Case Summaries
June 17, 2022

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OPINIONS

JURISDICTION

Standing

***Grassroots Leadership, Inc., et al. v. Texas Department of Family and Protective Services, et al.*, —S.W.3d—, 2022 WL — (Tex. June 17, 2022) [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 TEX. HUM. RES. CODE § 42.002(4) 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.

CORPORATIONS

Fiduciary Duties

***In re Estate of Poe,* — S.W.3d —, 2022 WL — (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.

PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

Trust Modification Proceedings

***In re Troy S. Poe Trust,* — S.W.3d —, 2022 WL — (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.

FAMILY LAW

Jurisdiction, Post-divorce Property Division

***S.C. v. M.B.,* — S.W.3d—, 2022 WL — (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 § 23.001. The legislature then enacted a new remedy, now, codified in Family Code §§ 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 § 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 § 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 § 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 § 9.203's neighboring subchapter, is full of references to exclusive jurisdiction, while the § 9.203 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—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 § 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.

PROCEDURE—PRETRIAL

Discovery

In re UPS Ground Freight, Inc., — S.W.3d —, 2022 WL — (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.

TAXES

Premium and Maintenance Taxes

Hegar v. Health Care Service Corporation, **— S.W.3d —, 2022 WL — (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.

PROCEDURE—PRETRIAL

Mootness & Discovery Breadth

***In re Contract Freighters, Inc. d/b/a CFI and Randall A Folks*, — S.W.3d—, 2022 WL —, (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 (collectively CFI) 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.

If the petition had become moot, the Court would lack subject-matter jurisdiction, and so the Court first addressed mootness. The Court found that the McPhersons' unilateral withdrawal of the challenged actions did not moot the case. This Court's decision in *In re Allied Chemical Corp.*, 227 S.W.3d 652 (Tex. 2007), shows that 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.

Since the case was not mooted by the unilateral withdrawal of the discovery

requests, the Court turned to the merits. In previous cases, this Court has found these kinds of fishing expeditions to be overly broad and burdensome as a matter of law. *See In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014). In *National Lloyds*, the Court held that a discovery request for a national search over multiple years with no attempt to relate the breadth to the underlying incident is impermissible under the rules of discovery. The Court likewise found that the discovery ordered in this case was "not merely an impermissible fishing expedition; [it was] an effort to dredge the lake in hopes of finding a fish." *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). The Court thus conditionally granted mandamus relief.

PROCEDURE—PRETRIAL

Summary Judgment

Weekley Homes, LLC v. Paniagua, — S.W.3d —, 2022 WL — (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 drew on its recent holding in *Regency Field Services, LLC v. Swift* to explain 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*.

NEGLIGENCE

Premises Liability

***United Supermarkets, LLC v. McIntire,* — S.W.3d —, 2022 WL — (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. On June 11, 2018, 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 Ford F-250 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.

FAMILY LAW

Termination of Parental Rights

***In the Interest of A.L.R., a Child,* — S.W.3d —, 2022 WL — (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 § 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. Tex. Fam. Code §§ 161.001(b)(1)(O) & (Q). The father appealed, arguing that his service plan—which phrased tasks as requests—was insufficiently specific to support termination under the Family Code 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's order on Subsection (Q).

PROCEDURE—PRETRIAL

Responsible Third-Party Designation

In re YRC, Inc., d/b/a YRC Freight, — S.W.3d —, 2022 WL — (Tex. June 17, 2022) [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. On January 25, 2021, 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 for March 2021—62 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, under *In re Coppola*, 535 S.W.3d 506 (Tex. 2017), 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 62 days before the March 2021 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. TEX. CIV. PRAC. & REM. CODE § 33.004(d). 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." TEX. R. CIV. P. 47(a). 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.

TEXAS ALCOHOLIC BEVERAGE CODE

Permits

***Gabriel Inv. Grp. v. Tex. Alcoholic Beverage Comm'n,* — S.W.3d —, 2022 WL — (Tex. June 17, 2022) [22-0062]**

This is a certified question case in which the Supreme Court answered questions posed by the United States Court of Appeals for the Fifth Circuit. The 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 45 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.

GRANTED CASES

GOVERNMENTAL IMMUNITY

Texas Tort Claims Act

***Rattray v. City of Brownsville,* — S.W.3d — 2020 WL 6118473 (Tex. App.—Corpus Christi–Edinburg 2020) pet. granted, — Tex. Sup. J. — (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.

Petitioners, Homeowners, experienced flooding after heavy rainfall. 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, 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.

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. 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 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 has not yet been scheduled.

ARBITRATION

Arbitrability

***MP Gulf of Mex., LLC v. Total E&P USA, Inc.*, 2020 WL 7392768, (Tex. App.—Tyler 2020), pet. granted, — Tex. Sup. Ct. J. — (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 was granted. Oral argument has not yet been set.

OIL AND GAS

Deed Construction

Van Dyke v. The Navigator Group, 2020 WL 786330 (Tex. App.—Eastland 2020), pet. granted, __ Tex. Sup. Ct. J. __ (June 17, 2022) [21-0146]

This case concerns a dispute over the relative quanta of ownership in a mineral estate owned by the assignees of two families, the Mulkeys and the Whites. The families dispute 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. An oral argument date has not yet been set.

CONTRACTS

Releases and Reliance Disclaimers

Austin Trust Co. v. Houren, No. 14-19-00387-CV, 2021 WL 970819 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. granted), ___ Tex. Sup. Ct. J. ___ (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 has not yet been scheduled.

NEGLIGENCE

Duty

***Mendez v. Houston Harris Area Safety Council, Inc.*, 634 S.W.3d 154 (Tex. App.—Houston [1st Dist.] 2021), pet. granted, (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 has not yet been set.

PROCEDURE—PRETRIAL

Statute of Limitations

***Ferrer v. Almanza,* 2021 WL 1011908 (Tex. App.—Amarillo Mar. 16, 2021), pet. granted, — Tex. Sup. Ct. J. — (January 28, 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 has not yet been set.

INTENTIONAL TORTS

Defamation

***Lilith Fund for Reproductive Equity v. Dickson,* 2021 WL 3930728 (Tex. App.—Amarillo 2021), pet. granted, 65 Tex. Sup. Ct. J. — (June 17, 2022) [21-0978], consolidated for oral argument with *Dickson v. Afiya Center*, 636 S.W.3d 247 (Tex. App.—Dallas 2021), pet. granted, 65 Tex. Sup. Ct. J. — (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 has not yet been set.