legislature, and called a special session of the Legislature. The House Democratic Caucus and all but one of the 67 Democratic House members then filed a petition for writ of mandamus in the Supreme Court, arguing that the Governor's veto of the Legislature's funding violated the separation of powers. Subsequently, the Governor placed on the agenda for the special session both election legislation and Article X funding for the Legislature.

The Supreme Court denied the Democratic members' petition. The Court explained that because the Governor had placed Article X funding on the special session's agenda, the Legislature could still fund itself, regardless of whether it also passed the election legislation that the Governor supported. Accordingly, the dispute over the Legislature's lack of funding was not between the Governor and the Legislature but rather internal to the Legislature—the Democratic members simply disagreed with the legislative majority's choice to consider the election legislation before Article X funding during the special session. Emphasizing that, under these circumstances, the Governor's veto of Article X neither prevented the Legislature from funding itself nor forced the Legislature to enact legislation of the Governor's choosing, the Court concluded that the Governor's actions did not violate the separation of powers.

8. Takings

a) *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 the Texas Government Code, 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. The Supreme Court of Texas reversed the court of appeals' judgment and reinstated the trial court's directed verdict.

The Court held that Schrock adduced no evidence of a 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.

b) *Jim Olive Photography v. University of Hous. Sys.*, 624 S.W.3d 764 (Tex. June 18, 2021) [19-0605]

The issue in this case was whether the University of Houston's use of a copyrighted photograph, without permission or attribution on a website, was a constitutional, per se taking of private property that entitled the photographer to compensation. The photographer, Olive, alleged that the university downloaded a copy of a photograph from Olive's website, where it was listed for sale, removed all identifying copyright and attribution material, and displayed the image on several webpages promoting the university's business program. Olive sued, alleging the university's publication of his photograph was an unlawful taking, and sought compensation under the Texas and U.S. constitutions. The university answered with a jurisdictional plea, asserting its sovereign immunity. The trial court declined to dismiss Olive's suit, prompting the university to pursue an interlocutory appeal. In that appeal, the university argued that a copyright is not property protected by the federal and state constitutions and even if it were constitutionally protected property, Olive's allegations of infringement did not state a cognizable taking. Olive responded that the Takings Clause protects all types of property and that the university's appropriation and display of his copyrighted work was a per se taking that should not be analyzed under the multi-factor test for regulatory takings. The court of appeals generally agreed with the university, concluding the copyright infringement alleged here was

not a taking. The court reasoned that the university's single copyright infringement was not a "taking" because it did not take away Olive's right to use, license, or dispose of the underlying creative work.

The Supreme Court affirmed the dismissal of Olive's takings claim, concluding that copyright-infringement allegations assert a violation of the owner's copyright, but not its confiscation, so factual infringement allegations do not alone allege a taking. As Olive pleaded and presented his case, the property at issue was the copyright. It was not Olive's original photograph or the unauthorized copy displayed on the university's website but rather the bundle of rights Olive possessed in the photograph. Thus, the question was whether the university's unauthorized use of a copy amounted to a taking of the copyright itself.

The Court observed that the government can generally "take" property in two ways: (1) the government can physically appropriate or invade property or (2) the government can regulate property so restrictively, or intrude on property rights so extensively, that it effectively "takes" the property. Olive argued that the university's unauthorized use of a digital copy of his photograph was akin to a physical appropriation of tangible personal property and therefore analogous to a per se taking. The Supreme Court disagreed.

The Court noted that infringement of a copyright is different from a typical appropriation of tangible property where rights are more closely bound to the physical thing. In claiming an infringement, the copyright owner still retains its right to possess, use and dispose of the copyrighted work and to exclude others from doing so. But in a per se taking, the government's "appropriation of property" means the property is actually occupied or taken from the owner. Copyright infringement by the government does not take possession or control of or occupy the copyright.

Olive argued that "exclusivity" is the core component of each specific right granted under the Copyright Act. By reproducing and displaying Olive's photograph without permission, the university deprived Olive of his exclusive right to control his work. The Court rejected this argument, noting that infringement did not equate to the "theft" or "conversion" of the copyright owner's exclusive rights. Nor did the act of infringement necessarily destroy those rights because the copyright owner retained them even after the infringement, including the right to exclude others from using the copyrighted work.

Because the state retained its immunity in the absence of a properly pleaded takings claim, the Supreme Court affirmed the court of appeals' decision to sustain the jurisdictional plea and dismiss the case.

Justice Busby filed a concurring opinion. The concurrence agreed that Olive had not alleged a per se takings claim under federal-takings jurisprudence and did not argue for a different result under the Texas Constitution. The concurrence suggested, however, that the Texas Constitution might possibly provide greater protection against government actions affecting private property under some circumstances.

G. CORPORATIONS

1. Fiduciary Duties

a) *In re Estate of Poe*, — S.W.3d —, 2022 WL 2183306 (Tex. June 17, 2022) [20-0178]

The issues in this case are (1) whether a director of a corporation may owe an informal fiduciary duty to manage the corporation in the best interest of an individual shareholder in addition to his formal fiduciary duties to the corporation, and (2) whether the jury was correctly charged regarding the statutory safe harbor under Business Organizations Code Section 21.418(b) for an otherwise self-dealing transaction.

Dick Poe, as the sole director of Poe Management, Inc. (PMI), authorized the issuance of 1,100 shares of PMI stock, which he purchased for approximately $3.2 million. Before the share issuance, Dick's son, Richard, was PMI's sole shareholder. Richard found out about the share issuance after Dick's death, and he sued to invalidate the share issuance. Richard asserted two main theories: (1) the share issuance was a self-dealing transaction that violated Dick's fiduciary duties to PMI as a director, and (2) Dick breached an informal fiduciary duty he owed to Richard to manage PMI in Richard's best interest.

Over Richard's objection, the trial court submitted the informal-fiduciary-duty theory to the jury. The trial court also submitted a question asking about the safe harbor for self-dealing transactions under Section 21.418(b). The trial court instructed the jury that they could find the share issuance valid under any of the three conditions set forth in the statute: if it was approved by disinterested directors, if it was approved by a vote of the shareholders, or if it was fair to PMI. Richard objected, arguing that only the third condition (fairness to PMI) was raised by the evidence.

The jury found that Dick breached an informal fiduciary duty he owed to Richard and that the share issuance was not valid and enforceable. The trial court rendered judgment invalidating the share issuance. The court of appeals affirmed, holding there was sufficient evidence to support the jury's "no" answer to the question whether the share issuance was valid and enforceable under Section 21.418(b). Concluding that this finding was sufficient to support the judgment, the court did not address whether submission of the informal-fiduciary-duty theory was proper.

The Texas Supreme Court reversed. The Court concluded that, as a matter of law, a corporation's director cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder. A director's fiduciary duty in the management of a corporation is solely for the benefit of the corporation. The Court also held that the trial court abused its discretion by instructing the jury that it could find the share issuance valid and enforceable based on conditions for which there was no support in the evidence.

The Court concluded that the jury's deliberations should have focused solely on whether the share issuance was fair to PMI. As a result of the erroneous submission of the informal-fiduciary-duty theory and the extraneous instructions regarding grounds for

finding the share issuance was valid and enforceable, the trial court's errors likely confused or misled the jury when it answered this question. The Court therefore held that the trial court's charge errors probably caused the rendition of an improper judgment and remanded for a new trial.

H. ELECTIONS

1. Candidates

a) *In re Anthony*, 642 S.W.3d 588 (Tex. Mar. 18, 2022) (per curiam) [22-0193]

The issue in this application for mandamus relief is whether a city secretary correctly rejected a candidate's application to be on the ballot because the candidate left the blank to supply her occupation blank. Relator Linda Anthony serves as the current Mayor of West Lake Hills but is otherwise retired. On her 2022 application to appear on the ballot, she did not fill in an answer in the box labeled "Occupation (Do not leave blank)." Anthony's opponent, Jeffrey Taylor, objected to her application for failing to include an occupation, as required by Texas Election Code Section 141.031(4)(B). The city secretary rejected Anthony's application, and the court of appeals denied Anthony's petition for writ of mandamus.

Anthony argued that because she is retired, she has no occupation to include on her application, and therefore her application does not violate the Election Code. Taylor argued that the Legislature requires an occupation from every candidate and that therefore the city secretary had no discretion to accept the application.

The Court granted Anthony mandamus relief. The ordinary meaning of the word "occupation" encompasses compensated work, and as a retired, uncompensated mayor, Anthony has no occupation. Because Anthony cannot include on her application what she does not have, her application did not violate the Election Code. The city secretary's review of the application was limited to Taylor's challenge and to Anthony's response, which demonstrated that her application was not deficient. Taylor did not dispute the factual truth of Anthony's occupational status, only the legal effect of the blank box.

2. Voting by Mail

a) *Paxton v. Longoria,* — S.W.3d —, 2022 WL 2080867 (Tex. June 10, 2022) [22-0224]

This case involves three certified questions relating to a pre-enforcement challenge to two recently enacted provisions of the Texas Election Code: section 276.016(a)(1) and section 31.129. Section 276.016(a)(1), enacted as part of the Election Integrity Protection Act of 2021, makes it an offense for a "public official or election official" to "knowingly . . . solicit[] the submission of an application to vote by mail from a person who did not request an application." Section 31.129 states that an election official who is employed by or is an officer of the state or a political subdivision of the state and violates a provision of the Election Code may be liable to the state for a civil penalty, which may include termination and loss of employment benefits.

Isabel Longoria, the Harris County Elections Administrator, and Cathy Morgan, a volunteer deputy registrar serving in Travis and Williamson Counties, sued in federal court to enjoin enforcement of the anti-solicitation provision and the civil-liability provision (as applied to violations of the anti-solicitation provision). Longoria and Morgan sued Texas Attorney General Warren K. Paxton and the district attorneys of Harris, Travis, and Williamson Counties, all in their official capacities. The district court granted a preliminary injunction, and Paxton and Williamson County District Attorney Shawn Dick appealed. The United States Court of Appeals for the Fifth Circuit certified three questions to the Court: (1) whether volunteer deputy registrars are "public officials" under the Election Code, (2) whether certain types of speech constitute solicitation under section 276.016(a)(1), and (3) whether the Attorney General is a proper official to enforce section 31.129.

The parties agreed on the answers to the first and third certified questions, so the Court answered, based solely on those agreements, that (1) Morgan, a volunteer deputy registrar, was not a public official subject to section 276.016(a)(1); and (2) the Attorney General lacks authority to enforce section 31.129. Because there was no adversity between the parties on those questions, the Court disclaimed any effect of its answers beyond this case.

With respect to the second certified question, the Court concluded that solicitation under section 276.016(a)(1) was not limited to seeking applications of mail-in ballots from persons who were ineligible to vote by mail. The plain text of section 276.016(a)(1) prohibits officials from soliciting the submission of a vote-by-mail application from "a person who did not request an application." The Court also concluded that the definition of "solicits" under section 276.016(a)(1) is not limited to demanding submission of an application for mail-in ballots. Finally, the Court concluded that telling voters they have the opportunity to apply for mail-in ballots is not solicitation under section 276.016(a)(1), but instead qualifies as providing "general information about voting by mail, the vote by mail process, or the timelines associated with voting," which is expressly excluded from section 276.016(a)(1) under section 276.016(e)(1).

I. EMPLOYMENT LAW

1. Employment Discrimination

a) *Apache Corp. v. Davis*, 627 S.W.3d 324 (Tex. June 25, 2021) [19-0410]

At issue in this case is whether legally sufficient evidence supported the jury's finding that an email sent by respondent Davis complaining of discrimination was a but-for cause of her termination. Cathryn Davis was a senior paralegal in the litigation section of Apache Corp.'s legal group. Her supervisor was department head Dominic Ricotta. After several years of working well together, Davis and Ricotta's relationship became strained.

As a cost-savings measure, Apache directed its department heads to require employees to hew more closely to Apache's official business hours of 7:30 a.m. to 5:30 p.m. Monday through Thursday and 7:30 a.m. to 11:30 a.m. on Friday. Ricotta directed

all litigation department employees to submit a 40-hour work-week schedule that tracked these hours as closely as possible. Davis refused, maintaining in emails to Ricotta that she needed to take a midday break of a few hours on Tuesdays and Thursdays to drive her daughter to college classes. Ricotta also announced that employees could no longer work overtime without prior approval. Davis violated this policy twice. On December 3, 2012, Davis sent Ricotta a long email, with the subject line "Notice of Discrimination Claim," complaining about Ricotta's treatment of her. The email mentioned "woman discrimination" and alleged that Apache had mistreated other female employees. After an internal investigation of her complaints was completed, Davis was terminated.

Davis sued Apache for retaliation. The jury found that Davis' December 3 email was a but-for cause of her termination. The trial court rendered judgment on the jury's verdict in favor of Davis for more than $900,000. The court of appeals modified the attorneys' fee award and affirmed the judgment as modified. The Supreme Court reversed and rendered judgment for Apache.

The Court reaffirmed the test for causation in a retaliation case: the employee must prove that, but for her protected conduct, the employer's prohibited conduct would not have occurred when it did. Over the years, courts have identified several factors that may bear on causation, which the court of appeals had analyzed one-by-one before concluding that some evidence supported the verdict. But the Supreme Court stressed that these factors are not a replacement for the "would not have occurred when it did" test and that they may not be helpful in every case. Here, the undisputed evidence demonstrated that prior to the December 3 email, Davis behaved insubordinately, and Ricotta was close to firing her. The Court concluded that there was no evidence to support the jury's causation finding and rendered judgment for Apache.

b) *Tex. Dep't of Transp. v. Lara*, 625 S.W.3d 46 (Tex. June 25, 2021) [19-0658]

At issue in this case is whether TxDOT was entitled to dismissal of plaintiff Albert Lara's claims under the Texas Commission on Human Rights Act in Chapter 21 of the Labor Code. After two decades of work as a TxDOT inspector, in April 2015, Lara became ill with stomach issues requiring hospitalization, a major surgery, and then recovery at home. During the summer of 2015, Lara submitted benefits forms to TxDOT with an estimated return date provided by his physician. The last update, sent in July, stated an estimated return date of October 21, 2015, but also stated that Lara would need an additional surgery. TxDOT terminated Lara effective September 16—the date his sick leave expired and five weeks before his estimated return date.

Lara sued TxDOT for (1) failing to accommodate his disability under Section 21.128(a) of the Act, (2) retaliation under Section 21.055, and (3) disability discrimination under Section 21.051. TxDOT filed a combined plea to the jurisdiction and motion for summary judgment asserting sovereign immunity. The trial court denied

TxDOT's motion. The court of appeals affirmed on the Section 21.128(a) claim, reversed on the Section 21.055 claim, and concluded that Lara had not pleaded a Section 21.051 claim after all. Both parties petitioned for review.

The Supreme Court agreed with the court of appeals that the trial court had properly refused to dismiss Lara's failure-to-accommodate claim. Under Section 21.128(a), it is generally unlawful for an employer "to fail or refuse to make a reasonable workplace accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability." TxDOT argued that Lara had effectively requested indefinite leave, which is not reasonable as a matter of law. The Supreme Court agreed that indefinite leave would not be a reasonable accommodation but concluded that Lara had presented sufficient evidence that he had not requested indefinite leave and that the leave he requested was reasonable. Central to the Court's analysis was TxDOT's leave-without-pay policy, which provided that TxDOT must grant an employee leave without pay lasting up to a year if the employee requires it as an accommodation for a disability. Additionally, there was evidence that Lara could have returned to work as early as October 21, just five weeks after his sick leave expired.

The Supreme Court also agreed with the court of appeals that the trial court should have dismissed Lara's retaliation claim, but for a different reason. Under Section 21.055, it is unlawful for an employer to retaliate against an employee who "opposes a discriminatory practice" or engages in other protected activity. The court of appeals had held that an accommodation request is not opposition to a discriminatory practice as a matter of law. The Supreme Court agreed with Lara that this statement is too broad, and the Court assumed that an accommodation request could potentially qualify as opposition to a discriminatory practice in some circumstances. But the Court reaffirmed the rule stated in a recent case that to invoke the protection of Section 21.055, the conduct relied on by the employee "must, at a minimum, alert the employer to the employee's reasonable belief that unlawful discrimination is at issue." The Court found no evidence that Lara had alerted TxDOT to the possibility of discrimination in his accommodation requests and therefore held that Lara could not make a prima facie case of retaliation.

Finally, the Supreme Court held that Lara's pleadings were sufficient to allege a claim for disability discrimination under Section 21.051 and that the court of appeals should have addressed TxDOT's challenge to the trial court's refusal to dismiss that claim. The Court affirmed the court of appeals' judgments with respect to Lara's failure-to-accommodate and retaliation claims and remanded to the court of appeals for consideration of TxDOT's challenge to Lara's disability-discrimination claim.

J. EVIDENCE

1. Medical Expense Affidavits

a) *In re Guevara*, 624 S.W.3d 920 (Tex. June 25, 2021) (per curiam) [20-0343]

At issue in this proceeding was whether mandamus relief was available from an order regarding

controverting affidavits served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness and necessity of a claimant's medical expenses. Agapito Escobedo sued Alexander and Jose Alfredo Guevara, seeking damages for injuries he allegedly suffered as a result of an auto accident. Escobedo served affidavits from his medical providers in accordance with section 18.001, setting forth the amounts he was charged and averring those amounts were reasonable and necessary. The Guevaras served counteraffidavits challenging the reasonableness and necessity of some of Escobedo's alleged medical expenses. Escobedo moved to strike the counteraffidavits for not complying with section 18.001(f). Escobedo's motion also requested that the Guevaras be prohibited from introducing any evidence or argument that the medical expenses incurred by Escobedo were unreasonable or unnecessary. The trial court granted Escobedo's motion.

In a per curiam opinion, the Supreme Court granted the Guevaras' petition for writ of mandamus, holding that the trial court's order vitiates or severely compromises the Guevaras' defense by precluding them from otherwise challenging the reasonableness or necessity of Escobedo's medical expenses at trial. The Court ordered the trial court to vacate its order, but without prejudice to Escobedo's ability to refile a motion to challenge the counteraffidavits in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

b) *In re Hub Group Trucking, Inc.*, 625 S.W.3d 315 (Tex. June 25, 2021) (per curiam) [20-0241]

At issue in this proceeding was whether mandamus relief was available from an order striking a controverting affidavit served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness of a claimant's medical expenses, as well as orders denying motions for reconsideration of that order. Susan Kenna sued multiple defendants, seeking damages for injuries she allegedly suffered as a result of an auto accident. Kenna served affidavits from her medical providers in accordance with section 18.001, setting forth the amounts she was charged and averring those amounts were reasonable and necessary. The defendants served a counteraffidavit challenging the reasonableness of some of Kenna's alleged medical expenses. Kenna moved to strike the counteraffidavit for not complying with section 18.001(f), and the trial court granted Kenna's motion. The Supreme Court issued a per curiam opinion denying the defendants' petition for writ of mandamus without prejudice to give the trial court an opportunity to reconsider its orders in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

c) *In re Parks*, 631 S.W.3d 700 (Tex. June 25, 2021) (per curiam) [20-0345]

At issue in this proceeding was whether mandamus relief was available from an order striking controverting affidavits served under section

18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness and necessity of a claimant's medical expenses. Gabriela Veytsman sued Jeremiah Parks, seeking damages for injuries she allegedly suffered as a result of an auto accident. Veytsman served affidavits from her medical providers in accordance with section 18.001, setting forth the amounts she was charged and averring those amounts were reasonable and necessary. Parks served counteraffidavits challenging the reasonableness and necessity of some of Veytsman's alleged medical expenses. Veytsman moved to strike the counteraffidavits for not complying with section 18.001(f), and the trial court granted Veytsman's motion. The Supreme Court issued a per curiam opinion denying Parks's petition for writ of mandamus without prejudice to give the trial court an opportunity to reconsider its order in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

d) *In re Sanchez*, 625 S.W.3d 316 (Tex. June 25, 2021) (per curiam) [21-0068]

At issue in this proceeding was whether mandamus relief was available from an order striking a controverting affidavit served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the necessity of a claimant's medical expenses. G.D., a minor child, sought damages from Andres Sanchez for injuries the child allegedly suffered as a result of an auto accident. G.D. served affidavits from the child's medical providers in accordance with section 18.001, setting forth the amounts the child was charged and averring those amounts were reasonable and necessary. Sanchez served a counteraffidavit challenging the necessity of G.D.'s alleged medical expenses. G.D. moved to strike the counteraffidavits for not complying with section 18.001(f), and the trial court granted G.D.'s motion. The Supreme Court issued a per curiam opinion denying Sanchez's petition for writ of mandamus without prejudice to give the trial court an opportunity to reconsider its order in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

e) *In re Savoy*, 631 S.W.3d 700 (Tex. June 25, 2021) (per curiam) [20-0843]

At issue in this proceeding was whether mandamus relief was available from an order striking controverting affidavits served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness of a claimant's medical expenses. John Patrick Hartley sued multiple defendants, seeking damages for injuries he allegedly suffered as a result of an auto accident. Hartley served affidavits from his medical providers in accordance with section 18.001, setting forth the amounts he was charged and averring those amounts were reasonable and necessary. The defendants served counteraffidavits challenging the reasonableness of some of Hartley's alleged medical expenses. Hartley moved to strike the counteraffidavits for not complying with section 18.001(f), and the trial court granted Hartley's motion. The Supreme Court issued a per curiam

opinion denying the defendants' petition for writ of mandamus without prejudice to give the trial court an opportunity to reconsider its order in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

K. EXPUNCTION OF ARREST RECORDS

1. Statutory Requirements

a) Ex parte K.T., consolidated for oral argument with Ex parte C.F., — S.W.3d —, 2022 WL 1510329 (Tex. May 13, 2022) [20-0977, 21-0075]

The issue in these cases is whether an acquittal and conviction can form a criminal episode, which would bar expunction of records under the expunction statute.

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 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.

b) *Ex parte R.P.G.P.*, 623 S.W.3d 313 (Tex. May 14, 2021) [19-1051]

At issue in this case was (1) whether a driving while intoxicated (DWI) arrest record may be expunged when court-ordered supervision was served for a possession-of-marijuana charge arising from the same arrest and, if not, (2) whether a nondisclosure order for the possession charge otherwise has any effect on the DWI expunction.

Petitioner R.P.G.P. was arrested and charged with DWI and possession of marijuana, misdemeanor offenses. The State subsequently dismissed the possession charge after R.P.G.P. completed deferred adjudication community supervision and later dismissed his DWI charge after he completed a pretrial intervention program. R.P.G.P. then filed a petition to expunge the DWI arrest records pursuant to Code of Criminal Procedure article 55.01(a)(2)(A). Months later, the trial court entered an order of nondisclosure for all the records relating to R.P.G.P.'s arrest for marijuana possession. The State opposed the partial expunction request on the basis that arrest records cannot be expunged as to any single offense unless all charges stemming from the arrest are eligible for expunction under article 55.01. The possession charge was ineligible for expunction because R.P.G.P. had served the equivalent of court-ordered community supervision for that charge, so the State argued that no part of the arrest records could be expunged.

After allowing the State to question R.P.G.P. about the possession charge at the expunction hearing, the trial court ruled that R.P.G.P. could not expunge his DWI arrest records, agreeing with the State's arguments. R.P.G.P. appealed, and the court of appeals affirmed, reasoning that the expunction statute did not allow individuals to expunge individual offenses if they arose from the same transaction. The court of appeals also held that the nondisclosure order did not bar the State from disclosing R.P.G.P.'s possession charge at the expunction hearing. R.P.G.P. petitioned the Supreme Court for review, arguing that (1) the nondisclosure order prohibited the State from questioning him about the possession charge and (2) in any event, article 55.01(a)(2)(A) permits expunging individual charges resulting from the same arrest.

The Court held article 55.01(a)(2) is an offense-based expunction provision and, with respect to misdemeanor offenses, the proviso in

article 55.01(a)(2)(A) is also offense-based. Accordingly, the Court did not reach R.P.G.P.'s alternative argument that the trial court erred in compelling his testimony regarding a nondisclosed offense. Regarding article 55.01(a)(2), the Court focused on the text of the provision, noting how "the charge" and "the offense" being eligible for expunction indicated that expunction tied an arrest to a single offense. Regarding article 55.01(a)(2)(A), the Court analyzed how that provision contrasted "*a* misdemeanor offense based on the arrest," which used singular language, with "*any* felony arising out of the same transaction," which used plural language. Based on its analysis of this language and surrounding text, the Court held that article 55.01(a)(2)(A) is offense-based for misdemeanors and arrest-based for felonies. The Court thus reversed the court of appeals' judgment and remanded the case to the trial court to grant R.P.G.P.'s petition and render an expunction order with regard to his DWI arrest records.

Justice Bland filed a dissent. She would have held article 55.01(a)(2)(A) was arrest-based for misdemeanors "based on the arrest" and that R.P.G.P.'s DWI arrest was ineligible for expunction because it was based on his marijuana possession arrest. Justice Bland would have also held the State was permitted to disclose R.P.G.P.'s marijuana charge at the expunction hearing because the nondisclosure statute allows criminal justice agencies to disclose such information for criminal justice purposes, which she contended the State did here.

L. FAMILY LAW

1. Emergency Removal

a) *In re Tex. Dep't of Fam. and Protective Servs.*, 623 S.W.3d 363 (Tex. May 14, 2021), dissent from denial of mandamus relief [21-0235, 21-0236]

In this mandamus proceeding involving the emergency removal of an infant from her parents' home, the court of appeals held that the trial court abused its discretion in failing to order the child returned home following an adversary hearing conducted a few weeks after the removal. On May 20, 2020, when M.M. was two-and-a-half months old, she was admitted to the hospital because of a distended belly. During tests to determine the cause, the hospital discovered fractured ribs and additional suspected fractures. The hospital also diagnosed an injury to M.M.'s uteropelvic junction. A few weeks earlier, M.M.'s pediatrician had noticed a bruise on M.M.'s cheek that Mother speculated Father may have caused by using his fingers on M.M.'s cheeks to push her lips open while feeding her. The Department of Family and Protective Services interviewed M.M.'s parents, who could not explain how M.M. had suffered the injuries. The parents signed a safety plan under which they could not be alone with M.M. On June 4, the day before M.M. was released from the hospital, the trial court granted the Department's request for emergency removal and ordered that M.M. be placed with her paternal grandfather.

At a three-day adversary hearing commenced on June 30, the Department presented evidence that M.M.'s injuries were caused by non-accidental

trauma while the parents were her primary caregivers. The parents could not explain the injuries, and both parents testified they did not believe the injuries were caused intentionally. The parents presented evidence that the fractured ribs were suffered during M.M.'s birth and that the ureter injury may have been caused during a hospital procedure. At the conclusion of the hearing, the trial court appointed the Department as M.M.'s temporary managing conservator and approved her placement with the grandfather. The court of appeals granted the parents' petitions for writ of mandamus and ordered M.M. to be returned to their home, holding that reasonable efforts had not been made to enable M.M. to return home as the Family Code requires.

The Supreme Court denied the Department's request for mandamus relief. Justice Lehrmann dissented to the denial, opining that the evidence supported the trial court's findings that (1) a danger to M.M.'s physical health or safety was caused by an act of the persons entitled to possession and for M.M. to remain in the home was contrary to her welfare, (2) the urgent need for protection required M.M.'s immediate removal and reasonable efforts, consistent with the circumstances and providing for her safety, were made to prevent her removal, and (3) reasonable efforts had been made to enable M.M. to return home, but there was a substantial risk of continuing danger if she were returned home. The court of appeals focused on the third finding, concluding it was erroneous because the Department had made no efforts to enable M.M. to return home between the date of her removal and the date of the adversary hearing. Justice Lehrmann disagreed with that conclusion based on the evidence that M.M.'s injuries were the result of nonaccidental trauma, the absence of an explanation for the injuries, the parents' denial of the possibility that the injuries were intentionally caused, and the parents' corresponding inability to demonstrate to the trial court that they could protect M.M. pending further investigation. Justice Lehrmann noted that the absence of conclusive evidence about the cause of M.M.'s injuries was not dispositive at that early stage of the proceedings, and she expressed concern that the court of appeals' holding sets an impermissibly high bar for the Department to meet and hamstrings trial courts' ability to protect children.

2. Investigation of Child Abuse

a) *In re Abbott,* — S.W.3d —, 2022 WL 1510326 (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.

The 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.

3. Jurisdiction, Post-divorce Property Division

a) *S.C. v. M.B.*, — S.W.3d—, 2022 WL 2192167 (Tex. June 17, 2022) [20-0552]

After a divorce decree fails to divide all community property, does a district court other than the divorcing court have subject-matter jurisdiction to divide the undivided property? The Supreme Court answered yes.

S.C. and M.B. divorced. Part of that divorce process included dividing up their community property—a property classification that can only exist in marriage. To do so, S.C. prepared an inventory, which later became part of the divorce decree. Some parts of the community estate were left off the inventory and remained undivided.

Until 1987, community property that went undivided in a divorce decree could later be divided by a court only through a common law partition action, now codified in Property Code Section 23.001. The legislature then enacted a new remedy, now, codified in Family Code Sections 9.201–.205, which provides the opportunity for either spouse to seek a just-and-right division of property not divided in a divorce.

M.B. did not use this new remedy. Instead, she sued under Property Code Section 23.001 in a court other than the divorcing court, along with other causes of action not relevant here. S.C. filed a plea to the jurisdiction claiming that only the Family Code remedy was available and that only the divorcing court had subject-matter jurisdiction over that remedy. The trial court granted the plea, but also certified a permissive appeal under Civil Practice and Remedies Code Section 51.014(d), which the court of appeals accepted. The court of appeals reversed. The Texas Supreme Court granted S.C.'s petition for review, affirmed the court of appeals' judgment, and remanded the case to the trial court.

The Court held that Section 9.203 does not manifest the necessary clarity to divest district courts other than the divorcing court of subject-matter jurisdiction. After reviewing how property not divided in divorce decrees was treated before the legislature created the new remedy in 1987, the Court turned to the text of the Family Code. Looking to the Family Code as a whole, the Court noted that the Family Code, including Section 9.203's neighboring subchapter, is full of references to exclusive jurisdiction, while Section 9.203 itself is silent to jurisdiction. The Court also noted, while "shall" was mandatory language, it only mandates that the just-and-right standard must be applied if properly invoked. In addition, the Court reviewed several troubling consequences of the opposite approach of voiding decades-old judgments, eliminating property and jury rights, effectively imposing adverse possession after only two years, and generating unnecessary questions about property classification.

Justice Bland filed a dissenting opinion, in which Justice Boyd and

Justice Busby joined. The dissenting justices would hold that the plain language of Family Code Section 9.203(a) requires the court that adjudicated the parties' initial divorce to hear any subsequent claim that the final divorce decree failed to divide property that was part of the community estate. Upon determining that such property went undivided, the court that rendered the final decree then must apply the Family Code's requirement of just and right division in the context of the overall marital estate. Accordingly, the dissent would hold that the trial court in this case properly granted the jurisdictional plea because the claim alleged is one for undivided marital property subsequent to a final divorce decree, and it was not the district court that adjudicated the parties' divorce. Further, the dissent would hold that the court of appeals lacked jurisdiction to hear this permissive appeal because the permissive appeal statute excludes cases brought under the Family Code.

4. Termination of Parental Rights

a) In the Interest of A.L.R., a Child, — S.W.3d —, 2022 WL 2183303 (Tex. June 17, 2022) [21-0658]

At issue in this case was whether a father's court-ordered family service plan was sufficiently specific under Section 161.001(b)(1)(O) of the Family Code to support the termination of his parental rights.

The trial court terminated the father's parental rights to his daughter, finding by clear and convincing evidence that he had failed to comply with his court-ordered service plan and that he had engaged in criminal conduct that resulted in his incarceration for more than two years. The father appealed, arguing that his service plan—which phrased tasks as requests—was insufficiently specific to support termination under subsection (O). He also argued that there was insufficient evidence that he would remain incarcerated for at least two years. The court of appeals affirmed the trial court's order, holding that sufficient evidence supported termination of the father's parental rights under Subsection (O). The court of appeals did not reach the father's argument regarding Subsection (Q).

The Supreme Court reversed, holding that the service plan was too ambiguous to support termination of the father's parental rights under Subsection (O). The service plan's tasks were worded as requests, which do not connote a mandatory requirement. Although the plan's "goals" were worded as positive mandates, the service plan could be interpreted as merely requiring that the parent provide the child with a safe environment, with the plan's requested tasks only guiding the parent toward that requirement. The Department argued that the father's completion of one of the service plan's tasks demonstrated that he understood that those tasks were required. The Court observed, however, that while a parent's engagement with the terms of an ambiguous service plan may show the parent's understanding of the terms, it does not, without more, show a parent's understanding that completion of specific tasks is mandatory.

The Court remanded the case to the court of appeals for consideration of

the trial court order on Subsection (Q).

b) *In re C.L.E.E.G., a Child*, 639 S.W.3d 696 (Tex. Feb. 4, 2022) [21-0245]

The issue presented in this case was whether the record contained sufficient evidence to support the trial court's finding that G.G. (Father) would not receive parole from his prison sentence and would be unable to care for C.L.E.E.G. (the Child) for at least two years.

The Department of Family and Protective Services placed the Child in foster care after she tested positive for methamphetamines at birth. When the Child was six months old, Father was imprisoned after pleading guilty to four felony charges, including possession of a controlled substance with intent to deliver and felon in possession of a firearm. He received concurrent seven-year sentences. The Department moved to terminate Father's parental rights under Texas Family Code Section 161.001(b)(1)(Q), which allows for termination with clear and convincing evidence the parent will be imprisoned and unable to care for the child for at least two years. The trial court terminated Father's parental rights, and he appealed, arguing the evidence was legally and factually insufficient to support the trial court's findings. The court of appeals reversed, concluding that Father presented testimony he would be paroled in the near future and the Department failed to refute that evidence.

The Court reversed in a per curiam opinion and reinstated the trial court's judgment terminating Father's parental rights. Although evidence of the availability of parole is relevant when considering termination under subsection (Q), the factfinder is free to assess the demeanor of witnesses and disregard a parent's parole-related testimony, especially when it amounts to mere conjecture. Looking to the record, the Court concluded that sufficient evidence supported the trial court's finding that Father would be ineligible for parole within two years. Father testified he "knew for a fact" he would not serve the full seven years because he had enrolled in a gang-disassociation program, was studying to obtain his GED, and had good behavior, and because the COVID-19 pandemic could also increase his chance of parole. Contradicting this testimony, Father conceded that the parole board would consider his lifelong criminal history and multiple convictions, that he had previously had his community supervision revoked, and that he had already been denied parole once. The court of appeals substituted its judgment for that of the trial court, which could reasonably have found that Father would not be paroled. And given Father's testimony that he had no family members he would want the Child placed with during his incarceration, and his failure to provide any names to the Department for background checks, the trial court could reasonably have found he was unable to care for the Child during his imprisonment. Thus, sufficient evidence existed to support the trial court's termination of his parental rights under subsection (Q).

c) *In re D.T., a Child*, 625 S.W.3d 62 (Tex. June 25, 2021) [20-0055]

At issue in this case was whether parents who retain their own counsel in state-initiated parental-termination cases—as opposed to having counsel appointed—may raise ineffective-assistance-of-counsel claims. The Supreme Court previously recognized that indigent parents with appointed counsel may raise such claims. *See In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). Since that decision, most courts of appeals that considered the issue had limited the availability of ineffective-assistance-of-counsel claims to parents with appointed counsel.

In this state-initiated termination proceeding, Mother was initially found indigent and appointed counsel, but she retained her own counsel before trial. The jury found that grounds existed for parental termination and that termination was in the child's best interest. Mother's retained counsel filed a notice of appeal but became unable to continue the representation. The trial court again appointed counsel for Mother's appeal. Neither Mother's retained counsel nor her newly appointed appellate counsel filed a motion for a new trial or otherwise took steps to preserve a challenge to the legal and factual sufficiency of the evidence. In the court of appeals, Mother (1) challenged the legal and factual sufficiency of the evidence and (2) raised an ineffective-assistance-of-counsel claim against her retained counsel. The court of appeals affirmed, rejecting Mother's sufficiency challenge because it was not preserved and holding that Mother could not challenge her trial counsel's performance because that counsel was retained. Mother petitioned the Supreme Court for review, raising the sole issue of the availability of ineffective-assistance-of-counsel claims to parents with retained counsel.

The Supreme Court held that parents with retained counsel, like parents with appointed counsel, may raise ineffective-assistance-of-counsel claims in state-initiated parental-termination suits. In so holding, the Court relied on a 2015 amendment to Texas Family Code section 107.013 that requires trial courts to inform all unrepresented parents of "the right to be represented by an attorney." TEX. FAM. CODE § 107.013(a-1). The Court reasoned that, because the statute applies without regard to indigency, it confers on all parents opposing government-initiated termination suits the right to have the assistance of counsel. That, coupled with the Court's holding in *In re M.S.* that the right to counsel embodies the right to effective counsel, led the Court to hold that all parents opposing state-initiated parental-termination suits can challenge their counsel's performance with an ineffective-assistance-of-counsel claim regardless of whether counsel was appointed or retained.

The Court then reviewed Mother's ineffective-assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984). It held that Mother failed to show that her counsel's performance was objectively unreasonable. Therefore, her ineffective-assistance claim failed as a matter of law, and the Court affirmed the judgment of the court of appeals.

Justice Boyd, joined by Chief Justice Hecht and Justice Lehrmann, concurred. The concurrence agreed with the Court's judgment affirming the court of appeals but disagreed with the Court's holding that parents with retained counsel may raise ineffective-assistance-of-counsel claims. The concurrence reasoned that the Family Code does not create a statutory right to counsel in parental-termination cases (other than the right to appointed counsel for indigent parents), and therefore there is no basis for parents with retained counsel to raise ineffective-assistance-of-counsel claims. The concurrence further challenged the Court's holding that such a right exists as dicta because the Court ultimately affirmed the court of appeals.

d) *In re G.X.H.*, 627 S.W.3d 288 (Tex. Apr. 30, 2021) [19-0959]

At issue in this case is whether it is permissible for a trial court to extend the dismissal date in a suit affecting the parent-child relationship under section 26.401(b) of the Texas Family Code by entry into the court's docket sheet. Father and Mother are parents of two children: G.X.H., Jr. and B.X.H. On September 21, 2017, the Department of Family and Protective Services filed suit seeking the termination of both parents' rights, thereby starting the clock on the one-year countdown towards section 263.401's automatic dismissal date. On August 29, 2018, the trial court granted an extension of the trial by entry on the court's docket sheet without mentioning the statutorily required findings. The parties proceeded with the trial through December 2018. At the trial's conclusion, the trial court found that clear and convincing evidence supported termination of both parents' parental rights under Texas Family Code section 161.001(b)(1)(D), (E), and (O), and that termination was in the children's best interests. The court of appeals vacated the trial court's decree and dismissed the underlying case. The Supreme Court reversed and remanded to the court of appeals.

The Court held that the trial court's pronouncement of an extension of the initial dismissal date in its docket-sheet entry satisfied Texas Family Code section 263.401(b) and allowed the trial court to retain the suit on its docket beyond the initial dismissal date and through the date of the Final Decree. Additionally, when a trial court grants an extension after conducting an oral hearing and the record of that hearing is not made part of the record on appeal, courts may imply the section 263.401(b) findings were made on the record at the oral hearing.

Justice Guzman, joined by Justice Busby, concurred but wrote to emphasize that the Court's ruling did not sanction an abdication of the duty to affirmatively make the findings section 263.401(b) requires before the legislatively mandated dismissal date can be extended.

e) *In re J.F.-G.*, 627 S.W.3d 304 (Tex. May 21, 2021) [20-0378]

At issue in this case was whether legally sufficient evidence supported the termination of a father's parental rights to his daughter, "Julie," based on a finding of endangerment pursuant to section 161.001(b)(1)(E) of the Texas Family Code.

Julie's father spent much of his adult life in prison due to escalating criminal activity. He was convicted of multiple drug-related offenses before his daughter's birth: possession of marijuana, possession of a controlled substance, and sale of marijuana. He failed to report to prison for the sale charge and was a fugitive when Julie was born in March 2010. Subsequently, Father turned himself in and served eighteen months. Upon his release from prison, however, he almost immediately committed robbery and was jailed pending trial. He was convicted and sentenced to another eight years in prison. Father spoke with Julie's mother only three or four times a year and, prior to his release, had last seen Julie when she was four years old. While Father was incarcerated, Julie sustained serious injuries from a car accident caused by her mother's intoxicated boyfriend. Julie's mother and her mother's boyfriend tested positive for cocaine. The Department of Family and Protective Services removed Julie and her half-sisters, and they were placed with a family who wishes to adopt them. The court papers filed by the Department were the first time that Julie's father learned of the circumstances surrounding her removal. After serving over seven years of his sentence, Julie's father was released on parole. He then behaved unimpeachably, securing housing and employment, testing negative for drugs, and attending his twice-monthly visitation with Julie. Nevertheless, the trial court terminated the father's parental rights.

The trial court found that the father had "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child," TEX. FAM. CODE § 161.001(b)(1)(E), and that termination was in Julie's best interest. The court of appeals affirmed. Father appealed, arguing that incarceration alone is not enough to support a finding of endangerment and that there was legally insufficient evidence to terminate his parental rights based on subsection (E).

The Court affirmed, noting that it was required to defer to the trial judge's factual determinations. It held that legally sufficient evidence supported the trial court's conclusion that Julie's father engaged in endangering conduct under subsection (E). The Court emphasized that although the mere fact of a conviction will not support termination, evidence concerning multiple criminal episodes of escalating seriousness, together with the duration, nature, and consequences of the imprisonment, is relevant to a determination of endangerment when it presents a risk to a child's physical or emotional well-being. The Court specifically noted Julie's father's absence from Julie's childhood for more than eight years, history of dealing drugs, and minimal effort to contact Julie or be a part of decisions regarding her health, education, or well-being during his incarceration.

Justice Blacklock, joined by Justice Guzman, Justice Devine, and Justice Busby, dissented. The dissent stated that for a parent's criminal history or imprisonment to amount to endangerment under subsection (E), it must be accompanied by facts that make the crimes or imprisonment

uniquely dangerous to the child. It concluded that no such facts existed in this case, asserting that the majority upheld the endangerment finding based solely on the father's criminal history, his imprisonment, and the normal disruptions in family life caused by imprisonment, in contravention of the text of the statute.

f) *In re J.W.,* — S.W.3d —, 2022 WL 1739028 (Tex. May 27, 2022) [19-1069]

In this case, Father challenges the legal sufficiency of the evidence to support the jury's finding that his parental rights should be terminated as well as the trial court's submission of a broad-form termination question to the jury.

J.W. was born with drugs in his system, including opiates and amphetamines, some of which originated with Mother's abuse of codeine-containing medication while pregnant. The Department of Family and Protective Services removed J.W. from his parents and placed him in foster care. After a five-day jury trial, the jury found that both parents' rights should be terminated, and the trial court rendered a final order of termination. As to Father, the jury found that "at least one" of the statutory termination grounds contained in Texas Family Code Sections 161.001(b)(1)(D) (endangering conditions or surroundings), (E) (endangering conduct), and (O) (failure to comply with service plan after removal for abuse or neglect) were established and that termination was in J.W.'s best interest. The court of appeals affirmed as to both parents. Only Father petitioned for review.

The Supreme Court reversed and remanded for a new trial. First, the Court held that legally sufficient evidence supported the Subsection (O) ground because the jury reasonably could have concluded based on the evidence that Father failed to maintain a safe and stable home environment, as the service plan required. Much of the same evidence also supported the jury's best-interest finding.

The Court went on to hold that legally insufficient evidence supported the Subsection (D) termination ground, which applies when a parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the child's physical or emotional well-being. The Court explained that, as a general matter, the relevant time frame for evaluating this ground is before a child's removal. Because J.W. was removed almost immediately after he was born and his parents had only supervised visits with him until trial, only Father's role with respect to J.W.'s "environment" before he was born is relevant to Subsection (D). And while a parent's knowledge of the other parent's drug use during pregnancy and corresponding failure to attempt to protect the unborn child from the effects of that drug use can contribute to an endangering environment and thus support an endangerment finding, Father did not fail to make such an attempt here. Rather, when Mother learned she was pregnant and informed Father of her codeine-dependency, he made a concerted effort to help Mother address her addiction.

Because legally insufficient evidence supported one of the termination

grounds, which was improperly submitted to the jury as part of a broad-form termination question that commingled valid and invalid grounds, the Court held that the error prevented it from determining whether the jury based its verdict on the invalid ground. Accordingly, the Court remanded for a new trial on termination of Father's parental rights.

Justice Young filed a concurring opinion emphasizing that Father must be judged by his own actions, not Mother's, and that neither the Court nor the Department contends that Father had an obligation to divorce Mother to maintain his parental rights. Rather, Father presented the divorce as evidence that he was addressing the risk Mother posed to J.W., and the evidence that the divorce was not genuine called that claim into question.

Justice Boyd dissented, agreeing with the court of appeals that legally sufficient evidence supports all three termination grounds as well as best interest. Justice Boyd thus would have affirmed the court of appeals' judgment affirming the termination of Father's parental rights.

Justice Blacklock, joined by Justice Devine and Justice Busby, also dissented, opining that none of the termination grounds were supported by legally sufficient evidence and that judgment should be rendered reinstating Father's parental rights.

g) *In re L.C.L.*, 629 S.W.3d 909 (Tex. June 25, 2021) [20-0432]

The trial court terminated Mother's parental rights to her two children on several grounds, including endangerment of their physical and emotional well-being. The court of appeals reversed the endangerment finding but held that sufficient evidence supported an additional termination ground. The court of appeals also found that factually insufficient evidence supported the trial court's finding that termination was in the children's best interest, remanding for a new trial only on best interest. Both Mother and the Department of Family and Protective Services petitioned for review of the court of appeals' judgment.

The Supreme Court denied the petitions for review. Justice Lehrmann, joined by Justice Bland, concurred in the denial to note a disagreement among the courts of appeals—regarding the proper consideration of a parent's drug use as part of an endangering course of conduct—that should be resolved in the proper case. The concurrence further noted a recent decision by the Court that bears on the resolution of that disagreement. *In re J.F.-G.*, 627 S.W.3d 304 (Tex. May 21, 2021). However, the concurrence agreed with the Court's denial of the petitions because the propriety of the termination judgment did not depend on the endangerment findings.

h) *In re of M.P.*, 639 S.W.3d 700 (Tex. Feb. 4, 2022) (per curiam) [21-0360]

The issue in this parental termination case was whether the appellate court should remand for a new trial when it affirms on one ground for termination but reverses on other grounds. The trial court terminated the parental rights of Father on several grounds under Section 161.001(b) of

the Family Code. The grounds included failure to comply with a court-ordered service plan (subsection O), endangering conditions (subsection D), and endangering conduct (subsection E). The court of appeals affirmed under (O) but concluded that the evidence was factually insufficient to support termination under (D) and (E). The court of appeals was required to review the sufficiency of the evidence under (D) and (E), even though it could affirm the termination of parental rights under (O), because the Supreme Court had held that such review is required. *In re N.G.*, 577 S.W.3d 230 (Tex. 2019). Due process concerns require such review because termination under (D) and (E) can affect parental rights as to other children.

The court of appeals, after concluding that the evidence was factually insufficient under (D) and (E), remanded the case to the trial court for a new trial on those grounds. The Supreme Court reversed the part of the court of appeals' judgment remanding the case. The Supreme Court held that in these circumstances, the court of appeals should dispose of the case by affirming the termination under (O) and striking the (D) and (E) findings. A remand was inappropriate because it would delay the proceedings and could not change the result that Father's parental rights were terminated on ground (O). Accordingly, the Court reversed the part of the court of appeals' judgment remanding the case for a new trial and rendered judgment striking the trial court's findings on grounds (D) and (E).

5. Visitation Orders

a) *In re J.J.R.S.*, 627 S.W.3d 211 (Tex. June 4, 2021) [20-0175]

At issue in this case was whether, and under what circumstances, a trial court may order that a parent's access to a child is solely at the discretion of the managing conservator. Second, whether the trial court's issuance of an ex parte temporary order pursuant to Texas Family Code section 262.201(o) is unconstitutional on its face or as applied to Mother.

In August 2018, law enforcement responded to an aggravated robbery at a San Antonio motel. Law enforcement found Mother's two children in a nearby motel room. Police confiscated drugs and drug paraphernalia from the scene. Police made no arrests during the incident, but Mother called her sister—the children's maternal aunt—to take the children that night. The case was referred to the Texas Department of Family and Protective Services. Fearful for the children's safety, the Department filed its original petition against Mother later that same month. The trial court issued a temporary emergency order naming the Department temporary sole managing conservator, subject to a full adversary hearing. Before the full adversary hearing, the Department was unable to find Mother to serve her with citation, so the court issued an order naming the Department temporary managing conservator pursuant to Family Code section 262.201(o). After the final trial nearly a year later, the trial court named Aunt and Uncle managing conservators and named Mother a possessory conservator. The visitation order

stated that Mother could have supervised visitation with the children only if the managing conservators "agreed to visitation. Sole discretion." The court of appeals and Supreme Court affirmed.

Mother argued that Family Code section 153.006(c), which permits nonspecific visitation orders, does not permit orders that lack all specificity. Conversely, the Department argued that the propriety of any restriction or limitation imposed on access rights depends on whether such restrictions are in the best interest of the child. Mother also argued that section 262.201(o), which allows trial courts to issue temporary orders before a parent is served with notice through publication, deprives parents of due process.

The Supreme Court rejected Mother's argument that "as agreed" visitation orders are an outright denial of access, instead holding that, when read in conjunction, sections 153.006(c) and 153.193 permit a restriction or limitation on a parent's access rights to the extent necessary to protect the children's best interest. Moreover, the inability to hold the managing conservators in contempt is not fatal to the validity of such an order. The Court declined to address Mother's constitutional arguments regarding section 262.201(o) because complaints related to the temporary order were rendered moot by the issuance of a final order.

M. FEDERAL PREEMPTION

1. Federal Protection of Lawful Commerce in Arms Act

a) *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. June 25, 2021) [19-0497]

At issue in this case was whether Academy was shielded from plaintiffs' claims by the federal Protection of Lawful Commerce in Arms Act (PLCAA) and, if so, whether that protection entitled it to mandamus relief from the trial court's order denying summary judgment.

Plaintiffs comprised the survivors and families of victims of the 2017 Sutherland Springs church shooting. Plaintiffs filed multiple lawsuits (consolidated for pretrial matters) against Academy, the retailer from which the perpetrator Devin Kelley purchased the weapon used in the shooting. The suits alleged negligence, negligent hiring and training, negligent entrustment, and gross negligence arising out of Academy's sale to Kelley. Academy sold Kelley a Model 8500 Ruger AR-556 packaged with a thirty-round large-capacity magazine (LCM), as well as an additional LCM, sold separately. Kelley presented himself as a Colorado resident, prompting certain requirements imposed by the federal Gun Control Act on the sale of a firearm to an out-of-state resident. Academy completed the required federal forms prior to the sale and ran a check through the National Instant Criminal Background Check system. Because of a failure by the United States Air Force to update the system with information disqualifying Kelley from purchasing a firearm, the system authorized Academy to "proceed" with the sale.

Academy moved for summary judgment in the trial court, arguing that the PLCAA protected it from having to participate in the litigation. Academy asserted that the PLCAA, which generally prohibits a "qualified

civil liability action"—an action against the seller or manufacturer of firearms and related products for damages caused by a third party's criminal conduct—forecloses the plaintiffs' suits and compels their dismissal. The trial court denied the motion, and Academy sought mandamus relief in the court of appeals. The court of appeals denied Academy's petition without discussion.

The Supreme Court held that Academy was entitled to mandamus relief. To begin, the Court held that the trial court abused its discretion by denying Academy's motion for summary judgment based on the PLCAA's protections. In doing so, the Court rejected plaintiffs' arguments that two of the PLCAA's enumerated exceptions applied to allow the claims to proceed. First, the Court determined that the PLCAA's "predicate" exception, which permits otherwise barred claims when the seller violated a law applicable to the product's sale, was not relevant here. Plaintiffs argued that the predicate exception applied because the sale to Kelley did not satisfy the Gun Control Act's requirement that the sale of a firearm to an out-of-state resident "fully comply" with the legal conditions of sale in both states. Plaintiffs' argument rested on a Colorado statute that bans the sale and possession of LCMs. The Court disagreed, noting that the GCA's requirements only applied to firearms, not detachable magazines, even when sold in the same box. Thus, the sale of the AR-556 rifle complied with both Texas and Colorado law, and the predicate exception was inapplicable.

The Court then rejected the plaintiffs' contention that the PLCAA's exception for an action for negligent entrustment applied. The Court observed that despite its included definition of "negligent entrustment," the PLCAA explicitly disclaims the creation of any cause of action. Therefore, the applicability of the negligent entrustment exception necessarily depended on the viability of a negligent entrustment claim in the relevant state. Because Texas does not recognize a cause of action for negligent entrustment based on the sale of property, the negligent entrustment exception did not permit the claims.

Finally, the Court concluded that mandamus was appropriate because Academy lacked an adequate remedy by appeal. The operative language of the PLCAA states that covered actions "may not be brought" in state or federal court. Relying on prior decisions by the federal courts of appeals, the Court interpreted this language as conferring upon Academy a protection akin to immunity from suit. Therefore, Academy was shielded from the burdens of litigation and would lose an important right by the very act of proceeding to trial. In such circumstances, mandamus relief is permissible.

Justice Boyd filed a concurring opinion. He agreed that Academy was entitled to mandamus relief. However, Justice Boyd disagreed that the negligent entrustment exception depended on the viability of the claim under state law. He opined that the exception did apply because the contours of the exception depended on the PLCAA's own definition of negligent entrustment. Instead, Justice Boyd would have granted Academy's motion for

summary judgment on the negligent entrustment claim itself because Texas does not recognize the cause of action.

b) *In re Academy, Ltd.*, 625 S.W.3d 314 (Tex. June 25, 2021) (per curiam) [19-0637]

At issue in this case was whether Academy could seek mandamus relief from a trial court order compelling discovery in a case that Academy claimed was barred by the federal Protection of Lawful Commerce in Arms Act (PLCAA). The underlying lawsuit, which arises out of the 2017 Sutherland Springs church shooting, is nearly identical in substance to those in *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. June 25, 2021) [19-0497]. In that case, the Court granted Academy's petition for writ of mandamus on the grounds that the PLCAA barred plaintiffs' claims and entitled Academy to summary judgment. In this case, the Court issued a per curiam opinion denying Academy's petition for mandamus relief from the discovery order and expressed its belief that the trial court should have the opportunity to reconsider its order in light of the Court's opinion in 19-0497.

N. GOVERNMENTAL IMMUNITY

1. Chapter 2400

a) *Von Dohlen v. City of San Antonio*, 643 S.W.3d 387 (Tex. Apr. 1, 2022) [20-0725]

The issue in this case is whether individuals suing the City of San Antonio for excluding Chick-fil-A from the San Antonio airport on account of Chick-fil-A's contributions to various religious organizations pleaded sufficient facts to invoke a statutory waiver of governmental immunity.

At a March 2019 meeting, two members of the San Antonio City Council expressed concerns about Chick-fil-A's inclusion in a proposed concession agreement for the San Antonio airport, citing Chick-fil-A's history of funding anti-LGBTQ organizations. The city council ultimately voted in favor of amending the concession agreement to replace Chick-fil-A with another vendor. After the vote, the Texas Legislature passed Senate Bill 1978, which created Chapter 2400 of the Government Code. The statute prohibits a governmental entity from taking any adverse action against a person based wholly or partly on the person's contributions to religious organizations.

Following Chapter 2400's effective date, five citizens residing in counties near the airport sued the city in state district court. The citizens alleged that the city's continued exclusion of Chick-fil-A based on its donations to religious organizations violated Chapter 2400. The citizens requested declaratory and injunctive relief, plus costs and attorney's fees. The city sought dismissal based on governmental immunity and lack of standing. After a hearing, the trial court denied the city's jurisdictional challenges, and the city appealed. The court of appeals reversed and rendered judgment dismissing the case for lack of jurisdiction.

The court of appeals reasoned that, although the citizens purported to be seeking only prospective relief, the only plausible remedy for their claims was invalidation of the previously enacted concession agreement. Thus, the court of appeals concluded that the

citizens' claims were barred by governmental immunity. The court of appeals did not address standing.

The Supreme Court reversed the court of appeals' judgment dismissing the case for lack of jurisdiction and remanded the case to the trial court. The Court held that the citizens failed to allege sufficient facts to invoke a waiver of immunity because their petition did not point to any specific action taken by the city on or after Chapter 2400's effective date that could constitute an "adverse action" under Section 2400.002. The Court rejected the citizens' argument that their mere allegation that the city is taking actions to implement the agreement approved by the city council is sufficient to invoke a waiver of immunity because the citizens did not describe any of the actions related to the agreement's implementation. But the Court further held that because the citizens' petition did not affirmatively negate the existence of jurisdiction, they should be given the opportunity to replead. The Court concluded that standing should be determined based on the parties' live pleading, so it would be premature to weigh in on the city's standing arguments before the citizens repleaded.

Justice Blacklock concurred in the judgment, joined by Justice Devine. The concurrence would have held that the citizens' petition sufficiently invoked a waiver of immunity because it credibly alleged that the exclusionary, discriminatory effects of the city council's vote would continue to be felt after Chapter 2400's effective date. The concurrence reasoned that, based on the record, the city was not entitled to a presumption that it would comply with Chapter 2400 after its effective date.

2. Contract Claims

a) *In re City of Galveston*, 622 S.W.3d 851 (Tex. May 7, 2021) [20-0134]

At issue in this case was whether a writ of mandamus would issue to compel the General Land Office Commissioner to refer its dispute with the City of Galveston to the State Office of Administrative Hearings.

Galveston entered a contract with a private party to administer disaster relief funds in the wake of Hurricane Ike. The federal government provided the funds for the contract through the General Land Office. The private contractor sued Galveston for amounts due under the contract, and Galveston agreed to settle for $13.5 million. As part of the settlement, Galveston agreed to not add any General Land Office employees as defendants "in this or any related litigation." Galveston then sought to recoup the $13.5 million settlement from the General Land Office using the dispute resolution process for "contractors" laid out in Chapter 2260 of the Government Code. The General Land Office Commissioner refused to refer the claim to the State Office of Administrative Hearings, per the statute, because it interpreted the statute as excluding Galveston's claims.

Galveston sought mandamus relief. It argued that the duty to refer its claim was ministerial and that the Commissioner had no discretion to refuse to refer the claim.

The Court held that while the Commissioner lacked authority to

determine whether Chapter 2260 applied, mandamus relief would not issue because Galveston agreed not to hale the Commissioner into court. Galveston's agreement was not against public policy, and Galveston could still seek relief from the legislature.

Justice Blacklock concurred that Galveston's agreement barred mandamus relief but wrote separately that the Court should not have addressed whether the Commissioner had a duty to refer the claim. Additionally, because the Commissioner's obligation to refer only arises if a "contractor" under the statute makes the claim, the Commissioner can make an initial determination as to whether Galveston is a "contractor." Justice Blacklock expressed doubt as to whether Chapter 2260 covered agreements like the one at issue.

3. Federal Civil Rights

a) *Pidgeon v. Turner*, — S.W.3d —, 2022 WL 1696441 (Tex. May 27, 2021), dissent to the denial of the petition for review [21-0510]

Jack Pidgeon and Larry Hicks (collectively, Pidgeon) sued the City of Houston and its Mayor (collectively, the Mayor), challenging the Mayor's directive "that same-sex spouses of employees who have been legally married in another jurisdiction be afforded the same benefits as spouses of a heterosexual marriage." The trial court denied the Mayor's pleas to the jurisdiction and temporarily enjoined her from extending benefits contrary to Texas law. While the Mayor's interlocutory appeal was pending in the court of appeals, the United States Supreme Court handed down its decision in *Obergefell v. Hodges*. The court of appeals vacated the trial court's temporary injunction, and in 2017, the Supreme Court unanimously reversed and remanded the case to the trial court, recognizing that the full extent of *Obergefell*'s "reach and ramifications" on issues not addressed in that case remain to be explored by the courts.

Back in the trial court, Pidgeon filed an amended petition, seeking to enjoin the Mayor's "*ultra vires* expenditures of public funds." He also pursued temporary and permanent injunctions against city officials, as well as declaratory relief. The trial court granted the Mayor's pleas to the jurisdiction and cross-motion for summary judgment. The court of appeals affirmed, and the Supreme Court denied Pidgeon's petition for review.

Justice Devine dissented to the denial of the petition. Five years ago, the Court deemed the case sufficiently important to the state's jurisprudence to grant review. In Justice Devine's view, the case had not diminished in importance since then. The dissent also expressed the view that the U.S. Supreme Court's cases were distinguishable from Pidgeon's case and did not inexorably dictate the outcome because none of them addressed Pidgeon's central question: whether the same-sex spouses of City employees are constitutionally entitled to receive tax-funded spousal benefits under state law.

4. Official Immunity

a) *City of San Antonio v. Riojas*, 640 S.W.3d 534 (Tex. Feb. 18, 2022) [20-0293]

At issue in this case is what a governmental defendant must show to demonstrate a law-enforcement-officer's good faith for purposes of establishing the officer's official immunity from suit when the plaintiff's injuries occurred in the context of routine traffic management.

While driving on an interstate highway, San Antonio police officer Tristan activated his emergency lights to warn approaching motorists of a traffic slowdown ahead. Behind Officer Tristan and three lanes to the left of him, plaintiff Riojas wrecked his motorcycle after the car in front of him stopped abruptly. Riojas sued the City, claiming that Officer Tristan acted negligently by turning on his emergency lights and that the lights caused Riojas' accident.

The City filed a plea to the jurisdiction, arguing that its governmental immunity from suit had not been waived. Riojas argued that the City's immunity was waived by Section 101.021(1) of the Texas Tort Claims Act. A main issue in the case was whether Officer Tristan "would be personally liable" to Riojas under Section 101.021(1)(B) or whether his actions were protected by official immunity. In order for the doctrine of official immunity to apply, the City was required to prove that Officer Tristan was acting in good faith when he turned on his emergency lights. The trial court denied the City's plea, and the court of appeals affirmed.

The court of appeals reasoned that under *Wadewitz v. Montgomery*, 951 S.W.2d 464 (Tex. 1997), in order to prove Officer Tristan's good faith, the City was required to show that Officer Tristan balanced the need for action against the potential risks of taking it before activating his emergency lights. The court then concluded that Officer Tristan's affidavit failed to meet the *Wadewitz* need-risk balancing test.

The Supreme Court held that the court of appeals had applied the wrong test. *Wadewitz* and other cases applying the need-risk balancing test had involved a high-speed pursuit or some other emergency action carrying an inherent risk of harm to the public. The Court explained that it had expressly limited the need-risk-balancing requirement to the emergency-response context and held that when a routine law-enforcement activity is at issue, the governmental defendant is only required to show that a reasonably prudent officer faced with the same circumstances could have believed his conduct was justified. Officer Tristan's affidavit met that test, and Riojas did not present any conflicting evidence. Accordingly, the Court reversed the judgment of the court of appeals and dismissed Riojas' claims against the City for lack of jurisdiction.

5. Takings

a) *San Jacinto River Auth. v. Medina*, *consolidated for oral argument with San Jacinto River Auth. v. Burney* and *San Jacinto River Auth. v. Argento*, 627 S.W.3d 618 (Tex. Apr. 16, 2021) [19-0400, 19-0401, 19-0402]

Homeowners whose homes were flooded during Hurricane Harvey sued the San Jacinto River Authority, a political subdivision of the State, alleging that releases of rising water from the Lake Conroe reservoir during Harvey caused or contributed to their flood damage. Suit was filed under Chapter 2007 of the Government Code, which waives the State's sovereign immunity for a statutory-takings claim to the extent of liability created by the chapter. The Chapter defines the term "taking" to include governmental actions compensable as takings under the state and federal constitutions, as well as less intrusive governmental actions that cause "a reduction of at least 25 percent in the market value of the affected private real property." The Chapter further enumerates the governmental actions to which it applies while specifying fourteen governmental actions to which it does not apply.

The River Authority argued that the Chapter's waiver of immunity did not apply to the decisions it made during Harvey because the Chapter applies only to regulatory takings and not to the physical takings alleged by the homeowners. Alternatively, the Authority contended that even if the Chapter applies to physical takings, its actions were nevertheless excluded from the Chapter by two exceptions, which expressly exclude certain governmental actions responsive to emergency situations. The Authority argued further that the plaintiffs' pleadings conclusively established it was responding to an emergency when releasing flood water from the reservoir. Its actions were therefore excluded from the Chapter, and the lower courts erred in denying its Rule 91a motion to dismiss.

The Supreme Court concluded that the chapter was not limited to regulatory takings. Chapter 2007 neither expressly limits its application to regulatory matters nor expressly excludes all physical takings from its terms. Rather, the chapter generally defines takings to include both physical and regulatory takings and governmental action to include, among other things, the "physical invasion" of property, which is capable of referring to either type of taking. And although the chapter's primary remedy for a taking is recission of the offending action and not an award of damages, the Court noted that the statute provides for additional relief beyond that available under common law for inverse condemnation. Finally, the Court concluded that statutory exceptions to liability under the chapter were not established by the homeowners' pleadings and that the court of appeals therefore did not err in affirming orders that denied the River Authority's motions to dismiss under Rule 91a.

Justice Blacklock filed a dissenting opinion, arguing that the Court's decision is contrary to well-established limitations on judicial power. Because Chapter 2007 does not authorize an award of damages for the statutory

taking it defines and the homeowners only sought damages, he concluded that the redressability element of standing was missing. He therefore would have dismissed the Chapter 2007 claims for lack of jurisdiction.

6. Texas Tort Claims Act

b) *Maspero v. City of San Antonio*, 640 S.W.3d 523 (Tex. Feb. 18, 2022) [19-1144]

At issue in this case is whether the City of San Antonio's governmental immunity is waived under the Texas Torts Claims Act for a police officer's use or operation of a patrol car while in pursuit of a fleeing suspect. In 2012, Kimberly Kory, a San Antonio police officer, was participating in an investigation of a drug-trafficking operation and was in vehicular pursuit of a fleeing suspect, David Rodriguez. In his attempt to evade apprehension, Mr. Rodriguez's vehicle collided with the Masperos' vehicle, resulting in the Masperos' injuries and the death of two of their children. The Masperos sued the City, asserting Section 101.021 of the Tort Claims Act waived the City's immunity because their injuries arose from Officer Kory's operation or use of a motor-driven vehicle. In response, the City filed a plea to the jurisdiction, claiming the Masperos' injuries were too attenuated from the officer's use of a motor vehicle to trigger Section 101.021 and that in any event, Section 101.055, the Act's emergency exception, rendered the Act inapplicable to the Masperos' claims. The trial court granted the City's plea, and the court of appeals reversed, holding the Act waived the City's immunity.

The Supreme Court reversed, holding that the Act's emergency exception applied as a matter of law. Under Section 101.055, the Tort Claims Act does not apply to—and thus does not waive immunity from—a claim arising from an employee's action while reacting to an emergency situation (1) if the action complied with the laws and ordinances applicable to emergency action or (2) in the absence of such a law or ordinance if the action was not reckless. It was undisputed that Officer Kory was reacting to an emergency situation. The Court held that Officer Kory's alleged failure to comply with internal department policies did not equate to a failure to comply with "laws and ordinances" and that her alleged failure to use her siren at the time of the collision neither violated the Transportation Code nor had a causal nexus to the Masperos' injuries. The Court further held that the Masperos had failed to raise a fact issue that Officer Kory acted with conscious indifference or reckless disregard for the safety of others during the pursuit. Because Section 101.055 foreclosed the Act's application, the Court did not address whether Section 101.021 would otherwise have waived the City's immunity. Finally, the Court rejected the court of appeals' holding that an independent, common-law ground existed to waive the City's immunity on the Masperos' claim for negligent implementation of policy. Because the City is immune from suit, the Court dismissed the case for lack of jurisdiction.

7. Texas Whistleblower Act

a) *City of Fort Worth v. Pridgen,* — S.W.3d —, 2022 WL 1696036 (Tex. May 27, 2022) [20-0700]

This case concerns the proper interpretation of "good faith report[] [of] a violation of law" under the Texas Whistleblower Act.

Abdul Pridgen and Vance Keyes were veteran law enforcement officers employed by the Fort Worth Police Department. Both supervised the Department's Internal Affairs and Special Investigations Units, which are responsible for investigating allegations of police misconduct. In December 2016, the Department received national attention when a video depicting Officer William Martin's forceful arrest of a woman and her daughter went viral. Pridgen and Keyes helped lead the Department's subsequent investigation of the incident. After reviewing Officer Martin's body camera video, arrest affidavit, and a Facebook live video, they concluded he committed several criminal violations and should be terminated. They assert they reported these conclusions to their supervisor, Chief Fitzgerald, on multiple occasions. Ultimately, Officer Martin was only suspended for ten days.

Several months after the incident, Officer Martin's previously undisclosed body camera video and other confidential files were released and posted on a public website and a Facebook page. Chief Fitzgerald initiated an investigation into the source of the leak. Internal Affairs officers concluded that Pridgen had downloaded the files to a thumb drive, and that Keyes had been in Pridgen's office at the time of the download. Pridgen and Keyes were subsequently placed on detached duty and demoted.

Pridgen and Keyes sued the City pursuant to the Whistleblower Act, alleging the City took adverse action against them in response to their reports of Officer Martin's alleged violations of law. The trial court denied the City's motions for summary judgment. The court of appeals affirmed. The City petitioned for review in the Supreme Court, arguing that Pridgen and Keyes did not "report" under the Act because they did not disclose new information and that they made their "reports" as part of their normal job duties.

The Supreme Court reversed. First, the Court held that based on common dictionary definitions of the term, to "report" under the Act, an employee must provide information as opposed to mere conclusions or opinions. A public employee must convey information that exposes or corroborates a violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct. The Court also held that the Act's "good faith" limitation applies to the "report" requirement.

The Court rejected the City's argument that to "report" under the Act, an employee must "disclose" new information. It reasoned that though disclosing new information regarding illegal conduct may qualify as "report[ing] a violation of law," the Act protects other types of communications, such as corroborative reports. The Court likewise rejected the City's argument that employees do not "report[] a violation of law" under the Act when they convey information as part of their job duties.

It reasoned that such a limitation might preclude the Act from protecting public employees in positions where they are best equipped to convey information regarding government illegality.

Applying these principles, the Court determined that Pridgen and Keyes had failed to "report" under the Act. First, the Court concluded that Pridgen's and Keyes's "reports" were not geared toward exposing, corroborating, or otherwise providing information pertinent to identifying or investigating governmental illegality. It noted that Pridgen and Keyes did not "report" any new information to Chief Fitzgerald. Additionally, since Pridgen and Keyes and Chief Fitzgerald reviewed the same sources, Pridgen and Keyes did not "corroborate" any facts that were unverified or subject to dispute. The Court concluded that Pridgen's and Keyes's testimony merely evidenced an intent to persuade Chief Fitzgerald to classify Officer Martin's known actions as criminal conduct and to terminate his employment. These recommendations amounted to conclusions and opinions that do not trigger the Act's protections. Therefore, the Act does not waive the City's immunity from suit.

Justice Blacklock concurred. The concurrence agreed with the majority that to "report" under the Act, employees must convey information, not just conclusions, and that Pridgen's and Keyes's statements did not satisfy this requirement. However, he thought the Court erred in rejecting the City's other proposed limitations. He also disagreed with the Court's discussion of the Act's purpose, which he believed risked opening the door to expansive readings of the Act that could jeopardize other executive-branch prerogatives, like hiring and firing employees.

Justice Boyd dissented. The dissent agreed with the majority that reports must provide information. However, he argued that Pridgen and Keyes satisfied this requirement because their reports included factual information regarding conduct they reasonably believed constituted violations of law. Therefore, they submitted sufficient evidence to show they "report[ed]" under the Act.

8. Ultra Vires Claims

a) *Van Boven v. Freshour*, — S.W.3d —,2022 WL 2015663 (Tex. June 3, 2022) [20-0117]

The issue in this case is whether members of the Texas Medical Board acted ultra vires by refusing to void a temporary sanction reported against a physician to the National Practitioner Data Bank even though the Board ultimately determined that the allegations underlying the temporary sanction were not proved.

After two patients filed complaints against Dr. Van Boven, the Board temporarily restricted his license to practice medicine and reported the suspension to the federal Data Bank. The U.S. Department of Health and Human Services issues a Guidebook categorizing the types of reports to be made, which include an Initial Report, a Void Report, and a Revision-to-Action Report. In accordance with the Guidebook's instructions, the Board submitted to the Data Bank an Initial Report with notice of Van Boven's temporary suspension.

Later, an Administrative Law Judge concluded the Board did not prove the allegations against Van Boven. Although the Board could have sought judicial review of the judge's findings, the Board adopted them. The Board issued a final order dismissing the disciplinary proceeding against Van Boven and reinstating his medical license.

Van Boven then urged the Board to submit to the Data Bank a Void Report, which the Guidebook says is appropriate when the action giving rise to the Initial Report is overturned on appeal. The submission of a Void Report removes the Initial Report from the physician's record. The Board instead submitted a Revision-to-Action report, which the Guidebook describes as "a report of an action that modifies an adverse action previously reported." When a Revision-to-Action Report is filed, the Initial Report remains part of the physician's record.

Van Boven sought a writ of mandamus directing the Board members to submit a Void Report to the Data Bank. Van Boven argued that the Board's immunity from suit was waived because the Board acted ultra vires by submitting a Revision-to-Action Report. The trial court denied the Board member's plea to the jurisdiction, but the court of appeals reversed and rendered judgment dismissing Van Boven's suit.

The Supreme Court reversed and remanded the case to the trial court for further proceedings. The Court reasoned that the Board's final order overturned the temporary suspension and that, therefore, the Guidebook required a Void Report to be filed.

Justice Boyd filed a dissent explaining his view that the Board's decision to file a Revision-to-Action Report rather than a Void Report did not violate any state or federal law and therefore was not an ultra vires act.

b) *Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, — S.W.3d —, 2022 WL 1815042 (Tex. June 3, 2022) [20-0855]

At issue in this case was whether governmental immunity protected a zoning commission's determination that a proposed subdivision conformed with applicable law.

Escalera Ranch is a subdivision within the City of Georgetown's extraterritorial jurisdiction, accessible via Escalera Parkway. A developer applied to the city's Planning and Zoning Commission for approval of a preliminary plat for a new subdivision, Patience Ranch, neighboring Escalera Ranch. As planned, Escalera Parkway would provide the only access to homes in Patience Ranch. Several Escalera Ranch residents expressed concerns about adding more traffic to Escalera Parkway and asserted that the plan did not conform to the City's Unified Development Code (UDC). The Planning and Zoning Commission concluded the plat did conform to UDC requirements, and that it had a duty under state law to approve the conforming plat.

The Escalera Ranch Owners' Association sued the Commission members in their official capacities for mandamus relief, asserting that the plat was nonconforming. In a plea to the jurisdiction, the Commissioners argued that the Association lacked standing to sue, and that they had a ministerial duty to approve a plat they had

determined to be conforming. The trial court granted the Commissioners' plea. The court of appeals reversed, reasoning that the increased traffic along with the accompanying safety risks amounted to a particularized injury and that the determination of whether the plat was conforming was a matter of discretion, judicially reviewable for a clear abuse.

The Supreme Court reversed the court of appeals, concluding that governmental immunity protected the Commissioners' determination of conformity. The Court explained that governmental immunity for the Commissioners had not been waived by statute, and the Association's claim did not fall within the *ultra vires* exception to governmental immunity. First, there was no ministerial duty under state law to deny a nonconforming plat. Next, there was no clear abuse of discretion by the Commissioners. The UDC required a determination of conformity by the Commissioners, and listed items for the Commissioners to consider in making their determination. The Court concluded that, so long as the Commissioners fully consider the proper materials, the duty to interpret the UDC had been committed to the Commissioners' discretion. Since the record showed that the Commissioners considered the proper items, the Association's challenge to a discretionary decision made within the Commissioners' authority was barred by governmental immunity and must be dismissed. Since the Court resolved the case on governmental immunity grounds, it did not reach whether the Association had standing to challenge the plat approval.

O. GUARDIANSHIP

1. Service of Process

a) *In re Guardianship of Fairley*, — S.W.3d —, 2022 WL 627776 (Tex. Mar. 4, 2022) [20-0328]

The issue in this case was whether orders issued in a guardianship proceeding were void because the ward was not properly served in compliance with Texas Estates Code chapter 1051. James Fairley's wife, Mauricette, filed applications to be appointed as his temporary and permanent guardian. Both applications were personally served on James by a private process server. James's daughter, Juliette, opposed the applications. The probate court appointed Mauricette as James's guardian, and Juliette unsuccessfully appealed that order.

After James died, Juliette filed a wrongful-death suit against Mauricette in district court. On Mauricette's motion, the probate court transferred the wrongful-death suit to the still-pending guardianship proceeding. The probate court then denied Juliette's motion under the Texas Citizens Participation Act (TCPA) challenging both the motion to transfer and a Rule 91a motion to dismiss. Juliette filed an interlocutory appeal, arguing (among other things) that the probate court's orders were void because James was never properly served with the applications under chapter 1051 of the Estates Code. The court of appeals held that James was properly served, and it affirmed the probate court's order. Juliette petitioned for review, asserting that all the probate court's orders were void for lack of jurisdiction over James.

The Supreme Court held that the probate court's orders were not void. The Court first concluded that the probate court obtained subject-matter jurisdiction over the guardianship proceeding when Mauricette filed her initial application. James's death did not moot the appeal, nor did his death automatically terminate the guardianship proceeding so as to deprive the probate court of jurisdiction to transfer the wrongful-death suit.

With respect to service, the Court held that Estates Code section 1051.103(a) identifies who must be personally served with a guardianship application, but section 1051.051 specifies who may serve the application and how service must be effected. If the person to be served is in Texas, service must be by "the sheriff or constable." But if the person to be served is not in Texas, service is authorized by "a disinterested person competent to make an oath." The application for temporary guardianship was served on James while he was in New York. Although the statute allowed that application to be served by a private process server, the record failed to establish that the person effecting service was "disinterested." James was in Texas when he was served with the application for permanent guardianship, so service of that application by a private process server did not comply with the statute.

The Court nevertheless concluded that these technical defects in service did not void the probate court's orders. James was represented in the guardianship proceeding by a court-appointed attorney ad litem, and through the attorney's affirmative actions, James entered a general appearance in that proceeding and thereby consented to the personal jurisdiction of the probate court and waived any technical defects regarding service. It was undisputed that James was personally served with the applications, and Juliette failed to establish that any defect in the method of service rose to the level of a violation of due process.

Justice Devine, joined by Justice Blacklock, dissented. Noting that proposed wards in guardianship proceedings are among the most vulnerable members of society, the dissent would have held that the failure to strictly comply with the heightened service requirements set forth in the Estates Code deprived the probate court of jurisdiction over James.

P. INSURANCE

1. Duty to Defend

a) *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195 (Tex. Feb. 11, 2022) [21-0232]

At issue in this case is whether Texas law permits consideration of extrinsic evidence to determine whether a liability insurer owes a duty to defend when the plaintiff's pleading is silent about a potentially dispositive coverage fact.

David Jones sued 5D Drilling & Pump Service for damages resulting from 5D's negligence while drilling an irrigation well. Jones alleged that he contracted with 5D in 2014 and that 5D stuck a drilling bit in the bore hole, rendering the well useless. The petition alleges that Jones's land was damaged but is silent as to when any alleged damage occurred.

Monroe Guaranty Insurance Co. and BITCO General Insurance Corp. each provided commercial general liability coverage to 5D, but at different times. 5D demanded a defense from both insurers, but Monroe refused to defend, contending that any covered property damage occurred before its policy period began. The underlying lawsuit settled, and BITCO sued Monroe in federal district court, seeking contribution for its defense costs. Monroe and BITCO stipulated that 5D's drill bit stuck in the bore hole "in or around November 2014," which was before Monroe's policy began in October 2015.

Applying the "eight-corners rule" and considering only Jones's petition and the Monroe policy, the district court held that Monroe owed a duty to defend because the property damage could have occurred anytime between the formation of the drilling contract in 2014 and the filing of Jones's lawsuit in 2016. Monroe appealed, and the Fifth Circuit certified two questions to the Court: (1) whether the exception to the eight-corners rule articulated in *Northfield Insurance Co. v. Loving Home Care, Inc.*, was permissible under Texas law; and (2) when applying such an exception, whether a court may consider extrinsic evidence of the date of an occurrence.

The Court held that extrinsic evidence may be considered in duty-to-defend cases under certain circumstances. The eight-corners rule remains the initial inquiry to be used. But if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

The Court's standard is similar to that in *Northfield*, with minor refinements. First, the threshold inquiry is: does the pleading contain the facts necessary to resolve the question of whether the claim is covered? Second, there is no requirement that the extrinsic evidence goes to a "fundamental" coverage issue. And third, the proffered extrinsic evidence must conclusively establish the coverage fact at issue.

In response to the Fifth Circuit's second certified question, the Court concluded that evidence of the date of an occurrence may be considered if it meets the other requirements for consideration of extrinsic evidence. In this case, the stipulation's use as urged by Monroe would overlap with the merits of liability, so it cannot be considered in determining whether Monroe owes a duty to defend.

2. Insurer's Tort Liability

a) *Elephant Ins. Co. v. Lorraine Kenyon,* 644 S.W.3d 137 (Tex. Apr. 22, 2022) [20-0366]

The issue in this wrongful death and survival action is whether an automobile insurer owed an insured motorist a duty either to process an accident claim without requesting that the insured take photographs or to issue a

safety warning along with any such request.

Following a single-vehicle automobile accident, the insured called her husband from the accident scene and then called her insurer to report the accident. In response to the insured's inquiry about whether to take pictures, the insurer's call center representative replied, "Yes, ma'am. Go ahead and take pictures." At some point, the insured's husband arrived at the accident scene, and while taking pictures, he was struck and killed by another vehicle. The insured sued the insurer under negligence and gross-negligence theories that were based, in whole or part, on the insured's contention that the insurer's call center employee was negligent in "instructing" her to take unnecessary photographs of a single vehicle accident because the instruction substantially increased the risk of harm to her husband and such photos would be of nominal or no value in processing any claim. The insured argued that, given the "special relationship" between them, the insurer had a general duty to act as a reasonable and prudent insurance company and breached that duty when it instructed the insureds to take photographs.

The trial court denied the insurer's motion for summary judgment on the insured's policy benefits claims but granted summary judgment on the insured's negligence claims, ruling the insurer "owed no duty" to the insured or her husband with respect to those claims. Deeming the duty issue a controlling question of law, the court authorized a permissive appeal as to the portion of the summary judgment order pertaining to that question.

The court of appeals affirmed in a divided panel opinion. On en banc rehearing, the court split again but came to the opposite decision, reversing and remanding. Strictly construing the permissive appeal as constrained to the existence of any duty at all, the court held that (1) insurers generally owe their insureds a duty of good faith and fair dealing and (2) the insurer failed to conclusively negate that duty because the record bore some evidence that the "request or instruction [to] take accident scene pictures" had "[some]thing to do with the processing [or paying] of claims." The court further held that the insurer had voluntarily undertaken a duty for the insured's benefit or protection and, in doing so, increased the risk of harm to the insured and her husband. Finally, and in response to the dissents, the court held that even if a duty did not already exist between insurer and insured, one should be recognized based on the *Phillips* factors—an array of considerations courts balance in determining the existence and parameters of a common law duty. The dissents asserted that the majority had adopted a "new duty" and, along the way, had misapplied the *Phillips* factors, the duty of good faith and fair dealing, and the common law negligent undertaking theory.

The Supreme Court unanimously reversed. The Court first clarified that once accepted by an appellate court, a permissive interlocutory appeal is an appeal like any other. That being the case, and in light of such an appeal being from "the order," the scope of review is not strictly construed with respect to the controlling question of law. Here, the question of the

insurer's duty involved not only the existence but also the scope of any duty, and the Court held that the insured's negligence claims failed for want of an *applicable* legal duty. The Court explained that (1) the duty of good faith and fair dealing applies to an insurer's sharp practices and, thus, does not encompass the conduct alleged here; (2) the *Phillips* factors do not weigh in favor of recognizing a new duty requiring insurers to refrain from requesting accident scene photos or of doing so only with a safety admonishment; and (3) the insurer did not, by answering a phone call and responding to a question about taking photographs, voluntarily undertake an affirmative course of action that was "necessary" to "protect" the insureds or their property from "harm." The Court therefore rendered a take-nothing judgment for the insurer on the insured's negligence and gross negligence claims.

Justice Young concurred. He opined that, in the modern era, it is unlikely courts could properly "discover" a new duty lurking in the shadows, especially when, as here, the degree of positive law and regulation is considerable. The concurrence suggested that, in an appropriate case, the Court might re-examine the judicial role in recognizing tort duties, observing that the *Phillips* factors require "weighing" and "balancing" considerations that are more suited for the legislative branch than the judiciary.

3. Policies/Coverage

a) *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263 (Tex. May 21, 2021) [19-0885]

To collect benefits under an underinsured motorist (UIM) policy, an insured must obtain a judgment establishing the liability and underinsured status of another motorist involved in an accident with the insured. Moreover, the judgment must be binding on the UIM carrier because, according to *Brainard v. Trinity Universal Insurance Co.*, the carrier "is under no contractual duty to pay benefits until the insured obtains a judgment establishing [these prerequisites to coverage]." 216 S.W.3d 809, 818 (Tex. 2006). These conditions to coverage may, and often must, be established by the insured in a direct action against the carrier. *Brainard*, however, does not explain what form this litigation should take beyond commenting on the unique nature of the UIM contract, which conditions benefits "upon the insured's legal entitlement to receive damages from a third party." *Id.*

In this case, the insured filed suit against his UIM carrier as a declaratory judgment action to determine his coverage under the policy. Before trial, the parties stipulated to the insured's coverage under the UIM policy and to the insurer's entitlement to an offset for the insured's settlement with the other driver, but the insurer contested causation and its insured's damages. After a jury determined that the insured's damages far exceeded the other driver's liability coverage and the insured's own UIM coverage, the carrier promptly paid the UIM benefits. But the carrier objected to the trial

court's award of attorney's fees, arguing that the award was inappropriate because it had not breached the UIM contract as per *Brainard* and in any event, the Declaratory Judgments Act was not the proper vehicle to determine the coverage question.

The insured argued that declaratory relief was the only remedy available to him under *Brainard*. The insured could not sue his UIM carrier for breach of contract because no breach had occurred, according to *Brainard*, and he could not sue his carrier directly for the underlying tort because it was not the tortfeasor. He thus concluded that his action on the UIM contract was appropriately brought as a declaratory judgment action to determine the existence of conditions precedent to coverage in connection with the underlying tort and to declare his rights and status under the UIM policy. The court of appeals agreed and affirmed.

The UIM Carrier complained to the Supreme Court that the insured's use of the Declaratory Judgments Act to determine his contractual rights and, in particular, to recover attorney's fees in a UIM case was contrary to *Brainard*, which denied an insured's request for attorney's fees under similar circumstances. The Supreme Court disagreed, noting that the insured in that case sued the UIM Carrier for breach of contract before the carrier had any duty to pay, or any breach had occurred, and accordingly denied the insured's request for attorney's fees under Chapter 38 of the Civil Practice and Remedies Code. The Court concluded that the Declaratory Judgments Act was properly invoked to resolve a contract dispute about coverage, which could only be settled by a judgment that established the existence of conditions precedent to such coverage identified in *Brainard*. Moreover, the award of attorney's fees did not conflict with *Brainard* because they were not awarded under Chapter 38, but rather under Chapter 37 as part of the remedy afforded by the Act. And unlike the mandatory fee award under Chapter 38 for breach of contract, the award of fees under Chapter 37 is committed to the sound discretion of the trial court and awarded only when "equitable and just."

Chief Justice Hecht filed a dissenting opinion in which he argued that a UIM coverage dispute was not a proper matter for a declaratory judgment and that the insured should therefore not recover his attorney's fees under Chapter 37.

b) *Dillon Gage Inc. of Dall. v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590*, 636 S.W.3d 640 (Tex. Dec. 3, 2021) [21-0312]

The issues in this case were whether a gold-coin dealer sustained a loss "consequent upon" handing over coins against a fraudulent check, and whether alleged negligence by a third party was an independent cause of the loss. A thief opened an account with a gold-coin dealer under a false identity and paid for $1.2 million in gold coins using fraudulent checks. After the checks provisionally cleared, the dealer sent shipping tracking information to the thief. The thief used this information to reroute the shipment, allowing the thief to pick up the coins. The

dealer claims the shipper negligently allowed the rerouting.

The dealer made a claim against its insurance policy, which covered losses during shipment but excluded losses "consequent upon" handing over the property against fraudulent checks. The insurer refused coverage, citing the exclusion. The dealer sued, and the federal district court granted summary judgment for the insurer. The United States Court of Appeals for the Fifth Circuit certified two questions to the Texas Supreme Court: (1) whether the dealer's losses were sustained consequent upon handing over the insured property against a fraudulent check, and if yes, (2) whether the shipper's alleged errors were an independent cause of the dealer's loss.

The Supreme Court answered the first question yes and the second question no. It held that "consequent upon" in the policy connoted but-for causation, based on the ordinary meaning of the words in the policy. The dealer's loss followed as a result from handing over the coins against the fraudulent check. Further, under Texas concurrent-causation doctrine, the shipper's alleged negligence was not an independent cause of the dealer's loss. The same actor or actors who forged the checks also induced the shipper to reroute the packages. The alleged shipping error was therefore dependent on handing over the property against the fraudulent checks.

c) *Farmers Grp., Inc. v. Geter*, 620 S.W.3d 702 (Tex. Apr. 9, 2021) [19-0996]

The primary issue in this case was whether an insurer could cancel a homeowners policy statewide or was instead contractually required to renew those policies when the insured requested renewal under the terms of the policy. Farmers Group and other insurers offered a standard policy known as the HO-B policy. Because of a large number of mold claims, Farmers and all other insurers in the State stopped offering this policy. Farmers instead began offering the HO-A policy. The Texas Department of Insurance (TDI) approved this decision and, in fact, mandated that all insurers stop offering the HO-B policy by the end of 2002. By statute, an insurer may choose not to renew a policy so long as it provides the insured a written notice no later than thirty days before the policy expires. Farmers provided the required notice to its insureds and offered the HO-A policy instead. However, Sandra Geter brought a class action alleging that she and others were entitled to renew their HO-B policies under the terms of the policy, which provided in section 6(a) that "[w]e may not refuse to renew this policy because of claims for losses resulting from natural causes."

The trial court granted summary judgment to Geter and the class, holding that Farmers breached the insurance contract by not renewing the policies. The court of appeals affirmed the trial court's judgment insofar as the trial court held Farmers breached the insurance contract but remanded the case for a decision on the proper remedy.

The Supreme Court reversed the court of appeals on Geter's breach-of-contract claim and rendered a take-nothing judgment. The Court

interpreted section 6(a) as relating to claims and losses of the individual policyholder. This provision did not preclude an insurer from terminating the policy statewide because of systemic losses that made continued use of the policy financially untenable. The Court found several reasons for this construction of the policy. TDI had authority to approve of the statewide use of policies and had permitted Farmers and all other insurers to discontinue the HO-B policy. TDI had issued a bulletin and affidavit supporting Farmers's interpretation of the policy. The Attorney General had also issued an opinion agreeing with this interpretation. While not controlling, the Court found the views of TDI and the Attorney General persuasive. Under common law principles, terms in a contract that are repeated should ordinarily be interpreted in a consistent manner. The policy as a whole, when it referred to claims and losses, was best interpreted as referring to the individual policyholder's claims and losses. Section 6(a) addressed renewal of "this policy," not an industry-wide decision to discontinue the use of the policy. For these reasons, the Court concluded that Farmers was permitted to discontinue the use of the HO-B policy, consistent with TDI's statewide mandate that the policy no longer be used.

The Court also addressed attorney's fees. The trial court had awarded fees to class counsel. The Court remanded the issue of these fees to the trial court for further consideration, noting that Geter and the class ultimately had not prevailed on their claim and this lack of success was a critical factor the trial court should consider when it revisited the fee issue. The Court also addressed fees requested by intervenors. The intervenors were two class members and their counsel who sought fees for work counsel had done in a related class-action suit. The Court held that the trial court had not abused its discretion in denying these parties leave to intervene, noting the long delay in seeking fees and other considerations.

d) *In re USAA Gen. Indem. Co.*, 629 S.W.3d 878 (Tex. May 7, 2021) [20-0075]

At issue in this underinsured-motorist case was whether an insurer that does not consent to or participate in the insured's suit against the motorist is entitled to judgment on the verdict against that motorist after the insured and motorist settle and dismiss the claim without rendition of judgment. Following a car accident, Adam Reising sued Sue Ann Baldor for negligence and his insurer, USAA, for underinsured-motorist coverage. Underinsured-motorist coverage permits an insured to recover, up to policy limits, the amount the insured is legally entitled to recover but unable to recover from an at-fault motorist's insurer. In underinsured-motorist litigation, only a judgment establishes the amount an insured is "legally entitled to recover." To obtain a judgment binding against the insurer, an insured must either try the negligence issues against the motorist with the insurer's consent or try the negligence issues directly against the insurer, with or without having first tried them against the motorist.

USAA demanded its own jury trial and declined to consent to

Reising's suit against Baldor. The trial court abated Reising's claim against USAA and proceeded to trial on Reising's claim against Baldor. The jury found Baldor 100% responsible for the accident and awarded Reising $160,000 in damages. Prior to judgment, however, Reising and Baldor settled for more than the jury awarded and agreed to dismiss the negligence claim with prejudice. After granting the agreed dismissal, the trial court lifted the abatement and set a trial date for Reising to try his claim against USAA. USAA then notified Reising that it consented to a judgment on the Baldor verdict and moved for judgment on that verdict. It argued a separate trial was no longer necessary because Reising recovered from Baldor's insurer all damages to which he was legally entitled, and, regardless, collateral estoppel barred Reising from retrying the negligence case, so the trial court had a ministerial duty to render judgment in its favor. The trial court denied the motion, and the court of appeals summarily denied USAA's petition for a writ of mandamus.

The Supreme Court denied USAA's petition for a writ of mandamus, holding the trial court did not abuse its discretion by ordering a second trial at which Reising would try the negligence issues directly against USAA to establish the amount he is legally entitled to recover from Baldor for purposes of establishing his entitlement to underinsured-motorist coverage. First, the Court held collateral estoppel did not apply because it applies only to final judgments and no judgment had been rendered. The Court further held that the agreed dismissal of Reising's claim against Baldor prior to the rendition of judgment rendered the verdict unenforceable between Reising and Baldor, and USAA, by consenting, placed itself in the same position as Baldor with respect to the verdict. Because USAA was abated from the suit and did not participate in the trial, its post-dismissal consent to bind itself to the verdict did not revive the verdict's enforceability such that USAA could bind Reising to the verdict. The Court therefore did not address whether USAA was entitled to consent to Reising's suit against Baldor post-verdict because even if timely, its consent did not entitle it to judgment.

Justice Bland, joined by Justice Lehrmann, dissented. The dissenting justices would have granted relief on the basis that the trial court had a ministerial duty to render judgment on the verdict because the agreed dismissal did not render the verdict unenforceable.

e) *Pharr–San Juan–Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466 (Feb. 11, 2022) [20-0033]

At issue in this insurance-coverage dispute is whether a golf cart is covered under an automobile liability policy. The Pharr-San Juan-Alamo Independent School District had an automobile-liability insurance from the Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund. The policy required the Insurance Fund to indemnify and defend the School District for damages "caused by an accident and result[] from the

ownership, maintenance or use of a covered auto." The policy defined "auto" as "a land motor vehicle . . . designed for travel on public roads."

After Alexis Flores was thrown from a golf cart driven by a School District employee during a school program, she sued the sued the School District. While that suit was pending, the School District requested a defense and indemnity from the Insurance Fund under its automobile policy. The Insurance Fund refused, asserting that the policy did not provide coverage because a "golf cart" is not designed for travel on public roads and thus is not an "auto." The Insurance Fund filed this suit seeking a declaratory judgment that it had no duty to defend the School District. The School District filed a counter-claim for declaratory judgment that the policy required the Insurance Fund to defend and indemnify the School District. Meanwhile, Flores won a $100,000 judgment against the School District.

Both the Insurance Fund and the School District moved for summary judgment. With its motion, the School District attached additional documents, including print-outs of portions of the website of E-Z-Go, a golf-cart manufacturer, and a Wall Street Journal article on electric vehicles. The trial court determined as a matter of law that the policy requires the Insurance Fund to defend and indemnify the School District. It entered a final judgment requiring the Insurance Fund to pay the School District the costs it incurred in defending Flores's suit and the $100,000 it paid to satisfy the judgment in that suit, plus post-judgment interest.

The Insurance Fund appealed, and the court of appeals reversed, holding that neither party was entitled to summary judgment on either the duty to defend or the duty to indemnify. The appellate court first held that, in an exception to the eight-corners rule that prohibits the consideration of extrinsic evidence in insurance cases like this, it could consider extrinsic evidence because the evidence was relevant only to the insurance-coverage dispute and not relevant to the merits of Flores's claims against the School District. Next, the court concluded that the School District's extrinsic evidence established that "the term 'golf cart' has an expanded meaning in today's lexicon," such that it may include vehicles that are designed for travel on public roads. But the court concluded that the trial court erred by granting the School District's summary-judgment motion because the extrinsic evidence raised a fact question about the design of the golf cart from which Flores was thrown. On the duty to indemnify, the court of appeals also held that the evidence created a genuine issue of fact regarding whether the golf cart was an "auto" covered by the policy.

The School District petitioned the Supreme Court for review, but the Insurance Fund did not. The Supreme Court affirmed the court of appeals' judgment reversing the trial court's judgment, but for different reasons. As to the duty to defend, the Court first noted that in a separate case decided the same day as this one, the Court approved an exception to the eight-corners rule that allows consideration of extrinsic evidence in certain conditions. *See Monroe Guar. Ins. Co. v.*

BITCO Gen. Ins. Corp., 640 S.W.3d 195 (Tex. 2022). The Court concluded that the *Monroe* exception did not apply to this case. The *Monroe* exception requires a "gap" in the plaintiff's petition that leaves the Court unable to determine whether coverage exists by applying the eight-corners rule. In this case, there was no "gap" in the petition's recitation of facts that needed to be filled. And based on the facts alleged, the petition in this case did not state a claim that could trigger the duty to defend under the eight-corners rule.

The Court held that the common, ordinary, and generally accepted meaning of "golf cart" did not include vehicles "designed for travel on public roads," as the insurance policy defined "auto." The Court looked to dictionary and statutory definitions, determined that the extensive legislation permitting golf carts to be operated on public roads under limited circumstances showed that golf carts are not normally designed for public-road use, and noted that courts from other jurisdictions have consistently used and construed the term "golf cart" to refer to a vehicle not designed for travel on public roads. Second, the Court held that even if it could consider the School District's extrinsic evidence, that evidence did not support a finding that golf carts are "designed for travel on public roads."

As to the duty to indemnify, the Court held again that the evidence conclusively established that the vehicle from which Flores was thrown was not "designed for travel on public roads." The evidence showed that the golf cart was "an older model, electric type [golf cart] commonly seen on golf courses," was a "normal golf cart you would see at a golf course," and was "not street legal," even if it may have been used on public roads for brief periods. Thus, no evidence established that the golf cart was a "covered auto" under the policy. Finally, the Court noted that its analysis would entitle the Insurance Fund to summary judgment. But because the Insurance Fund did not file a petition for review, the Court could not render judgment in its favor and instead remanded to the trial court.

4. *Stowers* Claims

a) *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261 (Tex. Apr. 23, 2021) [19-0701]

At issue in this case was whether the trial court properly denied an insurer's motions to dismiss claims against it by its insured for negligent failure to settle within policy limits and for breach of contract. Cassandra Longoria was driving and rear-ended a vehicle driven by Gary Gibson. Gibson sued Longoria, seeking damages of $1 million. Longoria's insurer, Farmers Texas County Mutual Insurance, provided an attorney who failed to designate an expert by the deadline. The trial court denied a motion to permit a late designation. Gibson offered to settle for $350,000, which was within Longoria's policy limits. Farmers countered with $250,000. Longoria, concerned about her potential liability for damages above her policy limits, agreed to pay the additional $100,000. Longoria then sued Farmers for negligent failure to settle and for breach of contract. Farmers filed motions to dismiss the claims under Texas Rule of Civil Procedure 91a, asserting that Texas law did not recognize a *Stowers*

cause of action when there has not been a judgment against the insured exceeding policy limits. Farmers also asserted that Longoria had no cause of action for breach of contract because Farmers had no duty to pay damages when Longoria was not legally responsible for any damages, Farmers had a right under the policy to settle or defend "as we consider appropriate," and its only duty to settle was the extra-contractual *Stowers* duty. The trial court denied the motions to dismiss.

Farmers sought mandamus relief in the court of appeals. The court held the trial court properly denied the motion to dismiss the *Stowers* claim because the law was not clear as to whether such a claim always required an excess judgment. The court, however, held that the trial court should have dismissed the breach of contract claims.

The Supreme Court first held that Longoria had no *Stowers* claim against Farmers. The Court had consistently recognized a *Stowers* cause of action only when the insured's liability exceeds policy limits, which Longoria's did not. The Court then addressed whether Longoria had a claim for breach of contract. Longoria alleged that (1) Farmers breached its obligation to defend Longoria against Gibson's suit by failing to designate expert witnesses on time and (2) Farmers breached its obligation to pay a settlement within policy limits when it chose to settle without exhausting coverage or securing a release for Longoria, demanding instead that she contribute personal funds to the settlement. As for the first claim, the Court agreed with Farmers that Longoria had no cause of action because a liability insurer is not vicariously responsible for the conduct of an independent attorney it selects to defend an insured. However, the Court held that Longoria could pursue a claim for breach of Farmers's duty to indemnify. The policy gave Farmers the right to "settle . . . as it considers appropriate" so Longoria did not have a cause of action for Farmers failing to accept a settlement offer within policy limits. However, she did have a cause of action against Farmers for breaching its separate promise to pay the damages for which the settlement made her legally responsible.

Chief Justice Hecht, joined by Justice Boyd and Justice Blacklock, dissented in part. The dissent agreed that Longoria did not have a *Stowers* claim. The dissent disagreed, however, that Longoria had a cause of action for breach of the duty to indemnify because an insurer's duty to indemnify is only triggered by a settlement in which the insured admits to facts establishing her legal responsibility. The dissent would have ordered dismissal of all Longoria's claims.

5. Texas Anti-Indemnity Act

a) *Maxim Crane Works, LP v. Zurich Am. Ins. Co.*, 642 S.W.3d 551 (Tex. Mar. 3, 2022) [21-0727]

At issue in this certified question case is whether a person employed by a general contractor is also considered an "employee" of the subcontractor under the Texas Anti-Indemnity Act.

Skanska USA, Inc., a general contractor, hired Berkel & Co. Contractors as a subcontractor on a large construction project in Houston. As a

condition of working on the job, Skanska required its subcontractors to participate in a contractor-controlled insurance program (CCIP), which provided both general commercial liability and workers' compensation insurance. Berkel then leased a crane from Maxim Crane Works, L.P., for use on the construction project. As required under the lease, Berkel named Maxim as an additional insured under Berkel's commercial general liability insurance policy, which was issued by Zurich American Insurance Company. Maxim did not enroll in Skanska's CCIP.

A Berkel employee operating the crane caused the boom to collapse, crushing the leg of Tyler Lee, a Skanska project supervisor. Lee recovered workers' compensation benefits under Skanska's CCIP and then sued Berkel, Maxim, and others in state court. A jury returned a verdict for Lee, allocating 90% of the fault to Berkel and 10% to Maxim. Maxim and Lee settled. The Fourteenth Court of Appeals reversed the trial court's judgment against Berkel because it concluded that the Texas Workers Compensation Act provided the exclusive remedy for Lee's injuries. The court reasoned that because Lee and Berkel were both covered under Skanka's CCIP, they were effectively co-employees under the Act.

In this separate suit, which was removed to federal court, Maxim sought declaratory relief and damages against Zurich for improperly denying Maxim coverage as an additional insured under Berkel's policy. The TAIA sets forth a general rulemaking indemnification clauses in construction contracts unenforceable. The rule applies equally to additional insured coverage, but an exception makes additional insured coverage enforceable if the claim runs against the policyholder's employee. The district court granted summary judgment for Zurich on the ground that the "employee exception" of the Texas Anti-Indemnity Act (TAIA) precluded Maxim from coverage as an additional insured. Maxim appealed.

In the U.S. Court of Appeals for the Fifth Circuit, Maxim and Zurich agreed that the TAIA voids Berkel's CGL policy from covering Maxim's costs unless the "employee exception" applies to their dispute. The Fifth Circuit therefore certified the following question to the Court: whether the employee exception "allows additional insured coverage when an injured worker brings a personal injury claim against the additional insured (indemnitee), and the worker and the indemnity[or] are deemed 'co-employees' . . . for purposes of the [Texas Workers' Compensation Act (TWCA)]."

The Court accepted the certified question and held that the word "employee" in section 151.103 of the TAIA bears its common, ordinary meaning, which is not affected by whether the indemnitor and injured employee are considered co-employees for purposes of the TWCA.

Q. INTENTIONAL TORTS

1. Defamation

a) *Hogan v. Zoanni*, 627 S.W.3d 163 (Tex. June 4, 2021) [18-0944]

At issue in this case was whether the Defamation Mitigation Act (DMA) authorizes dismissal of a plaintiff's defamation claims when that

party fails to provide the defendant with a statutory request for correction, clarification, or retraction of the allegedly defamatory statements prior to the expiration of the statute of limitations.

In 2014, David Hogan's lawyers sent Stephanie Zoanni a cease-and-desist letter accusing her of defamation, identifying two specific publications containing examples of her allegedly defamatory statements. Shortly after, Hogan filed suit for defamation, referencing the same statements his counsel identified in the letter to Zoanni. Just before trial, and more than a year after the statements had been published, Hogan amended his petition to add other allegedly defamatory statements. The trial court denied Zoanni's motion for a directed verdict to dismiss the claims based on the new statements, and Zoanni declined the trial court's offer to abate the suit. A jury awarded a $2.1 million verdict for Hogan, which included the new statements. The court of appeals reversed, concluding that the trial court should have dismissed the claims based on the new statements because Hogan did not provide a request for correction, clarification, or retraction and no longer could provide a request within the period of limitations.

A plurality of the Court held that the DMA does not authorize dismissal for failure to provide a statutory request but rather the abatement of claims and that remedy was available to Zoanni when Hogan amended his petition adding the new claims. The Court reasoned that allowing for the dismissal of claims for failure to provide the request would defeat both the plain language and purpose of the statute. The DMA provides a plaintiff with a method of notifying a defendant of the allegedly defamatory statements and only authorizes the removal of exemplary damages for failure to comply with its provisions. It further authorizes a defendant to seek abatement if the plaintiff fails to provide the request that the DMA requires.

Chief Justice Hecht, joined by Justice Blacklock and Justice Huddle, dissented, concluding that the DMA allows for dismissal if a plaintiff fails to provide a request to the defendant during the period of limitations. Because Hogan could no longer provide such a request, the dissent would have affirmed the court of appeals. Justice Boyd concurred, generally agreeing with Chief Justice Hecht that dismissal is appropriate under the statute. However, because Zoanni failed to seek abatement to show that she had not received the written request required by the DMA, she waived her right to seek dismissal.

b) *Mem'l Hermann Health Sys. v. Gomez*, — S.W.3d —, 2022 WL 1194374 (Tex. Apr. 22, 2022) [19-0872]

At issue in this defamation and business-disparagement case was whether any evidence supported the jury's findings that certain statements were published and caused damages.

Miguel A. Gomez, III, M.D., was a cardiovascular surgeon at a Memorial Hermann hospital campus in Houston. When Methodist West opened a nearby campus, Gomez began to discuss splitting his practice between the two hospitals. A Memorial Hermann

employee—Jennifer Todd—contacted a Methodist West employee—Cyndi Peña—to share concerns about Gomez's reputation as a surgeon. Peña had heard concerns before, and she informed Methodist West's CEO. Methodist West hired Gomez. Meanwhile, Memorial Hermann began to review non-risk-adjusted surgeon mortality rates. This review flagged Gomez as a surgeon with a particularly high mortality rate. Gomez objected to the use of this data, arguing it was statistically invalid. However, another Memorial Hermann employee—Byron Auzenne—told Gomez that the data was being widely shared. Gomez eventually resigned his privileges at Memorial Hermann and moved his practice entirely to Methodist West.

Gomez sued Memorial Hermann for antitrust violations, and defamation (of him) and business disparagement (of his professional association). Gomez argued that Memorial Hermann used faulty data as part of a "whisper campaign" to ruin his reputation and prevent him from pulling patients to a rival hospital. The jury charge provided two statements in quotation marks—one from Auzenne to Gomez, and one from Todd to Peña—and asked the jury to answer the defamation and disparagement questions "with respect to" the quoted statements. The jury rejected Gomez's antitrust claims but awarded him over $6 million in damages for defamation and business disparagement. The court of appeals affirmed, holding that Auzenne's statement encompassed the mortality data generally, and that Todd's statement represented the alleged whisper campaign.

The Supreme Court reversed and rendered judgment for Memorial Hermann. The Court first interpreted the jury charge, which provided specific quoted statements, instructed the jury to answer the questions "with respect to" the provided statements, and referred the jury back to "the statement." The Court held that the jury charge only asked the jury about the quoted statements themselves, not the mortality data in general or the alleged whisper campaign.

Accordingly, the Court held that no evidence supported the jury's finding that Auzenne's statement to Gomez was published. Auzenne made the statement to Gomez alone. There was no evidence that the quoted statement properly before the jury was communicated to a third party besides Gomez. Similarly, the Court held that no evidence supported the jury's finding that Todd's statement to Peña caused any of Gomez's claimed damages. The Court reasoned that the jury charge did not encompass a widespread whisper campaign but asked about the specific statement that Todd made to Peña. The evidence showed that Peña had already heard from others what Todd reported to her. Nothing connected Peña to any of Gomez's referring physicians. While Peña informed Methodist West's CEO of what she heard, no harm came of it—Methodist West still offered Gomez a position at the hospital.

R. JURISDICTION

1. Eminent Domain

a) *In re Breviloba, LLC,* — S.W.3d —, 2022 WL 2282598 (Tex. June 24, 2022) (per curiam) [21-0541]

At issue in this case was whether, in an eminent domain case, counterclaims exceeding the amount-in-controversy cap on a county court at law's additional jurisdiction require a transfer to the district court.

Breviloba, LLC sued H & S Hoke Ranch, LLC in a county court at law to condemn a 50-foot-wide pipeline easement across Hoke Ranch's property. Hoke Ranch counterclaimed, arguing that Breviloba was a sham entity that lacked eminent domain authority. Hoke Ranch sought ownership of the portion of pipeline crossing its land or $13 million in damages.

Hoke Ranch moved to transfer its counterclaims to the district court, arguing that they exceeded the county court at law's $250,000 jurisdictional limit. The county court at law denied the motion. A divided court of appeals granted Hoke Ranch's mandamus relief and ordered the entire case be transferred to the district court. Breviloba sought mandamus relief from the Supreme Court.

The Supreme Court conditionally granted Breviloba's writ of mandamus, agreeing that the county court at law retained jurisdiction over the entire eminent domain case. Under the Texas Property Code, district courts and county courts at law have concurrent jurisdiction over eminent domain proceedings, with no amount-in-controversy cap. The Texas Government Code provides a jurisdictional grant to county courts at law for civil cases up to a $250,000 amount-in-controversy limit. But this is *in addition to* other jurisdiction provided by law, and the $250,000 cap does not limit a county court at law's jurisdiction over eminent domain cases specifically granted in the Property Code.

The Court then concluded that Hoke Ranch's counterclaims were in fact part of an eminent domain case and therefore not subject to an amount-in-controversy cap. Hoke Ranch's counterclaims challenged Breviloba's condemnation authority—a clear issue of eminent domain. The court at law therefore maintained its jurisdiction.

Accordingly, the Court held that the court of appeals erred and conditionally granted mandamus relief, directing the court of appeals to vacate its mandamus order.

2. Jurisdictional Discovery

a) *In re Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d 671 (Tex. Feb. 4, 2022) [20-0384]

The issue in this mandamus proceeding is whether permissible discovery under Texas Rule of Civil Procedure 120a(3) must relate exclusively to the jurisdictional question.

Plumbing installer Christianson Air Conditioning and Plumbing, LLC and homebuilder Continental Homes of Texas, LP (together, "Christianson") sued pipe-manufacturer NIBCO, alleging that NIBCO's brand of PEX pipe leaked after installation in thousands of Texas homes. Christianson also brought claims against Canadian engineering firm Jana Corporation, claiming that Jana helped NIBCO

reformulate defective PEX pipe and obtain certification for the Texas market. Jana filed a special appearance contesting personal jurisdiction under Rule 120a. Christianson successfully moved to compel the depositions of two corporate representatives over Jana's objections that Christianson's proposed list of thirty deposition topics impermissibly touched the merits of the case.

Jana filed a petition for writ of mandamus in the Third Court of Appeals, challenging nine of the deposition topics. The court of appeals granted Jana mandamus relief as to eight of the topics, holding that the trial court abused its discretion by compelling jurisdictional discovery of information not exclusively related to the jurisdictional question. Christianson then filed this mandamus proceeding, challenging the court of appeals' conclusions regarding six of the deposition topics. Christianson argued that the court of appeals read Rule 120a(3) too narrowly, and that topics targeting the "purposeful availment" element of jurisdiction may necessarily overlap with merits issues.

Rejecting the court of appeals' standard, the Court held that a trial court does not abuse its discretion merely by compelling discovery on topics that overlap with merits issues. Instead, when a plaintiff requests jurisdictional discovery under Rule 120a(3), the information sought must be essential to prove at least one part of the plaintiff's theory of personal jurisdiction. Thus, when a stream-of-commerce-plus theory of personal jurisdiction is at issue, proposed deposition topics must target either the defendant's purposeful availment of the Texas forum or the relatedness between the alleged forum contacts and the litigation. The Court also noted that the topics proposed must also comport with principles limiting the scope of discovery generally. In reviewing Christianson's proposed topics, the Court concluded that the challenged topics, in addition to being overbroad or duplicative under general discovery principles, encompass some matters essential to establishing purposeful availment or relatedness, but also encompass matters non-essential to either factor. Holding that mandamus relief was proper, the Court conditionally granted mandamus relief, directed the court of appeals to vacate its mandamus order, and instructed the trial court to apply the Court's new standard to the remaining disputed deposition topics.

3. Mootness

a) *Diocese of Lubbock v. Guerrero*, 624 S.W.3d 563 (Tex. June 11, 2021) (per curiam) [20-0005]

The issue in this appeal was whether the trial court erred in denying the Diocese of Lubbock's motion to dismiss under the Texas Citizens Protection Act (TCPA). Jesus Guerrero, a deacon of the Diocese, sued the Diocese for including his name on a list of clergy credibly accused of sexual abuse of a minor. He alleged that the list and accompanying public statements by the Diocese were defamatory.

The Diocese moved to dismiss Guerrero's claims under the TCPA based on its free speech rights. The Diocese also filed a plea to the jurisdiction, contending that the ecclesiastical abstention doctrine barred the court

from entertaining jurisdiction in the case. The trial court denied both motions. The Diocese then sought review of the denial of the motions to dismiss through an interlocutory appeal and through a writ of mandamus. The court of appeals affirmed the trial court's interlocutory order denying the motion to dismiss and denied the Diocese's petition for writ of mandamus, concluding the ecclesiastical abstention doctrine did not apply to Guerrero's suit.

As before, the Diocese sought appellate review of the order denying its motion to dismiss under the TCPA and mandamus review of the order denying its plea to the jurisdiction. In the accompanying mandamus, the Supreme Court concluded that the ecclesiastical abstention doctrine barred the trial court from exercising jurisdiction over Guerrero's suit. *See In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. June 11, 2021). Following that determination, the Supreme Court concluded that the collateral matters asserted in the TCPA appeal were moot. The Court accordingly vacated the orders below and dismissed the cause.

4. Personal Jurisdiction

a) *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1 (Tex. June 25, 2021) [18-0350]

The issue presented was whether Texas courts may exercise personal jurisdiction over SprayFoamPolymers.com, an out-of-state manufacturer of spray foam insulation.

SprayFoam is a Connecticut corporation with its principal place of business and sole office in Connecticut. In July 2013, the Lucianos hired a Texas installation company to install spray foam in their new home. The installation company installed Thermoseal 500, a product manufactured by SprayFoam. Soon after the installation, the Lucianos alleged they began to suffer from coughing spells, itchy and burning eyes, allergies, and headaches. The Lucianos sued both the installation company and SprayFoam in Texas, pleading claims of negligence, products liability, breach of warranties, nuisance, breach of contract, and violations of the DTPA. SprayFoam specially appeared to contest jurisdiction, arguing that Texas courts lacked personal jurisdiction over it. The trial court denied SprayFoam's special appearance, but the court of appeals reversed. The Supreme Court reversed and remanded the case to the trial court for further proceedings.

The Court held that the evidence supported the trial court's conclusion that SprayFoam had sufficient minimum contacts with Texas such that the exercise of specific jurisdiction over SprayFoam would not offend traditional notions of fair play and substantial justice. First, the Court held that SprayFoam purposefully availed itself to Texas with the use of a local distribution center that SprayFoam used for "outsourced logistics services in Texas." SprayFoam also utilized a local sales solicitor to market its product in Texas. Viewing SprayFoam's purposeful contact in totality, the Court held that SprayFoam's contacts evinced an intent to create a market for its products in Texas. Second, the Court held that the lawsuit related to SprayFoam's contacts in Texas. The Court relied on *Ford Motor Co. v. Montana Eighth*

Judicial District Ct., 141 S.Ct. 1017 (2021) for the proposition that due process does not require a direct causal connection between SprayFoam's purposeful contacts and the lawsuit.

5. Standing

a) *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, — S.W.3d —, 2022 WL 2283221 (Tex. June 24, 2022) [22-0008]

This direct appeal arises from two consolidated suits challenging the constitutionality of the Legislature's recently enacted laws reapportioning the State's senatorial and representative districts based on the 2020 census. The census data was not released until September 2021, after the conclusion of the Legislature's 2021 regular session, and the Legislature then passed the reapportionment laws during a special session called by the Governor.

In one of the suits, the Mexican American Legislative Caucus (MALC) sued the Governor and the Secretary of State for declaratory and injunctive relief. MALC claims that H.B. 1, which reapportioned the representative districts, is unconstitutional because it violates Article III, Section 26 of the Texas Constitution—the "county line rule"—by providing only one district wholly contained within Cameron County even though the county's population is sufficient to support two such districts. In the other suit, two state senators, a registered voter and candidate for House District 37, and the Tejano Democrats (collectively, the Gutierrez plaintiffs) sued the State of Texas challenging the validity of both H.B. 1 (for the same reason as MALC) and S.B. 4, which reapportioned the Texas senatorial districts. The Gutierrez plaintiffs allege that both bills violate Article III, Section 28 of the Texas Constitution because they were enacted during a special session of the Legislature rather than during "the first regular session" after publication of the census, as Section 28 requires.

Both cases were transferred to and consolidated before a special three-judge district court. The defendants filed pleas to the jurisdiction, arguing the plaintiffs lacked standing and their claims were barred by sovereign immunity. The trial court denied the pleas except as to the Gutierrez plaintiffs' claim for injunctive relief. The defendants appealed, reiterating their standing and immunity arguments and also contending that the plaintiffs' claims are moot because they have disclaimed any request for relief with respect to the 2022 election, and the current district maps will not apply to the 2024 election because the Legislature is constitutionally required to undertake reapportionment again in 2023.

The Supreme Court reversed in part, dismissed in part, and remanded in part. As an initial matter, the Court held that the plaintiffs had not disclaimed their request for relief as to the 2022 election and that their claims were not moot. Although the likelihood of obtaining relief relating to the 2022 election is low, such relief is not impossible.

Turning to MALC's suit, the Court held that MALC lacked associational standing to challenge Section 26. To establish associational standing, MALC had to show, among other things, that its members would

otherwise have standing to sue in their own right and that the interests it seeks to protect are germane to its purpose. MALC identified only one member, a representative and resident of Cameron County. The Court assumed without deciding that MALC had met its initial burden as to its individual members' standing, agreeing that if MALC's interpretation of Section 26 is correct, Cameron County's residents are being deprived of their constitutional right to two representatives, not just one, fully devoted to serving the interests of those residents rather than the residents of both Cameron County and a neighboring county. However, the interest that MALC claims gives some of its members individual standing as Cameron County residents to challenge H.B. 1 for violating Section 26 is unrelated to MALC's organizational purpose—maintaining and expanding Latino representation across elected offices in Texas. Accordingly, MALC failed to meet the second prong of associational standing.

By contrast, the Court held that one of the Gutierrez plaintiffs, a Cameron County resident, sufficiently alleged a particularized injury with respect to H.B. 1's alleged violation of Section 26. Another Gutierrez plaintiff, a state senator who was elected in 2020 for a four-year term but is required to run for reelection in 2022 because all senators must run for reelection after apportionment, sufficiently alleged a particularized injury with respect to S.B. 4's alleged violation of Section 28. Specifically, he alleged that Section 28 prohibits reapportionment until the 2023 regular session and that absent the unconstitutional apportionment during an earlier special session, he would not have been deprived of his four-year term. Notwithstanding these particularized injuries, the Court held that they were not traceable to the State of Texas, the only named defendant in the Gutierrez plaintiffs' suit, because there was no enforcement connection between the challenged laws and the State itself. However, the Court explained that it could remand for the plaintiffs to replead their claims against a proper state defendant absent incurable jurisdictional defects.

To determine whether remand rather than dismissal was a proper remedy, the Court evaluated the State's assertion that the claims were facially invalid and thus barred by sovereign immunity. First, the Court held that the Section 26 claim was not facially invalid. The provision states that a county with a sufficient population for "more" than one representative is entitled to be apportioned "such . . . representatives." Then, any "surplus of population" is joined with a "contiguous county or counties." At the plea-to-the-jurisdiction stage, the plaintiffs met their burden by alleging that Cameron County had a sufficient population for more than one representative and that it was entitled to two districts wholly within its borders, absent conflict with the one-man, one-vote principle.

However, the Court agreed with the State that the Section 28 claim was facially invalid and thus barred by immunity. Section 28 states in part that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." The Court

held that in requiring reapportionment at that first regular session, Section 28 does not prohibit reapportionment at other times. The Legislature is vested with all legislative power—the power to make, alter, and repeal laws—not expressly or impliedly forbidden by other constitutional provisions. Further, the plaintiffs' interpretation would foreclose reapportionment despite the fact that, following the census, the existing maps on their face violate the U.S. Constitution.

Accordingly, the Court dismissed MALC's claims and the Gutierrez plaintiffs' Section 28 claim for lack of jurisdiction and remanded the Gutierrez plaintiffs' Section 26 claim to give them an opportunity to replead against a proper State defendant.

Chief Justice Hecht, joined by Justice Boyd and Justice Blacklock, dissented, opining that the claims were moot as to the 2022 election. As to the 2024 election, the claims are not yet ripe and may never germinate because reapportionment before that election is a virtual certainty. Accordingly, the dissent would have dismissed both suits for lack of jurisdiction.

b) *Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692 (Tex. Apr. 9, 2021) [19-0475]

At issue in this case was whether a city resident has standing to challenge the electric rates charged by a municipally owned utility. Data Foundry sued the City of Austin, alleging the rates the City was charging for electricity were unreasonable, excessive, confiscatory, and discriminatory. The trial court concluded that Data Foundry lacked standing and granted the City's motion to dismiss. The court of appeals reversed the trial court's dismissal based on standing but affirmed in part the dismissal of some of Data Foundry's claims on other grounds. The Supreme Court affirmed in part and reversed in part, remanding all claims to the trial court for further proceedings.

The Court held that Data Foundry's claim that the rates charged by the City were unlawful and discriminatory alleged a particularized injury that conferred standing. Data Foundry alleged it suffered financial harm by paying the City a sum of money that exceeded what Data Foundry contended it should have to pay. The Court held that a ratepayer was not required to allege its injury was distinct from injuries other ratepayers may suffer, disapproving of contrary language in *Tuck v. Texas Power & Light Co.*, 543 S.W.2d 214 (Tex. App.—Austin 1976, writ ref'd n.r.e.), and *Schenker v. City of San Antonio*, 369 S.W.2d 626 (Tex. App.—San Antonio 1963, writ ref'd n.r.e.). Because the trial court dismissed Data Foundry's claims solely on the basis of standing, and the City's other arguments were either not considered by or not properly raised in the trial court or the court of appeals, the Court remanded all claims to the trial court for further proceedings.

c) *Grassroots Leadership, Inc. v. Tex. Dep't of Family and Protective Servs.*, — S.W.3d —, 2022 WL 2183124 (Tex. June 17, 2022) (per curiam) [19-0092]

At issue in this case was whether formerly detained asylum-seeking mothers have standing to

challenge a Department of Family and Protective Services rule applying to certain family detention facilities.

After a federal court enjoined the Dilley and Karnes federal immigration detention centers from detaining asylum-seeking families because the centers lacked a childcare license, the Department promulgated 26 Texas Administrative Code Section 748.7, a rule establishing licensing requirements for family residential centers detention centers. Rule 748.7 provides an exception to state childcare licensing standards that largely prohibit facilities from housing unrelated adults and children in the same bedroom.

Grassroots Leadership, together with several detained mothers and a daycare operator, sued the Department to challenge Rule 748.7, and, in particular, the room-sharing exception. They alleged that, in reliance on Rule 748.7(c), the centers permit unrelated adults and children to share bedrooms, resulting in safety risks and privacy violations to the detainees and their children. The plaintiffs also alleged that the Rule's adoption results in longer detention periods. The plaintiffs sought injunctive relief and a declaration that the Department lacked authority to adopt Rule 748.7.

The Department and intervening private contractors who operate the facilities filed pleas to the jurisdiction, contending that the plaintiffs lack standing to challenge the Rule. After granting the pleas in part, the trial court declared Rule 748.7 invalid because it "contravenes" and "runs counter to the general objectives of" the Texas Human Resources Code. The trial court further enjoined the Department from granting licenses under Rule 748.7.

The court of appeals reversed, holding that the detainee-mothers lack standing to assert their claims. The court of appeals held the detainees did not allege an injury traceable to the Rule. The en banc court of appeals denied reconsideration, with three justices dissenting.

The detained mothers petitioned The Supreme Court for review, arguing they alleged concrete injuries traceable to Rule 748.7 that are redressable in court and thus they have standing. In cross-petitions, the respondents contested the detainees' standing and raised issues that the court of appeals did not reach.

In a per curiam opinion, the Supreme Court reversed and directed the court of appeals to consider the remaining jurisdictional issues and the merits of the case, as appropriate. The Court held that the detained mothers had standing to challenge the rule because they alleged concrete injuries, including probable risk of harm and privacy violations. Contrary to the court of appeals' interpretation, Rule 748.7 permits minors to share bedrooms with unrelated adults where it otherwise would not be permitted at these facilities, and thus the injuries alleged are traceable to the Rule. Should they be proven, the requested relief seeks redress of those harms.

6. Subject Matter Jurisdiction

a) *Preston v. M1 Support Servs., L.P.*, 642 S.W.3d 452 (Tex. Jan. 21, 2022) [20-0270]

At issue in this case was whether the families of three deceased Navy servicemembers and an injured servicemember may sue a private Navy contractor for negligently maintaining a helicopter that crashed during a training exercise, or if their claims are barred by the political question doctrine.

The Navy hired M1 Support Services to perform maintenance on a fleet of Navy aircraft. After the maintenance had been completed, five Navy servicemembers took one of the maintained helicopters out for a training exercise. During the exercise, the helicopter caught fire and crashed into the ocean, killing three passengers and injuring two. The survivors of the deceased and one injured passenger sued M1 under the Death on the High Seas Act and maritime law. M1 filed a plea to the jurisdiction, arguing that review of this case would require judicial second-guessing of military decisions constitutionally committed to the Executive and Legislative Branches. The trial court granted M1's plea to the jurisdiction, and the court of appeals affirmed. The Supreme Court reversed.

The Court held that the Navy did not exercise plenary control over M1's maintenance activities such that M1's actions could be considered Navy actions. Further, M1 did not adduce evidence in its plea to the jurisdiction that would connect any negligence on the Navy's part to the cause of the crash. Therefore, adjudication of this case could not implicate a review of Navy decisions. The Court held that issues that implicate sensitive military decision-making are insulated from judicial review. The claims here, however, did not implicate such sensitive matters.

The Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

b) *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791 (Tex. Apr. 16, 2021) [19-0767]

At issue in this case were two jurisdictional questions arising from the Texas Propane Gas Association's preemption challenge to regulations enacted by the City of Houston to regulate the liquefied petroleum gas industry. The Texas Natural Resources Code directs the Railroad Commission to adopt rules and regulations pertaining to all aspects of the liquefied petroleum gas industry, and the Commission has done so through a comprehensive set of statewide liquified petroleum gas regulations known as the LP-Gas Safety Rules. Section 113.054 of the Natural Resources Code provides that the LP-Gas Safety Rules "preempt and supersede any ordinance, order, or rule adopted by a political subdivision . . . relating to any aspect or phase of" the liquefied petroleum gas industry.

After the City amended its Fire Code to include hundreds of liquefied petroleum gas regulations, TPGA sued for a declaration that the City's rules are categorically preempted by section 113.054 and the LP-Gas Safety Rules. Although the trial court denied the City's plea to the jurisdiction, the court

of appeals agreed with one of the City's two jurisdictional arguments and remanded to give TPGA an opportunity to amend its pleadings. Both sides petitioned for review. The Supreme Court rejected both of the City's jurisdictional challenges and remanded the case to the trial court for proceedings on the merits.

The City's liquefied petroleum gas regulations impose monetary fines of up to $2,000 per violation per day. The City's first argument was that because its regulations are penal in nature, civil courts lack jurisdiction over TPGA's preemption claim, which is a criminal law matter that can only be raised in defense to prosecution. The Court concluded that civil courts had jurisdiction over TPGA's preemption claim because the City's regulations threatened irreparable injury to the vested property rights of TPGA's members.

The Court further held that TPGA's lawsuit was not a criminal law matter outside of the civil courts' jurisdiction because the essence of the suit—a dispute over the City's legal authority to regulate a specific category of commercial activity, the liquefied petroleum gas industry—was more substantively civil than criminal. The Court reasoned that protection of property rights is a core civil-law function and that the criminal-law features of the City's regulations were merely incidental to the legal issues raised by TPGA.

The City's second jurisdictional challenge was to TPGA's standing to seek invalidation of all of the City's hundreds of liquefied petroleum gas regulations. The City argued that to challenge any discrete regulation, TPGA must demonstrate that one of its members was injured by that regulation. TPGA maintained that it has only one claim: that all of the City's liquefied petroleum gas regulations are preempted by the LP-Gas Safety Rules under section 113.054 of the Natural Resources Code.

The Court explained that because the City had not specially excepted to TPGA's pleadings, Texas law required that they be construed liberally in favor of the pleader. Applying that standard, the Court concluded that TPGA's pleadings were sufficient to demonstrate standing because the injury TPGA alleged was a burden to its members arising from inconsistent regulations, which section 113.054 was designed to prevent. The Court cautioned that whether TPGA could prevail on its preemption claim was an issue going to the merits, not standing.

Justice Blacklock filed an opinion concurring in part and dissenting in part, joined by Justice Boyd. Although the dissenting justices agreed with the Court's conclusion that TPGA's lawsuit was not a criminal law matter, they disagreed with the majority's holding that TPGA's pleadings were sufficient to establish standing to challenge all of the City's liquefied petroleum gas regulations. They pointed to federal-court decisions for the rule that a plaintiff attacking an entire statutory or regulatory scheme must plead facts showing a concrete injury arising from every provision of the scheme the plaintiff wants to enjoin, even if every provision is assailed on the same legal ground. Because in their view TPGA's pleadings had alleged an injury to one

member with respect to one instance of City enforcement only, the dissenting justices would have held that TPGA's pleadings adequately alleged injury with respect to the regulations implicated by that episode, but not with respect to the rest of the regulations. They would have affirmed the court of appeals' judgment granting the City's plea to the jurisdiction and remanded to allow TPGA an opportunity to replead.

S. MEDICAL LIABILITY

1. Discovery

a) *In re LCS SP, LLC*, 640 S.W.3d 848 (Tex. February 25, 2022) [20-0694]

At issue in this case is whether a plaintiff suing under Civil Practice and Remedies Code Chapter 74, the Texas Medical Liability Act, may obtain discovery of a skilled nursing facility's general policies before serving the expert report that the Act requires. Section 74.351(s) stays discovery in health-care liability cases until the plaintiff serves the defendant with an expert report supporting the plaintiff's claim, unless the discovery seeks information that is "related to the patient's health care."

Donna Smith was a patient at the Signature Pointe Senior Living Community, a skilled nursing facility owned by LCS SP, LLC. During that time, she allegedly suffered multiple falls, fracturing her ankle, shoulder, and hip. Her husband, Kenneth Smith, sued on her behalf, asserting health-care liability claims against LCS under the Texas Medical Liability Act. Before serving LCS with the Act's required expert report, Smith sought discovery of LCS's general policies. LCS objected, arguing that the Act stayed discovery until after the service of an expert report. The trial court denied Smith's motion to compel discovery.

Smith petitioned the court of appeals for mandamus relief, and the appellate court granted a stay of Smith's expert-report deadline. The court then conditionally granted relief, holding that LCS's policies were relevant to assessing the appropriate standard of care that applies to the facility. LCS petitioned the Supreme Court for relief.

Invoking the Act's stay of discovery in Section 74.351(s), the Court held that LCS's policies were not discoverable before Smith served LCS with an expert report. Although the Act excepts information "related to the patient's health care" from the stay of discovery, LCS's policies are not specific enough to Mrs. Smith's health care to exclude them from the discovery stay. Smith argued that the Court's precedent in *Diversicare Gen. Partner v. Rubio*, 185 S.W.3d 842 (Tex. 2005), meant that LCS's policies were necessarily discoverable before the service of an expert report. However, the Court had no occasion to examine the Act's stay of discovery in *Diversicare*. Though information may be relevant and discoverable, only that which is specifically related to the patient's health care may be had before the plaintiff serves a report. Thus, the trial court acted within its discretion in determining that production of general policies and procedures was premature.

LCS also objected to the court of appeals' stay of the Act's expert-report deadline. The Court held that the appellate court's stay was an appropriate

exercise of the court of appeals' power to grant "any just relief" under Texas Rule of Appellate Procedure 52.10(b) to preserve the rights of the parties and the court's jurisdiction.

The Court conditionally granted mandamus relief for LCS.

2. Expert Reports

a) E.D. v. Tex. Health Care, P.L.L.C., 644 S.W.3d 660 (Tex. May 6, 2022) (per curiam) [20-0657]

The issue in this medical-malpractice case is whether an expert report reflects "an objective good faith effort" to satisfy the Texas Medical Liability Act's "fair summary" standard in a suit alleging that negligent perinatal care during labor and delivery caused an infant's brain damage and other serious health conditions.

The defendant doctor induced the mother's labor after a full-term, healthy pregnancy. During the next day and a half, fetal heart-rate tracing showed intermittent signs of fetal distress. These tracings were not accurately charted by the attending nurse, but the doctor physically examined the patient at one point and communicated with the nurse about the patient's condition at least two times. Shortly after the last communication between doctor and nurse, the situation became "very concerning" when the fetal heart rate plummeted, a condition called fetal bradycardia. Twenty minutes later, the baby was delivered in grave condition via emergency cesarean section, and she was subsequently diagnosed with hypoxic ischemic encephalopathy, cerebral palsy, and quadriplegia.

The baby's parents sued the doctor, his medical practice, and others for negligence. After the plaintiffs timely served an amended expert report as required by the Medical Liability Act, the defendant doctor and his practice filed a joint motion to dismiss the healthcare-liability claims with prejudice. The motion asserted that the report inadequately articulated a demonstrable breach of the standard of care and was "conclusory, speculative, and disconnected from the underlying facts."

The trial court denied the motion, but the court of appeals reversed, dismissed the claims with prejudice, and remanded to the trial court to award reasonable costs and attorney's fees. The court found the report conclusory, speculative, and legally insufficient to support the healthcare-liability claims.

Without hearing oral argument, the Supreme Court reversed and remanded. The Court concluded that the expert's report was adequate under the Medical Liability Act's "good faith" and "fair summary" standards because it (1) described the standard of care the doctor owed to mother and child as requiring effective communication with the nurse or close personal monitoring of the fetal heart rate; (2) identified the doctor's breach as failure to timely and accurately evaluate the fetal heart-rate tracing markers, either personally or by making appropriate inquiries of the attending nurse; and (3) explained that earlier delivery would have avoided or lessened the injury the baby suffered and that the doctor's failures delayed delivery too late to avoid injury.

The Court held that, in concluding to the contrary, the court of appeals

failed to consider the report as a whole and impermissibly weighed the credibility of the expert's opinions.

b) *Lake Jackson Med. Spa, Ltd. v. Gaytan*, 640 S.W.3d 830 (Feb. 25, 2022) [20-0802]

The primary issue in this case is whether a plaintiff's claims constitute "health care liability claims" under the Texas Medical Liability Act. A preliminary issue is whether the Act prohibited the plaintiff from filing an amended petition after the Act's deadline for serving expert reports.

Erika Gaytan sued Lake Jackson Medical Spa, Ltd., its employee, an aesthetician, and its owner, Dr. Robert Yarish, complaining that the aesthetician negligently performed various skin treatments that caused scarring and discoloration to Gaytan's skin. Gaytan originally sued for "medical negligence" involving an "improper and negligent course of medical treatment." Well after 120 days had passed, the defendants moved to dismiss Gaytan's claims because she had not served an expert report as required by the Texas Medical Liability Act.

In response, Gaytan argued that the Act did not apply because she complained only about "cosmetic skin treatments" she received "purely for aesthetic reasons." She filed a second amended petition the day before the hearing on the defendants' dismissal motion, in which she omitted all references to the Act and to "medical" treatments or negligence. Her factual allegations remained the same. The trial court denied the defendants' dismissal motion, and the defendants took an interlocutory appeal. The court of appeals affirmed.

The Court held first that the courts could consider Gaytan's second amended petition. First, the Act's 120-day deadline expressly applies only to the serving of an expert report, and not to the filing of amended pleadings. Second, the Act says nothing about whether or when a claimant can amend her pleadings, and the rules generally permit parties to freely amend their pleadings. Third, courts must consider "the underlying nature of the plaintiff's claim rather than its label." Finally, the Act's dismissal process justifies the trial court's consideration of amended pleadings.

As to the underlying nature of Gaytan's claims, the Court held that they were health care liability claims subject to the expert-report requirement. First, although Dr. Yarish never saw Gaytan personally, a physician-patient relationship can arise "without the formalities of a contract," and the lack of consent-to-treatment forms or the like does not preclude a relationship. A patient need not interact directly with or have physical contact with the physician for the relationship to exist. What matters is the physician's express or implied agreement to provide, and the patient's express or implied agreement to accept, the physician's "professional services." The facts of this case conclusively establish that Gaytan became Dr. Yarish's patient by seeking treatments from an employee at a medical spa Dr. Yarish owned and operated.

Next, Gaytan's claims complained of "medical care or treatment." Expert testimony was necessary

because Gaytan complained of services and treatment "not within the common knowledge of laypersons." The proper and applicable standards of "dermatological care," reliance on medical histories, risks involving the use of prescription creams, and proper adjustments of a laser-treatment device, as well as whether defendants' conduct fell below those standards, are all matters that require expert testimony. And the conduct Gaytan complained of was an "inseparable or integral part of the rendition of health care." "Nonsurgical medical cosmetic procedures" constitute "the practice of medicine" in Texas. Gaytan asserted that she sought the treatments for acne, which is a disease, from a physician-owned "medical spa," which by definition offers medical services that must be performed or supervised by a licensed physician.

Gaytan's claims were therefore health care liability claims subject to the Texas Medical Liability Act's expert-report requirements. Because Gaytan failed to serve an expert report before the Act's 120-day deadline, the Court dismissed her claims. The Court remanded the case to the trial court to award defendants their reasonable attorney's fees and costs.

c) *Rogers v. Bagley*, 623 S.W.3d 343 (Tex. Apr. 16, 2021) [19-0634]

At issue in this case was (1) whether claims asserted against a state mental health facility and its employees arising from the death of a patient, pleaded as claims under 42 U.S.C. § 1983, are health care liability claims (HCLCs) under the Texas Medical Liability Act (TMLA); and (2) if so, whether section 1983 preempts the TMLA's requirement to timely serve an expert report.

David Saxon Bagley sued Rio Grande State Center (RGSC)—a state-run mental health facility—and several of its individual employees under 42 U.S.C. § 1983, alleging that they caused the death of his son, Jeremiah Bagley. The incident that led to Jeremiah's death began when Jeremiah, who had been committed to RGSC for psychiatric issues, attacked his one-to-one supervisor. Several psychiatric nurse assistants restrained and sedated him. Jeremiah went into cardiac arrest and died shortly thereafter. Bagley brought section 1983 claims against the psychiatric nurse assistants, RGSC supervisors, Jeremiah's treating doctor, and RGSC itself for constitutional violations, including excessive force and deliberate indifference. Bagley did not file the expert reports the TMLA requires for HCLCs. The defendants moved to dismiss for the failure to file the reports. Bagley argued that his claims were not HCLCs, and, even if they were, section 1983 preempted the TMLA's expert-report requirement. At the hearing on the motion to dismiss, Bagley nonsuited RGSC. The trial court denied the motion to dismiss, and the defendants, including nonsuited RGSC, appealed. The court of appeals affirmed the denial of the motion to dismiss, holding that Bagley's claims were HCLCs, but that section 1983 preempted the TMLA's expert-report requirement. Both Bagley and the defendants petitioned for review.

The Supreme Court held that Bagley's claims were HCLCs because they alleged a departure from accepted

standards of health care and safety in the setting of a mental health facility. It further held that 42 U.S.C. § 1983 does not preempt the TMLA's expert-report requirement. The Court concluded that the expert-report requirement is procedural, not substantive, in nature. The Court further reasoned that the expert-report requirement would not cause reliably different outcomes if section 1983 cases were filed in state court instead of federal court. So, section 1983 does not preempt the requirement. In response to Bagley's argument that RGSC was not a proper party to the appeal because he nonsuited it, the Court held that RGSC was a proper party under Texas Rule of Civil Procedure 162 because it had a motion to dismiss pending at the time of the nonsuit. The Court reversed the court of appeals and remanded the case to the trial court to allow Bagley to comply with the expert-report requirement.

3. Sufficiency of the Evidence

a) *Pediatrics Cool Care v. Thompson,* — S.W.3d —, 2022 WL 1509741 (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 long history 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.

T. MEDICAL MALPRACTICE

1. Damages—Periodic Payments Statute

a) *Columbia Valley v. A.M.A.*, — S.W.3d —, 2022 WL 1194371 (Tex. Apr. 22, 2022) [20-0681]

In this medical negligence case, the jury awarded more than $10 million to the plaintiff, who was born with his umbilical cord wrapped tightly around his neck and later was diagnosed with cerebral palsy. The jury found that his injuries were caused by the defendant because, for example, nurses long delayed calling the obstetrician after observing the baby's heartrate drop dangerously. The defendant asked the trial judge to apply the Periodic Payments Statute to the award of future medical damages. The trial court awarded $604,000 annually for five years and ordered that the remainder be paid to a special-needs trust up front and in a lump sum. After trial, the defendant challenged the jury award and the application of the periodic-payments statute. The court of appeals affirmed the trial court.

The Supreme Court's only other opinion interpreting the periodic-payment statute, *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020), was published after the trial court made its decision in this case. In *Regent Care*, the Supreme Court examined the periodic-payment statute for the first time and gave

guidance to trial courts in applying the statute to jury awards. Because the trial court made its decision without *Regent Care*'s guidance, the Supreme Court remands the case to the trial court to apply the periodic-payments statute in light of *Regent Care* and this opinion.

Accordingly, the Court affirmed the jury award but reversed the lower courts' decision on the application of the Periodic Payments Statute. Specifically, the Court held that the trial court must point to evidence, either contained in the record or gathered in further hearings about the structure of the periodic payments, to justify how it structures any periodic-payments order, including any amount paid up front as a lump sum. The court's order cannot contradict the jury award. Finally, the award must not evade the statutory requirement that payments of future medical costs cease if the beneficiary dies before the payments are complete. The remanded for further proceedings regarding the periodic-payments award structure.

U. MUNICIPAL LAW

1. Drainage Fees

a) *Perez v. Turner,* — S.W.3d — , 2022 WL 2080868 (Tex. June 10, 2022) [20-0382]

This suit challenged a City of Houston drainage fee ordinance. In 2010, voters approved Proposition I, which amended the City Charter to create a drainage and street fund to receive revenue from various sources including fees imposed on real property owners. Elizabeth Perez (a municipal voter and taxpayer) and others filed an election contest. The Supreme Court held in *Dacus v. Parker*, 466 S.W.3d 820, 822 (Tex. 2015), that the proposition language misleadingly failed to mention drainage charges that would be imposed on property owners. On remand, the trial court held that Proposition I's amendment to the City Charter was void; that ruling was upheld on appeal. Meanwhile, in 2011, the city council passed its own ordinance known as the Drainage Fee Ordinance (DFO), creating a utility that was allowed to collect and spend drainage fees. In 2015, following the Supreme Court's *Dacus* decision, Perez filed the pending suit against the City, its mayor, and its director of public works (collectively the City). Perez claimed she had paid fees under the DFO. She alleged that the DFO was void and that the fees had been assessed and collected under the void DFO and 2010 charter amendment. The suit sought class certification, and as relief sought reimbursement of drainage fees and prospective injunctive relief against such fees.

The City filed a plea to the jurisdiction/motion for summary judgment. The trial court dismissed the suit, concluding that (1) Perez's constitutional claims relating to the 2010 charter amendment at issue in *Dacus* were not ripe for adjudication at the time the pending suit was filed; (2) Perez lacked standing to challenge the collection of drainage fees under the charter amendment or the DFO; and (3) governmental immunity barred her ultra vires claims. In 2018, while the case was on appeal, the City passed a new charter amendment curing the principal defects in the DFO that Perez had alleged. The court of appeals affirmed

the dismissal of Perez's claims based on its analysis of ripeness and standing.

The Supreme Court affirmed the court of appeals' dismissal of the claims but remanded the case to the district court to allow Perez the opportunity to replead her claims.

The Court reasoned that much of the case Perez originally pleaded had been overtaken by events, and construed Perez's briefing in the Supreme Court as limited to (1) a claim for reimbursement of the allegedly illegal drainage fees paid between 2011 and 2018, and (2) an ultra vires claim for prospective injunctive relief prohibiting City officials from spending any drainage fees collected between 2011 and 2018 that may remain in the City's accounts.

The Court disagreed with the court of appeals that claims regarding the alleged invalidity of the 2010 charter amendment were not ripe at the time Perez filed suit. Perez had asserted a present injury sufficient to make her claims ripe. The Court then addressed standing. The Court held that Perez had standing to pursue the two remaining claims. Perez had taxpayer standing to seek an injunction against the expenditure of illegally collected funds. She also had standing to bring her remaining reimbursement claim.

Hence, the Court did not affirm the dismissal of the two remaining claims on jurisdictional ripeness and standing grounds. However, the Court ultimately held that these claims were properly dismissed on grounds of governmental immunity. To defeat a plea to the jurisdiction based on governmental immunity, a plaintiff must plead facts that, if true, establish a viable claim that is not barred by immunity. Under this requirement, the claims were properly dismissed. Perez's reimbursement claim and her claim for injunctive relief were premised on the City's lack of authority to assess the drainage fees in the absence of a valid charter amendment. The Court, however, agreed with the City that even in the absence of the 2010 charter amendment, the City had authority under its general authority as a home-rule municipality to enact the DFO. Perez argued that the DFO conflicted with a state statute—the Municipal Drainage Utility Systems Act (MDUSA)—but the Court held that the MDUSA itself states that it does not alter a home-rule municipality's general powers. Tex. Loc. Gov't Code § 552.054. The Court noted that Perez might have a valid claim that the DFO violated the City Charter's revenue or spending caps, but she did not argue this theory of drainage fee invalidity to the Court.

Finally, the Court held that while Perez's claims were properly dismissed, she should be given the opportunity to replead in light of intervening events. The Court therefore remanded the case to the district court.

2. Solid Waste Regulation

a) *Builder Recovery Services, LLC v. Town of Westlake*, — S.W.3d —, 2022 WL 1591976 (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.

3. Zoning

a) *Powell v. City of Houston*, 628 S.W.3d 838 (Tex. June 4, 2021) [19-0689]

The issue in this case was whether the City of Houston's Historic Preservation Ordinance was enacted in violation of Chapter 211 of the Texas Local Government Code or the City of Houston's Charter.

The City of Houston adopted the Historic Preservation Ordinance in 1995. The Ordinance allows the City to establish historic districts and requires owners of properties in those districts to apply for a certificate of appropriateness from the Houston Archaeological and Historical Commission before modifying or developing their property. Kathleen Powell and Paul Luccia own homes in Heights East District, a City of Houston neighborhood which was designated a historic district in 2008. Some homeowners in that neighborhood sought reconsideration of the neighborhood's designation as a historic district, but that effort was unsuccessful. Powell and Luccia then sought a declaratory judgment that the Ordinance is void and unenforceable because it violates the City Charter's limits on the City's zoning power and was not adopted in compliance with certain provisions of Chapter 211 of the Local Government Code. The trial court rendered judgment for the City. The court of appeals affirmed, concluding the Ordinance is not a zoning ordinance and therefore does not violate limits on the zoning power in the City Charter or Chapter 211 of the Local Government Code.

The Court affirmed. The Court considered separately whether the Ordinance violates the City Charter or Chapter 211 of the Local Government Code. The City Charter prohibits zoning unless adopted through a binding referendum, and the City held no referendum in adopting the Historic Preservation Ordinance. The Charter does not, however, define the term "zoning." The Court saw no violation of the Charter because the Ordinance did not constitute zoning in the ordinary meaning of the term, which is the "district-based regulation of the uses to which land can be put and of the height, bulk, and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan." The Court also determined that the procedural and substantive requirements in Chapter 211 of the Local Government Code apply to the Ordinance but concluded that Powell and Luccia failed to show the City violated those requirements in adopting the Historic Preservation Ordinance.

Justice Bland joined the majority in part and wrote a concurring opinion rejecting some of the Court's reasons for concluding that the Ordinance does not meet the ordinary definition of "zoning," a definition which the concurring justices believed the Court interpreted too narrowly. Justice Devine, Justice Blacklock, and Justice Huddle joined the majority in part and joined the concurrence.

V. NEGLIGENCE

1. Independent Contractors

a) *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860 (Tex. May 7, 2021) [20-0368]

The issue in this case was whether the general contractor on a construction project retained sufficient control over its independent contractor's work to owe a duty of care to the independent contractor's employee. JLB Builders, L.L.C. was the general contractor for a high-rise construction project in Dallas. It subcontracted the concrete work to Capform, Inc. Jose Hernandez, a Capform employee, was injured on the job when a rebar cage on which he was standing detached from the ground, fell, and landed on his legs. Hernandez sued JLB for negligence and gross negligence, alleging JLB retained contractual and actual control over Capform's work and, as a result, owed him a duty of care. JLB moved for both traditional and no-evidence summary judgment. The trial court granted the motions, and Hernandez appealed as to the negligence claim.

The court of appeals panel affirmed summary judgment for JLB on the no-evidence ground. The court then granted en banc reconsideration and, in a split decision, reversed summary judgment. It held that a fact issue existed regarding whether JLB exercised actual control over the work that caused Hernandez's injury. The en banc majority relied primarily on testimony that JLB retained control over the daily schedule, had supervisors on site the day of the injury, inspected for safety every day, and required safety harnesses.

The Supreme Court reversed and rendered judgment that Hernandez take nothing from JLB. It held that Hernandez failed to raise a fact issue as to whether JLB exercised actual control over Capform with respect to the injury-causing work. No evidence indicated that JLB exercised control over the timing or sequence of Capform's employees' work. Further, the mere presence of a general contractor's safety employee does not create a duty, and a general contractor's safety requirements only give rise to a duty when those requirements "unreasonably increase" the probability and severity of injury. Additionally, a duty arises when a general contractor knows of an unsafe condition and specifically approves the work anyway, but Hernandez did not show that here.

The Court also held that the contract between Capform and JLB did not impose a duty of care on JLB. The contract required Capform to furnish all supervision of its employees, made Capform responsible for safety precautions and inspections, and required Capform to coordinate with JLB in scheduling Capform's work. The contract granted general supervisory authority to Capform. It did not grant the kind of control over the means, methods, and details of Capform's work that would give rise to a duty.

2. Premises Liability

a) *Cath. Diocese of El Paso v. Porter*, 622 S.W.3d 824 (Tex. May 7, 2021) [19-0190]

The principal issue in this case was whether volunteers working in a third-party vendor's booth at a festival were invitees of the landowner or only

licensees. San Lorenzo Church, a small Catholic parish in Clint, holds an annual festival on its grounds. One year, the El Paso 4-H Leaders Association paid the Church to rent a booth at the festival. 4-H used the booth to sell funnel cakes, gorditas, and snow cones, and it staffed the booth with volunteers. A fire broke out in the booth, injuring 4-H's volunteer workers, including four teenage volunteers. The families of the four teenage volunteers sued both the Church and Heritage Operating, L.P., which had allegedly filled a propane tank that the families believed to have caused the fire.

After a month-long trial, featuring testimony from thirty-five fact and expert witnesses, the jury returned a defense verdict. The jury found that the 4-H volunteers were licensees on the Church's property and awarded the families zero damages. The jury also failed to find that either the Church or Heritage negligently caused the volunteers' injuries. The court of appeals affirmed in part and reversed in part. It held that the volunteers were the Church's invitees as a matter of law and that the verdict for the Church was against the great weight and preponderance of the evidence. However, the court rejected the families' arguments that evidence of Heritage's lack of negligence was factually insufficient, that the trial court erred by not correcting the Church's attorney's statement that the jury was not required to find any party negligent, and that the trial court committed reversible error in several evidentiary rulings.

The Supreme Court affirmed in part and reversed in part. The Court concluded that the volunteers were licensees because they were on the Church's land to benefit 4-H, not the Church. The Court also determined that the record did not contain evidence allowing it to overturn the jury's finding that the Church had not breached the duty it owed the volunteers as licensees. Finally, the Court held that the trial court properly refused to instruct the jury to disregard the Church's counsel's statement, that legally sufficient evidence supported the jury's verdict in favor of Heritage, and that the trial court did not commit reversible error in several evidentiary rulings. Accordingly, the Court rendered judgment that the families take nothing.

b) *In re Eagleridge Operating, LLC*, 642 S.W.3d 518 (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 that 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.

c) *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502 (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 the 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.

d) United Supermarkets, LLC v. McIntire, — S.W.3d —, 2022 WL 2183063 (Tex. June 17, 2022) [21-0208]

This case concerned whether an approximately 3/4-inch divot in a grocery store parking lot presented an unreasonable risk of harm. United owns a Market Street grocery store in Frisco. Sherie McIntire, a regular customer, sustained serious injuries when her heel caught a small defect in the Market Street parking lot as she exited her truck. McIntire sued United, asserting premises-defect claims. The trial court granted United's motions for summary judgment, holding that the defect was not unreasonably dangerous as a matter of law. The court of appeals reversed and remanded. It reasoned that McIntire provided evidence that the divot's size and shape indicated it posed an unreasonable risk of harm, and that United failed to clearly mark the divot. Additionally, it cited McIntire's expert's report, which reflected that United disregarded safety standards and that the defect could have caused McIntire's injuries.

In a per curiam opinion, the Supreme Court reversed and reinstated the trial court's judgment, holding that the divot was not unreasonably dangerous as a matter of law. It noted that the divot measured less than an inch deep, no evidence indicated it had produced other complaints or injuries, and nothing in the record suggested the defect was unusual relative to other small pavement defects. It also held that it could not conclude that McIntire's accident was foreseeable considering that tiny surface defects in parking lots are ubiquitous and naturally occurring.

Additionally, the Court stated that McIntire's expert's report did not alter its conclusion. It reasoned that testimony that a condition could injure an invitee did not constitute evidence that the condition posed an unreasonable risk of harm. Moreover, McIntire failed to submit evidence showing that the safety codes referenced in the expert report applied to the Market Street parking lot either when it was constructed or on the date of the accident.

3. Public Utilities

a) CenterPoint Energy Res. Corp. v. Ramirez, 640 S.W.3d 205 (Tex. Feb. 11, 2022) [20-0354]

The issue of first impression in this personal-injury case is whether a limitation of liability provision in a utility tariff approved by state regulators bars the utility's liability for damages suffered by a residential customer's

houseguests. Other issues include whether the tariff's liability limitations (1) violate the Texas Constitution's open courts guarantee or (2) conflict with local ordinances and are rendered inoperative because the tariff expressly resolves all conflicts in favor of other laws and regulations.

In 2011, Adrian and Graciela Castillo purchased a new home. Over the next three years, Graciela's parents, Fernando and Minerva Ramirez, were frequent visitors and guests at the home. During these visits, the Ramirezes used the home's gas services for daily living activities. In 2015, while Fernando was attempting to repair the Castillos' electric clothes dryer, he inadvertently opened the valve on an unused gas line behind the dryer. Escaping gas accumulated to combustible levels and ignited, resulting in an explosion that damaged the home and seriously injured Fernando.

The Ramirezes sued the homebuilder, the plumber, and the utility for personal-injury damages under negligence and gross-negligence theories. They alleged that all three defendants had breached a duty to plug or seal the unused gas line. The plumber settled; the trial court directed a verdict for the defendants on the gross-negligence claims; and after finding all of the defendants negligent as alleged, the jury apportioned responsibility 60% to the homebuilder, 34% to the utility, and 6% to the plumber.

The utility filed a motion for judgment notwithstanding the verdict, urging that the regulator-approved and filed utility tariff precludes liability for any portion of the Ramirezes' damages. The tariff provides that, "[u]nless otherwise expressly stated," it applies to "all Consumers regardless of classification." The tariff further states that the terms "'Consumer, Customer and Applicant' are used interchangeably" and broadly defined to "mean a person or organization *utilizing* [the utility's] services or who wants to utilize [the utility's] services." The tariff then provides, without exception, that the utility "shall not be liable for *any* damage or loss caused by the escape of gas from Consumer's housepiping or Consumer's appliances" and defines "housepiping" as "[a]ll pipe and attached fittings which convey gas from the outlet side of the meter to the Consumer's connection for gas appliances." That is precisely how the houseguests were injured, but the parties disputed whether the tariff applies to anyone other than the utility's customers and whether the specific provision at issue applies regardless of the Ramirezes' "consumer" or "customer" status. They also disputed the applicability of another liability limitation that was subject to an exception the Ramirezes claimed to have established.

The trial court denied the utility's motion and rendered judgment on the jury's verdict, awarding the Ramirezes more than $6.9 million in actual damages. On appeal, the homebuilder settled, and the court of appeals affirmed the judgment against the utility. Although the court acknowledged that the tariff's terms broadly apply to any person "utilizing" the utility's gas services, it nonetheless determined that the tariff did not apply to a customer's houseguests and that, as a general proposition, a tariff only governs the relationship between the utility

and its customer. The court further resolved the utility's jury charge and evidentiary challenges in favor of the jury's verdict.

The Supreme Court reversed and rendered judgment for the utility because (1) the tariff's terms expressly apply to "all consumers," (2) as active users of the utility's gas services, the houseguests met the tariff's definition of that term, and (3) their damages were caused by an excluded peril. The Court explained that a tariff approved by a regulatory body is not a "mere contract" and instead carries "the force and effect" of law. Accordingly, the houseguests were bound by the tariff's terms because, as consumers, the tariff applied to them and, like any other law, neither assent nor actual knowledge is required to enforce its terms as written. While opinions of the Court have used words to the effect that a tariff is binding on a customer, that does not mean that it is not binding on a noncustomer notwithstanding tariff language that makes it so. Such statements arose in cases involving the tort claims of customers and are but a truism, not a rule of limitation. Tariff provisions remain amenable to challenge for reasonableness or want of regulatory authority, but neither were at issue here.

The Court also found no conflict between the tariff's liability limitation and the local ordinances. An ordinance imposing a duty is not inconsistent with a tariff provision limiting liability for damages; to the contrary, they are correlated with one another because a liability limitation only comes into play if the utility could be liable for violating some duty or obligation imposed by law or contract. Finally, assuming the open-courts provision was implicated, the Court held that enforcement of the liability limitation did not infringe the Ramirezes' constitutional rights because the tariff did not withdraw all remedies or avenues of redress or make a remedy by due course of law contingent on an impossible condition.

W. OIL AND GAS

1. Continuous Drilling Clause

a) *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884 (Tex. Apr. 9, 2021) (per curiam) [19-1054]

The issue in this contract dispute involved the interpretation of a mineral lease's "continuous drilling program" provision. The lease provided that after its sixth anniversary, lessee Sundown had an obligation to reassign the tracts not held by production. However, reassignment would be delayed if Sundown engaged in a continuous-drilling program. The continuous-drilling program stated that "[t]he first such continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well." Another provision of the lease amply defined "drilling operations" to include reworking and reconditioning, not just drilling a new well.

Lessor HJSA sued Sundown, requesting the reassignment of the tracts not held by production because Sundown had failed to maintain a continuous-drilling program. The parties did not dispute that Sundown had spudde—in a well before the sixth

anniversary of the Effective Date; the dispute was over the meaning of "drilling operations." HJSA argued that the continuous-drilling clause's sentence structure created a specific meaning for "drilling operations," which could only mean spudding-in of a well. Sundown argued that the defined term for "drilling operations" should be applied because the lease states it should be used "whenever used in th[e] lease." The parties agreed that if the defined term applied, then Sundown effectively delayed reassignment of tracts not held by production by engaging in a continuous-drilling program.

The trial court granted partial summary judgment for Sundown, applying the defined term for "drilling operations." The court of appeals reversed, holding that the more specific definition of "drilling operations" controlled over the general term. In a per curiam opinion, the Supreme Court reversed in part and rendered judgment for Sundown. The Court reasoned that the lease clearly defines "drilling operations" "whenever" used in the lease, and therefore it should apply to any part of it, including the continuous-drilling clause. The Court noted that HJSA's position would essentially replace the word "drilling operations" with the word "spudded-in," which would impermissibly rewrite the lease drafted by sophisticated parties. HJSA's concerns that the lease's construction would discourage full exploration were also dismissed because the lease nonetheless recognized Sundown's implied duty to reasonably develop the land.

2. Covenants to Protect Against Drainage

a) *Rosetta Res. Operating, LP v. Martin*, — S.W.3d —, 2022 WL 1434662 (Tex. May 6, 2022) [20-0898]

This oil and gas dispute contained three issues: First, whether the lessee's obligation to protect against drainage was triggered under a poorly drafted lease addendum; second, whether the lessors were barred by res judicata from raising a lease-construction argument that was waived in a severed appeal; and third, whether the court of appeals erroneously reversed the trial court's summary judgment for claims not challenged on appeal.

The Martins, lessors-respondents, entered into a mineral lease agreement (the Martin Lease) with Mesquite Development, which later assigned its rights to lessee-petitioner Rosetta Resources Operating, LP. Shortly after the assignment, Rosetta joined Newfield Exploration Co. and Dynamic Production, Inc. (collectively Newfield) to create a pooled unit which contained the northern portion of the lease. Newfield subsequently drilled a well on the pooled unit (the Martin Well) and a well on nearby non-adjacent acreage (the Simmons Well). The Martins sued both Rosetta and Newfield under breach-of-contract, tort, and statutory theories. The Martins argued that Rosetta and Newfield did not protect against drainage from the Simmons Well as required under an addendum to the Martin Lease. On individual motions for summary judgment, the lessees argued that the Simmons Well did not trigger an obligation to protect against drainage because it was

drilled on acreage that did not adjoin the lease acreage. The trial court granted summary judgment for Newfield and severed the claims against it for appeal. During the Newfield appeal, the Martins argued that the Martin Well had triggered the addendum's covenant to protect against drainage from the Simmons Well. Concluding that such an argument was waived, the court of appeals affirmed the trial court's summary judgment because the Simmons Well did not trigger the addendum.

After the Newfield appeal but before ruling on Rosetta's summary judgment, the trial court invited the Martins to raise the Martin-Well argument in an amended petition and motion for summary judgment. Denying the Martins' motion, the trial court granted summary judgment for Rosetta on each of the Martins' claims. The court of appeals reversed and remanded, granting partial summary judgment for the Martins because the Martin Well triggered a general duty to protect against drainage and a specific duty to spud an offset well or release the undrilled acreage. Rosetta petitioned for review, arguing the addendum could not be construed to allow separate triggering and draining wells, the Martins' argument was barred by res judicata, and the court of appeals erroneously reversed summary judgment on claims the Martins did not challenge.

The Supreme Court held that the addendum is ambiguous regarding whether the Martin Well triggered Rosetta's obligation to protect against drainage from the Simmons Well. Though the addendum is mostly unambiguous, the Court concluded that it is subject to competing reasonable interpretations as to whether Rosetta's drainage-protection obligation is limited to drainage from sources listed exclusively in the addendum's first clause. Second, the Court held that res judicata does not prevent the Martins from raising their Martin-Well argument against Rosetta. Res judicata does not preclude litigation of claims that have been severed by a trial court, and Rosetta seeks to seeks to preclude an issue, not a claim. Third, the Court held that the court of appeals erred by reversing Rosetta's summary judgment as to the Martins' tort and statutory claims. Because a party must negate each possible summary judgment ground and Rosetta established economic-loss-rule and no-benefit grounds for summary judgment on the Martins' tort and statutory claims, the court of appeals did not properly reverse summary judgment as to those claims.

The Court reversed the court of appeals judgment, reinstated the trial court's summary judgment in part as to the Martins' tort and statutory claims, and remanded for further proceedings on the Martins' claim for breach of contract.

3. Pooling

a) *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189 (Tex. June 11, 2021) [19-0567]

The issue in this case was whether the lessor impliedly ratified an otherwise unauthorized pooling agreement. Margaret Strickhausen owned a mineral interest on a tract in La Salle County. BPX acquired a lease on the

interest. Under the written lease agreement, pooling of the lease with other leases "is expressly denied and shall not be allowed under any circumstances without the express written consent of the Lessor." BPX, without express written consent, pooled several tracts, including the Strickhausen property. BPX then drilled a producing well on Strickhausen's property. The well ran horizontally under other pooled tracts. BPX claimed the well would not have been economically feasible without pooling. BPX asked Strickhausen to sign a ratification that included her property in the pooled unit. Strickhausen's attorney, Armstrong, then exchanged emails that included a request for more information. BPX told Armstrong that if Strickhausen refused to ratify the pooling, her royalty would be based on a certain ratio. Armstrong claimed he made it clear that Strickhausen would not ratify the pooling absent a favorable settlement. BPX informed Armstrong that Strickhausen would receive a higher royalty if she agreed to the pooling and that royalties would be "placed in suspense" absent ratification of the pooled unit. The parties never expressly agreed to a pooling arrangement. Nor did the parties ever agree to an alternative settlement. BPX, however, sent royalty checks to Strickhausen that she deposited.

Strickhausen sued BPX for breach of contract. BPX claimed Strickhausen had impliedly ratified the pooling by accepting the royalty checks. Strickhausen claimed that she accepted the checks not because she agreed to the pooling but because she wanted to receive the royalties she believed she was owed under her lease. On cross-motions for summary judgment, the trial court ruled for BPX on the wrongful-pooling claim and related claims. The trial court held Strickhausen was estopped from denying that she had ratified the pooling. On interlocutory appeal, the court of appeals reversed, holding that a fact issue was presented on the issue of ratification.

The Supreme Court affirmed the court of appeals. The Court reasoned that ratification turns on whether Strickhausen intended to be bound by the pooling arrangement and that implied ratification turns on objective evidence of intent, such as the party's conduct. Determining intent turns on the totality of the circumstances, and implied ratification requires proof that the party clearly intended to ratify. Under these standards, BPX did not establish ratification as a matter of law. Depositing the royalty checks was arguably an acceptance of benefits consistent with an intent to ratify the pooling, but other evidence was inconsistent with such an intent. Among this contrary evidence, Strickhausen had bargained for an agreement that expressly prohibited pooling absent written consent, she refused to sign such a consent, and her attorney continued to negotiate a settlement that was never reached. Strickhausen offered a plausible explanation for why her acceptance of the royalty checks should not imply her acceptance of pooling. With or without pooling, Strickhausen was owed royalties. The totality of the circumstances did not permit BPX to reasonably infer that acceptance of royalty checks meant that Strickhausen had consented to the pooling.

Justice Boyd, joined by Chief Justice Hecht, Justice Bland, and Justice Huddle, dissented. As the dissent read the record, Strickhausen may have initially indicated that she was refusing to ratify the pooling, but she later accepted the pooling by accepting checks calculated and paid under the pooling arrangement. The dissent emphasized that Strickhausen knew the royalty checks were calculated on a tract participation basis, reflecting her position as a participant in a pooled unit. The dissent concluded as a matter of law that Stickhausen had, by accepting the royalty checks, impliedly ratified the pooling of the leases.

4. Royalty Payments

a) *Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC*, 639 S.W.3d 682 (Tex. Feb. 4, 2022) [20-0639]

This mineral dispute involves the construction of an oil-and-gas deed with respect to the delivery point for calculating a royalty. The issue is whether and to what extent a royalty interest bears a proportionate share of postproduction costs.

The predecessors of Nettye Engler Energy, LP conveyed a tract of land, reserving a one-eighth nonparticipating in-kind royalty interest in minerals. The relevant deed language states the royalty is "free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine." Such an interest is free of production costs but bears its proportional share of postproduction costs from the point of delivery to the royalty interest holder unless the conveyance specifies otherwise. Initially, the wellsite operator that preceded BlueStone Natural Resources II, LLC sold Engler's share of production, valuing it at the point of sale to the gas purchaser's pipeline, which rendered the royalty free of postproduction costs. But when BlueStone assumed operations, it began valuing Engler's share of production in the onsite gathering pipeline, thus burdening the royalty with postproduction costs from that point forward. Engler's royalty payments decreased, and Engler sued BlueStone for common-law conversion and money had and received. The parties agreed that some gas pipeline exists and that the royalty is free of production costs and postproduction costs incurred before delivery into that pipeline, but they disagreed about the location of the pipeline. Engler argued that the deed could only refer to offsite pipelines, like downstream transportation or distribution pipelines, because a gathering pipeline is not a "pipe line" as the term is used in the deed. BlueStone argued that gathering pipelines are pipelines in both ordinary and trade meaning, so it was proper to calculate the royalty interest as bearing postproduction costs after that point.

On cross-motions for summary judgment, the trial court held Engler's royalty interest was free of cost in the transportation pipeline, and thus free of some but not all postproduction costs. The court awarded Engler $88,849.33 in actual damages. BlueStone appealed, and the court of appeals reversed and rendered judgment in BlueStone's favor. The court viewed *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019), as establishing a rule equating "into the pipeline" deed

language with a delivery or valuation point "at the wellhead or nearby." For this reason, and because the court concluded that a gathering system is a pipeline, the court held that the deed language at issue essentially created a delivery point at the wellhead. The Supreme Court affirmed but disagreed that *Burlington Resources* established such a rule, concluding instead that the opinion merely emphasized that all contracts, including mineral conveyances, are construed as a whole to ascertain the parties' intent from the language they used to express their agreement. Thus, when construing an oil-and-gas deed, the standard rules of contract construction apply, and a deed's language is given its plain meaning unless the instrument shows the parties agreed otherwise. An expert affidavit opining on the meaning of the deed language did not elucidate the understanding of the words at the time the deed was executed and would only have impermissibly added limiting language to modify the terms. Accordingly, the Court did not consider it.

Following the standard rules of contract construction, the Court observed that a gas gathering pipeline is a "pipe line" in common, industry, and regulatory parlance. Case law further confirms that mineral conveyances commonly contemplate delivery into onsite pipelines "connected to the well." The absence of similar limiting language in the deed did not narrow the ordinary meaning of the term "pipe line." The deed did not exclude a gathering pipeline from the usual meaning of the term, specify a particular pipeline, or otherwise negate delivery at or near the wellsite. Accordingly, BlueStone satisfied its obligation to deliver Engler's share of production "free of cost in the pipe line" by deducting postproduction costs incurred after delivery in the gas gathering system from gross sales proceeds in accounting for the value of Engler's nonparticipating royalty interest.

X. PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

1. Will Contests

a) *In re Estate of Johnson*, 631 S.W.3d 56 (Tex. May 28, 2021) [20-0424]

At issue in this case was whether a beneficiary who has accepted a benefit under a will is estopped from later contesting that will. Subsumed within this issue was the will proponent's evidentiary burden to establish an estoppel-by-acceptance-of-benefits defense.

Dempsey Johnson executed a will in which he devised his estate through specific bequests and left the residuary to his three daughters: Lisa Jo Jones, Tia MacNerland, and Carla Harrison. In addition to MacNerland's residuary interest, Johnson bequeathed her a mutual fund and one-half of a bank account. Johnson named Jones as the estate's independent executor.

Johnson died in August 2017. In October, Jones applied to probate his will. In December, Jones transferred to MacNerland the mutual fund account that Johnson had bequeathed to her, and MacNerland assumed ownership of the account. The account's value at the time of transfer was $143,229.15. In February 2018, MacNerland sued

Jones, as the estate's executor, seeking to set aside Johnson's will, alleging that Johnson lacked testamentary capacity when he executed the will or did so under Jones's undue influence. MacNerland did not offer an alternate will for probate. Jones answered that MacNerland lacked standing to contest the will because MacNerland had accepted benefits under it from the mutual fund account.

In May, Jones filed a sworn inventory of the estate's assets and liabilities, which valued Johnson's estate at $1,427,209.94. Jones then moved to dismiss MacNerland's will contest for lack of standing. In response, MacNerland conceded that she had inherited the mutual fund through her father's will. Relying on the inventory, however, MacNerland argued that the acceptance-of-benefits doctrine did not deprive her of standing to contest the will because the value of the mutual fund was "far less" than one-third of her father's $1.4 million estate—the proportionate amount MacNerland claims she "would have received" had he died without a will. The trial court dismissed MacNerland's will contest for lack of standing.

The court of appeals reversed, holding that Jones failed to satisfy her burden, as the will's proponent, by failing to demonstrate that MacNerland had accepted greater benefits than those to which she was entitled under the will or intestacy laws.

The supreme Court reversed and rendered judgment dismissing the suit. When a party challenges a will contestant's interest in an estate, the trial court hears that issue during an in limine proceeding before the trial on the merits of the contest. During that hearing, the contestant must establish an interest in the underlying estate. At that point, the burden shifts to the will's proponent to adduce evidence of any affirmative defense (e.g., estoppel by acceptance of benefits) that precludes the contestant from proceeding with her claim. Absent any evidence rebutting it, competent evidence showing that a contestant voluntarily accepted benefits under the will is sufficient to bar the contestant from proceeding to the merits of her claim.

A contestant may rebut the acceptance-of-benefits doctrine's applicability by showing that she did not accept the benefits through the will or that she lacked knowledge of some material fact at the time of acceptance. The Court reiterated, however, that the test for determining whether a contestant's acceptance of benefits estops her from bringing a will contest does not depend on the value of the benefits, nor is it to be determined by comparing them with what the statutes of descent and distribution would afford the beneficiary in the absence of a will. Rather, the doctrine asks whether the contestant has an existing legal entitlement to the accepted benefits under the will. If the contestant is otherwise presently entitled to the accepted benefits, then her acceptance is not inconsistent with suing to set aside the will.

MacNerland conceded that she accepted the mutual fund account through Johnson's will as part of the distribution of the estate. Because MacNerland did not present competent evidence showing that her acceptance was involuntary, the Court reversed

the court of appeals' judgment and rendered judgment dismissing the suit.

2. Trust Modification Proceedings

a) *In re Troy S. Poe Trust,* — S.W.3d —, 2022 WL 2183068 (Tex. June 17, 2022) [20-0179]

The issue in this case was whether there is a right to a trial by jury in a judicial trust-modification proceeding under Texas Property Code Section 112.054.

Dick Poe established a trust to provide for the needs of his son, Troy. The trust required that trustees make decisions unanimously and designated as trustees Dick, his other son Richard, and his accountant Anthony Bock. When Dick died, Richard and Bock had multiple disputes, both related and unrelated to the trust's administration. Bock filed a petition in the probate court seeking modification of the trust under Section 112.054, and Troy (acting through an attorney ad litem) supported the modification request. Richard opposed modification and demanded a jury trial on all triable issues. The probate court denied Richard's jury demand, conducted a bench trial, and ordered that the trust be modified.

The court of appeals reversed and remanded the case for a new trial, concluding that Richard was entitled to a jury trial on the predicate questions of whether the trust needed to be modified. The court of appeals noted that the Constitution's Judiciary Article provides a jury right in "causes" and that the Legislature is authorized to regulate jury trials. The court of appeals then reasoned that Texas Property Code Section 115.012 "generally provides for jury trials" by incorporating the Rules of Civil Procedure into actions brought under the Trust Code. Bock and Troy sought rehearing, challenging the court of appeals' statutory analysis and arguing, for the first time, that no constitutional jury right attaches in a judicial trust-modification proceeding because it is a "special proceeding" outside the scope of the Judiciary Article. The court of appeals denied rehearing, and both Bock and Troy petitioned the Supreme Court for review.

The Supreme Court reversed, holding that there was no statutory right to a trial by jury in a judicial trust-modification proceeding. The Court noted that Section 112.054 does not provide for or even mention a jury, and it held that the Trust Code's incorporation of the Rules of Civil Procedure could not be construed to create a jury right where one did not already exist. Additionally, the Court concluded Bock and Troy preserved their complaint that the Constitution does not require a jury trial in judicial trust-modification proceedings by raising those arguments in their motion for rehearing and petitions for review. But the court of appeals never addressed those arguments. Noting that it was not the Court's ordinary practice to be the first forum for novel questions, the Court remanded the case to the court of appeals for consideration of petitioners' constitutional arguments in the first instance.

Justice Busby filed a concurring opinion, joined by Justice Devine and Justice Young. The concurrence agreed

with the Court's statutory analysis and decision to remand but noted the need for a coherent framework for evaluating the scope of the Constitution's guarantees of a trial by jury and provided an overview of the Court's precedents for consideration in future disputes over whether the Constitution provides a right to a jury in a particular proceeding.

Y. PROCEDURE—APPELLATE

1. Appellate Deadlines

a) Mitschke v. Borromeo & Blackjack Ranch L.L.E., LLC, — S.W.3d —, 2022 WL 1510317 (Tex. May 13, 2022) [21-0326, 21-0331]

This case answers two questions about appellate procedure: first, if there is a conflict within transferor-court case law, how does the transferee court resolve it; second, 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.

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 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.

2. Finality of Judgments

a) *In re Guardianship of May K. Jones*, 629 S.W.3d 921 (Tex. Sept. 17, 2021) [20-0439]

The issue in this guardianship case is whether a probate court's order purporting to dispose of a petition for bill of review was interlocutory and unappealable because it lacked decree-like language adjudicating and disposing of the petition.

May Jones, an elderly woman suffering from dementia, was placed under the guardianship of one of her four daughters. After an unsuccessful appeal, two other daughters initiated a bill-of-review proceeding to overturn the guardianship order on myriad grounds. The probate court granted motions to dismiss the petition for bill of review, concluding that the court lacked jurisdiction to grant the requested relief.

On appeal, the court of appeals did not reach the merits of the dispute but instead dismissed the appeal for want of jurisdiction. The court held that the dismissal order was interlocutory and unappealable. Although the order stated it was "final" and granted the dismissal motions based on lack of subject-matter jurisdiction, the court concluded that the order lacked decretal language, like "ordered, adjudicated, and decreed," and thus did not actually adjudicate and dispose of the petition for bill of review. In other words, the court concluded that the order was not a judgment at all.

The Supreme Court reversed and remanded, holding that the probate court's order was a final and appealable judgment. The court's order, styled as an "Order Granting Sanctions and Dismissing Case," actually disposed of all parties and issues in the bill-of-review proceeding, stated that it was a "final order," and declared that the legal effect of granting the motions to dismiss was "[t]he dismissal of the Bill of Review filed in this case[.]" The Court explained that neither technical formality nor particular phraseology are required for finality and the language in the probate court's order sufficiently disposed of the petition for bill of review. Although the parties agreed that the order was final, they disagreed whether finality was to be determined under *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001), which applies to cases in which only one final judgment may issue, or *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995), which governs finality in cases in which multiple judgments that are final for purposes of appeal can be rendered on certain discrete issues. While one side argued the bill-of-review proceeding was collateral to the guardianship case and thus subject to the one-final-judgment rule, the other side argued the bill-of-review proceeding was part of the ongoing guardianship case and was final as to that discrete portion of the case. Because disposition of all parties and claims in the bill-of-review proceeding would make the order final under either standard, the Court found the distinction immaterial to the issue presented.

3. Jurisdiction

a) *Kenneth D. Eichner, P.C. v. Dominguez*, 623 S.W.3d 358 (Tex. May 14, 2021) (per curiam) [20-0263]

The issue in this case was whether appellate rule 26.1(a) applies to Kenneth D. Eichner, P.C.'s new-trial motion when the trial court struck Eichner's petition before rendering final judgment. Eichner is an accounting firm that intervened in a suit between the owner of a condominium (which Eichner has a lien against) and another party who possessed another lien against the condominium. After participating throughout trial, the trial court struck Eichner's petition in intervention and then rendered final judgment. Eichner filed a motion for new trial twenty-eight days after the trial court signed its final judgment. He then filed a notice of appeal eighty-seven days after the final judgment. The court of appeals concluded that the appeal was untimely, which deprived it of jurisdiction, and Eichner did not qualify as a party whose new-trial motion could extend the appellate deadline.

The Supreme Court disagreed. In a per curiam opinion, it held that the appeal was timely because appellate rule 26.1 applies to any "party" to a final judgment, which includes a party who intervenes prior to a final judgment. Generally, only a named party may appeal. A person who attempts to intervene after a final judgment is not bound by and cannot appeal that final judgment unless the trial court sets it aside. But Eichner appealed prior to the final judgment. Because Eichner could not appeal the interlocutory order until after the trial court signed the final judgment, and because the order striking its intervention occurred before and merged into the final judgment, Eichner had to appeal the final judgment and qualified as a "party" to the final judgment. Therefore, Eichner's new-trial motion triggered rule 26.1(a)'s extension of the appellate timetable and Eichner's notice of appeal was timely. The Court reversed the court of appeals' judgment and remanded the case to the court of appeals to decide the remaining issues.

b) *Philips v. McNeill*, 635 S.W.3d 620 (Tex. Dec. 3, 2021) [19-0831]

The issues in this"case were (1) whether pharmacist John McNeill's request for findings of fact and conclusions of law following the trial court's grant of the Health and Human Services Commission's plea to the jurisdiction extended McNeill's deadline to file an appeal from thirty to ninety days under Texas Rule of Appellate Procedure 26.1; and (2) whether McNeill, who contracted with the Commission as part of its Medicaid Vendor Drug Program (VDP), was statutorily entitled to a contested-case hearing to dispute the results of a program audit.

In 2012, the Commission conducted an audit of McNeill's participation in the VDP and concluded that he had been overpaid by roughly $70,000. McNeill requested on multiple occasions that the Commission provide him a contested-case hearing to dispute the results, and the Commission repeatedly refused. McNeill sued the Commission, alleging that he was entitled

to a contested-case hearing both statutorily and under the U.S. and Texas Constitutions. The Commission filed a plea to the jurisdiction based on sovereign immunity, which the trial court granted. McNeill filed a request for findings of fact and conclusions of law. Then, eighty-seven days after the trial court's order, McNeill filed his notice of appeal.

On appeal, the Commission argued both that McNeill was not entitled to a contested-case hearing and that the court of appeals did not have jurisdiction because McNeill's appeal was untimely, contending that his deadline to file was thirty, not ninety, days after the trial court's order. The court of appeals unanimously held that McNeill's appeal was timely but fractured on the question of whether McNeill had a right to a contested-case hearing. The majority held that he did, but on federal due process grounds, not statutory grounds. The dissent felt that the majority had inappropriately reached the constitutional issue.

The Supreme Court held that a request for findings of fact and conclusions of law following a trial court proceeding extends the appellate timetable from thirty to ninety days where the trial court proceeding was the type where evidence could be considered, and evidence was before the trial court. Under this rule, McNeill's appeal was timely and jurisdiction was proper. The Court further held that McNeill was entitled to a contested-case hearing under section 531.1201 of the Government Code, and that the Commission's failure to provide him one was *ultra vires* action not shielded by sovereign immunity. Finally, the Court held that the court of appeals erred in deciding on constitutional grounds where statutory grounds were available, and that the court of appeals' due process analysis in the case should not be considered authoritative.

c) *Chen v. Razberi Tech., Inc.*, — S.W.3d —, 2022 WL 1696321 (Tex. May 27, 2022) [21-0499]

The issue on appeal was whether the court of appeals retained jurisdiction to determine the merits of a live jurisdictional dispute after an order on interlocutory appeal merged into a final judgment that was not subsequently appealed.

Razberi Technologies, Inc. had a business relationship with a Taiwanese company, DynaColor. When the relationship soured, Razberi sued DynaColor and its Taiwanese CEO, Warren Chen (collectively, Chen) in Texas. Chen specially appeared to challenge personal jurisdiction. After the trial court denied the special appearances, Chen filed an accelerated interlocutory appeal. While the appeal was pending, the trial court rendered final judgment in Razberi's favor on the merits, and Chen did not appeal the final judgment. Razberi then filed a motion to dismiss the pending appeal as moot because the order on appeal had merged into the final judgment. The appellate court agreed and dismissed Chen's appeal as moot without resolving the still-live jurisdictional issue. The court held that Chen could have raised the jurisdictional issue by filing a separate appeal from the final judgment but

chose not to do so.

Chen moved for rehearing citing Texas Rule of Appellate Procedure 27.3, which applies to an order or judgment on appeal that is subsequently modified or vacated. Rule 27.3 requires an appellate court to treat the pending appeal "as from the subsequent order or judgment." The appellate court granted rehearing and withdrew its original opinion in *Chen I*, but on second rehearing, the court reversed course and reinstated its original opinion.

The Supreme Court reversed and remanded to the court of appeals to consider the merits of the special appearances. The Court held that, under Rule 27.3, a second "protective" notice of appeal from the final judgment was not necessary for the appellate court to maintain its pre-existing jurisdiction over the still-live jurisdictional dispute. Rule 27.3 prevented an appeal from an interlocutory jurisdictional ruling from becoming moot when it merged into a final judgment, and further accords with the general principle that "a court of appeals has jurisdiction over any appeal in which the appellant files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction."

Because Chen timely appealed the jurisdictional ruling, the court of appeals erred in dismissing the appeal as moot solely because the order on appeal subsequently merged into the final judgment. A second notice of appeal was not required unless the parties wished to expand the scope of the appeal beyond the issues encompassed by the pending appeal.

4. Permissive Interlocutory Appeals

a) Indus. Specialists v. Blanchard Refining Co., — S.W.3d —, 2022 WL 2082236 (Tex. June 10, 2022) [20-0174]

The issue presented in this case is whether a court of appeals abused its discretion either by denying a petition for permissive interlocutory appeal or by failing to explain its reasons for so doing.

Blanchard Refining Company hired Industrial Specialists to provide turnaround services at Blanchard's refinery in Texas City. A workplace fire injured several employees, who sued Blanchard. After the parties settled the employees' claims, Blanchard filed suit to enforce an indemnity provision in its contract with Industrial Specialists. The trial court denied the parties' competing summary-judgment motions but granted Industrial Specialists' unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code. The court of appeals denied Industrial Specialists' petition for permissive appeal. In a one-page memorandum opinion, the court concluded that "the petition fail[ed] to establish each requirement" for a permissive appeal. On appeal to the Supreme Court, both parties argued that the court of appeals abused its discretion by refusing to accept the appeal and by failing to adequately explain its reasons for that decision.

The Court disagreed with the parties and affirmed the court of appeals. Section 51.014(f) of the Texas Civil Practice and Remedies Code says

that a court of appeals "may" accept a permissive appeal if the appealing party timely files a petition "explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(f). Section 51.014(d) says trial courts "may" permit an interlocutory appeal if (1) the order "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." *Id.* § 51.014(d). Based on this clear statutory language, a majority of the Court held that section 51.014(f) permits courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met. A plurality of the Court agreed that the court of appeals' opinion satisfied Texas Rule of Appellate Procedure 47.4, which requires that memorandum opinions give the court's "basic reasons" for its decision.

Justice Blacklock filed a concurring opinion, in which Justice Bland joined, concluding that the Court's precedent in *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019), which held that section 51.014(f) grants "absolute" discretion to courts of appeals to deny permissive appeals, ought to have disposed of this case.. The concurrence thus joined the Court's holding that the court of appeals did not abuse its discretion by denying the appeal and would have further held that neither section 51.014(f) nor rule 47.4 required it to explain its reasons for doing so.

Justice Busby filed a dissenting opinion, in which Chief Justice Hecht and Justice Young joined, arguing that the court of appeals abused its discretion. First, it acted arbitrarily and unreasonably by failing to adhere to guiding principles in its decision, as evidenced by its denial of the permissive appeal when the two requirements of section 51.014(d) were objectively met. Further, it failed to adequately explain the reasons for its decision as required by both section 51.014 and rule 47.4.

5. Preservation of Error

a) Browder v. Moree, — S.W.3d —, 2022 WL 2282669 (Tex. June 24, 2022) (per curiam) [21-0691]

At issue in this case was whether a party, after obtaining an adverse ruling on his request for a jury trial, must also object to that adverse ruling to preserve the issue for appellate review. Bramlette Holland Browder sought conservatorship and possession of Kelly, the biological daughter of Rachel Moree and Clarence Dean Hinds, Jr. Although Browder is not related to Kelly, he lived with her and became a father figure to her during the course of his six-year relationship with Moree.

On November 26, 2018, Hinds appeared before the trial court and requested a continuance. The trial court agreed to recess the case until early March 2019, and on February 1, 2019, Browder filed a written demand for a jury trial. In a letter ruling, the trial court denied Browder's demand, concluding that Browder had waived his jury demand by failing to make it before the bench trial began in November

2018. The court of appeals affirmed, but it did so for a different reason. According to the court of appeals, Browder did not preserve the jury issue for appeal because he failed to object to the trial court's denial of his request or to the trial court's decision to proceed with a bench trial.

The Supreme Court denied Browder's petition for review, and Browder filed a motion for rehearing. In a per curiam opinion, the Supreme Court denied Browder's motion for rehearing. After determining that the trial court did not abuse its discretion in denying Browder's demand as untimely, the Court disapproved the court of appeals' holding that Browder needed to object to the trial court's denial of his jury demand to preserve the jury issue for appeal. Because Browder had already obtained an adverse ruling from the trial court on his jury demand, he did not need to object to that ruling to preserve his complaint.

6. Service of Process

a) *WWLC Inv., L.P. v. Miraki*, 624 S.W.3d 796 (Tex. June 18, 2021) [20-0173]

At issue in this case was whether a limited partnership's agents for service of process included its president, CEO, or owner. WWLC is a Texas limited partnership that leases commercial property. Sorab Miraki leased property from WWLC for use as a specialty food market and restaurant. Wendy Chen—a WWLC owner, then president, and now CEO—executed the lease on WWLC's behalf. Miraki stopped paying rent two years into the lease, complaining that WWLC had not made promised repairs. WWLC evicted Miraki, who then sued WWLC for breach of the lease, fraud, and violations of the Texas Deceptive Trade Practices Act. Miraki then tried to serve WWLC. In late January 2016, Miraki's process server tried five different times to serve WWLC through Chen at a home she owned. Coincidentally, the last attempt the process server made coincided with the day that WWLC's general partner and registered agent, HPZ International, Inc., forfeited its corporate charter. Unsuccessful in serving WWLC through Chen, Miraki moved for substituted service. The trial court granted it. Miraki's process server then attached a copy of the petition and citation to Chen's front door in early April 2016. WWLC did not respond. The trial court entered default judgment against WWLC in November 2016. In June 2017, WWLC sued to enjoin Miraki from executing the judgment on his formerly leased property and to set it aside through a bill of review. The trial court denied all relief. The court of appeals affirmed. The Supreme Court reversed and remanded.

The Court held that WWLC met its burden to prove lack of service of process. The Court reasoned that the Texas Business Organizations Code provides that a limited partnership's agent for service of process includes its general partner and registered agent. Unlike a corporation, its agents do not include its president or other officers, like a CEO. Instead, such officers would need to also qualify as its general partners to accept service of process on its behalf. Further, a limited partnership's owners include both its general and limited partners. One

could not infer from Chen's status as a WWLC owner that she also qualified as its general partner. No evidence in the record supported that Chen served in any other capacity that would have made service on her as WWLC's agent proper. Moreover, Miraki had the opportunity to serve WWLC through its known general partner and registered agent, HPZ. That HPZ lost its corporate charter did not matter because under the Business Code, a corporate general partner that forfeits its charter generally remains a limited partnership's general partner for at least 90 days thereafter. Because Miraki did not attempt to serve WWLC through HPZ at any point, HPZ remained WWLC's general partner at every point Miraki attempted service, and Chen could not accept service on WWLC's behalf, Miraki did not properly serve WWLC. Therefore, WWLC had no notice of Miraki's suit and was thus entitled to set aside the default judgment through its bill of review.

7. Vacatur

a) *Tex. Dep't of Family & Protective Servs. v. N.J.*, 644 S.W.3d 189 (Tex. Apr. 22, 2022) [20-0940]

The issue in this case is whether the Supreme Court should vacate the court of appeals' opinion after part of the case became moot on appeal.

The Department of Family and Protective Services initiated termination proceedings against 15-year-old N.J. three months after she gave birth. N.J. was never served with citation of the petition. The case went to trial, which N.J. participated in personally and through her court-appointed attorney ad litem. The jury returned a verdict terminating N.J.'s parental rights and appointing the Department as the child's managing conservator.

The court of appeals reversed and remanded the case for a new trial, concluding that the trial court lacked personal jurisdiction over N.J. The court held that N.J. could not waive service or consent to the court's jurisdiction because she is a minor.

The Department petitioned for review. While the case was pending in the Supreme Court, N.J., now 18, executed an affidavit relinquishing her parental rights. The Department declined to notify the Court of this development for over a year, and the Court granted the petition for review. Ten days before argument, the Department moved to (1) dismiss the appeal as moot, (2) vacate the court of appeals' judgment, (3) vacate the trial court's judgment in part, and (4) vacate the court of appeals' opinion.

The Supreme Court granted the Department's motion in part. The Court held that the portion of the case appealed by N.J. was moot. Accordingly, the Court vacated the court of appeals' judgment and the portion of the trial court's judgment terminating N.J.'s parental rights. But the Court rejected the Department's request to vacate the court of appeals' opinion. The Court concluded that vacatur of the court of appeals' opinion did not serve the public interest because (1) a parent's decision to voluntarily terminate his or her parental rights is not one that would be motivated by a desire to manipulate precedent, and (2) the Department substantially delayed

notifying the Court of the events that rendered the case moot.

Justice Lehrmann filed a concurring opinion. The concurrence agreed with the Court's opinion but emphasized that the Court's decision to let the court of appeals' opinion stand was not an endorsement of its rationale or holding.

8. Waiver

a) *Li v. Pemberton Park Cmty. Ass'n*, 631 S.W.3d 701 (Tex. Oct. 1, 2021) (per curiam) [20-0571]

The issue in this case was whether the petitioner waived appellate review by failing to preserve her argument that the respondent had enforced deed restrictions against her in violation of the Property Code. Respondent Pemberton Park Community Association (Association) is a homeowners' association. The Association enforces deed restrictions under a Declaration of Covenants, Restrictions and Easements (Covenants). The Association sued Li for violating certain Covenants when she repaired a crack in the stucco exterior of her house. In various pretrial pleadings, Li, representing herself pro se, raised the defense that other residents "with much worse violations" had not been subjected to enforcement efforts by the Association. She alleged that the Association had breached a covenant "of fair dealing" and "equal and same manner" and that the deed restrictions had been "selectively enforced" against her because she had complained about unrelated matters.

The trial court granted summary judgment in favor of the Association. On appeal, Li argued that she had raised a fact issue on whether the Association's enforcement action was barred because it violated section 202.004(a) of the Property Code. Section 202.004(a) provides that an exercise of discretionary authority by a homeowners' association is presumed reasonable unless the court determines that the exercise of authority was "arbitrary, capricious, or discriminatory." The court of appeals held that this argument had been waived because Li had not raised it in the trial court.

The Supreme Court reversed. The Court reasoned that under Texas Rule of Civil Procedure 166a(c), issues not raised in the trial court cannot be considered on appeal as grounds for reversal of a summary judgment. However, procedural rules should be liberally construed so that the right to appeal is not lost unnecessarily. If the substance of the issue was presented to the trial court, then the issue is preserved, even if the party did not rely on precisely the same caselaw or statutory subpart that she now urges on appeal. Parties are free to construct new arguments in support of the issues raised below. Under these standards, Li preserved her claimed statutory defense. Even though she did not cite section 202.004(a), she had argued that the Association's actions were arbitrary and discriminatory in that she was unfairly singled out for disparate treatment. The Court also noted that as a pro se litigant, Li's pleadings should be evaluated "with liberality and patience." Because Li preserved her statutory defense, the Court reversed the court of appeals' judgment. It remanded the case to the court of appeals for

consideration of other issues that court had not reached.

Z. PROCEDURE—PRETRIAL

1. Discovery

a) *In re Allstate Fire & Cas. Ins. Co.*, 624 S.W.3d 795 (Tex. June 18, 2021) [20-0810]

In this suit between an insurance carrier and its insured, involving the latter's entitlement to benefits under an uninsured/underinsured motorist policy, the trial court denied the insured's motion to compel the deposition of the carrier's corporate representative, and the court of appeals granted the insured's petition for writ of mandamus in part, holding that the insured was entitled to conduct a deposition narrowly focused on the disputed issues in the case.

The Supreme Court denied the carrier's petition for writ of mandamus without prejudice to give the trial court the opportunity to reconsider its order in light of the Court's contemporaneously issued opinion in *In re USAA General Indemnity Co.*, 624 S.W.3d 782 (Tex. June 18, 2021).

b) *In re Am. Airlines*, 634 S.W.3d 38 (Tex. Oct. 22, 2021) (per curiam) [20-0789]

The issues in this mandamus case asked (1) whether the plaintiff could depose an apex executive when he did not show that the executive had unique or superior personal knowledge of discoverable information and (2) whether the party resisting discovery waived its right to mandamus relief because of a "delay" in filing its petition for mandamus. The Court held that (1) no, the plaintiff could not depose the executive, and (2) no, the resisting party did not waive its right to mandamus relief because any delay was neither unjustified nor unexplained.

Elise Eberwein is American Airlines' Vice President of People and Communications—an apex executive. Shortly before the close of discovery, plaintiff Donald Arnette served defendant American with a notice of deposition for Eberwein. American opposed the deposition notice, arguing that Eberwein was an apex executive with no knowledge of the case. After two hearings, the trial court denied American's motion for protective order and compelled Eberwein's deposition. It also required Arnette to serve deposition topics for Eberwein. Neither party received a copy of the trial court's order for four months. After that, the case sat essentially dormant; to date, Arnette has not served deposition topics. Eight months after receiving the trial court's order, American petitioned for a writ of mandamus in the court of appeals, fearing a last-minute deposition notice that could derail its upcoming trial setting. The court of appeals denied relief based on American's "unexplained delay" in filing its mandamus petition.

The Supreme Court conditionally granted relief in a per curiam opinion. It held that the trial court abused its discretion in compelling this deposition. Under *Crown Central Petroleum Corp. v. Garcia*, a party seeking to depose an apex executive must arguably show that the executive has unique or superior personal knowledge of discoverable information. The general statements in Eberwein's online biography, on which Arnette relies, do not meet this standard. Nor did Arnette even

attempt to use less intrusive methods to obtain the information.

To the extent the trial court denied American's motion based on asserted procedural irregularities, that was an error. First, no statute or precedent requires a party resisting discovery to use a particular procedural vehicle to assert the apex doctrine. Second, the fact that American filed Eberwein's affidavit after discovery had closed did not waive Eberwein's right to protection—especially when Arnette noticed the deposition on the eve of the discovery deadline. And third, the affidavit, which sufficiently invoked the *Crown Central* guidelines, was before the trial court in time for the hearings and the trial court's ruling on the motion.

Finally, American did not waive its right to relief by waiting to file its petition because its "delay" was neither unreasonable nor unjustified. For all of these reasons, the Court conditionally granted mandamus relief.

c) *In re Central Oregon Truck Co.,* 644 S.W.3d 668(Tex. May 6, 2022) (per curiam) [20-0945]

In this personal-injury suit, the plaintiff alleges she suffered a traumatic brain injury and a corresponding diminution of her employment opportunities and earning capacity following a 2017 rear-end collision. The issue in the original proceeding is whether the defendants are entitled to seek (1) post-accident medical-billing information from the plaintiff's medical providers and (2) third-party production of the plaintiff's pre-accident medical, education, and employment records along with insurance records pertaining to injuries the plaintiff suffered in two prior accidents.

Although the Supreme Court determined the discovery requests seek relevant information, including information discoverable under *In re K&L Auto Crushers, LLC*, 667 S.W.3d 239 (Tex. 2021), the Court denied the mandamus petition without prejudice to allow the parties to confer and the trial court an opportunity to reconsider its orders in light of the extensive guidance *K&L Auto Crushers* provides for resolving the parties' disputes about proportionality, undue burden, overbreadth, and confidentiality.

d) *In re ExxonMobil Corp.*, 635 S.W.3d 631 (Tex. Nov. 19, 2021) (per curiam) [20-0849]

The issue in this case was whether the trial court abused its discretion by denying ExxonMobil's discovery requests to medical providers. 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.

The Supreme Court conditionally granted mandamus relief. Applying its holding in *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021), 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 that it lacked an 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.

In a per curiam opinion, the Court 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.*

e) *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. May 28, 2021) [19-1022]

The issue here was whether K & L Auto was entitled to mandamus relief from a trial court's denial of discovery of information related to various services and materials billed by three providers to the plaintiff in the case. After a slow-moving accident with no immediately reported injuries, Kevin Walker obtained treatment from several medical care providers under letters of protection, totaling about $1.2 million in charges. To contest the reasonableness of the amounts billed, K & L Auto sought broad discovery related to their billing practices and rates over a period of several years. The non-party providers objected, arguing the information requested was irrelevant, overbroad, unduly burdensome, confidential, and protected as trade secrets. At a hearing, the trial court sustained the objections and quashed the subpoenas without explaining why.

K & L Auto moved for partial reconsideration of the discovery order—the new motion abandoned many of the requests and sub-requests contained by the initial subpoenas and narrowed the requests to only production of documents related to (1) the amounts the providers charged insurance companies, federal insurance programs, and in-network healthcare providers for the services, materials, devices, and equipment billed to Walker as of the date of Walker's treatment, (2) the amounts the providers paid for the devices and equipment billed to Walker, and (3) the

providers' chargemaster (full) rates for the devices and equipment billed to Walker and how the providers determined those rates.

The narrowed requests still broadly sought, in part, all communications between the providers and any manufacturer, seller, or distributor of any device used by the providers to treat Walker and all documents related to certain services and devices provided. But in the motion and at the hearing, K & L Auto noted its willingness to enter into a reasonable protective order to address confidentiality and trade secrets issues and emphasized that it wanted to focus the trial court on the specific types of discovery authorized by case law. It argued its requests were now targeted to the specific services/devices at issue, did not implicate confidentiality concerns, and fell squarely within the discovery authorized in *In re North Cypress Medical Center Operating Co.*, 559 S.W.3d 128 (Tex. 2018) (orig. proceeding). The trial court again denied the discovery without explanation. The court of appeals denied the mandamus petition for failure to show K & L Auto was entitled to relief.

The Supreme Court disagreed with the court of appeals. Focusing on the narrowed requests, the Court held that the trial court abused its discretion by completely denying discovery and that K & L Auto had no adequate remedy on appeal. Primarily, it held much of the requested information was relevant because *North Cypress* applies to the personal-injury context. Thus, any denial on relevance grounds was abuse. It also made several circumstance-specific holdings in light of its conclusion that *North Cypress* applied. The requests were not overbroad because the motion for reconsideration and statements at the hearing sufficiently tailored the requests to the time period, devices, and services at issue and approved by *North Cypress*. The requests were not unduly burdensome because they were similar to what was authorized in *North Cypress*, the providers had a financial stake in the outcome of the case, and the providers failed to establish an undue burden. And finally, the trial court should have considered whether it could permit the discovery while protecting any allegedly confidential information, as requested by K & L Auto. Thus, the Court held that to the extent the trial court denied discovery for these reasons, it was also an abuse of discretion. Therefore, the trial court's absolute denial was an abuse. The Court conditionally granted the writ of mandamus and ordered the trial court to vacate its order denying K & L Auto's motion for reconsideration, although the trial court retained discretion to address the narrowed discovery requests.

Justice Huddle concurred. She disagreed that K & L Auto sought only the information that *North Cypress* concluded was discoverable. Although she believed that the trial court was within its discretion to deny the requested discovery given the document requests' broad scope, she agreed with the Court's ultimate decision to allow the parties and trial court the opportunity to brief and decide the appropriate scope of discovery with the benefit of the Court's decision. She emphasized that the non-party discovery the Court authorized will not be appropriate in

every personal injury case and that courts should consider factors to guide the proportionality analysis, including the existence of letters of protection, the value of claimed past medical expenses, the availability of pricing data from alternative sources, and rulings on section 18.001 counteraffidavits.

f) *In re Liberty Cnty. Mut. Ins. Co.*, 624 S.W.3d 796 (Tex. June 18, 2021) [20-0983]

In this suit between an insurance carrier and its insured involving the latter's entitlement to benefits under an uninsured/underinsured motorist policy, the trial court granted the insured's motion to compel the deposition of the carrier's corporate representative, and the court of appeals denied the carrier's petition for writ of mandamus.

The Supreme Court denied the carrier's petition for writ of mandamus without prejudice to give the trial court the opportunity to reconsider its order in light of the Court's contemporaneously issued opinion in *In re USAA General Indemnity Co.*, 624 S.W.3d 782 (Tex. June 18, 2021).

g) *In re Texan Millwork*, 631 S.W.3d 706 (Tex. Oct. 1, 2021) [20-0662]

Under Texas Rule of Civil Procedure 199.3, a subpoena is generally required to compel a witness's appearance at a deposition. But if the witness is (1) a party or (2) "retained by, employed by, or otherwise subject to the control of a party," the witness's attendance may be compelled following "service of . . . a notice of oral deposition upon" the party's attorney. In this original proceeding, the issue is whether the trial court erroneously compelled the relator, Texan Millwork, to produce a co-defendant for an oral deposition without a subpoena.

This discovery dispute arises from a fatal industrial accident. A granite store employee died when two 400-pound granite slabs fell off a construction worker's truck. After obtaining a default judgment against the construction worker, Lazaro Cabrera, the survivors added claims against Texan Millwork, a cabinet-maker that had hired Cabrera to fabricate the granite slabs into countertops for a residential construction project. Shortly after being sued, Texan Millwork obtained a sworn statement from Cabrera, which it later offered as evidence to support a summary-judgment motion asserting he was an independent contractor not subject to the cabinet-maker's control at the time of the accident.

Cabrera subsequently evaded the survivors' multiple attempts to contact him and serve him with a subpoena for an oral deposition. About a year later, the survivors served a notice of oral deposition on Texan Millwork and a motion to compel Cabrera's deposition. The survivors argued that Rule 199.3 dispensed with the subpoena requirement because Cabrera was either employed by Texan Millwork or subject to its control. In response, Texan Millwork produced evidence to refute past employment or control and establish the nonexistence of present employment or control, including uncontroverted evidence that Texan Millwork had no business relationship or contact with Cabrera for more than eight months prior to service of the

deposition notice. The trial court ordered Texan Millwork to make the worker available for a deposition within twenty-one days, and the court of appeals denied mandamus relief, citing disputed evidence that Texan Millwork employed or controlled the worker on the day of the accident, some three years before the survivors served the deposition notice. The court said the existence of fact issues arising from that disputed evidence mandated deference to the trial court's ruling.

After a successor trial judge declined to reconsider the ruling, the Texas Supreme Court conditionally granted mandamus relief. The Court construed Rule 199.3's plain language to preclude a court from compelling a party to produce a witness when employment and control are lacking at the time production is requested or required. Without considering whether the evidence raised a fact issue about employment or control at the time of the accident, which remained disputed, the Court found no evidence that either existed contemporaneous with service of the deposition notice or thereafter and the record instead bore uncontradicted evidence to the contrary. Focusing on the relevant time period, the Court held that (1) the trial court's order exceeded the permissible bounds of discovery and (2) the error was irremediable on appeal.

h) *In re UPS Ground Freight, Inc.,* — S.W.3d —, 2022 WL 2183129 (Tex. June 17, 2022) [20-0827]

In this wrongful-death suit, UPS Ground Freight, Inc. sought mandamus relief from a discovery order compelling production of all alcohol-and-drug test results for all drivers at its Irving, Texas facility following a fatal motor-vehicle accident involving a single UPS driver. The issues in the original proceeding included whether the discovery requests were overbroad and whether the disclosure was prohibited by federal law.

Phillip Villarreal, a driver operating out of UPS's Irving facility, tested positive for THC after he was involved in a multi-vehicle collision that killed Nathan Dean Clark. Clark's mother, Jacintha McElduff, sued Villarreal and UPS for negligence and gross negligence. Among other things, McElduff alleged that UPS knowingly failed to properly drug test Villarreal, knowingly allowed him to drive while under the influence, and knowingly failed to comply with federal alcohol-and-drug testing laws as well as its own testing policies.

In discovery, UPS produced information about its alcohol-and-drug testing program and all of Villarreal's test results. When deposed, Villarreal admitted that he had used marijuana for years before the collision and had provided marijuana to other drivers. To establish a pattern and practice of failing to adequately drug test at the Irving facility, McElduff served discovery requests seeking (1) the names, addresses, and telephone numbers of all UPS drivers dispatched out of that facility in the eleven years before the accident, and (2) all drug-and-alcohol tests of those drivers—including pre-employment, random, reasonable suspicion, periodic, and post-accident testing—without any time restriction. The trial court compelled production,

overruling UPS's objections that the requests were overbroad, sought irrelevant information, were preempted by federal law, and violated the nonparty drivers' privacy rights. The court of appeals conditionally granted mandamus relief, holding that the discovery requests were not appropriately time-limited and, therefore, overbroad. In response, the trial court revised the discovery order to include stricter time-period limitations.

When UPS raised similar objections to the revised discovery order, the court of appeals generally rejected all of UPS's objections but agreed that the discovery order violated the nonparty drivers' privacy. Conditionally granting mandamus relief in part, the court held that the trial court abused its discretion by compelling production of unredacted records that would reveal the identities of the nonparty drivers whose test results would be released. The trial court again revised its order, compelling production subject to redaction of identifying information. On the trial court's rendition of a compliant discovery order, the court of appeals dismissed the mandamus petition as moot.

The Supreme Court conditionally granted mandamus relief, holding that the trial court erred in compelling disclosure of confidential drug-test records of nonparty UPS employees who were uninvolved in the accident that claimed Clark's life. The discovery requests were overbroad because the individual drug-test results of uninvolved drivers were irrelevant to proving that UPS negligently trained, retained, and entrusted a vehicle to Villarreal or was grossly negligent in those regards. The results were also irrelevant to determining whether UPS complied with federal drug-test mandates because drug-test results of drivers from a single facility have no bearing on the national drug-testing program's compliance with federal mandates. The Court did not reach UPS's remaining objections.

i) *In re USAA Gen. Indem. Co.*, 624 S.W.3d 782 (Tex. June 18, 2021) [20-0281]

At issue in this case was whether the trial court abused its discretion by compelling the deposition of an uninsured/underinsured motorist (UIM) carrier's corporate representative in a case involving an insured's entitlement to UIM benefits.

Frank Wearden, an insured under an automobile policy issued by USAA, was in a car accident with Michelle Bernal. After settling with Bernal, Wearden sued USAA for breach of contract and a declaratory judgment, asserting he was entitled to UIM benefits. Wearden served a notice of intent to take the oral deposition of a USAA corporate representative on a variety of topics. USAA filed a motion to quash, conceding several facts regarding UIM coverage and arguing that the deposition was irrelevant to the only disputed issues in the case: whether Bernal was at fault for the accident, caused Wearden's damages, and was underinsured. USAA also argued the deposition was barred on proportionality grounds, asserting that the deposition was unreasonably cumulative, the information sought could be obtained from more convenient, less expensive sources, and the burdens of

the deposition outweighed the likely benefits. Alternatively, USAA argued the deposition topics were overbroad. The trial court denied the motion to quash, and the court of appeals denied USAA's petition for writ of mandamus. USAA then sought mandamus relief in the Supreme Court.

The Court granted USAA's petition for writ of mandamus in part. First, the Court held that the deposition was not categorically barred on relevance grounds, explaining that USAA's lack of personal knowledge about the circumstances of the accident did not equate to a lack of relevant knowledge. To the extent USAA possessed information supporting its position on the disputed issues, even if gleaned second-hand, that information was discoverable unless otherwise privileged.

Second, the Court held that proportionality concerns did not foreclose the deposition. Notwithstanding USAA's lack of personal knowledge, the Court concluded the record did not support USAA's position that the requested deposition was unreasonably cumulative or burdensome, noting that USAA objected only to the method of discovery and rejecting the notion that a deposition is inherently more burdensome than other permissible methods. However, the Court cautioned that a UIM carrier may in some circumstances demonstrate that its deposition is barred on proportionality grounds if the carrier discloses the relevant, nonprivileged information in its possession and explains how that information, combined with the carrier's lack of personal knowledge, shows that the deposition would provide little if any additional benefit in relation to the cost.

Third, the Court held that some of Wearden's requested deposition topics sought irrelevant information and thus exceeded the discovery rules' permissible scope. For example, USAA's coverage concessions rendered inquiry into many aspects of the UIM policy improper because such inquiry would go beyond the disputed issues in the case. Further, topics delving into extracontractual matters and questions seeking privileged information are not permitted. Accordingly, the Court held that the trial court abused its discretion in denying USAA's motion to quash with respect to the requested deposition topics that exceeded the proper scope as clarified in the Court's opinion.

2. Medical Expense Affidavits

a) *In re Allstate Indem. Co.*, 622 S.W.3d 870 (Tex. May 7, 2021) [20-0071]

This mandamus proceeding addressed the standard for striking a controverting affidavit served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness and necessity of a claimant's medical expenses.

Norma Alaniz sued her insurer, Allstate Indemnity Co., for allegedly failing to pay underinsured motorist (UIM) benefits after Alaniz was injured in an auto accident. Alaniz served multiple affidavits from her medical providers in accordance with section 18.001, setting forth the amounts Alaniz was charged and averring those amounts were reasonable and necessary. Allstate served a counteraffidavit from Christine Dickison, a registered

nurse and a medical billing and coding expert, disputing the reasonableness of some of Alaniz's medical expenses. Alaniz moved to strike the counteraffidavit for not complying with section 18.001(f). The trial court granted Alaniz's motion and rendered an order (1) striking the counteraffidavit from use for any purpose, (2) prohibiting Dickison from testifying, and (3) prohibiting Allstate from offering evidence or arguing that Alaniz's medical expenses were not reasonable. Allstate petitioned for a writ of mandamus.

The Supreme Court first held the trial court abused its discretion by striking the counteraffidavit. Section 18.001 provides that an affidavit stating that the amounts a person charged were reasonable and necessary is sufficient evidence that those amounts were reasonable and necessary unless a controverting affidavit is served. Section 18.001(f) provides that a counteraffidavit (1) must give reasonable notice of the basis on which the serving party intends to controvert the claim in the initial affidavit and (2) must be made by a person who is qualified to testify in contravention of the matters in the initial affidavit. The Court concluded that Dickison's education, training, and experience as a registered nurse, as well as her experience with medical billing and coding, qualified her to testify as to whether Alaniz's medical expenses were reasonable. The Court also concluded that Dickison's counteraffidavit provided "reasonable notice" of the basis on which Allstate intended to controvert the reasonableness of Alaniz's medical expenses. The Court held that "reasonable notice" under section 18.001(f) is similar to the "fair notice" requirement under Texas Rule of Civil Procedure 47. Because the counteraffidavit provided sufficient information to enable Alaniz to prepare a defense or response, the counteraffidavit satisfied the "reasonable notice" requirement. The Court concluded the trial court abused its discretion by determining that Dickison's opinions were unreliable. The Court held that section 18.001(f) does not require the opinions in the counteraffidavit to meet the admissibility requirements for expert testimony.

Finally, the Court concluded that mandamus relief was warranted. The trial court's order excluded Dickison from providing any testimony at trial and also prohibited Allstate from offering evidence, questioning witnesses, or arguing to the jury about the reasonableness of Alaniz's medical expenses. The Court held this order vitiated or severely compromised Allstate's defense because it precluded Allstate from engaging in meaningful adversarial adjudication of Alaniz's claim for medical expenses.

b) *In re Flores*, — S.W.3d —, 2021 WL 5977208 (Tex. Dec. 17, 2021) (per curiam) [20-0602]

At issue in this mandamus proceeding was whether relief was available from two orders striking controverting affidavits served under section 18.001 of the Texas Civil Practice and Remedies Code to dispute the reasonableness and necessity of a claimant's medical expenses, along with other orders issued the same day. Jose Salsedo sued Oscar Flores and Rivas Trucking Specialty, LLC, seeking damages for

injuries he allegedly suffered as a result of an auto accident. Salsedo served affidavits from his medical providers in accordance with section 18.001, setting forth the amounts he was charged and averring those amounts were reasonable and necessary. Flores and Rivas Trucking served counteraffidavits challenging the reasonableness and necessity of some of Salsedo's alleged medical expenses. Salsedo moved to strike the counteraffidavits for not complying with section 18.001(f), and the trial court granted Salsedo's motions. The Court issued a per curiam opinion denying the petition for writ of mandamus without prejudice to give the trial court an opportunity to reconsider its orders in light of the Court's opinion in *In re Allstate Indemnity Co.*, 622 S.W.3d 870 (Tex. 2021).

3. Mootness & Discovery Breadth

a) In re Contract Freighters, Inc., — S.W.3d —, 2022 WL 218307 (Tex. June 17, 2022) [21-0134]

This mandamus action challenged certain discovery rulings in a vehicle collision lawsuit. Relator Contract Freighters, Inc. employed Randall Folks as a driver. Folks's tractor-trailer collided with the vehicle of plaintiffs Jimmy and Paula McPherson, after which the McPhersons sued CFI as Folks's employer and for negligently hiring and training him. The challenged discovery requests sought records from CFI and from the U.S. Department of Transportation for any accident involving CFI within the last five years. CFI objected and moved to quash the requests, but the trial court and the court of appeals denied relief. CFI then filed its petition for a writ of mandamus in the Supreme Court.

After this Court requested a response to the writ of mandamus, the McPhersons purported to withdraw the challenged discovery requests by issuing new discovery requests that did not contain the objected-to items. The McPhersons then filed a motion in this Court to dismiss the petition as moot. They did not file anything with the district court regarding its challenged orders.

The Court found that the McPhersons' unilateral withdrawal of the challenged actions did not moot the case. A case is not necessarily mooted when the challenged actions are withdrawn, particularly when the plaintiff gave no enforceable assurances that they would not resubmit the challenged orders and when the action that purports to moot the case occurs only as appellate scrutiny grows near.

In previous cases, this Court has found these kinds of fishing expeditions to be overly broad and burdensome as a matter of law. The Court thus conditionally granted mandamus relief.

4. Responsible Third-Party Designation

a) In re YRC, Inc., d/b/a YRC Freight, — S.W.3d —, 2022 WL 2183065 (Tex. June 17, 2022) (per curiam) [21-0846]

At issue in this case was whether the trial court erred in denying defendant YRC's motion for leave to designate a responsible third party in a negligence suit arising from a workplace injury.

In 2015, plaintiff and real party

in interest James Curry was injured on the job while loading a trailer parked at a freight dock owned by his employer, Eaton Corporation. Eaton authorized YRC, the operating freight carrier, to pull the trailer away while Curry was still actively loading it, and Curry fell out and was injured. He then filed a successful workers' compensation claim. Curry filed a negligence suit against YRC and its driver in 2016. YRC filed a motion to designate Eaton a responsible third party pursuant to section 33.004 of the Texas Civil Practice and Remedies Code. At the time the motion was filed, trial was set sixty-two days later. The trial court denied the motion for leave to designate, finding that (1) YRC failed to establish good cause for its delay in filing its motion for leave; (2) the motion was untimely because it was filed five years after the subject injury and thus the statute of limitations on the claim against Eaton had expired; and (3) YRC failed to plead sufficient facts to support the motion. The court of appeals affirmed.

YRC sought mandamus relief from the Supreme Court, arguing that the trial court erred in denying the motion to designate. The Court agreed in a per curiam opinion, holding that all three of the trial court's grounds for denial were error. First, a motion to designate a responsible third party is timely so long as it is filed before the then-pending trial date. Because YRC's motion was filed sixty-two days before the trial setting, it was therefore timely. Second, the trial court erred in concluding that the motion was filed after the applicable limitations period expired. Section 33.004(d) provides that "a defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party" unless the possible designation was timely disclosed. There is no applicable limitations period with respect to Curry's claims against Eaton because Eaton is a workers' compensation subscriber, which provides the exclusive remedy for recovery for workplace injuries, and a negligence action by Curry against Eaton is precluded as a matter of law. Consequently, section 33.004 did not foreclose YRC's designation.

Finally, the trial court abused its discretion in concluding that YRC did not plead sufficient facts to support its motion. YRC was required to meet the pleading standard set out by the Texas Rules of Civil Procedure, which demands only "a short statement of the cause of action sufficient to give fair notice of the claim involved." The Court concluded that YRC's motion cleared that bar. Accordingly, the Court granted YRC's petition for writ of mandamus and directed the trial court to vacate its order denying YRC's motion for leave to designate a responsible third party and to grant the motion.

5. Service of Process

a) *U.S. Bank Nat'l Assoc. v. Moss*, 644 S.W.3d 130 (Tex. February 25, 2022) [20-0517]

At issue in this case was whether Estates Code chapter 505 or section 17.028 of the Civil Practice and Remedies Code is the appropriate method of service on a financial institution serving as a foreign corporate fiduciary.

Moss is a homeowner in Dallas County. In 2005, Moss refinanced his mortgage and signed a home equity deed of trust. U.S. Bank claimed ownership of that deed by assignment. In 2017, Moss sued the Bank, seeking to quiet title on his home, and alleged that the Bank could no longer sell the property because the statute of limitations had expired. He served the Bank—which was domiciled in Ohio and acting as a foreign corporate fiduciary in Texas—by serving the Secretary of State, pursuant to chapter 505 of the Estates Code. Section 505.004 provides that a foreign corporate fiduciary must appoint the Secretary of State as the fiduciary's agent for service of process in actions related to trusts, estates, and other matters. U.S. Bank did not appear in the quiet title lawsuit, and Moss obtained a default judgment.

U.S. bank sought to set aside the default judgment on the grounds that it was improperly served and filed an equitable bill of review in the trial court. The Bank contended that financial institutions may only be served pursuant to section 17.028 of the Civil Practice and Remedies Code, which requires service on a financial institution's "registered agent." The trial court agreed with Moss that service under the Estates Code was proper. The court of appeals affirmed, holding that both methods of service are valid and Moss properly effectuated service on the Bank via the Estates Code.

The Bank appealed to the Supreme Court, which reversed the court of appeals' judgment. First, the court held that section 17.028 of the Civil Practice and Remedies Code provides the exclusive methods of serving a financial institution. It then considered the comprehensive statutory landscape governing foreign corporations operating in Texas and determined that the Secretary of State, as an agent for service of process under Estates Code chapter 505, is not a "registered agent" as required by section 17.028. The Court reasoned that the various laws governing foreign corporations doing business in Texas, including the Civil Practice and Remedies Code and Estates Code as well as the Finance Code and Business Organizations Code, do not, when read together, support the conclusion that the Secretary of State can be a corporation's "registered agent" for purposes of service of process section 17.028 of the Civil Practice and Remedies Code. Consequently, the Court held that Moss's service of the Secretary did not satisfy the service requirements of 17.028 and the Bank was not properly served. The Court reversed the court of appeals' judgment denying the bill of review, rendered summary judgment setting aside the default judgment, and remanded the case to the trial court for further proceedings on the merits.

6. Standing

a) *Jones v. Turner*, — S.W.3d — , 2022 WL 1815031 (Tex. June 17, 2022) [21-0358]

This case concerns whether taxpayers have standing to challenge alleged misallocation of tax revenue by city officials and whether the taxpayers in this case sufficiently pleaded *ultra vires* acts by alleging the city officials had no discretion in so misallocating the funds.

Two Houston taxpayers, Jones

and Watson, sued Houston Mayor Sylvester Turner and other City Officials for allegedly underfunding the Dedicated Drainage and Street Renewal Fund established under the City Charter, which mandated that a certain amount of funds be spent "exclusively" on drainage and street maintenance. Specifically, the taxpayers alleged that in Fiscal Year 2020, the ad valorem tax revenue allocation to the Fund had a shortfall of about $50 million. The taxpayers' pleadings indicated that they calculated that amount by multiplying Fiscal Year 2020's total assessed taxable property value by the Charter's allocation of an "amount equivalent to proceeds from $0.118 of the City's ad valorem tax levy," minus debt service, to the Fund.

The City Officials filed a plea to the jurisdiction asserting governmental immunity. The City Officials argued the pleadings did not show that they acted outside their authority. They also contested the taxpayers' calculations. The trial court denied the plea to the jurisdiction.

On appeal, the City Officials maintained their entitlement to immunity and argued for the first time that the taxpayers lacked standing to bring suit. The court of appeals held that the taxpayers did not have standing. The appeals court concluded that the taxpayers failed to show that their suit sought to enjoin an illegal expenditure of funds (or any expenditure of funds)—a necessary component of taxpayer standing. Having determined that the taxpayers had not established taxpayer standing and had not otherwise shown a particularized injury, the appeals court dismissed the case for want of jurisdiction without reaching the immunity issue.

The Supreme Court reversed. It was undisputed the the taxpayers were "taxpayers" for purposes of standing, so the question was whether they pleaded sufficient facts showing that public funds were expended on allegedly illegal activity. The Court held they did. The taxpayers' calculations showed a measurable and not *de minimus* misallocation and alleged that the City was in fact spending the money on other services that would not have received those funds if City Officials had allocated them properly.

The Supreme Court also reached the immunity issue the court of appeals did not address. The Court held that the Charter gave the City Officials no discretion but to allocate the funds as mandated. Finally, the Court held that the trial court did not err in declining to dismiss the taxpayers' claims for mandamus and declaratory relief at the plea to the jurisdiction stage.

7. Summary Judgment

a) *Weekley Homes, LLC v. Paniagua*, — S.W.3d —, 2022 WL 2183128 (Tex. June 17, 2022) [21-0197]

The issues in this case were (1) whether a party preserves an issue for appeal when it "d[oes] not substantively argue" that issue in its briefing in the court of appeals but still directs the court's attention to the error about which it complains and (2) whether pleadings may constitute summary-judgment evidence.

In this case, Weekley Homes, LLC hired Leobardo Maravilla, Jose Maravilla, and John Paniagua to work

on a townhome construction project. While working on the project, the three men were moving a metal scaffold on a driveway made wet by rain. The scaffold came within six to ten feet of a temporary power line, electrocuting Jose and injuring Paniagua.

Paniagua and several of Jose's relatives sued Weekley for negligence, gross negligence, and premises liability. After discovery, Weekley moved for summary judgment under Chapter 95 of the Texas Civil Practice and Remedies Code, which limits a real-property owner's liability for common-law negligence claims arising from a contractor's or subcontractor's work on an improvement to the property. Weekley's summary-judgment motion cited the plaintiffs' petition as evidence that the driveway and townhome comprised a single improvement for Chapter 95's purposes. The trial court granted summary judgment in Weekley's favor on all claims. The court of appeals affirmed summary judgment on the gross-negligence claims but reversed as to the negligence and premises-liability claims, holding that—because pleadings could not constitute summary-judgment evidence—Weekley had not adduced evidence to satisfy the second requirement for Chapter 95's applicability.

The Supreme Court first determined that the plaintiffs preserved the issue of whether Weekley conclusively established the second requirement because they adequately directed the court of appeals' attention to their complaint; namely, that the trial court erroneously concluded Chapter 95 was applicable. The Supreme Court then addressed whether pleadings may constitute summary-judgment evidence. While acknowledging that pleadings are not generally competent summary-judgment evidence, the Court explained that judicial admissions in an opposing party's pleadings may be used as evidence to support a summary-judgment motion.

The Court reversed the judgment in part and remanded the case to the court of appeals for further consideration of Weekley's summary-judgment evidence in light of the Court's guidance in *Regency*.

AA. PROCEDURE—TRIAL AND POST-TRIAL

1. Error Preservation

a) *In the Matter of the Marriage of Anthony Lynn Williams and Theresa Gayle Williams*, — S.W.3d —, 2022 WL 2082238 (Tex. June 10, 2022) [21-0584]

At issue in this case was whether a defendant challenging the sufficiency of the evidence to support a default judgment must, to preserve error, also file a motion for new trial under *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

Anthony Williams filed for divorce from his wife, Theresa. Theresa failed to answer, and the trial court rendered a default judgment granting the divorce and dividing the marital estate. Theresa motioned for a new trial but raised neither the sufficiency of the evidence supporting the divorce decree nor *Craddock* in the trial court. The trial court denied Theresa's new trial motion, and she appealed, arguing that the trial court abused its discretion in the property division because there

was no evidence as to separate property and no evidence that the division was just and right. She did not assign as error the denial of her motion for a new trial.

The court of appeals affirmed, holding that Theresa's failure to challenge the denial of the new trial motion under *Craddock* resulted in a failure to preserve error of her other claims raised on appeal, including whether the trial court erred in its property division. Theresa appealed to the Supreme Court, contending that *Craddock* governs equitable challenges to default judgments, while evidentiary sufficiency is a legal challenge that can be raised for the first time on appeal.

The Supreme Court agreed with Theresa and reversed the court of appeals' decision in a per curiam opinion. The Court reasoned that a motion for a new trial under *Craddock* and an evidentiary-sufficiency motion are distinct. The Court held that a failure to file a motion for new trial under *Craddock* in the trial court does not foreclose a party's ability to raise on appeal an evidentiary challenge to a default property division.

b) *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dis*t., 642 S.W.3d 829 (Tex. Mar. 4, 2022) [20-0507]

The issues presented in this case were (1) whether a trial court's on-the-record, oral ruling on an objection to summary-judgment evidence is sufficient for error-preservation purposes when the ruling is not reduced to a written order and (2) whether the court of appeals erred in remanding for a new trial without addressing the appellant's rendition issues. A school district contracted for the installation of an artificial-turf field. After the field began to degrade, the district sued its general contractor (Altech) and the turf manufacturer (FieldTurf) for breach of warranty. Altech moved for summary judgment, arguing that there was no evidence that it had breached any warranty. The district responded that the construction contract specified a range of acceptable "G-Max" ratings the field was required to meet and attached a report showing that the field's G-Max rating exceeded that range. Altech objected in writing to the report on several grounds, including that it was not authenticated. The trial court sustained the objection on the record at the summary judgment hearing and granted Altech's motion for summary judgment, but the court did not issue a written order on the objections. After a five-day trial on the district's breach-of-warranty claims against FieldTurf, the trial court rendered judgment for the District on the jury's verdict and awarded the district $175,000 in damages.

The district appealed the summary judgment for Altech, and the district and FieldTurf both appealed the trial court's judgment on the jury's verdict. The court of appeals reversed the summary judgment, holding that the G-Max report remained in the summary judgment record because of the lack of a written order on Altech's objection and that the report created a fact issue on the breach-of-warranty claim against Altech. Without addressing the merits of the issues presented on appeal as to the judgment against FieldTurf, the court of appeals

remanded the warranty claims against both defendants for a new trial, holding that the erroneous summary judgment for Altech limited the evidence presented to the jury with respect to the claim against FieldTurf.

The Supreme Court reversed. The Court first held that the court of appeals erred in remanding the claim against FieldTurf for a new trial "in the interest of justice" because the record contained no support for the court of appeals' conclusion that the summary judgment for Altech, whether or not erroneous, affected the development or presentation of the evidence at trial on the claim against FieldTurf. Accordingly, the Court remanded the case to the court of appeals to address the merits of the parties' appellate issues on that claim in the first instance.

The Court further held that the court of appeals erred in holding that the G-Max report remained in the summary judgment record and could be considered in reviewing the summary judgment for Altech. Recognizing that both an objection and a ruling by the trial court are necessary to preserve error, the Court held that a written order is not required if the record clearly shows a ruling on the objection. Here, the reporter's record of the summary judgment hearing showed that the trial court sustained Altech's objection to the G-Max report, and the district did not argue on appeal that the court erred in doing so. Accordingly, the Court held that the report was not part of the summary judgment record on appeal and that the court of appeals erred in relying on the report to reverse the summary judgment. Finally, the Court rejected the district's argument that the G-Max report was cumulative of other evidence in the record that created a fact issue on the warranty claim. The Court thus reversed the court of appeals' judgment and reinstated the summary judgment for Altech.

2. Restraining Orders

a) *In re Luther*, 620 S.W.3d 715 (Tex. Apr. 9, 2021) [20-0363]

At issue in this habeas corpus proceeding is whether a judgment of contempt is void due to the underlying temporary restraining order's failure to comply with rule 683 of the Texas Rules of Civil Procedure. The City of Dallas filed suit to enjoin Shelley Luther and her salon, S&B Hot Mess Enterprises, LLC d/b/a Salon A La Mode, from operating the salon in violation of COVID-19 regulations. The trial court entered a temporary restraining order prohibiting Luther from providing in-person service at her salon "in violation of State of Texas, Dallas County, and City of Dallas emergency regulations." Luther continued to operate her salon. Seven days later, and before a hearing on the temporary injunction, the trial court convened the parties to hear the City's motion to show cause why Luther should not be held in contempt for violating the temporary restraining order.

At the show-cause hearing, the City presented evidence that Luther's salon was conducting in-person services after she was served with the temporary restraining order. Luther conceded that she had notice of the temporary restraining order and testified that she believed she was complying with applicable Centers for Disease Control regulations insofar as she had

altered salon operations by limiting the number of workers and customers inside the salon, requiring them to wear masks, enforcing distancing in waiting areas, and adding sanitizer stations. At the hearing's conclusion, the trial court made oral findings and entered a written contempt judgment, holding both Luther and her salon in criminal and civil contempt. That same day, Luther was remanded to the custody of the Dallas County Sheriff to complete a seven-day confinement. Luther filed with the Supreme Court a petition for writ of habeas corpus and a motion for emergency relief, and the Court ordered Luther released on personal bond, pending the resolution of her petition.

The Court granted Luther her requested relief. It held that the temporary restraining order's lack of specificity regarding the conduct to be restrained and the legal basis for its issuance do not conform with the strict mandates of rule 683, rendering it and the Judgment of Contempt and Order of Confinement void. Specifically, the temporary restraining order required Luther to cease and desist from conducting in-person services at the salon "in violation of State of Texas, Dallas County, and City of Dallas emergency regulations related to the COVID-19 pandemic." But nowhere does it specify any particular state, county, or city regulation that Luther has violated, is threatening to violate, or is being commanded to stop violating. Nor does it describe with specificity which "in-person services" were restrained, such that performing them would cause Luther to violate the temporary restraining order.

BB. PRODUCTS LIABILITY

1. Design Defects

a) *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197 (Tex. Apr. 16, 2021) [18-1181]

At issue in this case was whether legally sufficient evidence supported the jury's design-defect verdict and whether the jury charge caused an improper verdict. Clarence Johnson, an experienced HVAC technician, was severely injured by ignited fluid after the terminal in Emerson's compressor failed. Although the terminal's manufacturer, Fusite, simultaneously marketed another terminal design that had proven to be less likely to fail, Emerson elected to incorporate the older, more risky design. A jury concluded that the designs of the terminal and the compressor caused Johnson's injuries. The jury also found that the compressor's inadequate warnings caused Johnson's injuries. In a single apportionment question, the jury awarded liability 75% to Emerson, 15% to Fusite, and 10% to Johnson. The court of appeals affirmed.

Emerson and Fusite appealed, arguing that no evidence supported the conclusion that the compressor and terminal were *unreasonably* dangerous. Emerson and Fusite argued that mere evidence of a safer alternative design was not sufficient to uphold the verdict. Johnson responded that the jury also heard evidence supporting the factors described in *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997). Emerson and Fusite also argued that Johnson had not proven an ignition source for the fluid and that the jury's charge omitted express reference to the *Grinnell* factors. Emerson also

challenged the warnings verdict for sufficiency of the evidence and the wording of the court's charge.

The Supreme Court held that while the mere existence of an alternative design is not proof that the product was unreasonably dangerous, in this case, the jury also heard testimony on the cost, feasibility, and availability of the alternative design relative to the claimed danger. The jury heard that the two Fusite designs were available at the same cost, but the older design was significantly more likely to fail and cause injury. On this evidence, the jury could have concluded that the terminal and compressor were unreasonably dangerous. The Court also held that the jury did not need to ascertain the exact cause of ignition because the fluid's discharge was wholly attributable to the terminal and compressor design and ignition was foreseeable. The Court further held that while a jury charge should incorporate the *Grinnell* factors, in this case, it was not error to omit them because the charge the jury received referenced the *Grinnell* factors that Emerson and Fusite claim would have resulted in a different verdict.

The Court declined to consider Emerson's arguments about the warnings verdict because Emerson did not object to the single apportionment question and the design verdict was sufficient to uphold the judgment.

2. Non-Manufacturing Sellers

a) *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101 (Tex. June 25, 2021) [20-0979]

At issue in this case was whether an e-commerce marketplace may be held liable as a non-manufacturing seller of defective third-party products under the Texas Products Liability Act (TPLA). McMillan sued Amazon and Hu Xi Jie, a third-party merchant, in federal court after McMillan's child ingested—and was severely injured by—a button battery from a remote control purchased on amazon.com. The district court held that Amazon could be held liable as the seller of the remote under the TPLA because the Chinese manufacturer was not subject to the jurisdiction of the court and Amazon "distribut[ed] or otherwise plac[ed]" the remote into the stream of commerce. On appeal, the Fifth Circuit certified the following question: Under Texas products-liability law, is Amazon a "seller" of third-party products sold on Amazon's website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon's Fulfillment-by-Amazon program?

The Supreme Court answered no, holding that when product-related injuries arise from sales transactions, sellers are those who have relinquished title to the product in the chain of distribution. The rule that an entity may be held liable for defective products without transferring title is limited to non-sale commercial transactions. Because the TPLA does not expand liability beyond that which was established at common law, the Court concluded

that TPLA sellers—those entities engaged in the business of "distributing or otherwise placing" products in the stream of commerce—are limited to entities that either distribute products through ordinary sales or place products in the stream of commerce through non-sale commercial transactions. Because the remote at issue was obtained by McMillan in an ordinary sale and Amazon neither held nor relinquished title to the remote at some point in the distribution chain, Amazon was not a seller, despite controlling the process of the transaction and delivery of the product.

Justice Boyd, joined by Justice Devine, dissented. Looking to the ordinary meaning of "distributing" or "placing," the dissent would have held that Amazon was a seller of third-party products fulfilled by Amazon. Unlike a mail carrier or delivery service, Amazon controls the entire process of the transaction with the ultimate consumer. While the Court's holding may provide a helpful bright line for courts and future litigants, the common law should not be used to amend the text of the TPLA.

CC. REAL PROPERTY

1. Boundary Stipulations

a) *Concho Res., Inc. v. Ellison*, 627 S.W.3d 226 (Tex. Apr. 16, 2021) [19-0233]

The principal issue in this trespass-to-try-title suit between the lessees of adjacent mineral estates was whether the plaintiff ratified a boundary-stipulation agreement between the mineral fee owners.

In 1927, the Sugg family conveyed a portion of a tract of land sitting northwest of a public road, describing it in the deed as a 147-acre tract (the northwest tract). The remaining 493 acres of the tract (the southeast tract) were separately conveyed. A subsequent survey showed the portion of the tract located northwest of the public road to contain 301 acres, not 147, resulting in a disputed 154-acre tract. Through various conveyances and assignments, Jamie Ellison d/b/a Ellison Lease Operating became the lessee of the northwest tract's mineral estate, and Samson Resources Company became the lessee of the southeast tract's mineral estate. In 2008, the fee owners of the two mineral estates executed a boundary agreement stipulating that the disputed 154 acres were part of the southeast tract, and Jamie Ellison signed a letter signifying his acceptance of the stipulation's description of the location of his leasehold interest. Samson then drilled a well on the disputed tract. Samson also drilled or recompleted two additional wells that would violate Railroad Commission spacing rules if the public road were the boundary. Jamie Ellison died in 2011, and his wife subsequently sued Samson and its successor lessees (collectively, Concho) for trespass to try title and conversion, among other claims. Ellison also asserted claims for conversion and nonpayment of oil and gas proceeds against the purchaser of the oil produced from the disputed wells. Concho counterclaimed for breach of contract and a declaratory judgment. The parties filed cross-motions for summary judgment.

The trial court granted the defendants' motions for summary judgment and denied Ellison's. After a trial

on Concho's counterclaims, the jury returned a verdict in Concho's favor, and the trial court rendered judgment partially on the verdict and partially notwithstanding the verdict. The trial court's final judgment also dismissed Ellison's claims with prejudice and declared the boundary between the leaseholds to conform with the stipulation. The court of appeals reversed, holding the boundary stipulation void because the metes-and-bounds description in the 1927 deed controlled over the acreage description, meaning that the boundary was objectively clear and not subject to correction. The court also held that the letter Ellison signed could not ratify the void boundary stipulation and that Ellison raised a genuine issue of material fact on her claims against the purchaser.

The Supreme Court reversed, holding that the written boundary stipulation is enforceable according to its terms and that Ellison ratified the stipulation as a matter of law. The stipulation, signed by all owners of the adjacent mineral estates, on its face identified and resolved a "question" that had arisen among the parties about the location of the boundary between those estates. Such settlements are common and encouraged, regardless of whether they correctly resolve the issue; accordingly, the court of appeals' conclusion that the 1927 deed was objectively unambiguous as to the location of the boundary is immaterial to the stipulation's enforceability. The Court explained that the stipulation by itself does not retroactively bind third parties, like Ellison, with preexisting interests in the tracts. However, by signing the letter, Ellison voluntarily confirmed his acceptance of the boundary line agreed to in the stipulation as the leasehold boundary. The Court concluded that Ellison's assertions regarding fraudulent inducement and forgery were unsupported by the record, and it rejected the argument that equitable defenses, like ratification, are unavailable in a trespass-to-try-title action.

Finally, because the trial court correctly granted summary judgment on Ellison's trespass-to-try-title claim and because her remaining causes of action hinged on the viability of that claim, the Court held that Ellison's remaining claims failed as a matter of law. The Court reinstated the trial court's summary judgments and remanded the case to the court of appeals to consider unaddressed issues regarding the judgment on Concho's counterclaims.

2. Deed Correction

a) *Broadway Nat'l Bank v. Yates Energy Corp.*, 631 S.W.3d 16 (Tex. May 14, 2021) [19-0334]

The Texas Property Code authorizes the correction of a material error in a recorded original instrument of conveyance by agreement. The instrument correcting a material error must be executed by each party to the original instrument "or, if applicable, a party's heirs, successors, or assigns." The dispute on appeal was about when an original party's heirs, successors, or assigns are applicable, such that their agreement is necessary to make a valid correction.

The court of appeals concluded that the original parties to a conveyance could no longer correct their

mistake by agreement after a third party acquired an interest in the property by assignment. The court reasoned that the assignment or sale of an interest in the property by an original party triggered the "if applicable" clause, requiring the joinder of the assign for a material correction. In short, the court held that a correction instrument for a material error had to be signed by the property's current owners. The Supreme Court disagreed that a correction instrument's validity under section 5.029 invariably depended on the consent of an assign or subsequent purchaser. The Court instead interpreted the "if applicable" clause to provide a substitute for an original party to the conveyance who was unavailable to sign the correction instrument. The Court further disagreed with the court of appeals' interpretation of the "if applicable" clause as the statute's method for protecting the property interests of subsequent purchasers, noting the existence of other provisions for the protection of bona fide purchasers who might otherwise be adversely affected by the retroactive effect of a correction instrument. Finally, the Court rejected an alternative argument that the correction instrument was barred by the four-year statute of limitations applicable to deed-reformation suits. The Court held that the limitations statute did not apply to the remedy provided by the instrument-correction statutes because such statutes did not create a cause of action but rather a method for the parties to correct mistakes in an original conveyance without invoking the judicial process.

Justice Busby filed a dissent, which agreed with the court of appeals' interpretation of the statute. The dissent argued that the Court's interpretation read the phrase "if applicable" out of the statute, allowing the original parties to alter the interests of the current owners of the property without notice.

3. Deed Restrictions

a) *JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*, 644 S.W.3d 179 (Tex. Apr. 22, 2022) [20-0857]

This declaratory-judgment suit involves whether neighborhood deed restrictions prohibited a property owner's short-term rentals of the property.

JBrice Holdings, L.L.C. owned two townhomes in the Wilcrest Walk subdivision and leased them out as short-term rentals. The Wilcrest Walk property owners' association demanded that JBrice cease renting the properties for short terms and later adopted rules prohibiting short-term rentals, claiming rule-making authority under Texas Property Code Section 204.010(a)(6). The neighborhood deed restrictions included a leasing clause that allowed leasing of the properties in general and prohibited restrictions on an owner's leasing rights other than those listed in the deed restrictions themselves. The deed restrictions included a residential-use clause that prohibited use of the property "for any purpose other than as a private single-family residence" for the owner or his tenants.

JBrice sought a declaratory judgment that the deed restrictions allowed its short-term rentals. The association counterclaimed for breach of the

restrictive covenants and passed rules prohibiting short-term leases of fewer than thirty days. JBrice then asked the court to declare the association's amended rules invalid. The trial court granted partial summary judgment to the association on its claim that JBrice had breached the deed restrictions by renting for short terms. The court issued a permanent injunction on rentals of fewer than seven days and awarded attorney's fees. The court of appeals affirmed, concluding that the Property Code authorized the association to adopt rules barring short-term rentals because the deed restrictions were silent as to short-term use.

The Supreme Court reversed the judgment of the court of appeals, vacated the permanent injunction, and remanded the case for consideration of attorney's fees. The Court held that the residential-use covenant did not prohibit short-term rentals. Further, because the deed restrictions expressly prohibited restraints on leasing other than those contained within the covenants themselves, the association had no authority to adopt rules prohibiting short-term rentals under the Property Code.

4. Eminent Domain

a) Hlavinka v. HSC Pipeline P'ship, LLC, — S.W.3d —, 2022 WL 1696443 (Tex. May 27, 2022) [20-0567]

The issues in this case are (1) whether a pipeline company transporting polymer-grade propylene can be a common carrier with condemnation authority under the Texas Business Organizations Code, and (2) whether a property owner may testify during condemnation proceedings about recent arms'-length transactions with other pipeline companies as evidence of the current highest and best use of the property in determining the market value of the easement taken.

The Hlavinkas own several thousand acres of land in Brazoria County, across which run several privately negotiated pipeline easements. After failing to negotiate a deal with the Hlavinkas, HSC Pipeline Partnership, LLC, initiated condemnation proceedings to take an easement for its pipeline.

At trial, the Hlavinkas challenged: (1) whether Texas Business Organizations Code gave HSC condemnation authority, (2) whether any authority conferred by the Code applies to pipelines that transport polymer-grade propylene, and (3) whether HSC is a common carrier for public use. HSC moved for partial summary judgment as to its condemnation authority. The trial court granted HSC's motion for summary judgment and denied the Hlavinkas' jurisdictional plea.

As evidence of the condemned easement's value, the Hlavinkas sought to admit testimony of two recent arms'-length easement sales to other pipeline companies across the Hlavinkas' land. The trial court granted HSC's motion to exclude this testimony, thus limiting the land's market value to agricultural value.

The court of appeals determined that the Texas Business Organizations Code granted independent condemnation authority and that polymer-grade propylene qualifies as an "oil product," but the court reversed the summary

judgment in favor of HSC because it concluded that whether the pipeline served a public use was a fact question for the jury to resolve. The court of appeals also reversed the exclusion of evidence, holding that the testimony was admissible as evidence of the property's market value.

The Supreme Court affirmed the court of appeals' conclusion that the Code grants condemnation authority and that polymer-grade propylene is a qualifying product under that section. The Court reversed the court of appeals on the public use issue, holding that public use presents a legal question, and HSC's undisputed evidence demonstrates public use. The Court affirmed on the valuation issue, holding that a property owner may testify to arms'-length sales of easements to other pipeline companies as evidence of the condemned property's highest and best use, and the exclusion of such evidence was harmful error. The Court remanded the case to the trial court for a new trial to determine the market value of the property taken.

b) *Miles v. Tex. Cent. R.R. & Infrastructure, Inc.*, — S.W.3d —, 2022 WL 2282641 (Tex. June 24, 2022) [20-0393]

At issue in this case was whether two private entities (collectively, Texas Central) formed to construct and operate high-speed passenger rail between Houston and Dallas have statutory eminent-domain authority.

Miles, who owns property along the railway's proposed route, sued to challenge Texas Central's eminent-domain authority after it attempted to survey Miles's property. Texas Central counterclaimed, seeking a declaratory judgment that it is a "railroad company" and an "interurban electric railway company" with eminent-domain authority under Chapters 112 and 131 of the Texas Transportation Code, respectively. The trial court granted summary judgment for Miles. The court of appeals reversed, holding that Texas Central qualified as both a railroad company and an interurban electric railway company.

The Supreme Court affirmed. Chapter 131 grants eminent-domain authority to an "interurban electric railway company," which is a "corporation chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both." The Court held that Texas Central falls within the plain language of this grant of authority, as the company was chartered for the purpose of constructing and operating an electric railway between municipalities in this state—Houston and Dallas—for the transportation of passengers. The Court rejected Miles's assertion that the statute applies only to a specific kind of single-car electric railway that existed at the time the statute's predecessor was enacted in 1907 but was extinct by the 1940s. Chapter 131 places no limitations on size, speed, or distance, and the statute as a whole is consistent with the scope of the high-speed rail project at issue. Further, the Court's precedent supports interpreting statutes to embrace later-developed technologies when the text is broad enough to allow it, and the

Legislature's recodification of Chapter 131 in 2009 cuts against Miles's argument that the statute applies only to a kind of train that has been extinct in Texas for over 70 years. The Court recognized that doubts about the scope of eminent-domain statutes are resolved in favor of the landowner but held that no such doubts were presented by Chapter 131's unambiguous language.

The Court next addressed Miles's contention that under *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC*, 363 S.W.3d 192 (Tex. 2012), a private entity asserting eminent-domain authority must demonstrate a reasonable probability that the project will be completed and thus produce the public good for which authority is sought. The Court rejected that argument, explaining that although an entity may not obtain eminent-domain authority merely by claiming entitlement to it, it was undisputed that Texas Central was chartered for the requisite statutory purpose, was engaged in activities in furtherance of that purpose, and was endeavoring to construct a railway that was for public use. While such a "reasonable-probability-of-completion test" is rooted in sound public policy and would provide an additional layer of protection for landowners whose land is taken for speculative projects, it finds no support in *Denbury* or the Constitution. Rather, the Legislature has already provided numerous protections to landowners who are the subject of condemnation proceedings, and it is not the Court's role to second-guess the Legislature's balance between the rights of property owners and the benefits served by authorizing eminent domain.

Because the Court held that Texas Central qualifies as an interurban electric railway company with eminent-domain authority under Chapter 131, it did not address Texas Central's alternative argument that it also qualifies as a "railroad company" with eminent-domain authority under Chapter 112.

Chief Justice Hecht, joined by Justice Young, concurred, opining that Texas Central qualifies as both an interurban electric railway company and a railroad company.

Justice Young also separately concurred, opining that the Court correctly engaged in the heightened scrutiny required in interpreting statutes that confer eminent-domain authority. He explained that when a statute defines its scope by using clear words that prescribe specific conditions, as Chapter 131 does, the law reaches new developments that satisfy the statutory criteria.

Justice Devine dissented, arguing that Article I, Section 17(b) of the Texas Constitution forecloses Texas Central's contemplated taking by excluding from "public use" a taking "for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."

Justice Huddle, joined by Justice Devine and Justice Blacklock, dissented, arguing that Chapter 131, read in its historical context, conferred eminent-domain authority to facilitate construction of small electric railways traveling short distances, not high-speed rail requiring massive infrastructure and traversing hundreds of miles. Justice Huddle would hold that

serious doubts exist about whether Texas Central and its high-speed rail project fall within Chapter 131's scope, requiring that doubt to be resolved in the landowner's favor.

5. Trespass To Try Title

a) *Stelly v. DeLoach*, 644 S.W.3d 657 (Tex. Apr. 8, 2022) (per curiam) [21-0065]

The Supreme Court decided *Brumley v. McDuff*, 616 S.W.3d 826 (Tex. 2021) after the court of appeals made its decision in this case. In *Brumley*, the Court held that the Brumleys pleaded the elements of a trespass-to-try title claim even though they did not title the claim that way in their pleadings. Similarly, here, all parties knew that Stelly sought settled ownership of the land at issue, even though he brought a breach-of-contract claim. Under the standards in *Brumley*, the Court held that Stelly did accurately plead a trespass-to-try title claim and the four-year statute of limitations applicable to a breach of contract claim does not apply.

The Court reversed the court of appeals on thatissue and remanded for further considerations.

DD. STATUTE OF LIMITATIONS

1. Accrual

a) *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807 (Tex. May 7, 2021) [19-0545]

The issue in this case was whether an oil-and-gas lessee's claims against another lessee stemming from the spread of a hydrogen-sulfide plume from a disposal well were barred by the statute of limitations. Regency Field Services operated a disposal well in McMullen County pursuant to a Railroad Commission permit that allowed Regency to inject a gaseous mixture of hydrogen sulfide and carbon dioxide into a permeable layer of the Wilcox formation. Swift Energy Operating held mineral leases near the disposal well, including the PCQ lease, which had a carve-out for a well (the Horton #1) operated by Layline Petroleum. In July 2012, Layline detected hydrogen sulfide in the Horton #1 well. On October 23, 2012, Layline emailed Swift to inform it of a hydrogen sulfide "outbreak" in the area, stating that it had had to plug the Horton #1 well. The Railroad Commission ordered Regency to temporarily suspend its injection operations and revise its models regarding the rate of the plume's anticipated spread. Regency was then permitted to resume injections at a reduced rate.

In July 2014, the lessor of the PCQ lease and other surface owners sued Regency for trespass, negligence, and nuisance, among other claims. On September 24, 2015, Swift intervened in the suit and also brought claims for trespass, negligence, and nuisance. Regency pleaded as an affirmative defense that Swift's claims were barred by the two-year statute of limitations and moved for summary judgment. The trial court granted the motion and dismissed Swift's claims.

The court of appeals affirmed in part and reversed in part. It held that the evidence conclusively established that Swift's claims pertaining to the PCQ lease accrued before October 2012 and were therefore barred. However, the court concluded that the email exchange with Layline was not evidence

of the accrual of Swift's claims pertaining to other leases in the area. Because Regency had not presented other evidence of accrual, the court held that Regency had not conclusively established that the statute of limitations barred Swift's claims as to those leases and remanded the case to the trial court for further proceedings.

The Supreme Court concluded that the pleadings and evidence did not conclusively establish whether or when the lessee sustained any legal injury as a result of the defendant's alleged wrongful conduct. It thus reversed the part of the court of appeals' judgment granting summary judgment.

Swift alleged in its pleadings that Regency's wrongful conduct had already caused and would yet cause a variety of legal injuries. But its pleadings did not allege or establish when those past legal injuries occurred. In particular, Swift did not allege whether its past injuries occurred before September 24, 2013, or at some point between that date and the date Swift first filed its claims on September 24, 2015.

The Court noted that the statute of limitations may very well bar Swift's claims. But at this point, the pleadings and evidence do not conclusively establish that Regency's alleged wrongful operation of the Tilden injection well caused Swift to sustain a legal injury before September 24, 2013. The Court therefore reversed that part of the court of appeals' judgment granting summary judgment and remanded the case to the trial court for further proceedings.

2. Tolling

a) *Berry v. Berry*, — S.W.3d —, 2022 WL 1510330 (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. 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. The parents later transferred their limited partnership interest to the Berry Dynasty 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 the 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 Laura's company 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 twenty-five years, renewable for up to ninety-nine 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 this suit, Kenneth and his daughter Chelsea sued Kenneth's three brothers, the Ranch, Berry Contracting, and Berry Ranches. 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. The suit was filed in 2016 and concerned inadequate lease payments during the 2000 to 2007 period. The statute of limitations for breach of fiduciary duty is four years and bars the claims unless they were tolled by the discovery rule. Under the facts presented, Kenneth's claims for breach of fiduciary duty were time-barred. He was aware that Berry Contracting had leased the Ranch, and 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. 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 bothers, 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 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 brothers and others provided in the Consent Agreement that they did not wish to pursue such claims. 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.

a) *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. June 11, 2021) [20-0158]

In this quiet title action, a person who alleged mental incapacity sought to prevent his aunt from evicting him from property he inherited, contending that a deed to the aunt he had signed years earlier was void due to his lack of capacity. The aunt moved for traditional summary judgment based on the statute of limitations, and the nephew invoked the unsound-mind tolling statute. The trial court granted summary judgment for the aunt, and the court of appeals affirmed. The Supreme Court reversed.

The question before the Court was whether the aunt had the burden to negate unsound-mind tolling in order to conclusively establish her affirmative defense and obtain summary judgment.

The Court had answered this question yes many times as to other doctrines affecting the running of limitations, explaining that a "defendant who moves for summary judgment based on limitations must conclusively establish the elements of that defense" and "must also conclusively negate application of the discovery rule and any tolling doctrines pleaded as an exception to limitations." *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019). The Court once again answered yes in this case. The Court concluded that matters relevant to limitations generally fall into one of two categories that determine the parties' respective burdens on summary judgment. First, the defendant has the burden regarding any issues raised that affect which days count toward the running of limitations, such as accrual, the discovery rule, and tolling. Second, if the defendant carries that burden and conclusively establishes its defense, the plaintiff can avoid summary judgment by raising a genuine issue of material fact on any equitable defense that its suit should not be barred even though the limitations period has run, such as fraudulent concealment, estoppel, or diligent service.

The Court reasoned that unlike fraudulent concealment, equitable estoppel, and diligent service, which offer independent grounds for avoiding

dismissal even if the limitations period has expired, invoking the unsound-mind tolling statute challenges whether the defendant has conclusively proven that the limitations period in fact expired. Thus, the Court concluded that the burden was on Johnson to establish that Draughon was of sound mind. In doing so, the Court declined what it viewed as Johnson's invitation to create an exception to standards for traditional summary judgment in order to shift the burden of proof on tolling to the non-moving plaintiff.

The Court added that if a defendant prefers to place the burden on the plaintiff to raise a fact issue regarding any aspects of limitations on which the plaintiff would have the burden at trial, it is free to file a no-evidence motion for summary judgment as to those matters. Because the defendant in this case filed a traditional motion for summary judgment and did not conclusively negate unsound-mind tolling, the Court reversed the summary judgment in Johnson's favor.

b) *Zive v. Sandberg*, 644 S.W.3d 169 (Tex. Apr. 22, 2022) [20-0922]

At issue in this case was whether the rule announced in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991)—that the statute of limitations for a legal malpractice claim is tolled until all appeals of the underlying action are concluded—applies to appellate proceedings in which the malpractice plaintiff does not participate. Jeffrey R. Sandberg represented Youval Zive in a deficiency action arising out of Zive's personal guaranty of a loan. Settlement attempts failed, allegedly because of Sandberg's malpractice, and the trial court entered summary judgment in the lender's favor. Zive and his co-parties appealed, and on April 1, 2016, the Supreme Court denied Zive's petition for review and the separate petition filed by his co-parties. Zive took no further action regarding his petition, and when his co-parties filed a petition for writ of certiorari in the United States Supreme Court, he did not attempt to join or otherwise support their petition.

On October 1, 2018, Zive filed this legal malpractice suit against Sandberg. Sandberg moved for summary judgment, arguing that Zive's malpractice claim accrued on April 1, 2016, and therefore was barred by the two-year statute of limitations. The trial court granted Sandberg's motion and rendered a take-nothing judgment. The court of appeals affirmed. A dissent contended that *Hughes* tolling should encompass the period in which further appellate relief is available to a party, even if the party ultimately does not pursue it.

The Supreme Court affirmed the court of appeals' judgment. First, the Court held that *Hughes* tolling extends through only the appellate proceedings in which the malpractice plaintiff participates. Noting its preference for bright-line rules, the Court concluded it would be easier for courts and litigants to calculate *Hughes* tolling's end date by looking to the last action taken by the malpractice plaintiff. The Court also observed that this rule did not impose a burden on the malpractice plaintiff, who could benefit from *Hughes* tolling during the pendency of appellate

proceedings initiated by a co-party so long as he joined in those proceedings. Finally, the Court reasoned that this rule was most consistent with the general principle that a reversal on appeal as to one party does not warrant a reversal as to non-appealing parties.

The Court further held that for purposes of *Hughes* tolling, the date on which the litigation is "finally concluded" is the date the court in which the case is pending rules on the last action taken by the malpractice plaintiff. Although it acknowledged that there were other potential terminal points, the Court determined that these alternatives would overcomplicate the straightforward *Hughes* analysis. Applying *Hughes* to this case, the Court concluded that *Hughes* tolling ended on April 1, 2016, when the Court denied Zive's petition for review in the underlying case.

EE. STATUTORY IMMUNITY

1. Communications Decency Act

a) *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. June 25, 2021) [20-0434]

This case concerned whether lawsuits should have been dismissed because the claims were barred by the Communications Decency Act (CDA), a federal statute. Three plaintiffs brought suits against Facebook. The plaintiffs asserted common-law claims for negligence and products liability. They also asserted claims under Civil Practice and Remedies Code section 98.002, a Texas statute that creates a cause of action against persons who benefit from participation in a sex-trafficking venture. The suits alleged that plaintiffs were subjected to human trafficking after their abusers contacted them on Facebook or Instagram (which is owned by Facebook). The plaintiffs alleged that Facebook breached a duty to protect them from the dangers of grooming and recruitment on its platforms. Facebook moved to dismiss the suits under Texas Rule of Civil Procedure 91a, arguing that section 230 of the CDA provides that "no cause of action and no liability may be imposed under any State or local law that is inconsistent with this section" and that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another content provider." The district courts denied the motions to dismiss. The court of appeals denied mandamus relief, and Facebook sought mandamus relief ordering dismissal of the suits.

The Supreme Court granted the petition for writ of mandamus in part. It held that the common-law claims must be dismissed but the statutory claims may proceed. The Court considered federal precedent that has broadly interpreted section 230 to bar claims against internet companies stemming from their publication of information created by third parties. The Court adhered to this overwhelming federal precedent and held that the common-law claims were barred because these claims were, in essence, claims that Facebook had failed to take measures to prevent third parties from harming plaintiffs through communications on Facebook's platforms. Federal caselaw in similar cases treated these claims as barred under section 230.

However, the Court concluded that the statutory claims under section 98.002 were not barred because these claims require participating in human trafficking in a manner involving more than mere passive acquiescence in the wrongdoing. While expressing no view as to whether plaintiffs' statutory claims could ultimately be established factually, the plaintiffs had, at the pleadings stage, alleged that Facebook violated section 98.002 by engaging in affirmative acts encouraging the use of its platforms for sex trafficking. The Court construed section 230 as not barring plaintiffs' claims alleging Facebook's affirmative acts in violation of section 98.002. The Court accordingly held that these claims could proceed.

FF. TAXES

1. Charter School Exemption

a) *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535 (Tex. June 11, 2021) [19-0962]

This tax-exemption case concerned privately owned real property in Galveston County. Petitioner Odyssey 2020 Academy subleases the property and uses it to operate a public open-enrollment charter school. Odyssey contractually agreed to pay the property owners' ad valorem taxes, and it requested that the Galveston Central Appraisal District exempt the property from taxation under section 11.11(a) of the Tax Code as "property owned by this state." Odyssey relies on section 12.128(a) of the Education Code, which provides that property a charter school purchases or leases with state funds "is considered to be public property for all purposes under state law." Odyssey also argued that article XI section 9 and the public-property clause of article VIII section 2 of the Texas Constitution allow it to claim an exemption.

The Appraisal District denied Odyssey's exemption request, and Odyssey sought review in district court, which granted summary judgment for the Appraisal District. The court of appeals affirmed, reasoning that Odyssey had only a leasehold interest and section 12.128 does not give Odyssey either legal or equitable title to the property.

The Supreme Court held that Odyssey was not entitled to an exemption from the ad valorem tax. Property encumbered by a lease is taxed to the lessor who owns the underlying fee interest, and not even Odyssey contended that section 12.128 actually strips the private lessors of their fee ownership. The Court assumed that section 12.128 "consider[s]" property to be publicly owned for tax purposes if a charter school has a leasehold interest in it. But it concluded that the Texas Constitution does not allow the legislature to recharacterize a property interest that is not in fact publicly owned so that it qualifies for an exemption. The Court also concluded that the issue of Odyssey's entitlement to an Article XI section 9 exemption was not properly presented for review. But consistent with the Court's prior rulings, that exemption would not apply even if it had been before the Court. The Court concluded similarly with respect to Article VIII section 2 that precedent requires actual public ownership.

2. Franchise Tax

a) *Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402 (Tex. March 25, 2022) [20-0462]

This case concerned a franchise tax dispute over the method of allocating the proportion of services performed in Texas. Sirius XM Radio sells satellite radio services to customers in Texas and elsewhere. The content is largely produced outside of Texas and is transmitted on equipment largely outside of Texas. Customers can access the service by purchasing a radio and paying a subscription fee. A chip set in the radio decrypts the signal. If a customer pays the fee, Sirius sends a signal from out of state that permits the chip set to decrypt the signal.

The Texas franchise tax is based on three steps. First the taxpayer's "margin" is calculated. Second, the "apportioned margin" is calculated as the ratio of the taxpayer's gross receipts from business done in Texas, over the gross receipts from the entire business. Third, permitted deductions are applied to the apportioned margin to yield the "taxable margin" to which the tax rate is applied. This appeal concerned the second step.

The apportioned margin depends on the proportion of the taxpayer's receipts that are "gross receipts from business done in this state," TEX. TAX CODE § 171.106(a), which in turn depends on receipts from "each service performed in this State," *id.* § 171.103(a)(2). The Comptroller claimed that the relevant service performed in Texas, which it characterized as the "receipt-producing, end-product act," was the service of unscrambling the radio signal. Sirius argued that the relevant receipt-producing acts were the use of equipment and personnel to produce and broadcast the radio content.

Sirius paid the tax under protest and sought a refund. The district court agreed with Sirius as to the correct method for calculating the apportioned margin and ordered a substantial refund. The court of appeals reversed, agreeing with the Comptroller that the relevant receipt-producing act was unscrambling the radio signal.

The Supreme Court reversed the court of appeals. The Court held that "service performed in this State" refers here to the production and broadcasting of radio content, which occurs almost entirely outside of Texas. The Court, under a plain-meaning analysis of the statute, concluded that a service is performed in this State if the labor is done in this State. If technology performs the useful act, the location of the equipment is considered. Prior cases have likewise looked to the location of the taxpayer's personnel and equipment in determining the place where a service is performed. The Court also looked to the economic realities of the service and reasoned that customers are paying for the content Sirius produces and broadcasts, not decryption.

The Court reversed the court of appeals' judgment and remanded the case to that court for consideration of issues that court had not reached.

3. Premium and Maintenance Taxes

a) *Hegar v. Health Care Serv. Corp.*, — S.W.3d —, 2022 WL 2183134 (June 17, 2022) [21-0080]

The issue in this case was whether the Comptroller correctly assessed taxes against an insurer's sales of stop-loss policies under Insurance Code Chapters 222 and 257.

The Texas Department of Insurance approved Blue Cross Blue Shield to sell and issue stop-loss policies to employers that self-fund their employees' health insurance. The policies indemnify the policyholder for amounts it pays to reimburse health-care claims above a specific threshold. The threshold is set for each covered employee as well as for the entire covered group. In calendar year 2012, Blue Cross paid a premium tax on the stop-loss policies under Insurance Code Chapter 222 and a maintenance tax under Insurance Code Chapter 257. It filed suit to obtain a refund of these taxes. On cross-motions for summary judgment, the district court ruled in favor of Blue Cross, and the court of appeals affirmed. The Supreme Court granted the Comptroller's petition for review.

The premium tax applies to premiums received "from any kind of . . . insurance policy or contract covering risks on individuals or groups . . . arising from the business of . . . health insurance." TEX. INS. CODE § 222.002(b). The Comptroller argued that the policies cover risks on individuals and groups because the policies reimburse health-care claims above the individual and aggregate attachment points, which are directly tied to payment of individual and group health-care claims. Blue Cross responded that the stop-loss policies do not cover risks on individuals or groups because the self-insured employers were not natural persons.

The Supreme Court held that Section 222.002(b) unambiguously imposed a tax on stop-loss policies, and that the presumption in favor of the taxpayer did not apply. The policies cover risks on individuals and groups because the risk the policy covers is that the covered individuals will either collectively or individually incur health-care costs above the threshold amount. The Court observed that the statute's inclusion of an exception for stop-loss policies issued to HMOs supported the conclusion that other stop-loss policies are taxable. The Court also looked to the statute's use of the word "group" to mean "a single nonprofit trust" in Section 222.002(c) to foreclose a reading of the statute that limited "group" to mean multiple natural persons.

Blue Cross also argued that the stop-loss policies did not arise from the business of health insurance. The Court held that the policies do arise from the business of health insurance because payments under the policies directly relate to the obligation to provide health-care coverage.

The maintenance tax applies to premiums "collected from writing life, health, and accident insurance in this state." TEX. INS. CODE § 257.003(a)(1). The Comptroller argued that Blue Cross is only authorized to sell health insurance; if the stop-loss policies are not health insurance then Blue Cross lacks authorization to sell them. Blue

Cross responded that the losses covered by health insurance—bodily injury, death, or sickness—can only be suffered by natural persons, not employers.

The Court held that, because the purpose of the maintenance tax is to cover the costs of regulating the health insurance industry, the relevant question is whether the stop-loss policies are regulated as health insurance. Blue Cross conceded that stop-loss policies are treated as accident and health insurance for administrative and regulatory purposes.

Justice Blacklock filed a dissenting opinion, joined by Justice Devine, Justice Busby, and Justice Young. The dissenting justices agreed with the Court that the stop-loss policies are unambiguously subject to the maintenance tax. However, the dissent concluded that the stop-loss policies do not unambiguously cover risks on individuals or groups. The dissent would therefore have applied the presumption in favor of the taxpayer and affirmed the court of appeals.

GG. TEXAS ALCOHOLIC BEVERAGE CODE

1. Permits

a) *Gabriel Inv. Grp. v. Tex. Alcoholic Beverage Comm'n*, — S.W.3d —, 2022 WL 2183290 (Tex. June 17, 2022) [22-0062]

This certified question case concerned the Texas Alcoholic Beverage Code's prohibition against public corporations owning certain permits.

"Package stores" sell alcohol to the public and require a permit issued by the Texas Alcoholic Beverage Commission (TABC). In 1995, the Legislature enacted section 22.16(a) of the Alcoholic Beverage Code to prohibit public corporations (as defined by that section) from owning or controlling package stores. Subsection (a) provides that "[a] package store permit may not be held by a public corporation, or by any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation, or by any entity which would hold the package store permit for the benefit of a public corporation." Gabriel Investment Group, Inc. owns fourty-five package stores in South Texas. Although publicly owned, it fell under a grandfather clause, section 22.16(f), which provides that "[t]his section shall not apply" to a public corporation which held a package store permit on April 28, 1995.

In 2019, Gabriel filed for Chapter 11 bankruptcy protection. The parties represented that, as part of a proposed bankruptcy plan, Gabriel would remain the same corporation and would continue to hold its existing package store permits and acquire new ones. Gabriel proposed to sell all or part of its shares to another public corporation but was unsure if its planned stock sale to another, non-exempt public corporation would affect its exemption under subsection (f). Gabriel sued the TABC for a declaratory judgment, and the bankruptcy court granted summary judgment declaring that Gabriel would no longer be exempt under subsection (f) from the ban on public-corporation ownership of package store permits. The district court affirmed the bankruptcy court. Gabriel sought Fifth Circuit review.

The Fifth Circuit certified the following questions of Texas law to the Texas Supreme Court:

> 1. If Texas Alcoholic Beverage Code Section 22.16(f) exempts a package store from Section 22.16(a), and if the package store sells any, most, or all of its shares to a corporation that does not itself qualify under Section 22.16(f), will the package store's package store permits remain valid?
>
> 2. If yes to (1), can the package store validly accumulate additional package store permits by reason of Section 22.16(f)?

The Supreme Court accepted the certified questions and answered both questions "yes." The parties agreed that the certified questions should be construed to ask about a public corporation's package store permits, not a "package store's package store permits."

As to the first question, the Court held that subsection (f)'s exemption remains operative if an exempt public corporation sells its shares to a non-exempt corporation. The Court reasoned that subsection (f)'s reference to "this section," which "shall not apply" to an exempt corporation, could only mean the entirety of section 22.16, including subsection (a)'s prohibitions against ownership of package store permits by public corporations.

The Court rejected TABC's construction of section 22.16 to mean that ownership of an exempt corporation by a non-exempt corporation prohibits the exempt corporation from having a permit. TABC's reading would "apply" subsection (a) to the exempt corporation, in violation of the subsection (f) dictate that the entirety of section 22.16 "shall not apply" to exempt corporations. The Court held that the statute should be interpreted as unambiguously written. While permitting a large public corporation to own and control an exempt corporation might run counter to subsection (a)'s apparent purpose of banning ownership of a permit by a public corporation as well as any entity which is controlled by a public non-exempt corporation, the subsection (f) exception unambiguously applies to the entirety of section 22.16, including all of subsection (a). Statutory exceptions, by their nature, limit the scope of the general rule and do not necessarily advance the purposes behind the general rule.

As to the second certified question, the Court also answered it "yes" because TABC offered no argument that the Court could answer it "no" if the first question was answered in the affirmative.

HH. TEXAS CITIZENS PARTICIPATION ACT

1. Deadlines

a) *Kinder Morgan SACROC, LP v. Scurry County*, 622 S.W.3d 835 (Tex. Apr. 30, 2021) [19-1122]

The principal issue in this case was whether the original petition for judicial review pleaded a "legal action" that triggered the Texas Citizens Participation Act (TCPA)'s sixty-day filing window with respect to the subsequently pleaded taxpayer-fraud allegations or whether the assertion of those allegations in an amended petition

restarted the clock. The case also presented a threshold jurisdictional question concerning an alleged tax-ferret arrangement.

Several Taxing Units in Scurry County filed challenges before the Scurry County Appraisal Review Board (ARB), challenging the exclusion of property from the appraisal records. The Taxing Units focused on Kinder Morgan's property, arguing a substantial discrepancy existed between the appraised value of the property as determined by the appraisal district and the value the Taxing Units' experts derived from information in Kinder Morgan's sworn filings with federal and state governmental entities. The Taxing Units did not allege fraud and failed to present evidence of it.

The ARB denied the challenges, and the Taxing Units timely appealed to the district court. In the original petition for judicial review, the Taxing Units asked the trial court to order the re-appraisal of the omitted mineral interest property but failed to plead a single fact for fraud. More than sixty days after filing the original petition, the Taxing Units filed a second amended petition, alleging for the first time that Kinder Morgan had knowingly and purposefully provided inaccurate information to evade taxes. Kinder Morgan filed a motion to dismiss under the TCPA, but the Taxing Units objected to the timing, arguing that the motion had to be filed within sixty days after service of the original petition. The trial court denied the motion as untimely. The court of appeals affirmed, holding that the original petition's allegation of erroneous and incorrect omissions from the appraisal record gave fair notice of all possible theories that could cause such an omission.

The Supreme Court reversed and remanded to the trial court, holding that a new sixty-day window commenced from the addition of facts alleging taxpayer fraud because the original petition did not put Kinder Morgan on notice that the Taxing Units were implicating Kinder Morgan in wrongdoing with respect to the reappraisal claim. The Court relied on *Montelongo v. Abrea*—a contemporaneously issued opinion—for the proposition that an amended pleading that alleges new essential facts to support previously asserted claims triggers a new sixty-day period as to those facts. 622 S.W.3d 290 (Tex. 2021). The Court reasoned that the original petition failed to provide fair notice that the reappraisal cause of action was based on taxpayer fraud. It was not until the new essential facts were pleaded that Kinder Morgan could ascertain that the alleged tax deficiency resulted from its conduct. Therefore, a new sixty-day window commenced.

Regarding the jurisdictional issue, Kinder Morgan contended that the Taxing Units lacked the authority to hire an attorney on a contingent-fee basis, and therefore, their petition for judicial review was void and ineffective to invoke the trial court's jurisdiction. The argument was raised for the first time on appeal, and the Court, assuming an impermissible contingent-fee engagement, held it was not a jurisdictional impediment. The Court reasoned that the pleading would be defective but not void and according to its precedent, the Taxing Units should be

afforded a reasonable opportunity to perfect their filing.

b) *Montelongo v. Abrea*, 622 S.W.3d 290 (Tex. Apr. 30, 2021) [19-1112]

At issue in this case was whether an amended petition that asserted new claims, based on the same essential facts alleged in a prior petition, also asserted new legal actions that triggered a new sixty-day period for filing a motion to dismiss under the Texas Citizens Participation Act (TCPA). Abrea and 422 others sued Montelongo, a real estate investor, alleging that they were defrauded into purchasing Montelongo's real-estate seminars and products. In his original petition, Abrea asserted claims for deceptive trade practices, negligence, and negligent misrepresentation. Abrea later amended his petition, reasserting the original claims but also asserting new claims for fraud, conspiracy to commit fraud, fraudulent concealment, and breach of contract. The new claims were based on the same essential facts alleged in the original petition.

More than sixty days after service of Abrea's original petition but within sixty days of service of his amended petition, Montelongo filed a TCPA dismissal motion, arguing that some of Abrea's claims related to or were in response to Montelongo's exercise of his First Amendment rights. However, Abrea argued that the dismissal motion was untimely because it was filed more than sixty days after service of the original petition and the amended petition did not trigger a new sixty-day period because the new claims were based on the same facts alleged in the original petition. And even if the motion was timely, the TCPA did not apply to this case because Abrea's claims related to commercial speech, which is exempted from the TCPA. The trial court denied the dismissal motion, and Montelongo appealed. The court of appeals affirmed, holding that the dismissal motion was untimely.

The Supreme Court reversed and remanded to the court of appeals. The Court noted the TCPA's broad definition of "legal action," which includes a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim, or any other judicial pleading or filing that requests relief. Based on this definition, Montelongo argued that Abrea's amended petition qualified as a legal action that triggered a new sixty-day period because it was a petition, pleading, or filing. But the Court disagreed, reasoning that although an amended petition is a petition, pleading, or filing, a claimant's service of any amended petition, pleading, or filing cannot trigger a new sixty-day period. If an amended petition does not add new parties, claims, or essential factual allegations, it merely reasserts the same legal action to which the deadline has already applied and thus does not trigger a new sixty-day period. In turn, the Court concluded that Abrea's mere filing of his amended petition did not trigger a new sixty-day period.

Montelongo also argued that the new claims in Abrea's amended petition were new causes of action and therefore, new legal actions. Agreeing with Montelongo, the Court reasoned that a "cause of action" consists of alleged facts and the elements those facts

must establish to entitle a claimant to relief. The Court confirmed, based on statutory context, that this is necessarily the sense in which the TCPA uses the phrase "cause of action" to define a legal action. Citing other TCPA provisions, the Court explained that the TCPA provides for dismissing a legal action, and courts cannot dismiss facts. Further, the TCPA allows a claimant to avoid dismissal by offering evidence of each essential element of a claim. Thus, the elements of a claim comprise part of a legal action, meaning that an amended petition that asserts a new claim involving different elements than a previously asserted claim asserts a new legal action that triggers a new sixty-day period as to that new claim. Here, the Court held that Abrea's amended petition asserted new causes of action because it asserted new claims that required proof of different elements than the claims in his original petition. In turn, the court of appeals erred in holding that Montelongo's dismissal motion was untimely as to those new claims.

Accordingly, the Court reversed and remanded for the court of appeals to decide issues it had not previously addressed.

c) *Reynolds v. Sanchez Oil & Gas Corp.*, 635 S.W.3d 636 (Tex. Nov. 19, 2021 (per curiam) [21-0106]

This case concerns statutory deadlines under the Texas Citizens Participation Act (TCPA). 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 asserted fives causes of action. 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 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 v. Abrea*, 622 S.W.3d 290 (Tex. 2021) and *Kinder Morgan SACROC, LP v. Scurry County*, 622 S.W.3d 835 (Tex. 2021), the Court vacated the judgment below and remanded the case to reconsider its holding in light of those cases.

II. TEXAS TIM COLE ACT

1. Eligibility for Compensation

a) *In re G.S.*, 644 S.W.3d 160 (Tex. Apr. 22, 2022) [21-0127]

This case concerns whether an applicant under the Tim Cole Act adequately established his "actual innocence."

In September 2010, G.S. pleaded guilty to indecency with a child and was sentenced to seven years' imprisonment. Four years later, he applied for a writ of habeas corpus, arguing that his attorney had provided ineffective assistance by incorrectly advising him when he would be eligible for parole. After a hearing, the trial court recommended that the Court of Criminal Appeals reverse G.S.'s conviction. It did and remanded the case for a new trial. While the case was pending in the trial court on remand, G.S.'s alleged victim admitted that she had lied. The district attorney moved that the case be dismissed "pending further investigation."

In September 2015, G.S. applied for wrongful-imprisonment compensation under the Tim Cole Act. He included with his application a copy of the Court of Criminal Appeals' opinion granting him habeas relief based on the trial court's findings that G.S.'s attorney gave him "erroneous advice regarding parole eligibility." He also included a copy of the district attorney's motion to dismiss the charges.

The Texas Comptroller of Public Accounts denied G.S.'s application for compensation. G.S. filed an application to cure in November 2015 and included a copy of the alleged victim's written declaration recanting her accusations. The Comptroller denied that application as well.

In October 2016, the district attorney recommended that all records regarding G.S.'s arrest and conviction be expunged, which the trial court granted. Over the next four years, G.S. filed four more applications for compensation, with which he included copies of the expunction recommendation and order. The Comptroller denied all four. G.S. filed his petition for writ of mandamus in the Supreme Court.

The Court held that G.S. had not established that he is "actual innocent" as the Act requires. The Act provides three methods of establishing eligibility, two relevant to this case. The claimant can show he "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced" or that the trial court dismissed the charge against the claimant "based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and . . . the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced."

The Court held that G.S. did not establish that he was granted habeas relief "based on a court finding or determination" that he "is actually innocent of the crime" for which he was sentenced. G.S. argued he satisfied this eligibility method the same way the applicant did in *In re Allen*, 366 S.W.3d 696 (Tex. 2012), in which the Court held that the Court of Criminal Appeals implicitly made a *Schlup*-type actual-innocence finding when it granted habeas relief based on ineffective

assistance of counsel. But G.S.'s habeas petition was not based on a *Schlup*-type claim for relief. *Schlup* applies when a procedural bar prevents a claimant from obtaining habeas relief despite the existence of new evidence establishing the claimant's actual innocence. G.S.'s constitutional claim was not procedurally barred and was, in fact, heard and ruled upon by the trial court and the Court of Criminal Appeals.

The Supreme Court then held that G.S. did not establish that the trial court dismissed the charge against him "based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and . . . the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced." Here, the trial court dismissed the case based on the district attorney's motion, but the motion stated only that the district attorney wished to dismiss "pending further investigation." The Court therefore denied mandamus relief.

Justice Lehrmann joined the majority opinion but also filed a concurring opinion to express her concern that the statute can in some cases deny relief to the very people the Act was intended to compensate. In this case, if the exculpatory evidence had surfaced earlier, G.S. could have been entitled to habeas relief on actual-innocence grounds and thus eligible for compensation under the Tim Cole Act. Or if the case hadn't been dismissed, the district attorney could have filed a motion with the requisite statutory language regarding a lack of credible evidence and the attorney's belief of G.S.'s actual innocence. Second, relief could hinge on the apparently unbridled discretion of the state's attorney to include or not include the requisite language in a motion to dismiss following receipt of exculpatory evidence. Justice Lehrmann suggested the legislature consider amending the Act to address these concerns.

JJ. TEXAS UNIFORM TRADE SECRETS ACT

1. Sealing Exhibits

a) *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. Apr. 30, 2021) [19-0673]

The issue in this case was whether the Texas Uniform Trade Secrets Act (TUTSA) provides a separate pathway for sealing court records to which Rule of Civil Procedure 76a does not apply.

HouseCanary, Inc. agreed to license its home-appraisal technology to Title Source, Inc. After a dispute about the terms of that agreement, Title Source sued HouseCanary for breach of contract, claiming HouseCanary failed to perform its obligations. HouseCanary counterclaimed that Title Source misappropriated its trade secrets by using HouseCanary's technology to build derivative products in violation of the parties' agreement. After trial, HouseCanary moved under rule 76a to seal some of the trial exhibits, believing they contained HouseCanary's trade secrets. After the trial court denied the motion, HouseCanary moved the trial court to reconsider sealing under TUTSA. HouseCanary argued that TUTSA's requirement that trial courts preserve trade secrets by reasonable means, including by sealing

records, supported its motion. HouseCanary also argued that rule 76a did not apply to its request because TUTSA controls over the Rules of Civil Procedure in case of any conflict. The trial court granted HouseCanary's motion to reconsider, and Title Source appealed. The court of appeals reversed because the trial court failed to apply rule 76a, which the parties agreed to follow in a stipulated protective order they agreed to before trial.

The Supreme Court affirmed in part and reversed in part. The Court held that HouseCanary was partially correct: TUTSA displaces some of rule 76a's requirements when a party moves to seal materials containing alleged trade secrets in an action for misappropriation of trade secrets. But the Court also held parts of rule 76a—namely its procedural requirements and the substantive requirement that the movant show sealing is the least restrictive means available to protect the movant's interests in its trade secrets—do not conflict with TUTSA and are therefore not displaced. The Court held it was an abuse of discretion to grant a motion to seal without applying rule 76a's non-displaced provisions and remanded for further proceedings on sealing so that the trial court could apply the proper standard.

Chief Justice Hecht wrote an opinion concurring in the judgment but otherwise concluding that all of rule 76a's requirements conflict with TUTSA and the rule cannot apply to requests to seal material containing alleged trade secrets in an action brought under TUTSA.

KK. WORKERS' COMPENSATION

1. Independent Contractors

a) *Waste Mgmt. of Tex., Inc. v. Stevenson*, 622 S.W.3d 273 (Tex. Apr. 30, 2021) [19-0282]

The issue in this case was whether an injured worker was an employee of the defendant or an independent contractor. Plaintiff Robert Stevenson was hired by Taylor Smith, a temporary agency that supplied labor to clients. Stevenson was assigned to work on a garbage truck operated by defendant Waste Management of Texas, Inc. Both companies carried workers' compensation insurance specified by the Workers' Compensation Act. Stevenson was injured when the truck backed over his leg. Stevenson brought a common-law negligence suit against Waste Management. Waste Management alleged that the suit was barred by the exclusive-remedy provision of the Act. The trial court granted summary judgment for Waste Management. The court of appeals reversed, holding that a fact issue existed as to whether Stevenson was Waste Management's employee under the Act.

The Supreme Court reversed the court of appeals and rendered a take-nothing judgment against Stevenson. The Court reasoned that an employee covered by the Act is barred from bringing a common-law suit against his employer. The Court has recognized in several cases that (1) a worker can have two employers under the Act and (2) the client of a temporary agency can qualify as an employer under the Act. The Act broadly defines an employee as any person in the service of another under a contract of hire, whether express

or implied, or oral or written. The primary test for whether a worker is an employee of a defendant employer—as opposed to an independent contractor—looks to whether the employer had the right to control the progress, details, and methods of operations of the work. The Court held in *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013), that a temporary worker assigned to a client employer, who was injured while working on the client's garbage truck route, was an employee of the client. The plaintiff-worker was an employee of the client because the client controlled the details of the plaintiff's work.

The Court held that *City of Bellaire* was factually indistinguishable insofar as Waste Management controlled the details of Stevenson's work. The undisputed evidence showed that Stevenson was under the control of the truck driver and route managers employed by Waste Management. Waste Management decided how Stevenson would do his job, where he would stand, when he broke for lunch, and all other details of his work on the route.

The only remaining question was whether an agreement between a Waste Management affiliate, Waste Management National Services, and Taylor Smith compelled a different result. The agreement stated that personnel supplied by Taylor Smith shall be independent contractors with respect to Waste Management National Services. The agreement also stated that it includes affiliates as the context requires and that affiliates are intended third-party beneficiaries of the agreement. Despite this contractual language, the Court held that Stevenson was an employee of Waste Management for several reasons. Under existing dual-employer caselaw, a contract between the two employers is a factor to consider if the right of control is controverted. Here, the right of control was not in controversy because the undisputed evidence established that Waste Management had the right to control the details of Stevenson's work. Stevenson was in the service of Waste Management under the Act's statutory definition of employee, regardless of what an agreement to which Stevenson was not a party said. Permitting the agreement to control employee status would mean that employers could, without the consent of employees, dictate whether the Act applied, despite the Court's recognition that the Act should be liberally construed in favor of coverage to afford employees the protections the legislature created. Here, Stevenson did not want the Act to apply, but other employees might favor the certainty and prompt payment of benefits afforded by the Act.

Justice Boyd concurred. The concurrence would hold that the test for employee status under the Act and under the common law is identical and turns on whether the employer has the right to control the progress, details, and methods of operations of the employee's work. The "right" here is a contractual right. The concurrence agreed that Stevenson was Waste Management's employee only because, under common-law principles, the evidence of Waste Management's actual control was so persistent as to establish that the agreement was either a sham or the parties agreed to modify it.

III. GRANTED CASES

A. ADMINISTRATIVE LAW

1. Judicial Enforcement

a) *City of Houston v. Hous. Prof'l Fire Fighters' Ass'n*, 626 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0518]

This case concerns the Fire and Police Employee Relations Act, which created a judicial alternative to strikes and other labor techniques to protect the public from the dangers of a striking fire or police force. The Act requires that the compensation and other conditions of employment for firefighters and police officers are "substantially the same as compensation and conditions of employment prevailing in comparable private sector employment." The Act creates an alternative mechanism through which a public employer and firefighters can engage in non-compulsory arbitration or judicial enforcement of the standards of the Act if the employer refuses to arbitrate. The judicial-enforcement provision allows a trial court to "declare the compensation or other conditions of employment required by" the Act" for up to one year.

The collective bargaining agreement between the City of Houston and the Fire Fighters' Association expired on June 30, 2017. The parties failed to reach an agreement under the Act concerning compensation, work hours, overtime, paid leave, staffing, and grievance procedures. The Association filed suit after the Association requested arbitration and the City refused to arbitrate.

The Fire Fighters' Association sought a declaration of the compensation and other conditions of employment required by the Act. The City asserted the defenses of governmental and sovereign immunity and filed a plea to the jurisdiction and a motion for summary judgment challenging the constitutionality of sections of the Act. The trial court denied the City's plea to the jurisdiction and motion of summary judgment and granted the Association's cross-motion for summary judgment on immunity. The City appealed, and the court of appeals affirmed.

The City petitioned the Supreme Court, asserting that the judicial enforcement scheme of the Fire and Police Employee Relations Act is an unconstitutional violation of the separation of powers and that the City is entitled to governmental immunity.

The Supreme Court granted the petition for review. Oral argument is set for November 29, 2022.

2. Judicial Review

a) Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc., — S.W.3d —, 2020 WL 6696372 (Tex. App.—Dallas 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1165 (May 27, 2022) [20-0980]

This case addresses whether the court of appeals erred in holding that Wal-Mart could not recover tort and breach-of-contract damages from Xerox after Wal-Mart incurred losses during a massive system outage.

The Supplemental Nutrition Assistance Program (SNAP) is a federal program that provides nutritional support for qualifying low-income individuals and families. Wal-Mart accepts

SNAP benefits for qualifying food items. Xerox contracts with state agencies, which administer SNAP, to provide electronic verification of such purchases. In October 2013, Xerox's system unexpectedly went offline for more than ten hours, impacting more than 1,400 Wal-Mart and Sam's Club stores. During the outage, Wal-Mart employed a backup system ("store-and-forward") that allows it to store transactions and re-submit them for authorization when the system is restored.

Wal-Mart alleges that during the outage, Xerox misrepresented that the system was back online when it was still down, causing Wal-Mart to prematurely submit some transactions for authorization. When Xerox's system denied these transactions, Wal-Mart's system automatically deleted them. Other transactions were successfully submitted and processed after the outage but were denied because the SNAP beneficiary possessed insufficient funds or used an invalid PIN number. Wal-Mart alleges Xerox breached its contracts with the state agencies by failing to indemnify Wal-Mart for these transactions. Overall, Wal-Mart alleges it incurred over $2 million in losses. It sued Xerox for negligence and negligent misrepresentation. It also sued Xerox for breach-of-contract, alleging it was a third-party beneficiary to Xerox's contracts with the state agencies.

The trial court granted Xerox's motions for summary judgment. The court of appeals affirmed. First, it held that federal regulation bars retailers from suing third-party processors when their damages occur while employing the store-and-forward backup system. It also held that Wal-Mart failed to allege negligent misrepresentations subjecting Xerox to liability, and Xerox did not owe Wal-Mart a tort duty. Finally, the court rejected Wal-Mart's breach-of-contract claim on grounds that Wal-Mart failed to establish its status as a third-party beneficiary.

Wal-Mart petitioned the Supreme Court for review. It argues that the regulation only shields state agencies from liability and the court of appeals' interpretation would unjustifiably pre-empt state common-law tort actions. Second, Wal-Mart argues that Xerox was not entitled to summary judgment on Wal-Mart's breach-of-contract claims because the entirety of Xerox's contracts with the states are not in the record. Finally, Wal-Mart argues that the court of appeals erred in holding that Xerox did not owe Wal-Mart a tort duty, that Wal-Mart did not establish its third-party beneficiary status, and that Wal-Mart did not have a viable negligent misrepresentation claim. Xerox argues that Wal-Mart's system configuration constitutes a superseding cause of its losses because it prevented Wal-Mart from re-submitting transactions denied during the outage. The Supreme Court granted the petition for review. Oral argument is set for September 21, 2022.

B. ARBITRATION

1. Arbitrability

a) *MP Gulf of Mex., LLC v. Total E&P USA, Inc.*, — S.W.3d —, 2020 WL 7392768 (Tex. App.—Tyler 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1426 (June 17, 2022) [21-0028]

The primary issue in this case is whether incorporation of American Arbitration Association (AAA) rules constitutes clear and unmistakable evidence of an intent to arbitrate the question of arbitrability.

MP and Total had working interests in oil and gas units that shared a "Common System" for production. The Common System was governed by two agreements: the System Operating Agreement and the Cost Sharing Agreement. The underlying dispute in this case arose from MP's assessment of about $41 million to the Common System, which Total asserted should have been billed under the operating agreement of the individual unit at issue. MP demanded payment and initiated mediation under the System Operating Agreement's dispute resolution provisions. Mediation was unsuccessful.

Total sued under the Cost Sharing Agreement seeking declaration that the Cost Sharing Agreement allocated the costs to the individual unit under its operating agreement, not the Common System. Total also initiated arbitration under that unit's agreement. MP initiated AAA arbitration under the System Operating Agreement. Total moved to stay the AAA arbitration, and MP moved to compel it. The trial court denied MP's motion to compel and granted Total's motion to stay.

The court of appeals reversed and rendered judgment compelling AAA arbitration and lifted the stay. The court held that the System Operating Agreement's incorporation of the AAA rules was clear and unmistakable evidence of the parties' intent to arbitrate the question of arbitrability. The court accordingly held that whether the parties' dispute fell under the System Operating Agreement's arbitration provision was for the arbitrator, not the courts.

Total petitioned the Supreme Court for review, which the Court granted. Oral argument is set for September 20, 2022.

C. CLASS ACTIONS

1. Class Certification

a) *Mosaic Baybrook One, L.P. v. Simien*, — S.W.3d —, 2020 WL 5637499 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [19-0612 & 21-0159]; *consolidated for oral argument with Mosaic Baybrook One, L.P. v. Cessor,* — S.W.3d —, 2020 WL 5637212 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [21-0161]

The issues in these cases surround class certification: whether the trial courts performed the required "rigorous analysis" to determine whether the certification prerequisites were met and whether the certification orders listed all the elements of the

defenses, as the Rules of Civil Procedure require. In addition, one petition asks whether a court of appeals' opinion declining an application for a permissive interlocutory appeal must state a basic analysis for doing so and whether the requirements for certifying an interlocutory appeal were met.

Both lawsuits stem from tenant complaints. Tenants of properties that Mosaic owns and manages pursued class actions, claiming that Mosaic improperly billed them in violation of certain statutes. In *Simien*, class representative Simien sued Mosaic under a provision of the Water Code that was amended after Simien initiated the lawsuit. Mosaic specially excepted to Simien's petition, contending that the amendment applied retroactively. It also asked the trial court to strike Simien's request for certain penalties and attorney's fees and to dismiss the claim for lack of jurisdiction. The trial court overruled the special exceptions, denied the motion to dismiss, and granted Simien's motion for partial summary judgment. It certified Mosaic's request for a permissive interlocutory appeal of the summary-judgment ruling, which the court of appeals denied. The trial court later found that the class-certification prerequisites were satisfied and certified the requested classes. In *Cessor*, the trial court likewise granted the class representative's motion for certification.

Mosaic perfected interlocutory appeals in both cases, and the court of appeals affirmed the certification orders. Mosaic argued that the trial courts abused their discretion by certifying the classes without conducting a rigorous analysis to determine that the certification prerequisites were satisfied. The court of appeals disagreed. In *Simien*, it wrote that Mosaic's arguments on the merits neither pointed to "any theory unmoored from the pleadings" nor undermined the trial court's finding that the certification requirements were met. When Mosaic contended that the trial plan should have expressly addressed the elements of its defenses, the court of appeals held that the trial court did not abuse its discretion because the record showed that it had considered the defenses in deciding whether to certify the class. In *Cessor*, Mosaic complained that the trial court did not conduct the requisite rigorous analysis, but the court of appeals explained that deciding the merits of a suit to determine "its maintainability as a class action is not appropriate." It also reasoned that the statute's plain language made elaborate analysis unnecessary, and the trial court's certification order parsed the statutory language to identify the issues of law and fact common to the class.

Mosaic petitioned the Supreme Court for review in both cases. The Court granted the petitions, consolidating them for argument. Oral argument is set for September 21, 2022.

D. CONSTITUTIONAL LAW

1. Standing

a) *Am. Campus Cmtys., Inc. v. Berry*, — S.W.3d —, 2021 WL 4034077 (Tex. App.—Austin 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [21-0874]

The issues presented in this case are (1) whether absent class members lack standing to seek civil penalties for

alleged violations of the Texas Property Code and (2) whether the court of appeals was required to determine and evaluate the specific elements for the causes of action raised by the class.

American Campus Communities and over thirty of its subsidiaries (collectively, ACC) are landlords at various residential properties throughout Texas. Former tenants of ACC properties filed a class action alleging that ACC violated Section 92.056(g) of the Texas Property Code, which requires that leases contain bold or underlined language informing tenants of the remedies available when a landlord fails to repair or remedy conditions that materially affect the tenant's physical health or safety. The tenants further alleged that by omitting the required language, ACC knowingly attempted to waive its landlord duties in violation of a statutory anti-waiver prohibition, entitling the tenants to further civil penalties.

The trial court denied ACC's summary-judgment motion and issued an order granting class certification. ACC filed an interlocutory appeal of the class-certification order. The court of appeals modified the order to remove references to the tenants' claim for declaratory and injunctive relief, but it otherwise affirmed the class certification.

ACC petitioned the Supreme Court for review arguing that (1) the absent class members lack standing because they suffered no concrete injury-in-fact, and (2) the court of appeals erred by failing to examine the substantive elements of the underlying claims in its predominance analysis.

The Court granted the petition for review. Oral argument is set for October 5, 2022.

E. CONTRACT LAW

1. Oil-and-Gas Leases

a) *MRC Permian Co. v. Point Energy Partners Permian LLC,* 624 S.W.3d 643 (Tex. App.—El Paso 2021, *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0461]

This case presents two questions about contract interpretation of oil and gas leases plus another question about tortious interference with contract. First, what is the best reading of this force majeure clause? Second, how does this contract—and possibly other oil-and-gas contracts—measure how far a "wellbore extends horizontally in the producing formation"? Third, do the facts here present a fact issue about tortious interference in contract?

MRC Permian signed four essentially identical leases with mineral owners to develop oil and gas wells in the Permian Basin. After a three-year term, to retain the right to develop MRC had to drill a new well every 180 days. No one disputes that MRC missed that deadline. Because the deadline passed, Point Energy signed a new lease with the mineral owners. But MRC claims it properly gave notice under the force majeure clause, so the deadline was extended. Whether that deadline was extended—and therefore MRC's leased continued—turns on whether MRC properly had a right to invoke the force majeure clause. Point Energy argues a scheduling incident was the real cause of the missed deadline, so there was no force majeure and

the lease terminated.

If the lease terminated that leads to another question under the lease. The lease provides that upon termination the lease splits for each developed well, and MRC will have a lease for each well so long as it produces in paying quantities. The wells' acreage is determined by whether each wellbore extend horizontally more than 5,000 feet. MRC contends the lease requires measuring from where the wellbore enters the formation until it exits, while Point Energy argues it depends on angles and perforation of the wellbore.

Finally, MRC claims that Point Energy and some of its agents concealed their connections to one another and induced the mineral owners to breach their lease with MRC. Point Energy responds it had a good-faith belief the contract was terminated, there is no evidence that it knew it was not, and their leases are top leases that cannot interfere with MRC's rights.

MRC sued to settle these and other questions. The parties had several competing summary judgment motions. The trial court granted summary judgment on most issues in Point Energy's favor but certified an interlocutory appeal. The court of appeals reversed, finding for MRC on issues one and three, and decided because the contract did not terminate, it did not have jurisdiction to answer question two.

The Supreme Court granted review. Oral argument is set for October 25, 2022.

2. Releases and Reliance Disclaimers

a) *Austin Trust Co. v. Houren*, — S.W.3d —, 2021 WL 970819 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1427 (June 17, 2022) [21-0355]

There are three primary issues in this case. The first is whether the executor of an estate owed a fiduciary duty to trust beneficiaries. The second issue is whether a decedent's estate was required to, and did, disclose all material facts in connection with a release executed by beneficiaries to the decedent's marital trust. The third issue is whether the trial court abused its discretion in excluding certain financial documents from the summary judgment evidence.

Bob Lanier was the surviving spouse of Elizabeth Lanier, who died in 1984. Elizabeth was also survived by her and Bob's five children. Upon Elizabeth's death, her will created the Robert C. Lanier Marital Trust. When the Marital Trust was created, Elizabeth's estate was valued at approximately $54 million, and she placed most of those assets in the Marital Trust. Bob was the sole trustee and beneficiary of the Marital Trust until his death in 2014. Bob married Elyse after Elizabeth's death and was additionally survived by Elyse and her two children. The Marital Trust required mandatory distributions of Marital Trust income, which Bob received until his death in 2014. Additionally, Bob was permitted, as trustee, to pay himself amounts of the principal of the trust as he, in judgment determined were necessary for

his health, support, or maintenance in his accustomed standard of living. Over Bob's lifetime, his distributions to himself from the Marital Trust totaled $37,405,964. At the time of Bob's death, the Marital Trust was valued at approximately $5.5 million. In Bob's will, he directed the Marital Trust assets remaining at his death to pass to the Bob and Elizabeth Lanier Descendants Trust for the benefit of Elizabeth's Children. Additionally, Bob left assets from his own Estate—separate from the Marital Trust—to Elyse and her two children.

The Marital Trust terminated upon Bob's death, subject to the administration of Bob's estate and transfer of the Trust's assets. Jay Houren—respondent—served as the independent executor of Bob's Estate. Bob's Estate was entitled to recover from both the Marital and Descendants Trusts any federal estate taxes owed by Bob's Estate. To accommodate the Marital Trust beneficiaries' desire for expedited distribution of the Marital Trust's assets before Houren could file the federal tax return for Bob's Estate, Houren proposed a "Family Settlement Agreement" (FSA) to all interested parties.

After the FSA's proposal, negotiations ensued, and the parties and their respective attorneys received Disclosures—including accounting ledgers for Bob and the Marital Trust. The Disclosures included a general ledger at the center of this dispute, which the Marital Trust's beneficiaries claim as proof that Bob either owed the Marital Trust a $37 million debt or breached a fiduciary duty by taking excessive distributions from the Marital Trust's income. Despite the ledger's inclusion in the disclosures, all parties executed the FSA. The FSA contained a release that generally applied to any and all liability arising from any and all claims relating to Bob's Estate or the Marital Trust, as well as any claims related to, based upon, or made evident in the disclosures.

After all signatures on the FSA were obtained, funds were distributed from the Marital Trust to the Descendants Trusts. Additionally, Houren received an estate tax closing letter from the IRS in June 2016, and distributed Bob's Estate's assets according to Bob's will. Austin Trust then sent a demand letter to Houren seeking repayment of an alleged $37 million debt owed by Bob's Estate to the Marital Trust. Austin Trust based its demand on the general ledger as described above. Houren rejected Austin Trust's debt claim.

After Houren rejected Austin Trust's claim, he filed a declaratory judgment action against Austin Trust seeking a declaration that the alleged $37 million debt did not exist. Austin Trust answered and filed a counterclaim for a contrary declaration. Austin Trust also added a claim for a breach of fiduciary duty against Bob's Estate. Austin Trust alleged that Bob had violated the Marital Trust's terms by taking excessive distributions from the Marital Trust. Houren filed a motion for partial summary judgment on both of Austin Trust's claims, arguing that he had proved that the alleged debt did not exist, and further, that Austin Trust had released all claims to recover an alleged debt as well as any claim for a breach of fiduciary duty when it entered into the FSA. The trial court

granted the motion. Austin Trust appealed.

The court of appeals held that the Marital Trust beneficiaries released their claims against Houren and Bob's Estate when they signed the FSA. In its analysis, the court did not decide whether Bob and Houren owed the beneficiaries a fiduciary duty. Instead, the court applied the *Forest Oil* factors to determine that the FSA was enforceable and affirmed the trial court's grant of partial summary judgment.

In Austin Trust's briefing before the Supreme Court, it argues that Houren, as executor of Bob's Estate, owed a fiduciary duty to the beneficiaries of the Marital Trust. Houren failed to meet this standard, and the court of appeals failed to conduct a "full disclosure" analysis as it should have. Instead, it simply applied *Forest Oil*'s "at arm's length" factor test to determine that the FSA's release and reliance disclaimers were valid. Houren disagrees, arguing the FSA was a full and final release, and that Houren owed no fiduciary duty to the petitioners.

The Court granted the petition for review. Oral argument is set for October 4, 2022.

F. EMPLOYMENT LAW

1. Whistleblower Actions

a) *Tex. Health and Human Servs. Comm'n v. Pope,* — S.W.3d —, 2020 WL 2079093 (Tex. App.—Austin 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [20-0999]

At issue in this case is whether alleged reports made by two former managers at the Texas Health and Human Services Commission qualify as "good-faith reports [of] violation of law by [a] employing governmental entity" under the Whistleblower Act. While overseeing HHSC's Medical Transportation Program, under which contractors provide rides to Texans for Medicaid-eligible health services, Pope and Pickett complained to law enforcement authorities about a third-party contractor's failure to follow state parental-accompaniment rules, HHSC's failure to collect rebate payments from said contractor, and a lack of documentation to support responses to an on-going federal audit.

After Pope and Pickett were fired, they sued HHSC under the Texas Whistleblower Act. HHSC filed a plea to the jurisdiction and motion for summary judgment, arguing that that Pope and Pickett failed to show they made a good faith report of a violation of law by a *governmental entity*. The trial court denied HHSC's plea and motion. The court of appeals affirmed, concluding that Pope and Pickett's report of a third-party contractor's legal violation necessarily implicated a violation by HHSC, and that HHSC's "responsibility" to enforce Medicaid laws may have been violated when it did not seek reimbursement from the contractor.

In its petition for review, HHSC argued that Pope and Pickett reported violations of law by a third party, not HHSC, and that the Whistleblower Act's good-faith standard does not apply when a reporting employee does not identify a governmental entity. Next, HHSC argued that no law requires that it seek rebate payments from contractors; any law making HHSC

"responsible" for enforcing state Medicaid laws merely describes the agency's jurisdiction. Last, HHSC argued that Pickett's emails concerning the response to the federal audit should not be considered independent reports.

The Supreme Court granted HHSC's petition for review. Oral argument is set for November 29, 2022.

G. FAMILY LAW

1. Termination of Parental Rights

a) *In re A.A., G.A., & K.A.*, 635 S.W.3d 430 (Tex. App.—Amarillo Oct. 5, 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0998]

Mother's parental rights were terminated for noncompliance with her family-services plan.

Three of Mother's children were removed from their Father's care and placed in a foster home due to his neglect and abuse. At that time, Mother was living in New Mexico, and Father had primary custody of the children. The Department of Family and Protective Services filed a petition to terminate parental rights of both Mother and Father. The Department provided Mother with a plan she was required to follow to secure reunification with her children. The trial court found that Mother failed to comply with the plan and that termination of parental rights was in the children's best interests. Because of this, the trial court terminated Mother's parental rights under Section 161.001(b)(1)(O) of the Texas Family Code, which allows for termination if the parent failed to comply with the provisions of a court order specifically establishing the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the child's removal from the parent for the abuse or neglect of the child.

The court of appeals affirmed, holding that there was evidence that supported the trial court's finding that the children were removed from the home due to abuse or neglect and supported a finding that termination was in the children's best interest.

Mother's petition for review argues that the court of appeals interpreted Section 161.001(b)(1)(O) in an improperly expansive manner, making Mother subject to termination despite the absence of any allegation or sufficient evidence that she—as opposed to Father—abused or neglected the children. Mother also argues that Texas courts lack jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act because a New Mexico court determined Mother's initial custody determination under the divorce decree, vesting the court with continuing jurisdiction.

The Court granted the petition for review. Oral argument is set for October 4, 2022.

H. GOVERNMENTAL IMMUNITY

1. Contract Claims

a) *City of League City v. Jimmy Changas, Inc.,* 619 S.W.3d 819 (Tex. App.—Houston [14th Dist.] Feb. 18, 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0307]

At issue in this breach-of-contract case is whether League City's entering into an agreement with Jimmy Changas, Inc., for the construction of a restaurant was a governmental action—such that the City is immune from suit—or a proprietary action.

League City and Jimmy Changas entered into an agreement under Chapter 380 of the Texas Local Government Code, under which Jimmy Changas would build a restaurant and the City would reimburse Jimmy Changas for all its water and wastewater fees, all fees associated with plat approval and building permits, and a percentage of Jimmy Changas' sales-tax revenue. Jimmy Changas alleged that the City failed to reimburse it for any of these expenses, and it sued the City for breach of contract.

The City filed a plea to the jurisdiction, arguing that it performed a governmental function by making the agreement with Jimmy Changas, and that it therefore is immune from suit. It further argued that Jimmy Changas could not demonstrate that the City's governmental immunity had been waived under the Local Government Code. Jimmy Changas contends that the City's entering into the agreement does not qualify as a governmental action under the Texas Tort Claims Act and that its suit for damages may therefore proceed. The trial court denied the City's plea, and the court of appeals affirmed the trial court's denial.

The Supreme Court granted review. Oral argument is set for October 4, 2022.

2. Standing

a) *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, *probable jurisdiction noted*, 65 Tex. Sup. Ct. J. 286 (Jan. 21, 2022) [22-0008]

This direct appeal arises from two suits challenging the constitutionality of the Legislature's recent reapportionment of the State's senatorial and representative districts based on the 2020 census. The suits were transferred to and consolidated before a special three-judge district court under Chapter 22A of the Government Code. In the direct appeal, the State parties challenge the special trial court's interlocutory order on their pleas to the jurisdiction.

In November 2021, the Mexican American Legislative Caucus, Texas House of Representatives (MALC) sued the Governor and the Secretary of State in Travis County district court to challenge the constitutionality of HB1, which reapportioned Texas's representative districts. MALC alleges that HB1 is unconstitutional because it violates Article III, section 26 of the Texas Constitution—the "county line rule"—by splitting the Cameron County line twice, extending in two different directions into two different contiguous counties to form two distinct state

representative districts. MALC seeks declaratory and injunctive relief.

In a separate case filed the same month, two state senators, a registered voter, and the Tejano Democrats (collectively, the Gutierrez plaintiffs) sued the State of Texas in Travis County district court to challenge the validity of both HB1 and SB4—SB4 reapportioned the Texas senatorial districts. The Gutierrez plaintiffs allege that (1) HB1 and SB4 are invalid because they were enacted during a special session of the Legislature rather than during "the first regular session" after the publication of the census or, if not then, by the Legislative Redistricting Board, as required by the Texas Constitution and (2) HB1 violates the county line rule and dilutes the legislative representation of Cameron County.

Both cases were transferred to and consolidated before a special three-judge district court under Chapter 22A of the Government Code. The State filed pleas to the jurisdiction against the plaintiffs and their claims. As to MALC, the State argued that (1) the special trial court lacks jurisdiction over MALC's claims because its purported ultra vires claims against the Governor and the Secretary of State are based on allegations that these two government officials were acting consistently with an unconstitutional statute and (2) MALC has not established associational or organizational standing. The trial court granted the State's motion on those grounds.

As to the Gutierrez plaintiffs, the State argued that the special trial court lacks subject-matter jurisdiction over these plaintiffs because the claims are not traceable to or redressable by the State of Texas and they cannot overcome sovereign immunity. The State also argued that the Gutierrez plaintiffs lack standing because (1) one of the state senators and the voter do not claim to be injured and the other state senator's alleged injury is not traceable to the new map and an injunction would not redress that alleged harm, and (2) the Tejano Democrats have not plausibly alleged associational or organizational standing. The trial court denied the plea in part and granted it in part as to the claims for injunctive relief.

The State filed a direct appeal in the Supreme Court. The Court may hear a direct appeal from an order of a special three-judge district court. Accordingly, the Court noted probable jurisdiction to address the merits of the appeal and ordered briefing. Oral argument was heard on March 23, 2022.

3. Texas Tort Claims Act

a) *The Gulf Coast Center v. Curry*, — S.W.3d —, 2020 WL 5414983 (Tex. App.—Houston [1st Dist.] 2020) *pet. granted*, 65 Tex. Sup. Ct. J. 592 (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, asking 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. Oral argument is set for September 22, 2022.

b) *Rattray v. City of Brownsville,* — S.W.3d — 2020 WL 6118473 (Tex. App.—Corpus Christi–Edinburg 2020), *pet. granted*, 65 Tex. Sup. J. 1426 (June 17, 2022) [20-0975]

The issue in this case is, concerning the use of motor-driven equipment, whether negligent use or operation of a floodgate caused flooding damage to homeowners' properties.

Petitioner Homeowners experienced flooding after heavy rainfall. The Homeowners alleged that their homes were flooded from the nearby resaca and that the flooding was caused by the City of Brownsville's negligent operation of its stormwater system. The stormwater system contains a series of drainage ditches, resacas, and other bodies of water, which are controlled by multiple motor-driven gates and pumps. Specifically, the Homeowners allege that the misuse of the North Laredo Gate caused excessive stormwater to accumulate in the nearby resaca. On the day of the storm, four of the five gates were initially open, including the North Laredo Gate. That afternoon, a city employee charged with stormwater management noted that the resaca had normal waterflow. An hour later, the employee observed abnormal negative waterflow moving from downstream to upstream and closed the North Laredo Gate. Shortly after placing pumps at other downstream flood gates, the employee returned to the North Laredo Gate where he observed knee-deep water over the nearby road and continued negative water flow. This is when the homes flooded.

The Homeowners sued the City of Brownsville, claiming the City and its employees negligently operated motor-driven equipment by untimely activation. Following a hearing, the trial court denied the City's plea to the jurisdiction. The City filed an interlocutory appeal, asserting that its immunity from suit was not waived by the Texas Torts Claims Act, and therefore, the trial court lacked jurisdiction. The court of appeals reversed, finding that the City's actions constituted nonuse of property that did not invoke the waiver of immunity and remanded to the trial court with instructions to dismiss the homeowner's suit. The Homeowners appealed.

The Texas Tort Claims Act waives immunity from suit and liability for a "governmental unit." However, a governmental unit is liable if "property damage is proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment" if the damage "arises from the operation of use" of motor-driven equipment. Homeowners argue that concerning the use of motor-driven equipment, the court of appeals misapplied the nexus causation standard. They further argue that the court of appeals failed to look at their intent and by complaining about the North Laredo Gate being open, their intent was to complain about the gate being closed. The City argues that the Homeowners do not complain about the use of the gate, but instead allege that the City's failure to act was negligent.

The Court granted the homeowner's petition for review. Oral argument is set for October 27, 2022.

c) *Tex. Dep't of Transp. v. Christ*, — S.W.3d —,2021 WL 2149632 (Tex. App.—Corpus Christi–Edinburg 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 717 (April 1, 2022) [21-0728]

The issue in this case is whether modifying an engineering plan without an engineer's statutorily required seal is a discretionary act for which the Texas Department of Transportation retains immunity under the Texas Tort Claims Act.

One night, Daniel Christ went out for a ride on his motorcycle with his wife, Nicole Salinas, as a passenger. They exited an interstate onto an intersecting road headed west. Meanwhile, a sedan turned onto the same road headed east but entered the westbound lane. They collided. The crash led to severe injuries. Christ and Salinas sued the driver of the sedan. Eventually, they also added TxDot and a contractor.

TxDot and a contractor were working on the interstate and the intersection road. The interstate and road were not shut down. Instead, TxDot wanted to shift lanes so traffic could continue. This requires lane shifts with which many drivers are familiar. Despite this familiarity, each lane shift requires safety devices to guide drivers. Therefore, TxDot has an engineer devise a traffic control plan. Because an engineer prepares the traffic control plan, he must sign and seal it with his engineering seal. Here the sealed traffic control plan called for a concrete barrier between the opposite direction lanes. But the contractor decided there was not enough room for the concrete barrier. Instead, the contractor substituted a safety device called strips and buttons. The strips and buttons, TxDot claims, were substituted with an engineer's oral approval.

This case turns on whether that substitution was permissible. Typically, decisions about a traffic control plan are up to TxDot discretion. That discretion places TxDot into the protection of the Texas Tort Claims Act's discretionary function immunity. Christ and Salinas argued that because the original engineering plan was designed and sealed by a TxDot engineer, any modification must have been approved by some TxDot engineer in writing and with their seal. Christ and Salinas argue that engineering regulations about public works and engineering seals create a requirement of law that are not subject to TxDot's discretion. Without that discretion, TxDot could fall back into the Tort Claims Act's waiver of immunity. Or, in the alternative, the strips and dots are inherently a defect.

TxDot argues that this traffic device claim is still discretionary and that small alterations to traffic control plans in the field do not need an updated engineering plan. And the strips and buttons are not a defect of any kind. Accordingly, TxDot asserted its claim to immunity in a plea to the jurisdiction. The trial court denied the plea, so TxDot took an interlocutory appeal on the immunity question. The court of appeals credited TxDot's arguments and reversed. Christ and Salinas moved for rehearing, which the court of appeals also denied.

Christ and Salinas petitioned to the Texas Supreme Court. The Court

granted review. Oral argument is set for October 27, 2022.

4. Ultra Vires Claims

a) *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*, 65 Tex. Sup. Ct. J. 591 (Mar. 11, 2022) [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 arguing that the relief she sought was retrospective, and thus barred by sovereign immunity. The trial court denied the plea, and Texas State appealed. The court of appeals affirmed.

Both universities petitioned 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 is set for September 20, 2022.

b) *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 609 S.W.3d 569 (Tex. App.—Austin) *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0194]

There are three primary issues in this case. The first issue is whether Mike Morath, Commissioner of the Texas Education Agency, acted *ultra vires* by appointing a board of managers to exercise authority over Houston ISD, and by assigning a conservator to oversee Houston ISD's governance. The second issue is whether Dr. Doris Delaney, the conservator appointed by Commissioner Morath, had the

authority to suspend Houston ISD's superintendent search. The third issue is whether the trial court must reconsider its temporary injunction under the Texas Education Code as amended by Senate Bill 1365.

Two high schools are at the center of this dispute. The first high school, after receiving academic accountability ratings of "Academically Unacceptable" and "Improvement Required" for some years, was required by Commissioner Morath to submit a "campus turnaround plan." In 2016, Commissioner Morath appointed Dr. Delaney as a conservator to the District. The second high school received "Academically Unacceptable" academic accountability ratings from 2011 to 2017, did not receive a rating for the 2017–18 school year, and received another "Academically Unacceptable" rating again in 2019.

In March 2019, Commissioner Morath clarified Dr. Delaney's role as conservator, noting that her role included providing district-level support to Houston ISD's low-performing campuses. Following this clarification, Dr. Delaney suspended Houston ISD's superintendent search. Finally, around the same time, Commissioner Morath—acting on complaints received by the Agency's Special Investigations Unit—initiated a Special Accreditation Investigation against Houston ISD. Based on the investigation results, coupled with the length of Dr. Delaney's ongoing conservatorship and the second high school's academic accountability ratings, Commissioner Morath opted to replace Houston ISD's Board of Trustees with an appointed board of managers.

Houston ISD then sued the Agency, seeking several declarations relating to Commissioner Morath's actions. The District also sought a temporary and permanent injunction prohibiting the Commissioner from appointing a board of managers, Dr. Delaney from acting outside her lawful authority, and the Commissioner from imposing any sanctions or interventions on Houston ISD based on the Special Accreditation Investigation. The trial court granted the temporary injunction. On appeal, the court of appeals affirmed the trial court and ultimately held that the trial court had not abused its discretion in granting the District's temporary injunction.

In its briefing to the Supreme Court, the Agency argues that both Commissioner Morath and Dr. Delaney did not act *ultra vires*, and accordingly, the trial court abused its discretion in granting the District's temporary injunction. Further, the Agency argues that Senate Bill 1365—which went into effect on September 1, 2021 and presents significant amendments to the Texas Education Code—warrants the reconsideration or dissolution of the trial court's temporary injunction. Houston ISD argues that Commissioner Morath and Dr. Delaney acted *ultra vires*, so sovereign immunity was never waived and the trial court did not abuse its discretion in granting the District's temporary injunction.

The Court granted the petition for review. Oral argument is set for October 6, 2022.

I. INSURANCE

1. Coverage

a) Overstreet v. Allstate Vehicle & Prop. Ins. Co., 2022 WL 1579278 (5th Cir. 2022), *certified question accepted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [22-0414]

This certified-question case concerns Texas's "concurrent causation doctrine," which requires an insured to prove how much of the damage caused by a combination of covered and uncovered causes is solely attributable to the covered cause.

In June 2018, a wind and hailstorm hit the area where Harold Franklin Overstreet lived, allegedly damaging his roof. Overstreet reported the loss to Allstate. Allstate estimated the value of the loss at an amount that was less than the deductible. Disagreeing with the valuation, Overstreet sued Allstate in state court for breach of contract and various violations of the Texas Insurance Code. Allstate removed the case to federal court.

The federal district court granted judgment on the pleadings in favor of Allstate on most of Overstreet's claims under the Insurance Code, but left standing his claims for breach of contract and failure to conduct a reasonable investigation. The district court later granted Allstate's motion for summary judgment as to the remaining claims because it found that Overstreet's losses involved concurrent causes and Overstreet had not carried his burden of proving how much damage came from the June 2018 storm alone. On appeal to the U.S. Court of Appeals for the Fifth Circuit, Overstreet argued that Allstate failed to produce evidence of a non-covered event or peril sufficient to invoke the concurrent-cause doctrine and, even if it had, the testimony of Overstreet's adjustor adequately attributed the losses entirely to the wind and hailstorm.

The Fifth Circuit certified three questions to the Supreme Court: 1) Whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs; 2) If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss; and 3) If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing 100% of the loss to that peril).

The Supreme Court accepted these questions. Oral argument is set for September 21, 2022.

2. Private Rights of Action

a) *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 620 S.W.3d 458 (Tex. App.—Dallas 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1166 (May 27, 2022) [21-0291], *consolidated for oral argument with ACS Primary Care Physicians Sw., P.A. v. UnitedHealthcare Ins. Co.*, *certified question accepted*, 65 Tex. Sup. J. 491 (Feb. 25, 2022) [22-0138]

The principal issue in these two cases is whether section 541.060 or section 1271.155 of the Insurance Code create an implied private right of action for claims that a health maintenance organization has reimbursed an emergency-care provider at improperly reduced rates.

In *Texas Medicine Resources*, a group of Doctors filed suit against an HMO, Molina Healthcare of Texas, Inc., alleging that Molina had reimbursed them for emergency care provided to Molina enrollees at improperly reduced rates in violation of section 1271.155. The Doctors also alleged violations of section 541.060, which governs insurers' settlement practices and alternatively sought to recover under a quantum-meruit theory.

Molina filed a plea to the jurisdiction challenging the Doctors' standing to bring suit under the Insurance Code, which the trial court granted. The court of appeals affirmed, holding that section 1271.155 does not create an implied private right of action because it already contains a "comprehensive enforcement mechanism." The Supreme Court granted the Doctors' petition for review.

In *ACS*, the plaintiffs are doctors who are out-of-network with the defendant health-plan administrator, UnitedHealthcare. The Doctors allege that UnitedHealthcare paid them "at unacceptably low rates" for emergency care the Doctors provided to patients enrolled in UnitedHealthcare's healthcare plans.

The Doctors sued UnitedHealthcare in state court, and UnitedHealthcare removed to federal court. After the district court dismissed some, but not all, of the Doctors' claims, UnitedHealthcare sought interlocutory review of two issues: (1) whether the emergency-care state statutes provide for an implied private right of action; and (2) if so, whether ERISA preempts the claims brought under the emergency-care statutes.

The Fifth Circuit accepted the interlocutory appeal and certified the following questions to the Court:

> Do sections 1271.155(a), 1301.0053(a), and 1301.155(b) of the Texas Insurance Code authorize Plaintiff Doctors to bring a private cause of action against [UnitedHealthcare] for UHC's failure to reimburse Plaintiff Doctors for out-of-network emergency care at a "usual and customary" rate? Do sections 1271.155(a), 1301.0053(a), and 1301.155(b) of the Texas Insurance Code authorize Plaintiff Doctors to bring a private cause of action against [UnitedHealthcare] for [UnitedHealthcare]'s failure to reimburse Plaintiff Doctors for out-of-

network emergency care at a "usual and customary" rate?

The Court accepted the certified questions. Oral argument for both cases is set for September 20, 2022.

J. INTENTIONAL TORTS

1. Defamation

a) *Lilith Fund for Reproductive Equity v. Dickson*, — S.W.3d —, 2021 WL 3930728 (Tex. App.—Amarillo 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1427 (June 17, 2022) [21-0978], *consolidated for oral argument with Dickson v. Afiya Ctr.*, 636 S.W.3d 247 (Tex. App.—Dallas 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1427 (June 17, 2022) [21-1039]

The primary issue in this appeal is whether an anti-abortion advocate is entitled to a TCPA dismissal of defamation claims brought for referring to certain abortion-related organizations as "criminal organizations."

The Afiya Center, Texas Equal Access Fund, and Lilith Fund are abortion advocacy funds that provide information and financial assistance to those seeking an abortion. Mark Lee Dickson, an anti-abortion advocate, began campaigning for cities to enact ordinances declaring abortion to be illegal within city limits and designating certain organizations—specifically including the Funds—as "criminal organizations." Following the passage of the ordinance in Waskom, Texas, Dickson made several statements reasserting that abortion was illegal and that the Funds were criminal organizations. After requesting a clarification from Dickson that he had no reason to believe that the Funds had committed a crime under federal or state law, the Funds brought two suits for defamation. Dickson filed motions to dismiss under the TCPA, which both trial courts denied.

Dickson appealed both cases. The court of appeals in one case, 21-0978, reversed the denial of Dickson's motion to dismiss. That court reasoned that Dickson's statements were protected opinion or hyperbole because a reasonable person would not take his statements literally. The court of appeals in the other case, 21-1039, affirmed the denial of the motion to dismiss. That court held that Dickson's statements were actionable because a reasonable person would understand that Dickson meant his statements to be taken literally, and they were false.

Both parties filed petitions for review. Dickson argues that his statements were all true, since Texas's pre-*Roe v. Wade* abortion statutes are still valid. These statutes, along with the local ordinances at issue, make it truthful to say that abortion is illegal and that the Funds are criminal organizations. He also argues that the statements are protected opinion or hyperbole. Finally, Dickson argues that there is no evidence of actual malice, since he believed (and still believes) that the statements were true when he made them.

The Funds argue that Dickson's statements cannot be considered opinion or hyperbole. The proper standard is what a reasonable person would believe the speaker intended. Here, the Funds argue that Dickson plainly

intended his statements to be understood literally as a fact, thereby disqualifying them as protected opinions. The Funds argue that Dickson's statements were verifiably false, making them actionable. In addition, the Funds argue that they need only show that Dickson acted negligently with regard to the truth. Dickson's legal theory is contradicted by an overwhelming body of law, making his statements based on it negligent.

The Supreme Court granted the petitions for review. Oral argument is set for October 26, 2022.

K. MEDICAL LIABILITY

1. Expert Reports

a) *Collin Creek Assisted Living Ctr., Inc. v. Faber,* 629 S.W.3d 630 (Tex. App.—Dallas 2021) (en banc), *pet. granted*, 65 Tex. Sup. Ct. J. 716 (Apr. 1, 2022) [21-0470]

The issue in this case is whether claims against an assisted living facility arising out of a resident's fall on the facility's sidewalk, pleaded as premises liability claims, are health care liability claims (HCLCs) under the Texas Medical Liability Act (TMLA) and therefore require an expert report.

Collin Creek operates a licensed assisted living facility. Carmelina Smith was a resident. Smith's daughter, Christine Faber, came to pick Smith up for an appointment. With Smith seated backwards in a rolling walker, a Collin Creek employee wheeled Smith's walker down a parking lot sidewalk to Faber's car. A wheel of the walker became caught in the sidewalk. The walker tipped over, and Smith suffered injuries. She died about a week later.

Faber sued Collin Creek, asserting negligence, negligent hiring, premises liability, and bystander claims. Collin Creek moved to dismiss the case for failure to timely serve an expert report under the TMLA, arguing that Faber's claims were HCLCs. Faber amended her petition to remove any claims of active negligence by Collin Creek, leaving only allegations based on the condition of the sidewalk. The trial court granted Collin Creek's motion to dismiss. The court of appeals panel affirmed. On en banc reconsideration, the court of appeals reversed, holding that Faber's live petition did not assert an HCLC and did not require an expert report.

Collin Creek filed a petition for review. Collin Creek argues that Faber's amended pleading does not change the nature of Faber's claims. If the underlying facts could support an HCLC, then the requirements of the TMLA apply regardless of what theory the plaintiff pleads. Here, the underlying facts include the employee's provision of health care to Smith, which could support an HCLC and require an expert report. Therefore, the trial court's dismissal was proper.

The Supreme Court granted Collin Creek's petition for review. Oral argument is set for October 5, 2022.

2. Periodic Payments

a) *Virlar v. Puente*, 613 S.W.3d 652 (Tex. App.—San Antonio 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1165 (May 27, 2022) [20-0923]

The issues in this case concern settlement credits, periodic payments, and admission of evidence in the context of a medical malpractice suit alleging negligence against a doctor and his employer.

Jo Ann Puente experienced complications from gastric bypass surgery. Dr. Jesus Virlar assumed her care and, although nurses reported Puente's difficulty walking, dizziness, vomiting, and other symptoms, Dr. Virlar did not read their notes and was unaware of the symptoms. Puente was discharged with orders from Dr. Virlar for total parenteral nutrition, a method of giving intravenous nutrients that may or may not include thiamine. Dr. Virlar's orders did not include thiamine. Puente's health began to progressively decline. She was diagnosed with Wernicke's syndrome, which progressed to Korsakoff's syndrome. Wernicke's syndrome is reversible with a thiamine supplement; Korsakoff's syndrome is not. Puente, along with her minor daughter and her mother, sued Dr. Virlar, his employing hospital (Gonzaba), and other health care providers. Puente alleged negligence and sought recovery for physical pain, mental anguish, loss of earning capacity, and medical expenses.

After a trial, the jury found for Puente and awarded her over $14 million in damages. Dr. Virlar and Gonzaba filed a motion for settlement credit, arguing that Virlar's daughter's settlement should be applied to the judgment, and a motion for periodic payments. The trial court denied both motions, and Dr. Virlar and Gonzaba appealed. The court of appeals affirmed in part and reversed in part. It held that the trial court did not err in excluding certain witness testimony, applying a settlement credit would violate the Open Courts Provision of the Texas Constitution, and the trial court did not err in denying the motion for periodic payments. It reversed the portion of the jury's award for future lost earnings due to insufficient evidence.

In their petition for review, Dr. Virlar and Gonzaba argue that the court of appeals erred by (1) holding that applying a settlement credit would violate the Open Courts Provision of the Texas Constitution, (2) denying the motion for periodic payments, (3) affirming the trial court's exclusion of certain testimony, and (4) affirming the trial court's admission of evidence of Dr. Virlar's loss of privileges and other alleged bad acts regarding other patients. The Court granted the petition for review. Oral argument is set for October 26, 2022.

L. NEGLIGENCE

1. Duty

a) *Mendez v. Hous. Harris Area Safety Council, Inc.,* 634 S.W.3d 154 (Tex. App.—Houston [1st Dist.] 2021), *pet. granted*, 65 Tex. Sup. J. 1427 (June 17, 2022) [21-0496]

The issue in this case is whether companies that collect and test employment-related drug-screen samples owe a duty of care to the third-party employees being screened.

Mendez was required to submit to a random drug screen as part of his employment. Houston Area Safety Council (HASC) was the trade association that collected Mendez's samples and Psychemedics was the drug-testing lab that tested his samples. Mendez's urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although a subsequent hair test came back negative, Mendez was terminated from his employment. After a third test came back negative, Mendez was rehired but not assigned to any jobsites, so he ultimately began working for another employer.

Mendez sued HASC and Psychemedics, alleging the companies negligently administered and analyzed the first hair sample, resulting in a false positive that cost him his job. Both companies filed motions for summary judgment. The trial court concluded the companies did not owe Mendez a duty of care and accordingly granted summary judgment for the companies. The court of appeals reversed, holding that the risk–utility factors weighed in favor of imposing a duty on the companies.

HASC and Psychemedics petitioned the Supreme Court for review. The Court granted the petition. Oral argument is set for October 25, 2022.

M. OIL AND GAS

1. Deed Construction

a) *Van Dyke v. The Navigator Group*, — S.W.3d —, 2020 WL 786330 (Tex. App.—Eastland 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1427 (June 17, 2022) [21-0146]

This case concerns a dispute between two families, the Mulkeys and the Whites over whether the 1924 deed conveying the estate from the Mulkeys to the Whites, which reserved "one-half of one-eighth" of the mineral rights in the Mulkeys, left the Mulkeys with 1/2 or 1/16 of the mineral estate. In the trial court, the Whites filed a motion for partial summary judgment, which the court granted, declaring that the 1924 deed is unambiguous and reserved only 1/16 of the mineral estate in the Mulkey grantors.

The court of appeals affirmed the summary judgment. It agreed with the trial court that the deed unambiguously conveyed 15/16 of the mineral estate to the Whites. It distinguished cases in which the Supreme Court of Texas and other courts of appeal took notice of the circumstances surrounding the historical use of the fraction 1/8 in deeds, because the deed in this case does not contain unclear language or conflicting provisions. Additionally, the court of appeals held that the Mulkeys failed to establish title under the presumed grant doctrine.

The Mulkeys' assignees appealed the ruling. They argue that the trial court and court of appeals erred in granting summary judgment for two reasons. First, a fact question exists regarding whether the 1924 deed conveyed 1/2 or 1/16 of the estate, because the lower courts failed to account for what the language of the deed meant in 1924 when it was drafted, and there is precedent from the Supreme Court that the use of the 1/8 fraction in a deed is evidence that the parties were operating under the estate misconception theory. Second, the court of appeals

incorrectly applied a "gap in title" requirement in evaluating the Mulkeys claim to title under the presumed grant doctrine.

The Supreme Court granted the petition for review. Oral argument is set for October 6, 2022.

2. Leases

a) *Apache Corp. v. Apollo Expl., LLC,* 631 S.W.3d 502 (Tex. App.—Eastland 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [21-0587]

This oil-and-gas lease dispute involves what respondents Apollo Exploration, Cogent Exploration, and Sellmoco's (collectively Sellers) rights are under purchase and sale agreements (PSAs) entered into with petitioner Apache Corporation (Apache).

Sellers and Gunn Oil Company came to own over 109 leases in the Bivens Ranch area, totaling 120,000 acres, with the biggest lease being 100,000 acres. This lease is divided into three equal blocks: North Block, South Block, and East Block. Sellers and Gunn Oil eventually sold 75% of their interests in these leases to Apache, each executing a separate PSA with Apache. These PSAs cover the distinct fractional interests Sellers and Gunn Oil have in the same 109 leases.

In time, Sellers sued Apache and requested a declaration of their rights under the PSAs. Gunn Oil, who sold its remaining lease interest to Apache soon after the lawsuit was first initiated, did not join. Sellers sought to determine how to calculate the formula that—given a certain output—provides Sellers the right to repurchase some of Apache's leases, Apache's duties with regards to maintaining its leases, and Apache's duty to offer to sell a failing lease interest under one PSA to all Sellers. The petition also alleges Apache breached the PSAs and committed various related torts. Apache filed motions for summary judgment challenging Sellers' various tort claims and requesting the trial court construe the PSAs and the North Block lease in a certain way. Specifically, Apache argued the PSAs allowed Sellers to repurchase leases once lease revenues doubled expenses, that Apache was not required to offer Sellers a failing lease interest under the Gunn Oil PSA, and that the North Block Lease termination date was January 1, 2016.

The trial court granted Apache's motion as to some of Sellers' tort claims but not all. The trial court granted Apache's motions on how to calculate the lease repurchase formula and on how to account for the working interest originally owned by Gunn Oil. It also granted Apache's motion on the North Block Lease, holding the lease expired on January 1, 2016. Having narrowed the scope of relevant evidence, Apache filed motions seeking to exclude the testimony of three expert witnesses Sellers had designated to testify on damages on relevancy and reliability grounds. One of those experts, Peter Huddleston, testified that the North Block Lease expired on December 31, 2015, and on how to calculate the working interest in the Gunn Oil lease. The trial court granted these motions. With these rulings secured, Apache then filed a no-evidence motion for summary judgment arguing Sellers could produce no evidence of damages for their remaining breach-of-contract and tort

claims. The court granted the motion and, after Sellers nonsuited their remaining claims, rendered a final judgment that Sellers take nothing on their claims and that Apache recover attorneys' fees.

The court of appeals affirmed in part, reversed in part, and remanded the case back to the trial court for further proceedings. The court of appeals affirmed the trial court that Sellers take nothing on some of their tort claims and on the exclusion of two of the damages experts. The CA reversed on (1) the expiration date of the North Block Lease, (2) the determination that Apache did not have to offer Sellers its failing lease interests under the Gunn Oil PSA, and (3) the lease repurchase formula. The court of appeals reasoned the lease expiration date was ambiguous, that the PSA required Apache to offer all Sellers a failing least interest, and that Apache had not conclusively established its meaning of the repurchase provision was correct. Because of the reversals on the first two issues, the court of appeals also reversed the trial court's order excluding expert Huddleston's damages testimony as to those issues. Consequently, the appeals court also reversed the no-evidence summary judgment order on damages and its award of attorneys' fees to Apache. In light of these rulings, the appeals court reversed the final judgment and remanded for further proceedings.

Apache petitioned the Supreme Court requesting a reversal of the court of appeals' judgment that (1) there were fact issues regarding the North Block Lease expiration date, (2) Apache's obligation to offer Sellers its failing lease interests under the Gunn Oil PSA, and that (3) Apache had not conclusively established the meaning of the lease repurchase provision. Lastly, Apache requests the Court reinstate the trial court's order granting Apache's no-evidence summary judgment order.

The Supreme Court granted the petition on June 3, 2022. Oral argument is set for October 27, 2022.

3. Royalty Payments

a) *Devon Energy Prod. Co. v. Sheppard*, 643 S.W.3d 186 (Tex. App.—Corpus Christi–Edinburg 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 716 (April 1, 2022) [20-0904]

At issue in this case is whether the parties' lease required Devon Energy to add postproduction costs incurred by third-party purchasers to the gross proceeds from sale before calculating Sheppard's royalty.

Sheppard sued Devon Energy for allegedly reducing royalty payments by failing to add postproduction costs. Devon Energy asserted it did not incur the costs at issue; they were instead incurred by downstream purchasers, and Devon Energy was not required to add post-sale costs to the royalty base. The parties stipulated to twenty-three issues, each addressing particular amounts that Devon Energy allegedly failed to add to the royalty base in violation of the lease. The trial court granted summary judgment for Sheppard on all twenty-three issues.

The court of appeals affirmed in part and reversed in part. The court noted that the royalty provision was "highly unique": the provision stated that certain sums "shall be added" to

the royalty base so that Sheppard's royalty is not charged "directly or indirectly" with postproduction costs. The court held that, per those terms, the plain language of the lease required Devon Energy to add expenses incurred by third-party purchasers to the royalty base. Applying the lease as so construed, the court of appeals held that some but not all the amounts at issue in the stipulated issues should have been added to the royalty base. Accordingly, the court of appeals affirmed summary judgment as to those amounts that should have been added and reversed summary judgment as to those that should not have been added.

Devon Energy petitioned for review. Devon Energy asserts that because the royalty is based on gross proceeds from sale, post-sale costs necessarily must not be included in the royalty base. Devon Energy argues that the court of appeals therefore erred, contending that the court construed the lease's terms in isolation and without regard for precedent construing gross-proceeds leases. Sheppard argues that the plain language of the lease controls over background principles and that Devon's argument renders portions of the lease surplusage.

The Supreme Court granted Devon Energy's petition for review. Oral argument is set for October 5, 2022.

N. PROCEDURE—PRETRIAL

1. Statute of Limitations

a) *Ferrer v. Almanza*, — S.W.3d —, 2021 WL 1011908 (Tex. App.—Amarillo Mar. 16, 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1427 (June 17, 2022) [21-0513]

The issue in this case is whether section 16.063 of the Texas Civil Practice and Remedies Code tolls the statute of limitations on an action when a resident defendant is physically absent from the state even though the defendant is still amenable to service by Texas courts.

This suit arises from a car accident involving Respondent Isabella Almanza and Petitioner Sibel Ferrer. Following the accident, Almanza left to attend college out of state. Ferrer filed a negligence suit two years later but named the wrong defendants. Ferrer did not name as a defendant and serve Almanza until after the statute of limitations had run on her claims. Almanza moved for summary judgment based on the statute of limitations. Ferrer asserted section 16.063 as a defense to the statute of limitations.

The district court granted summary judgment for Almanza. Ferrer appealed and the court of appeals affirmed. The court of appeals held that Supreme Court and circuit precedent holding that non-residents amenable to service in Texas were not absent for purposes of tolling the statute of limitations under section 16.063 applied to bar application of the tolling statute to Ferrer's claims.

Ferrer filed a petition for review arguing that the court of appeals erred because (1) section 16.063 explicitly tolls the statute of limitations when a Texas resident is physically absent from the state and (2) Supreme Court precedent to the contrary only applied to non-residents. The Supreme Court

granted the petition for review. Oral argument is set for October 6, 2022.

O. PROCEDURE—TRIAL AND POST-TRIAL

1. Error Preservation

a) *Altech, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 634 S.W.3d 84 (Tex. App.—Texarkana 2020), *pet. granted*, 64 Tex. Sup. Ct. J. 1730 (Sept. 3, 2020) [20-0507]

At issue in this case is whether a trial court is required to issue a written order after it sustains an evidentiary objection on the record. A second issue is whether the court of appeals erred in remanding for a new trial without addressing all of the appellant's rendition points.

A school district contracted for the installation of an artificial turf field. After the field began to degrade, the school district sued its general contractor and the manufacturer of the artificial turf. The general contractor moved for summary judgment, arguing that there was no evidence that it had breached any warranty. The school district responded that the construction contract specified a range of acceptable "G-Max" ratings and attached a report showing that the G-Max rating of the field exceeded that range. The general contractor objected to the admission of the report, arguing that it was not authenticated. The trial court sustained the objections on the record and entered summary judgment for the general contractor but did not enter a written order on the objections. The trial court also entered partial summary judgment for the manufacturer. After a five-day trial solely on the school district's claim for breach of express warranty against the manufacturer, a jury awarded the school district $175,000. The school district and the manufacturer cross-appealed. The court of appeals reversed summary judgment for the general contractor because of a lack of a written order on the evidentiary objections. It also affirmed the partial summary judgment against the manufacturer but vacated the judgment against the manufacturer without considering the manufacturer's rendition points.

The general contractor and the manufacturer appealed to this Court. The general contractor argues that the court of appeals was required to address its rendition points before remanding for a new trial.

The Court granted the petition for review and heard oral argument on November 30, 2021.

2. Future Interests

b) *Jordan v. Parker*, 632 S.W.3d 108 (Tex. App.—El Paso 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [21-0205]

This case presents a dispute over the current ownership of an undivided one-eighth interest in the mineral rights to a family ranch, which turns on the scope of a 1998 deed purporting to convey all the grantor's right, title, and interest in the ranch. At the time, the grantor owned an undivided one-eighth interest in fee simple and had a vested remainder interest in another undivided one-eighth interest ("the Disputed Interest"), which remained subject to his then-living mother's life estate in the ranch.

In 2016, the beneficiary of the now-deceased grantor's will, Ola Kathleen Parker, filed suit against the grantees of the 1998 deed, alleging she was the rightful owner of the Disputed Interest under various theories, including a claim for trespass to try title and an alternative claim for reformation of the 1998 deed. After the parties filed competing motions for summary judgment, the trial court issued a final judgment ordering that Parker take nothing on her claims. The court of appeals reversed the trial court's judgment, holding (1) that the discovery rule deferred accrual of Parker's claims until 2016, and (2) that the 1998 deed conveyed only the grantor's fee simple interest in the mineral estate and not the Disputed Interest.

Defendant Michelle Elise Parker Jordan petitioned the Supreme Court for review, arguing that (1) the court of appeals erroneously required special language to convey a vested remainder interest; (2) that Parker's reformation claim was based on a plain omission for which the discovery rule is inapplicable; and (3) that the trial court correctly rejected Parker's estoppel-based claims. The Court granted the petition for review. Oral argument is set for September 22, 2022.

3. Personal Jurisdiction

c) *State v. Volkswagen Aktiengesellschaft*, — S.W.3d —, 2020 WL 7640037 (Tex. App.—Austin 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 312 (Jan. 28, 2022) [21-0130], *consolidated for oral argument with State v. Audi Aktiengesellschaft*, — S.W.3d —, 2020 WL 7640037 (Tex. App.—Austin 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 312, (Jan. 28, 2022) [21-0133]

The sole issue in this appeal is whether Texas courts have personal jurisdiction over a nonresident defendant when that defendant directs its actions toward the United States as a whole, but not Texas specifically. Volkswagen Aktiengesellschaft (VW Germany) and its subsidiaries, including Audi Aktiengesellschaft (Audi Germany) and Volkswagen Group of America, Inc., violated U.S. environmental laws by installing defeat devices in their cars. Defeat devices reduce the effectiveness of a car's emissions system and are illegal in the United States. Seeking to avoid complying with federal environmental regulations, VW Germany and Audi Germany jointly decided to install defeat devices in their cars sold in the United States. When the defeat devices began to develop hardware failures, VW Germany and Audi Germany installed software fixes in in-use, post-sale cars throughout the United States. They did this by (1) issuing recalls and installing the software fixes and (2) updating the software when customers brought their cars in for normal maintenance. They never revealed the purpose of these software updates.

When these actions came to light, the State of Texas sued Volkswagen Group of America and other American entities in a civil environmental enforcement action, seeking civil penalties and injunctive relief for violations of the Texas Clean Air Act. Throughout the litigation, the parties have referred to the original factory installation of defeat devices as "original

tampering." They have used the term "recall tampering" for the allegations of installing the software fixes via recall and service campaigns. The American defendants moved for summary judgment, arguing that federal law preempted the State's claims. The State later added VW Germany and Audi Germany as defendants. The trial court granted partial summary judgment for the defendants on the original-tampering claims, denying it as to the recall-tampering claims. The German entities specially appeared; when the trial court denied their special appearances, the German entities filed an interlocutory appeal.

A divided court of appeals reversed and dismissed the claims against the German entities, holding that they had not purposefully availed themselves of Texas because they directed recall-tampering toward the United States as a whole, not Texas specifically. Texas courts therefore had no personal jurisdiction over them.

The State filed a petition for review, arguing that the German entities purposefully availed themselves of Texas's jurisdiction by effectuating the recall campaigns through an American subsidiary and by maintaining ongoing relationships with the cars. The German entities counter that because their conduct was directed toward the United States as a whole, not Texas specifically, they did not purposefully avail themselves of Texas. The Court granted the petition for review, consolidating the cases for oral argument. Argument was held on February 22, 2022.

P. TEXAS CITIZENS PARTICIPATION ACT

1. Applicability to Claims

a) Comcast Corp. v. Hous. Baseball Partners LLC, 627 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted*, 65 Tex. Sup. Ct. J. 1279 (June 3, 2022) [21-0641]

This case addresses whether the Texas Citizens Participation Act (TCPA) applies to claims for fraud, civil conspiracy, and breach-of-contract stemming from the sale of a major sports network.

In 2003, the Houston Astros and Houston Rockets formed the Houston Regional Sports Network to broadcast games to viewers in Houston and the surrounding area. In 2010, Comcast purchased an equity interest in the Network and signed an affiliate agreement in which it agreed to distribute Network programming to all Comcast subscribers in exchange for an "affiliate fee." The premise behind the parties' business plan was the Network would sign similar agreements with other distributors for the same rates. In November 2011, Jim Crane and his affiliate, Houston Baseball Partners (HBP), purchased the Astros and their interest in the Network. The Network ultimately became insolvent. In September 2013, Comcast filed an involuntary bankruptcy petition against the Network. HBP subsequently sued McLane (the Astros' former owner), Comcast, and their affiliates for fraud, negligent misrepresentation, and civil conspiracy. It also sued McLane's affiliate, Champions, for breach-of-contract and sought a declaratory judgment regarding Champions' indemnification obligations.

HBP claimed that Comcast and McLane made two sets of material misrepresentations when HBP was conducting due diligence prior to purchasing the Network: (1) that Comcast believed the affiliate rates were "reasonable" and "achievable," and (2) Comcast, rather than the Astros, proposed the affiliate rates.

Comcast removed the case to federal court where the bankruptcy action was pending. After abating the action for five years, the bankruptcy court remanded the case. On remand, McLane filed a TCPA motion to dismiss, which Comcast joined. The trial court denied McLane and Comcast's TCPA motion, and they filed an interlocutory appeal. The court of appeals affirmed. First, it held that even though HBP had assigned "all of [its] rights under the [Purchase Sales Agreement]" to its affiliate prior to the sale, it still had standing to sue. Next, it held that the trial court did not err in denying Comcast and McLane's motion to dismiss. It assumed without deciding that the TCPA applied to HBP's claims. However, it held HBP met its burden to establish the prima facie elements for all its claims.

Comcast and McLane petitioned the Supreme Court for review. First, they argue that HBP lacks standing to sue because it assigned all its claims to Holdings. Second, they argue that the court of appeals erred in holding that HBP established its prima facie case for its tort and breach-of-contract claims. Among other things, they argue that (1) the alleged misrepresentation that Comcast proposed the affiliate rates is not material, (2) the alleged misrepresentation that the affiliate rates were "reasonable" and "achievable" is a non-actionable opinion or prediction, and (3) regardless, HBP did not establish its justifiable reliance on the alleged misrepresentations. Finally, they argue that the TCPA applies to HBP's claims because they implicate Comcast's and McLane's exercises of the rights of free speech and association. The Supreme Court granted the petition for review. Oral argument is set for October 25, 2022.

Q. TEXAS TIM COLE ACT

1. Eligibility for Compensation

a) *Brown v. City of Houston, certified question accepted*, 65 Tex. Sup. Ct. J. 755 (April 8, 2022) [22-0256]

This certified question from the U.S. Court of Appeals for the Fifth Circuit concerns the Tim Cole Act's immunity statute.

Alfred Brown was wrongfully convicted of two murders, for which he served over twelve years in state prison. He was released in 2017 and filed a § 1983 action in federal district court against the City of Houston, Harris County, and three individuals, based on his wrongful prosecution and conviction. While that case was pending, Brown sought and eventually obtained compensation under the Tim Cole Act for his wrongful imprisonment.

The Tim Cole Act provides, however that a person who receives compensation the Act "may not *bring* any action involving the same subject matter . . . against any governmental unit or an employee of any governmental unit." Based on this statute, the federal district court granted summary

judgment in favor of the defendants and dismissed Brown's § 1938 case with prejudice, concluding that the state's payment for wrongful conviction under the Tim Cole Act "provides immunity to suits against state and local government entities and employees seeking additional payment for the same wrongful conviction." Brown appealed to the Fifth Circuit, contending that he may maintain his § 1983 suit because he filed it before he received compensation under the Tim Cole Act. He argued that the statute's plain language only proscribes bringing an action subsequent to receiving Tim Cole Act compensation.

After oral argument, the Fifth Circuit sua sponte certified this question to the
Court:

> Does Section 103.153(b) of the Tim Cole Act bar maintenance of a lawsuit involving the same subject matter against any governmental units or employees that was filed before the claimant received compensation under that statute?

The Court accepted the certified question. Oral argument is set for September 22, 2022.

R. TOXIC TORTS

1. Causation

a) *Helena Chemical Co. v. Cox*, 630 S.W.3d 234 (Tex. App.—Eastland 2020), *pet. granted*, 65 Tex. Sup. Ct. J. 1165 (May 27, 2022) [20-0881]

The issue in this case is whether the plaintiff–farmers presented sufficient reliable evidence to survive a no-evidence motion for summary judgment that herbicide from the defendant's aerial application caused their alleged injuries.

Helena arranged for a large-scale aerial application of a mesquite herbicide called Sendero. Sendero is known to cause damage to cotton plants. After this application, cotton farmers upwind of the application site reported crop damage. A state inspector traced the damage to Helena's application. Test results from some of the fields indicated exposure to one of Sendero's active ingredients—an ingredient used in other herbicides besides Sendero. The farmers harvested or plowed under the damaged crop.

The farmers sued Helena for two-years-worth of damage to 111 fields in total, pleading negligence, gross negligence, negligence per se, and trespass. They engaged expert witnesses to address causation. Helena moved to strike the expert testimony as unreliable and filed a no-evidence motion for summary judgment, arguing there was no evidence that Sendero from Helena caused the alleged damage. The trial court granted both motions. The court of appeals reversed in part, holding that most of the expert testimony was reliable, and that it, along with the state inspection and test results, constituted sufficient evidence to raise a fact issue as to causation.

Helena filed a petition for review. Helena argues that the farmers failed to link the damage to Helena's application because they insufficiently ruled out alternative causes. In addition, Helena argues that the farmers

failed to present evidence of dose-specific exposure to each of their 111 allegedly damaged fields, and that such a showing is required in order to survive summary judgment. Finally, Helena argues that the causation experts' opinions are unreliable because they are based on speculation.

The Supreme Court granted Helena's petition for review. Oral argument is set for October 26, 2022.

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