Case Summaries
June 23, 2023

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

OPINIONS

NEGLIGENCE

Duty

Hous. Area Safety Council v. Mendez, ___ S.W.3d ___, 2023 WL ___ (Tex. June 23, 2023) [21-0496]

The issue in this case is whether third-party companies that collect and test employment-related drug-testing samples owe a duty of care to the employees being tested.

Mendez was required to submit to a random drug test as part of his employment. Houston Area Safety Council collected Mendez's samples, and Psychemedics tested them. Mendez's urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although two subsequent hair tests came back negative, Mendez's employer refused to assign him to any jobsites.

Mendez sued the Safety Council 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 that the companies did not owe Mendez a duty of care and granted summary judgment for the companies. The court of appeals reversed.

The Supreme Court reversed and rendered judgment for the companies. Chief Justice Hecht delivered the opinion of the Court, which held that third-party companies hired by an employer do not owe the employees they test a common-law duty of care. The Court concluded that the risk–utility factors set out in *Greater Houston Transportation Co. v. Phillips* weigh against imposing such a duty and that declining to recognize a duty is consistent with existing tort law.

Justice Young filed a concurring opinion joined by one other justice. They agreed with the majority but wrote separately to emphasize that the result could be reached without reliance on the risk–utility factors. Justice Boyd filed a dissenting opinion joined by two other justices. They would have held that the risk–utility factors weigh in favor of imposing a duty on the third-party companies.

CORPORATIONS

Stock Redemption

Skeels v. Suder, ___ S.W.3d ___, 2023 WL ___ (Tex. June 23, 2023) [21-1014]

The central issue in this declaratory-judgment suit is whether a corporate resolution authorized a law firm to redeem a departing shareholder's shares on terms unilaterally set by the firm's founders.

As a shareholder in a law firm, David Skeels signed a corporate resolution generally authorizing the firm's founders "to take affirmative action on behalf of the Firm." After his relationship with the firm later soured, the firm terminated his employment and proposed separation terms, including that Skeels relinquish his rights to his shares. When Skeels did not agree, the founders purported to redeem his shares at no cost. Skeels then sued the firm and two of its founders, and the firm counterclaimed. Both sides raised competing declaratory-judgment claims on whether the resolution authorized the founders' redemption actions. In a pretrial ruling, the trial court declared that it did, and the court of appeals affirmed.

The Supreme Court reversed and remanded the case to the trial court. The Court held that the resolution, by modifying "affirmative action" with "on behalf of the Firm," authorized the founders to take action the firm could take, but it neither expanded the scope of the firm's authorized actions nor constituted an agreement that the founders may set redemption terms on Skeels's behalf. And because the firm was not authorized to set the redemption terms without Skeels's agreement, the Court held that the resolution did not independently authorize the founders to unilaterally set those terms. Chief Justice Hecht dissented, concluding that Skeels agreed in the resolution that the firm could redeem his shares on his departure without payment.

GOVERNMENTAL IMMUNITY

Arm of the State

CPS Energy v. Elec. Reliability Council of Tex. and *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, ___ S.W.3d ___, 2023 WL ___ (Tex. June 23, 2023) [22-0056, 22-0196]

The main issue in these cases is whether ERCOT is entitled to sovereign immunity.

ERCOT is the independent system operator for Texas's power grid. CPS Energy is a utility company that buys and sells electricity on the ERCOT wholesale electricity market. Following Winter Storm Uri, some wholesale market participants defaulted on their payment obligations to ERCOT. CPS alleges that ERCOT unlawfully short-paid CPS to offset those losses. It sued ERCOT for breach of contract and various other claims. ERCOT filed a plea to the jurisdiction, asserting sovereign immunity and, alternatively, that the Public Utility Commission had exclusive jurisdiction. The trial court denied the plea, and the court of appeals reversed and dismissed the claims for lack of jurisdiction.

ERCOT publishes reports annually that project the state's capacity and demand for electricity over the next five years. ERCOT published reports that projected a severe electricity shortfall, and Panda, a group of private-equity investors, alleges that it relied on those reports when it decided to construct new power plants. ERCOT later revised its predictions to reflect an excess of electricity supply, and Panda sued for fraud and other claims. ERCOT filed a plea to the jurisdiction asserting sovereign immunity and that the PUC had exclusive jurisdiction. The trial court granted the plea. Sitting en

banc, the court of appeals reversed.

In an opinion by Chief Justice Hecht, the Supreme Court rendered judgment for ERCOT in both cases. After concluding that ERCOT is a "governmental unit" entitled to an interlocutory appeal, the Court held that ERCOT is entitled to sovereign immunity. Specifically, the Court held that ERCOT is an "arm of the State" because, pursuant to the Utility Code, ERCOT operates under the direct control and oversight of the PUC, it performs the governmental function of utilities regulation, and it possesses the power to adopt and enforce rules. The Court further held that recognizing immunity satisfies the policies underlying immunity because it prevents the disruption of key governmental services, protects public funds, and respects separation of powers principles. The Court also held that the PUC has exclusive jurisdiction.

Justice Boyd and Justice Devine filed a dissenting opinion, joined by two other justices. They agreed that ERCOT is a governmental unit and that the PUC has exclusive jurisdiction, but they would have held that ERCOT is not entitled to sovereign immunity.

PROCEDURE—PRETRIAL

Dismissal

In re First Rsrv. Mgmt., L.P., ___ S.W.3d ___, 2023 WL ___ (Tex. June 23, 2023) [22-0227]

The issue in this case is whether the trial court should have dismissed the plaintiffs' negligent-undertaking claim against a group of private-equity investors under Texas Rule of Civil Procedure 91a.

After explosions at a chemical plant caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. When it became clear that the original defendant, plant-owner TPC, was bankrupt, Plaintiffs sued TPC's private-equity investors, First Reserve, for negligent undertaking. Plaintiffs allege that First Reserve undertook to take charge of TPC's operations and was negligent by failing to provide resources for safety measures that could have prevented the explosions. The trial court denied the motion to dismiss, and the court of appeals denied mandamus relief.

The Supreme Court held that the trial court should have dismissed the claim for lacking a basis in law. A cause of action has no basis in law under Rule 91a if it is barred by an established legal rule and the plaintiff has failed to plead facts demonstrating that the rule does not apply. It is well established that a parent does not become liable for a subsidiary's actions merely by appointing directors to the subsidiary's board, by overseeing the subsidiary's budgetary decisions, or by setting policies and procedures for the subsidiary. And under Supreme Court precedent, liability for negligent undertaking cannot be based on an omission, a promise that is not accompanied by either performance or reliance by the injured party, or the failure to make an expenditure. Yet the only factual allegation in the petition about how First Reserve controlled TPC's operations is that First Reserve, together with another investor group, appointed four members to the five-member board of managers that governed TPC. Plaintiffs failed to plead facts that would take First Reserve's conduct outside the norm of private-equity-investor behavior.

Despite its holding, the Court declined to grant relief because of procedural irregularities in the case caused by TPC's bankruptcy. Justice Boyd concurred in the Court's disposition but did not file a separate opinion.

GRANTED CASES

MEDICAL LIABILITY

Damages

Velasco v. Noe, 645 S.W.3d 850 (Tex. App.—El Paso 2022), *pet. granted* (June 23, 2023) [22-0410]

The issue in this case is what damages, if any, are recoverable in a medical negligence action based on "wrongful pregnancy."

Velasco sought prenatal care for her third child from Dr. Noe. Before Velasco's scheduled C-section, she paid $400 to Dr. Noe's clinic, which she alleges she paid to receive a sterilization procedure. Dr. Noe performed the C-section, but no sterilization procedure was performed. Velasco subsequently became pregnant with her fourth child and sued Dr. Noe for negligence, among other torts, alleging that he failed to notify her that he did not perform the sterilization procedure.

The trial court granted summary judgment for Dr. Noe on all of Velasco's claims. A divided court of appeals affirmed in part and reversed in part. The court reversed as to her medical negligence claim, concluding that Velasco produced enough evidence on each element to survive summary judgment. Additionally, it held that mental anguish and pain and suffering damages are recoverable in a wrongful pregnancy action upon a showing of negligence. The court affirmed summary judgment on all of Velasco's other claims.

Dr. Noe petitioned the Supreme Court for review. Dr. Noe argues that Texas law does not recognize wrongful pregnancy actions, and alternatively, if it does, any damages are limited to medical expenses associated with the failed or unperformed procedure. The Supreme Court granted the petition for review.

FAMILY LAW

Termination of Parental Rights

In re R.J.G., 2022 WL 1158680 (Tex. App.—San Antonio 2022), *pet. granted* (June 23, 2023) [22-0451]

The primary issue in this case is whether substantial compliance is sufficient to avoid termination of parental rights under Section 161.001(b)(1)(O) of the Family Code.

DFPS removed Mother's three children and provided her with a service plan, which she was required to follow to secure their return. Although she made progress toward completing the services, she failed to complete the required counseling, parenting classes, and substance abuse classes in exactly the manner prescribed by the plan. Specifically, she attempted to complete those services with different providers from those prescribed in the plan. She also continued to associate with Father, who was physically abusive, in contravention of her counselor's recommendations. The trial court terminated Mother's parental rights under Paragraph (O).

The court of appeals affirmed. It held that substantial compliance with the service plan is insufficient to avoid termination under (O). It also held that Mother did not prove by a preponderance of the evidence that she was unable to comply with the plan or that her failure to comply was not her fault—an affirmative defense to termination under (O).

Mother petitioned the Supreme Court for review. Mother argues that substantial compliance is sufficient to avoid termination under (O) and that she complied with her service plan, just not in the way that DFPS wanted. She also argues that she proved

the affirmative defense to termination under (O) because she made a good faith effort to comply with the plan and any failure to comply was not her fault. The Court granted the petition for review.

NEGLIGENCE

Willful and Wanton Negligence

Marsillo v. Dunnick, 2022 WL 3906212 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-0835]

In this healthcare-liability claim arising from an emergency physician's treatment of a snakebite, the main issue is whether the plaintiff has produced some evidence of "willful and wanton negligence" by the physician, as required by statute.

When Dr. Kristy Marsillo treated thirteen-year-old Raynee Dunnick for a rattlesnake bite, she followed her hospital's guidelines detailing when to administer antivenom, which resulted in Raynee's receiving the antivenom three hours after arriving at the hospital. Raynee survived, but the Dunnicks sued, alleging that Dr. Marsillo should have administered the antivenom immediately and that her failure to do so is the proximate cause of Raynee's lasting pain and impairment. The trial court granted Dr. Marsillo's no-evidence motion for summary judgment, but the court of appeals reversed.

The Supreme Court granted Dr. Marsillo's petition for review. She argues that willful and wanton negligence is the same standard as gross negligence and that there is no evidence to satisfy it. She also argues that there is no evidence of proximate cause.

PROCEDURE—TRIAL AND POST-TRIAL

Collateral Attack

Hensley v. St. Comm'n on Jud. Conduct, 2022 WL 16640801 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-1145]

The issue is whether Hensley's suit against the State Commission on Judicial Conduct is a collateral attack on a public warning the Commission issued against her.

Hensley is a justice of the peace. For religious reasons, she only officiates weddings between heterosexual couples. If a same-sex couple asks her to officiate their wedding, Hensley informs the couple that she will not do so because of her beliefs and provides the couple with a referral to alternative officiants.

The State Commission on Judicial Conduct initiated an investigation into Hensley's wedding practices. After the Commission issued a tentative public warning, Hensley elected to appear for an informal hearing. At that hearing, Hensley asserted that the investigation and proposed sanctions violate her free-exercise rights as guaranteed by the Texas Religious Freedom Restoration Act. After the hearing, the Commission issued a public warning. Rather than appeal to a special court of review, Hensley filed this lawsuit asserting various claims under the Act.

The Commission and its members filed a plea to the jurisdiction, arguing that Hensley's suit is an impermissible collateral attack on the public warning because Hensley failed to appeal that warning to the special court of review and that both the Commission and its members have sovereign immunity. The trial court granted the plea, and the court of appeals affirmed.

Hensley petitioned for review, arguing that neither preclusion principles nor sovereign immunity bar her suit. The Supreme Court granted Hensley's petition for review.