Case Summaries
May 27, 2022

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OPINIONS

FAMILY LAW
Termination of Parental Rights

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

Termination of parental rights is authorized if the factfinder finds by clear and convincing evidence both a statutory predicate ground for termination and that termination is in the child's best interest. 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. This evidence included: the condition of Father's home, which Department caseworkers testified was unsafe for a child; the evidence undermining Father's willingness and ability to independently parent J.W. and the uncertainty of his living arrangements; and the uncertain nature of Father's continued association with Mother and his ability to protect J.W. in light of that association. Father and Mother filed for divorce shortly before trial, purportedly to give Father a fresh start with J.W., but evidence was presented indicating that the divorce was a sham, that Mother and Father were in a

controlling relationship, and that Father was unable to put J.W.'s needs above Mother's. Much of the same evidence supported the jury's best-interest finding. In so holding, the Court reiterated that it is the jury's role to weigh conflicting evidence and witness credibility.

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, including searching for treatment facilities that would accept pregnant women and driving her from College Station to Houston every day for several weeks to receive treatment at a methadone clinic.

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.

REAL PROPERTY

Eminent Domain

Terrance J. Hlavinka, Kenneth Hlavinka, Tres Bayou Farms, LP, and Terrance Hlavinka Cattle Co. v. HSC Pipeline P'ship, LLC, —S.W.3d— (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 Texas Business Organizations Code Section 2.105, 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 Section 2.105 gives HSC condemnation authority, (2) whether authority conferred by that section 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 Texas Business Organizations Code Section 2.105 granted independent condemnation authority and that polymer-grade propylene qualifies as an "oil product" under that section, but the court reversed the summary judgment in favor of HSC because it concluded that whether the pipeline served a public use pursuant to *Denbury Green Pipeline-Tex., LLC, v. Tex. Rice Land Partners, Ltd.,* 510 S.W.3d 909 (Tex. 2017) 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 Section 2.105 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 the court of appeals 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.

GOVERNMENTAL IMMUNITY

Texas Whistleblower Act

City of Fort Worth v. Pridgen, —S.W.3d—, 2022 WL (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. TEX. GOV'T CODE §§ 554.001–.010.

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 Jacqueline Craig's lawyer's 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. Additionally, upon considering the Act's context and statutory framework, the Court held that to "report" under the Act, 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, self-verifying 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. It held that these recommendations amount 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.

PROCEDURE—APPELLATE

Jurisdiction

Warren Chen and Dynacolor, Inc. v. Razberi Tech., Inc., —S.W.3d—, (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 (*Chen II*). In a split decision, the panel determined that the Texas Supreme Court's 2021 opinion in *ERCOT, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, had validated the original disposition of the appeal by favorably citing to *Chen I*.

On petition for review, Chen argued that the previously perfected appeal was not moot because Rule 27.3 required the appellate court to treat the interlocutory appeal as an appeal from the final judgment and expressly made appealing the final judgment optional. Razberi maintained that Rule 27.3 did not apply because the prior order had not been vacated or modified, as the rule contemplates; accordingly, Chen's failure to perfect an appeal from the final judgment precluded disposition on the merits.

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. As the Court explained, this conclusion aligns with the analysis in *Roccaforte v. Jefferson County*, which held that 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." *Panda Power*, which presented a distinctly different procedural posture, did not hold otherwise.

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.

GOVERNMENTAL IMMUNITY

Federal civil rights

Pidgeon v. Turner, —S.W.3d— (Tex. May 27, 2021) (Devine, J., dissenting 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.

GRANTS

TOXIC TORTS

Causation

Helena Chemical Co. v. Cox, et al., 630 S.W.3d 234 (Tex. App.—Eastland 2020), pet. granted, 65 Tex. Sup. Ct. J. — (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 has not yet been set.

MEDICAL LIABILITY

Periodic Payments

Virlar v. Puente, 613 S.W.3d 652 (Tex. App.—San Antonio 2020), pet. granted, — Tex. Sup. Ct. J. — [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.

After Jo Ann Puente underwent gastric bypass surgery, she began to experience complications. 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. A date for oral argument has not yet been set.

ADMINISTRATIVE LAW

Judicial Review

Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc., 2020 WL 6696372 (Tex. App.— Dallas 2020), pet. granted, __ Tex. Sup. Ct. J. __ (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 a federal regulation, 7 CFR § 274.8(e)(1), 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 court of appeals misconstrued Section 274.8(e)(1). It claims the regulation only shields state agencies from liability and argues that 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 the court of appeals decided all issues correctly. Additionally, it 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. A date for oral argument has not yet been set.

EMPLOYMENT LAW

Whistleblower Actions

Tex. Health and Human Servs. Comm'n v. Pope, 2020 WL 2079093 (Tex. App.—Austin 2020), pet. granted, __ Tex. Sup. Ct. J. __ (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 HHSC 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. A date for oral argument has not yet been set.

GOVERNMENTAL IMMUNITY

Ultra Vires Claims

Texas Education Agency; Mike Morath, Commissioner of Education in his Official Capacity; and Doris Delaney, in her Official Capacity v. Houston Independent School District, No. 03-20-00025-CV (Tex. App.—Austin Dec. 30, 2020) pet. granted, ___ Tex. Sup. Ct. J. ___ (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 additionally, whether he acted *ultra vires* by assigning a conservator to oversee Houston ISD's governance. The second issue is whether Dr. Doris Delaney, a 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." Additionally, in 2016, Commissioner Morath appointed Dr. Delaney as a conservator to the District with an eye toward assisting the school. The second high school received "Academically Unacceptable" academic accountability ratings from 2011 to 2017, did not receive a rating for the 2017-2018 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 Special Accreditation 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. A date for oral argument has not yet been set.

INSURANCE

Private Rights of Action

Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc., 620 S.W.3d 458 (Tex. App.—Dallas 2021), pet. granted, — Tex. Sup. Ct. J. — (May 27, 2022) [21-0291]

The principal issue in this appeal 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 ("HMO") has reimbursed an emergency-care provider at improperly reduced rates.

Texas Medicine Resources, LLP, Texas Physician Resources, LLP, and Pediatric Emergency Medicine Group, LLP (collectively, the "Doctors"), filed suit against an HMO, Molina Healthcare of Texas, Inc. ("Molina"), 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 Doctors petitioned the Supreme Court for review. The Court granted the petition for review. Oral argument has not yet been set.

GOVERNMENTAL IMMUNITY

Contract Claims

City of League City, Texas v. Jimmy Changas, Inc., 619 S.W.3d 819 (Tex. App.—Houston [14th Dist.] Feb. 18, 2021), pet. granted, (May 24, 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 the agreement, Jimmy Changas would build a restaurant in the City. In return, 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 has not yet been set.

CONTRACT LAW

Oil-and-Gas Leases

MRC Permian Co. v. Point Energy Partners Permian LLC, 624 S.W.3d 643 (Tex. App.—El Paso 2021, pet. granted, — Tex. Sup. Ct. J. — (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 MRC missed that 180-day 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. So, the force majeure event, MRC alleges, was off-lease wellbore instability, which set off a chain reaction that delayed drilling the next well. Contrarily 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. For each well, the acreage is determined by three facts: (1) is it an oil or gas well; (2) is it vertical or horizontal; and (3) did its wellbore extend horizontally more than 5,000 feet or not. All wells in dispute are horizontal oil wells, so the only question is does each wellbore extend horizontally in the producing formation for at least 5,000 feet—except to one well, which MRC concedes it does not. 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. After much litigation, 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 has not yet been set.

ADMINISTRATIVE LAW

Judicial enforcement

City of Houston v. Houston Prof'l Fire Fighters' Ass'n, 626 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2021), pet. granted, — Tex. Sup. Ct. J. — (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." TEX. LOC. GOV'T CODE § 174.021. 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 section 174.021 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 Section 174.021" 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 section 174.152 concerning compensation, work hours, overtime, paid leave, staffing, and grievance procedures. The Association filed suit under section 174.252 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 Section 174.021 for one year." 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 174.021 and 174.252. 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 petitions this 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 has not yet been set.

FAMILY LAW

Termination of Parental Rights

In re A.A., G.A., & K.A., 2021 WL 4552573 (Tex. App.—Amarillo Oct. 5, 2021), pet. granted, — Tex. Sup. Ct. J. — (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 has not yet been set.

Insurance—Policies

Coverage

Harold Franklin Overstreet v. Allstate Vehicle & Property Ins. Co., 2022 WL 1579278 (5th Cir. 2022), certified question accepted, __ Tex. Sup. Ct. J. __ (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 paid Overstreet nothing because its adjuster 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. The case has not yet been set for oral argument.