



## Case Summaries November 18, 2022

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### OPINIONS

#### PROCEDURE—APPELLATE

##### Judicial Appointments

*State v. Volkswagen Aktiengesellschaft*, consolidated for oral argument with *State v. Audi Aktiengesellschaft*, \_\_\_ S.W.3d \_\_\_, 2022 WL \_\_\_ (Tex. Nov. 18, 2022) (per curiam) [[21-0130](#), [21-0133](#)]

The issue addressed in this per curiam opinion is whether the Governor may appoint and commission substitute justices to participate in the Court's determination of a case in which the State of Texas is a party.

The State sued several related entities, including two German companies (Volkswagen Aktiengesellschaft and Audi Aktiengesellschaft), for alleged violations of state environmental laws. The German entities filed special appearances challenging the court's exercise of personal jurisdiction over them, which the trial court denied. A divided court of appeals reversed and dismissed the State's claims against the German entities. The State filed petitions for review. The Court granted the petitions and consolidated them for oral argument, which was held on February 22, 2022.

While the cases were pending, two of the Court's nine justices recused sua sponte. Relying on Government Code Section 22.005, the Chief Justice requested that the Governor commission two new justices to participate in the determination of these cases. The German entities objected to this procedure on various grounds. They argued that if the seven remaining justices cannot reach a five-justice majority, the Court should dismiss the petitions as improvidently granted.

The Court denied the German entities' objections. The Court first held that the Governor's appointment of justices to participate in determining these cases would not allow the State to be the judge of its own cause. The Governor is not the party bringing the underlying lawsuit—the suit was brought by the Attorney General at the request of the Texas Commission on Environmental Quality. The Court concluded that party status cannot be imputed on the Governor and the mere fact that justices are appointed by the Governor is no basis for claiming they would be acting on the State's behalf. The Court next held that the Governor's appointments do not violate due process. Neither the Governor nor the appointed justices have the type of personal or pecuniary interest in the outcome of these cases that would create a serious, objective risk of actual bias. And adopting the German entities' theory would prohibit the appointment of any substitute justice, which could prevent the Court from resolving the case. Finally, the

Court concluded that Texas’s procedural rules and ethical canons do not require the automatic disqualification or recusal of any justice appointed by the Governor. The mere fact that the Governor selected the justices to participate in these cases would not create in reasonable minds a perception that these justices would be unable to carry out their responsibilities with integrity, impartiality, and competence.

The Court set this case to be re-argued on January 9, 2023.

## **PROCEDURE—APPELLATE**

### **Dismissal**

*Alsobrook v. MTGLQ Invs., LP*, \_\_\_ S.W.3d \_\_\_, 2022 WL \_\_\_ (Tex. Nov. 18, 2022) (per curiam) [[22-0079](#)]

This case concerns the proper procedure for dismissal when a case becomes moot prior to the filing of the appeal. Mortgagee MTGLQ Investors sought to foreclose on Courtney Alsobrook’s property. Alsobrook filed suit and obtained a temporary injunction. After the injunction expired and Alsobrook did not move to extend it, the trial court granted summary judgment in MTGLQ’s favor, and MTGLQ successfully foreclosed on the property.

Alsobrook appealed. MTGLQ moved to dismiss the appeal as moot because Alsobrook was no longer the owner of the property. The court of appeals granted the motion and dismissed the appeal. Alsobrook then sought review in the Supreme Court, arguing that the court of appeals should have also vacated the trial court’s judgment.

In a per curiam opinion, the Supreme Court held that the court of appeals erred by failing to vacate the lower court’s judgment. The Court reiterated its long-standing practice of setting aside all previous orders when a case becomes moot on appeal. The Court also held that, under Rule of Appellate Procedure 43.2(f), the court of appeals should have dismissed the “case,” not the “appeal.” The Court therefore modified the court of appeals’ judgment to vacate the trial court’s judgment. The Court dismissed the case and affirmed the court of appeals’ judgment as modified.

## **GRANTED CASES**

### **GOVERNMENTAL IMMUNITY**

#### **Condemnation Claims**

*Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1*, 627 S.W.3d 529 (Tex. App.—Corpus Christi—Edinburg 2021), *pet. granted* (Nov. 18, 2022) [[21-0507](#)]

The issue presented in this case is whether a governmental entity possesses immunity against another co-equal governmental entity’s exercise of its eminent domain authority. If immunity exists, an additional question is whether the Legislature has waived that immunity by granting to the condemnor in the Water Code the power to condemn “any land.”

The Hidalgo County Water Improvement District Number 3 is statutorily empowered to “acquire by condemnation any land” to improve water resources within its jurisdiction. The Improvement District sought to extend a water pipeline under a canal that the Hidalgo County Water Irrigation District Number 1 owns. The Improvement District and the Irrigation District could not agree to terms for an easement. The Improvement District then filed this condemnation suit. The Irrigation

District responded with a plea to the jurisdiction, claiming that it is immune from suit.

The trial court granted the Irrigation District's plea, and the court of appeals affirmed. The court of appeals pointed to caselaw stating that governmental entities enjoy immunity against all suits for land. The court then concluded that by empowering water districts to condemn "any land," the Legislature had not unambiguously waived the immunity possessed by a governmental condemnee.

The Improvement District petitioned for review, arguing that the Supreme Court historically has not applied immunity in intragovernmental condemnation cases and that to apply it in this context would not serve immunity's underlying purposes. The Improvement District argues in the alternative that even if immunity would otherwise apply, the Legislature waived it in the Water Code. The Court has granted review. Oral argument has not yet been set.

## **INSURANCE**

### **Rescission of Policy**

*Arce v. Am. Nat'l Ins. Co.*, 633 S.W.3d 228 (Tex. App.—Amarillo 2021), *pet. granted* (Nov. 18, 2022) [[21-0843](#)]

The primary issue in this case is whether an insurer's ability to rescind a life insurance policy based on an applicant's material misrepresentation requires proof of the applicant's intent to deceive.

Sergio Arce applied for life insurance from American National Insurance Company. He did not disclose on his application that he had been diagnosed with hepatitis C and suffered from related health problems. Thirteen days after the policy was issued, he died in a car accident. His mother, Bertha, made a claim for benefits. American National denied the claim after discovering that Sergio had misrepresented his medical history.

Bertha Arce sued American National for breach of contract and violations of the Texas Insurance Code. The trial court granted summary judgment for American National, rescinding the policy and dismissing Arce's claims. The court of appeals reversed, concluding that a genuine issue of material fact exists as to whether Sergio intended to deceive American National on his insurance application.

American National petitioned the Supreme Court for review, arguing that the common law intent-to-deceive element for rescission claims conflicts with the recodified Insurance Code's unambiguous text, which does not require an intent to deceive except for policies in place longer than two years. American National asserts that requiring an intent to deceive for all rescission claims would eliminate that statutory distinction.

The Court granted American National's petition for review.