Case Summaries
January 27, 2023

Case summaries are prepared by court staff as a courtesy. They are not a substitute for the actual opinions.

OPINIONS

ARBITRATION

Enforcement of Arbitration Agreement

Taylor Morrison of Tex., Inc. v. Skufca, ___ S.W.3d ___, 2022 WL ___ (Tex. Jan. 27, 2023) (per curiam) [21-0296]

The issue in this case is whether children who sue with their parents for construction defects in their family home have joined their parents' contract claims—and therefore may be compelled to arbitrate under their parents' arbitration agreement—when the petition fails to distinguish between the parents' and children's causes of action.

Jack and Erin Skufca purchased a home from homebuilding company Taylor Morrison. The purchase agreement included an arbitration provision. The Skufcas allege that less than a year after moving in, the home developed significant mold problems that caused their children to be continuously ill. They sued Taylor Morrison for construction defects and fraud. The Skufcas' petition included both Mr. and Mrs. Skufca as plaintiffs, as well as Mrs. Skufca as next friend of the couple's two minor children. The Skufcas' petition, however, did not distinguish between the parents and children in any of its causes of action, including the breach-of-contract claim.

Taylor Morrison moved to compel the Skufcas to arbitrate. The trial court denied the motion as it pertained to the children. Taylor Morrison appealed, arguing that direct-benefits estoppel—the principle that a litigant who sues based on a contract subjects himself to the contract's terms, including its arbitration provision—requires the children to arbitrate their claims. The court of appeals affirmed, holding that direct-benefits estoppel did not apply because, based on its reading of the petition, the children did not actually join the breach-of-contract claim.

The Supreme Court reversed. The Court held that, because the breach-of-contract claim simply referred to "Plaintiffs" and did not distinguish between the parents and the children, the children joined their parents' breach-of-contract claim. The children were thus subject to their parents' arbitration agreement through direct-benefits estoppel. Moreover, even if the children had asserted only tort and other noncontractual claims, they would still be compelled to arbitrate because they sought direct benefits from their parents' purchase agreement by living in the home and suing for factually intertwined construction-defect claims.

ARBITRATION

Enforcement of Arbitration Agreement

Taylor Morrison of Tex., Inc. v. Ha, ___ S.W.3d ___, 2022 WL ___ (Tex. Jan. 27, 2023) (per curiam) [22-0331]

The issue in this case is whether a spouse and minor children may be compelled to arbitrate pursuant to the other spouse's arbitration agreement when the family sues for construction-defect claims concerning their family home.

Tony Ha signed a purchase agreement to buy a home from homebuilding company Taylor Morrison. The purchase agreement included an arbitration provision. Mr. Ha later sued Taylor Morrison, alleging that the home had developed significant mold problems and asserting claims based on construction defects and fraud. He was joined in the suit by his wife, Michelle Ha, and their three minor children. In their original petition, the Ha family collectively asserted a number of claims, including breach of contract. They later amended their petition, however, so that only Mr. Ha asserted the breach-of-contract claim. The trial court granted Taylor Woodrow and Taylor Morrison's motion to compel arbitration with respect to Mr. Ha, but it denied the motion as to Mrs. Ha and the children. The court of appeals affirmed.

The Supreme Court reversed. Under direct-benefits estoppel, litigants who sue based on a contract or who otherwise seek direct benefits from the contract subject themselves to its terms, including any arbitration provision. The Court held that direct-benefits estoppel applies in this case because Mrs. Ha and the children sought direct benefits from Mr. Ha's purchase agreement by living in the home. When a spouse and minor children live in a family home purchased by the other spouse, they have accepted direct benefits from the other spouse's purchase agreement such that they may be compelled to arbitrate under that agreement's arbitration provision when the family sues as an integrated unit for factually intertwined construction-defect claims.

GRANTED CASES

INSURANCE

Policies/Coverage

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Exxon Mobil Corp., 2021 WL 4268898 (Tex. App.—Houston [1st Dist.] 2021), *pet. granted* (Jan. 27, 2023) [21-0936]

The issue in this case is whether Exxon Mobil is considered an "additional insured" under National Union's umbrella policy or Starr Indemnity & Liability Insurance's bumbershoot policy.

This case arises out of a workplace accident where two contract employees were severely burned by a discharge of hot water. Exxon settled with the employees for a little over $24 million. Some of the settlement was covered by general-liability insurance policies obtained under a service agreement between Exxon and the contractor, Savage Refinery Service. Exxon paid the rest out of pocket. The service agreement required Savage to obtain at least $2 million in commercial general liability insurance and to name Exxon as an "additional insured." As a result, Savage obtained four different policies: (1) a $25 million bumbershoot commercial general liability policy from Starr, (2) a $25 million umbrella commercial general liability policy from National Union, (3) a $4.5 million primary commercial general liability policy from National

Union, and (4) a $1 million marine general liability/or AEL master liability from National Union/or AIG Europe Limited. After the accident, the smaller policies paid out, but the larger policies did not.

Exxon brought breach of contract claims against Starr and National Union for their failure to recognize Exxon as an "additional insured" on these larger policies. Exxon, National Union, and Starr filed competing motions for summary judgment. The trial court (1) granted Starr's motion against National Union and Exxon; and (2) granted Exxon's motion against National Union, holding National Union liable to Exxon for over $20 million under the umbrella policy. National Union and Exxon both appealed.

The court of appeals reversed and rendered in part and affirmed in part. It held that the trial court erred in granting Exxon's motion against National Union because Exxon's status as an "additional insured" only extended to primary coverage, not to the umbrella policy. The court also affirmed the trial court's decision in favor of Starr, reasoning that because the bumbershoot policy is an umbrella policy, Exxon had no contractual right to coverage.

Exxon filed a petition for review in the Supreme Court arguing that it should be considered an "additional insured" under both the National Union and Starr policies. Exxon reasons that under incorporation-by-reference principles, a document may be incorporated for the limited purpose of ascertaining who is insured or what risks are covered. Thus, Exxon argues, the documents here evidence that the primary policies intended to extend coverage to include Exxon as an additional insured under the umbrella policies. The Court granted the petition for review and set oral argument for 9 a.m. February 23.

CORPORATIONS

Corporate Governance

Skeels v. Suder, 2021 WL 4785782 (Tex. App.—Fort Worth 2021), *pet. granted* (Jan. 27, 2023) [21-1014]

The issue in this case is whether a resolution by law firm shareholders provides the firm with the power to redeem shares of a former partner for no value.

While a shareholder at Friedman, Suder & Cooke, P.C., David Skeels and other shareholders signed a resolution purporting to give the founding shareholders broad corporate powers. After Skeels left the firm, it notified him that it would be redeeming his shares for zero dollars by the powers authorized in the resolution. Skeels sued, seeking a declaration that the firm lacked the power to redeem his shares for no value. The trial court concluded that the resolution authorized the firm's actions and rendered judgment for the firm.

After multiple rehearings, the court of appeals modified the trial court's judgment to delete awards of fees and sanctions but otherwise affirmed. It concluded that the resolution was a shareholder agreement that granted the firm broad governing authority, including the power to redeem Skeels's shares on its chosen terms. The court of appeals rejected Skeels's argument that the firm's actions must comply with a Business Organizations Code provision regarding share redemption by professional corporations. The court also held that Skeels waived his complaint that the resolution lacked consideration was therefore unenforceable.

Skeels petitioned the Supreme Court for review. He asserts that he did not waive his lack-of-consideration defense and that the resolution must strictly comply with the

share-redemption requirements in the Code.

The Court granted Skeels's petition and set oral argument for 9 a.m. February 23.

GOVERNMENTAL IMMUNITY

Ultra Vires Claims

Abbott v. City of San Antonio, 648 S.W.3d 498 (Tex. App.—San Antonio 2021), *pet. granted* (Jan. 27, 2023) [21-1079]

Abbott v. Jenkins, 2021 WL 5445813 (Tex. App.—Dallas 2021), *pet. granted* (Jan. 27, 2023) [21-1080]

Abbott v. Harris County, 641 S.W.3d 514 (Tex. App.—Austin 2022), *pet. granted* (Jan. 27, 2023) [22-0124]

The primary issue in these cases is whether an executive order barring local mask mandates falls within the scope of authority granted to the Governor under the Texas Disaster Act.

The Texas Disaster Act empowers the Governor to declare a state of disaster and to issue responsive executive orders that have the force and effect of law. During the COVID-19 pandemic, several local governmental entities, including the City of San Antonio, Bexar County, Dallas County, and Harris County, enacted mask mandates. Citing his authority under the Disaster Act, Governor Abbott issued Executive Order GA-38 in response. GA-38 prohibits cities, counties, and other local governmental entities from issuing mask mandates. The order states that it supersedes any conflicting local requirements and suspends any statutes on which local officials might rely to issue contradictory orders.

In three separate lawsuits, local governmental entities and officers sued Governor Abbott, the State of Texas, and Attorney General Paxton, either in combination or separately. Each sought a declaration that GA-38's prohibition against mask mandates is unauthorized and an injunction barring its enforcement. San Antonio and Bexar County alternatively sought a declaration that the Disaster Act violates the Texas Constitution. In each case, the trial court granted a temporary injunction prohibiting enforcement of GA-38. The courts of appeals affirmed, concluding the local governmental entities demonstrated a probable right to relief because GA-38 went beyond the Governor's delegated authority under the Disaster Act.

Governor Abbott, the State of Texas, and Attorney General Paxton petitioned the Supreme Court for review. They argue that GA-38 is authorized by the Disaster Act and preempts inconsistent local orders. They also argue that the trial courts lacked jurisdiction to issue the temporary injunctions and that the courts of appeals did not properly balance the equities.

The Court granted the petitions for review and set oral argument for 9 a.m. February 22.

EMPLOYMENT LAW

Disability Discrimination

Tex. Tech Univ. Health Scis. Ctr. – El Paso v. Niehay, 641 S.W.3d 761 (Tex. App.—El Paso 2022) (per curiam), *pet. granted* (Jan. 27, 2023) [22-0179]

The issues in this case are (1) whether morbid obesity qualifies as a disability under the Texas Commission on Human Rights Act if the employer does not regard the obesity as caused by a separate condition; and (2) whether the employer waived

attorney–client privilege.

Texas Tech University Health Sciences Center–El Paso dismissed Dr. Lindsey Niehay from its medical residency program. Niehay sued for disability discrimination, contending that Texas Tech dismissed her because it regarded her as morbidly obese. Texas Tech filed a combined plea to the jurisdiction and motion for summary judgment, challenging whether Niehay was disabled and arguing that she was dismissed for reasons other than her weight. In response, Niehay offered deposition testimony from a Texas Tech employee about communications involving Texas Tech's in-house counsel that suggested Niehay's weight was a factor in her dismissal. The trial court overruled Texas Tech's objection to this testimony and denied Texas Tech's plea and motion.

The court of appeals affirmed. It held that Niehay asserted a valid disability-discrimination claim because morbid obesity may be regarded as a physical impairment without evidence of an underlying physiological cause of the obesity. The court also held that the trial court did not abuse its discretion in considering the deposition testimony because Texas Tech waived any privilege claim and that Niehay presented direct evidence of discriminatory intent.

Texas Tech petitioned the Supreme Court for review, arguing (1) that Niehay did not have a disability because it did not regard her morbid obesity as being caused by a separate condition; and (2) that it did not waive its attorney–client privilege over the deposition testimony. The Court granted the petition for review and set oral argument for 9 a.m. February 21.

ARBITRATION

Enforcement of Arbitration Agreement

Houston ANUSA, LLC v. Shattenkirk, 2022 WL 54967 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Jan. 27, 2023) [22-0214]

The issues in this case are (1) whether both substantive and procedural unconscionability must be shown to establish that an arbitration agreement is unenforceable; and (2) whether Shattenkirk produced sufficient evidence to establish that the arbitration agreement is unconscionable due to excessive costs.

Houston ANUSA owns and operates a car dealership in Houston. Walter Shattenkirk was hired as its general manager but later fired. He sued Houston ANUSA for discrimination and retaliation, alleging that he was terminated for reporting racist comments made by his supervisor. Houston ANUSA moved to compel arbitration based on an agreement that Shattenkirk allegedly signed during the hiring process, which requires the parties to arbitrate any claim arising from the employment relationship, including discrimination claims. The agreement does not specify who would pay administrative fees, the arbitrator's compensation, or other expenses.

The trial court concluded that the agreement is substantively unconscionable and refused to enforce it based on Shattenkirk's argument that the cost of arbitration would be so high that it would effectively preclude him from asserting his claims. The court of appeals affirmed, noting that no provision in the agreement caps Shattenkirk's costs and that Houston ANUSA failed to offer evidence to contest Shattenkirk's claim of financial hardship.

Houston ANUSA petitioned the Supreme Court for review, arguing (1) that the Court should require a showing of both substantive and procedural unconscionability when evaluating the unconscionability of arbitration agreements; and (2) that Shattenkirk failed to meet his burden of proof on either substantive or procedural

unconscionability. The Court granted the petition for review and set oral argument for 9 a.m. February 21.

CORPORATIONS

Veil-Piercing

In re First Reserve Mgmt., L.P., 2022 WL 120010 (Tex. App.—Beaumont 2022), *argument granted on pet. for writ of mandamus* (Jan. 27, 2023) [22-0227]

The issue in this case is whether the trial court should have dismissed the plaintiffs' claims against an investor in a petrochemical manufacturing company under Texas Rule of Civil Procedure 91a.

After explosions at a chemical plant in southeast Texas caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. Defendant–Relator First Reserve is a private-equity firm that owns a controlling stake in the plant's owner, TPC Group. TPC lacks its own board of directors and is run by the board of another entity related to First Reserve. Plaintiffs seek to pierce the corporate veil and hold First Reserve liable for damages caused by the explosion through an alter ego theory.

First Reserve moved to dismiss Plaintiffs' claims under Rule 91a, arguing that they fail as a matter of law because First Reserve's relationship to TPC and its governing board is consistent with industry standards for private-equity investment. The MDL court denied the motion, and the court of appeals denied First Reserve's mandamus petition.

The Supreme Court has set First Reserve's mandamus petition for oral argument at 9 a.m. on February 22.