Case Summaries
September 02, 2022

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OPINIONS

SANCTIONS
Jury Trial
***Nath v. Tex. Children's Hosp. & Baylor Coll. of Med.**, 2021 WL 451041 (Tex. App.—Houston [14th] Feb. 9, 2021], pet. denied Sept. 2, 2022 [21-0547]*

This petition for review presented several issues, including whether the plaintiff was entitled to a jury finding on the reasonableness and necessity of compensatory attorney's fees awarded against a represented party as a sanction under Chapter 10 of the Texas Civil Practice and Remedies Code.

The appeal involved a long-running dispute between a doctor and his former employer and colleagues and a $1.4 million fee-shifting sanction against the doctor for filing frivolous and improper pleadings. In two prior appeals, the Supreme Court reversed the sanction and remanded to the trial court with instructions to reconsider the amount awarded. Each time, the trial court reimposed the same $1.4 million sanction, after denying the doctor's demand for a jury determination on that issue. Each time, the court of appeals affirmed.

The Supreme Court denied the petition for review, but Justice Devine, joined by Justice Busby, issued an opinion dissenting from the denial. The dissenting justices noted that the right to a jury trial on the amount of compensatory attorney's fees is well-established in the Court's precedent but whether the right extends to attorney's fees awarded as a sanction under Chapter 10 is an open question the Court should answer given the importance of the constitutional right at issue. Although the doctor had not pressed his right to a jury trial in the two prior appeals to the Court, the dissent found no waiver of the issue based on "[t]he long-standing majority rule . . . that when an appellate court remands all or part of a case without limitation, a party who waived a jury before the original trial may nevertheless demand a jury on the remanded issue or issues." In the doctor's original petition, and following remand, he had timely requested a jury determination on the reasonableness and necessity of the opposing party's claimed attorney's fees. This, the dissent said, was all that was required to invoke the constitutional privilege.

GRANTED CASES

PROCEDURE—TRIAL AND POST-TRIAL

Batson Challenge

United Rentals N. Am., Inc. v. Evans, 608 S.W.3d 449 (Tex. App.—Dallas 2020), pet. granted., 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [20-0737]

This wrongful-death case presents issues regarding (1) *Batson* challenges in jury selection, (2) the duty owed to motorists by equipment shippers who use independent carriers, (3) the sufficiency of the evidence to support non-economic damages, and (4) the admissibility of testimony regarding the interpretation of the Texas Administrative Code and the necessity of a limiting instruction.

United Rentals outsourced the transport of its boom lift and forklift, with Lares Trucking hired to transport the forklift. In a mix-up, Lares Trucking's driver Valentin Martinez picked up and transported the boom lift instead, resulting in an over-height load. During transport, the boom lift struck a low-clearance bridge and a bridge beam collapsed on a vehicle, fatally injuring the driver, Clark Davis. Davis's family sued United Rentals.

During voir dire, the trial court sustained the plaintiffs' *Batson* challenge to peremptory strikes United Rentals used on black women but denied United Rentals' *Batson* challenge to the plaintiffs' peremptory strikes on men, four of whom were white. At trial and over an objection, the trial court allowed an expert witness to testify about allocation of responsibility under the Texas Administrative Code and denied United Rentals' requested limiting instruction regarding the Texas Administrative Code's requirements. The trial court rendered judgment on a jury verdict, awarding the plaintiffs $2.79 million in compensatory damages, including for pain and mental anguish Davis suffered before his death.

The court of appeals affirmed, holding that (1) the trial court did not err in its *Batson*, evidentiary, and charge rulings; (2) as a party participating in the loading of the over-height equipment, United Rentals owed Davis a duty of reasonable care; (3) sufficient evidence supported the jury's finding that United Rentals' negligence proximately caused Davis's death and that Davis consciously experienced pain and anguish; and (4) the damages award was not excessive. Three justices dissented to the denial of en banc reconsideration.

The Supreme Court of Texas granted United Rentals' petition for review. Oral argument is set for November 30, 2022.

DAMAGES

Non-Economic Damages

Gregory v. Chohan, 615 S.W.3d 277 (Tex. App.—Dallas 2020), pet. granted., 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0017]

The primary issue in this case concerns the proper standard of review for non-economic damages in tort cases.

Sarah Gregory was driving a tractor trailer for her employer New Prime when the vehicle slid on an icy road. She lost control and jackknifed across the highway, starting a string of auto accidents that killed Bhupinder Singh Deol. Deol's family sued

Gregory, New Prime, and others involved in the accident. All but Gregory and New Prime settled.

Before trial, Gregory and New Prime identified other drivers and their employers as responsible third parties, but the trial court struck those designations. The jury apportioned fifty-five percent of the responsibility to Gregory and thirty percent to New Prime. The jury awarded Deol's family $16,447,272.31 in economic and non-economic damages.

Gregory and New Prime appealed. The court of appeals, sitting en banc, affirmed. It held that the trial court did not err by striking Gregory's motion to designate responsible third parties. It rejected New Prime's argument that the noneconomic damages were excessive and were not individualized.

Gregory and New Prime petitioned the Supreme Court for review. They argue that the court of appeals applied the wrong standard of review regarding the non-economic damages and no objective standard supports the non-economic damages awarded here. They also argue that insufficient evidence supports the mental anguish damages awarded. Finally, they argue that the trial court erred by striking their responsible-third-party designations.

The Court granted Gregory and New Prime's petition and set oral argument for November 30, 2022.

PROCEDURE—TRIAL AND POST-TRIAL

Order Granting New Trial

In re Rudolph Auto., LLC D/B/A Rudolph Mazda, 616 S.W.3d 171 (Tex. App.—El Paso 2020), pet. granted, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0135]

At issue in this case is whether the trial court abused its discretion by granting plaintiff a new trial. Plaintiff was severely injured when her coworker struck her with his truck on the premises of their employer, a car dealership. Both plaintiff and the coworker had been drinking alcohol on the dealership's premises. Plaintiff brought tort claims against the dealership, the coworker who struck her, and a third coworker who had purchased the alcohol. A jury awarded plaintiff roughly $4 million in damages.

In response to Question 1, the jury found that neither plaintiff nor the coworker who struck her were acting in the scope of their employment when the accident occurred, but the jury found that the coworker who purchased the alcohol was acting in the scope of his employment. In response to Question 2, the jury found that any negligence by the dealership did not proximately cause plaintiff's injuries, but in response to Question 4, the jury assigned the dealership 10% responsibility. The trial court denied the dealership's motion to disregard the jury's answer to Question 4, and it granted plaintiff's motion for new trial. The court of appeals denied the dealership's mandamus petition with one justice dissenting.

In the Supreme Court, the dealership challenges each of the reasons given by the trial court in its order granting a new trial. One issue is whether the trial court erred by concluding that the jury's no-negligence finding in response to Question 2 and its assignment of responsibility to the dealership in response to Question 4 create an irreconcilable conflict. Other issues are whether *Painter v. Amerimex Drilling I, Ltd.* supports the trial court's decision to grant a new trial to reconsider arguments about whether plaintiff and the individual defendants were acting in the scope of employment

and whether a new trial is justified either by allegedly prejudicial testimony by the dealership's expert witness or by the jury's relatively small non-economic damages award to plaintiff.

The Court has granted review of the dealership's mandamus petition. Oral argument is set for December 1, 2022.

OIL AND GAS

Release Provisions

Finley Res., Inc. v. Headington Royalty, Inc., 623 S.W.3d 480 (Tex. App.—Dallas 2021), pet. granted, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0509]

This case presents issues concerning the scope of a release provision in an acreage swap agreement between two oil-and-gas lessees.

Finley owned leasehold rights to the shallow minerals (up to 5,000 feet deep) on a tract of land in Loving County ("Loving Tract") pursuant to the Arrington Lease. Headington held a leasehold interest in the "deep rights" (below 5,000 feet) on the same tract under the same lease. Petro Canyon obtained a top lease from WIRC, LLC entitling it to mineral rights for the entire Loving Tract upon termination of the Arrington Lease. In June 2017, Petro notified Finley that the Arrington Lease may have terminated due to Finley's failure to produce in paying quantities. They entered into an agreement in which Finley assigned its rights under the Arrington Lease to Petro's affiliate, and Petro agreed to assume all liabilities Finley incurred with respect to the Loving Tract. Finley notified Headington of its intent to plug and abandon its wells, and Headington took the position that the notice was too late because the Arrington Lease, including Headington's interest, had terminated before the assignment due to Finley's failure to produce. Petro and Headington subsequently entered into an acreage swap agreement whereby Petro assigned its interest in the Loving Tract to Headington in exchange for Headington's interest in other tracts. The agreement included a release provision in which Headington released Petro "and its affiliates and their respective officers, directors, shareholders, employees, agents, predecessors and representatives" for any claims and liabilities related to the Loving Tract.

Headington sued Finley, seeking recovery of damages stemming from the termination of Headington's rights under the Arrington Lease. Petro intervened, arguing Headington had released its claims against Finley by virtue of Finley's status as a "predecessor" of Petro with respect to the lease rights. The trial court rendered summary judgment for Finley and Petro, holding that the word "predecessor" in the release included a predecessor in title to the subject property interest.

A divided court of appeals reversed, holding that the word "predecessors" in the release did not unambiguously include Finley because it was included with a list of terms that relate to corporate composition or structure, not to real-property interests. Accordingly, the release did not apply to Finley—a predecessor in title. For essentially the same reason, the court of appeals held that Finley did not qualify as a third-party beneficiary of the release.

Petro and Finley filed petitions for review, arguing that the court of appeals ignored ordinary rules of contract interpretation and instead applied a narrow, and erroneous, construction of the release. The Supreme Court granted the petitions for review and will hear oral argument on November 30, 2022.

GOVERNMENTAL IMMUNITY

Texas Tort Claims Act

Fraley v. Tex. A&M Univ. Sys., — S.W.3d —, 2021 WL 3282161, at *3 (Tex. App.—Amarillo July 30, 2021), pet. granted, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0784]

This case results from a single-vehicle accident after Texas A&M University changed the design of an intersection and presents the issues of (1) the scope of an exception to the waiver of governmental immunity under the Texas Tort Claims Act for a governmental unit's exercise of discretionary powers, (2) when an off-road defect constitutes a special defect under the act, and (3) whether a plaintiff should be provided an opportunity to replead when the defendant's plea to the jurisdiction challenges only the failure to plead sufficient facts and not the existence of facts establishing jurisdiction.

Kristopher Fraley sued the University for claims of premises defect, special defect, and negligent implementation, asserting that after the University converted a four-way intersection to a T-intersection by changing a portion of an existing road to a drainage ditch without warning or safety devices, Fraley suffered injuries sustained in a single-vehicle accident. The University filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied.

The court of appeals reversed, concluding that (1) the University's decisions to eliminate a roadway and to not install new traffic safety devices are discretionary design decisions, (2) the redesign of the intersection is not within the same class as an obstruction or excavation and therefore is not a special defect under the Texas Tort Claims Act, and (3) Fraley did not plead any allegations of a misuse of tangible personal property. Noting that an amended petition could not cure the jurisdictional defects, the court of appeals dismissed Fraley's claims rather than provide an opportunity to replead.

Fraley petitioned the Supreme Court of Texas for review, arguing that he pleaded facts sufficient to waive the University's government immunity under the act and that even if not, he was entitled to the opportunity to replead to cure the jurisdictional defect. The Court granted Fraley's petition for review. Oral argument is set for November 29, 2022.

GOVERNMENTAL IMMUNITY

Arm of the Government

In re Elec. Reliability Council of Tex., Inc., argument granted on pet. for writ of mandamus, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0834], consolidated for oral argument with **CPS Energy v. *Elec. Reliability Council of Tex., Inc.***, 2022 WL —, — S.W.3d — (Tex. App.—San Antonio 2021), pet. granted., 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [22-0056]

The primary issues in these cases are whether the Electric Reliability Council of Texas (ERCOT) is a "governmental unit" entitled to an interlocutory appeal from the denial of a plea to the jurisdiction and whether ERCOT has governmental immunity from suit.

ERCOT is the system administrator for Texas's power grid. CPS Energy is a municipally owned utility. CPS sued ERCOT for its actions during the winter storm of February 2021. CPS claimed that ERCOT improperly kept energy prices raised, resulting in overcharges to energy-market participants like CPS and that ERCOT unlawfully adjusted CPS's account to make up for other participants' defaults. ERCOT filed a plea to the jurisdiction arguing that the Public Utility Council of Texas (PUC) had exclusive jurisdiction over CPS's claims and asserting governmental immunity. The trial court denied the plea.

ERCOT appealed under the interlocutory-appeal statute permitting "governmental unit" from taking an interlocutory appeal from a denial of a plea to the jurisdiction. It also filed a mandamus arguing that it enjoyed governmental immunity. The court of appeals held that ERCOT was a governmental unit that could take an interlocutory appeal under the statute. It therefore dismissed ERCOT's mandamus and, in the appeal, reversed the trial court's denial of ERCOT's plea to the jurisdiction. The court held that the PUC has exclusive jurisdiction over CPS's claims. And because CPS had failed to exhaust its administrative remedies, the court of appeals rendered judgment dismissing CPS's claims.

CPS petitioned the Supreme Court for review, and ERCOT filed a mandamus petition. In its mandamus, ERCOT maintains that it is entitled to governmental immunity. In its petition for review, CPS argues that ERCOT is not a governmental unit that can take an interlocutory appeal and that the PUC does not have exclusive jurisdiction over its claims. The Supreme Court granted CPS's petition for review and granted argument on ERCOT's mandamus petition. Oral argument is set for January 9, 2023.

REAL PROPERTY

Subrogation

PNC Mortg. v. Howard, 2021 WL 4236873 (Tex. App.—Dallas 2021), pet. granted, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-0941]

The issue is whether the statute of limitations bars a refinancing lender's equitable-subrogation claim.

In 2003, the Howards bought a home using two purchase-money mortgages. Two years later, they refinanced with Bank of Indiana, using that loan to pay off the earlier mortgages. In March 2008, the bank assigned the Howards' note and deed of trust to National City Mortgage Company (which later merged with PNC), and the Howards stopped making payments in November. National City accelerated the refinance note on June 19, 2009, and the parties dispute whether PNC later abandoned that acceleration. In the spring of 2010, Bank of Indiana accelerated and foreclosed despite the earlier assignment to National City. The Howards sued Bank of Indiana, seeking a declaration that the foreclosure sale was void; because Bank of Indiana's acceleration notice identified PNC as the mortgage servicer, the Howards also named PNC as a defendant. In January 2015, after the trial court granted partial summary judgment for the Howards declaring the sale void, PNC filed counterclaims for contractual and equitable subrogation and to foreclose the lien. PNC also filed a separate suit against the Howards for damages based on their failure to comply with the note's obligations. The two suits were consolidated.

The trial court held a bench trial and rendered a take-nothing judgment against PNC, ordering that the note and lien on the Howards' property were void. The court of appeals affirmed, and the Supreme Court reversed and remanded to the court of appeals. On remand, the court of appeals again affirmed, holding that the equitable-subrogation claim accrued on the maturity date of the refinancing loan—the date the loan was accelerated in June 2009—and was thus barred by the four-year statute of limitations.

PNC filed a petition for review, arguing that an equitable-subrogation claim accrues not on the maturity date of the new refinance debt, but on the maturity date of the original debt that the funds from the refinance loan were used to discharge. The Supreme Court granted the petition for review and will hear oral argument on December 1, 2022.

PRETRIAL PROCEDURE

Compulsory Joinder

In re Kappemeyer, 2021 WL 5577761 (Tex. App.—Corpus Christi—Edinburg Nov. 30, 2021], argument granted on pet. for writ of mandamus, 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [21-1063]

The principal issue in this case is whether individual homeowners are required to join all 700 of a community's other homeowners to secure a declaration that the homeowner's association cannot enforce restrictive covenants the association unilaterally amended to subject the plaintiffs to the association's enforcement authority. The trial court granted the association's motion to abate and ordered the plaintiff homeowners to join and serve all 700 homeowners within 90 days on pain of dismissal. The court of appeals summarily denied mandamus relief.

On petition for writ of mandamus to the Supreme Court, the plaintiff homeowners assert that joinder is not compulsory because they seek only a declaration preventing enforcement of the restrictive covenants against them and the Declaratory Judgments Act expressly states that a declaration of rights does not prejudice the rights of any person not a party to the lawsuit. They further contend that Rule 39 of the Texas Rules of Civil Procedure does not require joinder of all homeowners because the association acted unilaterally in amending the restrictive covenants and because the association failed to meet its burden to demonstrate that the other homeowners have "claim[ed] an interest relating to the subject of the action."

In opposition, the association argues that the other homeowners claim an interest in the litigation through their deeds because (1) the litigation impacts their property rights and (2) the findings necessary to grant the requested declaration would either invalidate the amended restrictive covenants entirely or allow the plaintiffs to avoid paying what the association has deemed their "fair share" of the upkeep for community amenities. The association further maintains that, without joinder, it would be at risk of multiple lawsuits and inconsistent obligations with respect to the nonparty homeowners.

Oral argument on the mandamus petition is set for December 1, 2022.

GOVERNMENTAL IMMUNITY

Arm of the Government

Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC, 641 S.W.3d 893 (Tex. App.—Dallas 2022), pet. granted., 65 Tex. Sup. Ct. J. — (Sept. 2, 2022) [22-0196]

The primary issue in this case is whether the Electric Reliability Council of Texas (ERCOT) enjoys governmental immunity.

ERCOT is the system administrator for Texas's power grid. It publishes reports on its predictions for the state's capacity and demand for energy. Panda relied on those reports when it decided to construct new power plants. When ERCOT later revised its predictions to indicate an excess of energy instead of a shortfall, Panda sued for fraud, negligent misrepresentations, and breach of fiduciary duty.

ERCOT filed a plea to the jurisdiction arguing that the Public Utility Council of Texas (PUC) had exclusive jurisdiction over Panda's claims and asserting governmental immunity. The trial court denied the plea. ERCOT appealed and filed a mandamus petition. The court of appeals reversed. Panda filed a mandamus petition in the Supreme Court, and ERCOT filed a conditional petition for review. Meanwhile, Panda also filed another petition for review in the court of appeals, which abated pending the Supreme Court's decision. But because of that appeal, the Supreme Court dismissed both petitions before it as procedurally moot.

The court of appeals reinstated Panda's appeal and held, in an en banc opinion, that ERCOT is not entitled to governmental immunity and that the PUC does not have exclusive jurisdiction over Panda's claims.

ERCOT again petitioned the Supreme Court for review. The Court granted EROT's petition and set oral argument for January 9, 2023.