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Editors' Corner

Dear Readers,

We have new co-managing editors in this issue, Jason Boatright, Kristen Vander-Plas, Dana Livingston, and Jody Sanders. Please let us know your feedback on the issue and keep us in mind for article submissions. We welcome any piece that presents an issue of interest to appellate practitioners.

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The Core of Trial Strategy: Practical Thoughts About Avoiding "Gotcha's" - Create Checklists[1]

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"If you didn't write it down, then it never happened."
— Tom Clancy.[3]

1. Introduction-Planning for Appeal Must Start at the Beginning of Any Case.[4]

Write "it" down. Great ideas, a plan, a strategy, they can all be lost in a flash when relying solely on memory. However, writing "it" down preserves those great ideas or, to paraphrase the words of Tom Clancy, "it" will never happen.

Formulation of a written strategy is critical to any endeavor, but for lawyers preparing a lawsuit for trial and appeal, it is imperative. The written strategy can simply be a "checklist" of tasks that must be or should be accomplished at certain points in time.[5] For complicated litigation, a plan must be for

[1] Texas and federal rules, statutes, and case law are cited herein. The authorities in other jurisdictions may direct some different rules and results from the cited authorities. However, the general propositions suggested for planning and error preservation should be applicable and are worthy of consideration in any jurisdiction.

[2] Dorsey & Whitney, Dallas; Justice, (Former), Fifth District Court of Appeals of Texas. B.S.B.A., Drake University; J.D., University of Missouri. Prior to joining the bench, Justice Lang was a partner in the Dallas office of Gardere Wynne Sewell L.L.P. Justice Lang clerked for the Hon. Fred L. Henley of the Supreme Court of Missouri from May 1972 to May 1973.

[3] Tom Clancy, Debt of Honor 600 (1994).

[4] As the title of this paper indicates, the intention of the author is to offer "practical thoughts" for planning litigation. So, comprehensive legal authorities are, intentionally, not offered as to each of the proffered topics listed in the Strategy Points-A Checklist.

[5] The effective use of checklist has been demonstrated to assure all required steps are executed in any complicated process including

the long run; that is, a plan which plots points for performance of tasks on a time line from the beginning of a lawsuit through a potential appeal. That time line must set out when certain pleadings, objections, motions, or other submissions must be filed in the trial court. The strategic plan must also include a list of "Gotcha's" that must be reviewed and checked off so no necessary steps are missed that are required by procedural rules or statutes.[6] In order to compose that complete strategy or checklist, a careful trial lawyer should enlist the services of a skilled appellate lawyer.

The suggestion that a skilled appellate lawyer be enlisted to assist in writing out the strategy is not a mere unabashed pitch for full employment of appellate lawyers. It is simply a reality. Teamwork between trial and appellate lawyers is necessary due to the complexity of the rules regarding, among other things, error preservation, the form and substance of dispositive motions, jury charges, and crafting appellate arguments and briefs. In summary, the critical importance of preparation of a comprehensive, written strategic plan is just this: *if error is not preserved—you lose*!

2. How can Error Preservation Be Planned?

Most points in a case where error must be preserved can be anticipated by: a) understanding what the adversary will likely do to prosecute its claim or defend against a claim, and b) plotting out what a client must do to present its case or defend against a claim. Experienced trial lawyers know why error preservation is critical. Yet, it is worth noting that appellate courts rarely review an issue raised in a brief on appeal unless that issue claiming error is preserved in the trial court by a proper objection or motion. In most cases, the record must

medicine, construction, aviation, and other specialized disciplines. Well thought out and prepared "checklists" assure thorough preparation and execution. *See* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 8-10 (2010).

[6] *See* Attachment 1. It sets out a long list of *Gotcha's* found in the Texas statutes and Rules of Civil Procedure.

show that the issue was brought to the trial court's attention and the trial court had the opportunity to correct the erroneous ruling or order, there and then.[7]

3. Strategy Points—A Checklist.

The points set out below, and other that might be applicable to a particular case, should be fleshed out in a detailed, written, strategic plan along with an analysis of rule and statutory "trip-wires," or "Gotcha's." A suggested "Gotcha" Checklist attached to this paper can provided part of a baseline for a trial and appellate plan.[8]

a. Selection of Court System and Venue.

There are many specific considerations to address when one selects where a lawsuit will be filed. The selection of the court system and venue is an opportunity to set the course of the case.

Of course, first, is the question of whether the parties are subject to the jurisdiction of the court. This issue is addressed below. Second, the law of the possible available forums must be reviewed to determine if the law applicable to the claims is more favorable in one jurisdiction than another. An example is the amount of punitive damages that can be recovered. Some states, including Texas, put a "cap" or statutory limit on the amount that can be recovered.[9] Third, a significant consideration is whether the region, state, or city where a court is located is known for judges and jurors who harbor prejudices or customs that could be unfavorable to a party.

b. Jurisdiction.

In every case, a thorough review should be undertaken of

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[7] *See infra* § 3(e).

[8] *See* Attachment 1. It sets out a list of *Gotcha's* found in Texas statutes and Rules of Civil Procedure.

[9] *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.008.

whether or not the court has jurisdiction.[10] If the court has no jurisdiction, it has no power to act. A defendant must raise valid jurisdictional questions by an appropriate motion or pleading requesting that the court dismiss the case.[11]

Of course, the question of whether there is personal jurisdiction is governed by "due process" under the United States Constitution.[12] Further, the question of whether there is subject matter jurisdiction is determined whether the law of the forum governs the claims raised.

The United States Supreme Court recently repeated long established law discussing the concept of jurisdiction, "[T]he word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)."[13]

c. Transfer of Venue and Removal of Suits by Defendants from State Court to Federal Court.

In Texas state court, a defendant has limited ability to request a change of venue solely based on the venue being

[10] Consider the amount in controversy, subject matter, and any other limits on a court's authority. *See* TEX. CONST. art. V; TEX. CIV. PRAC. & REM. CODE ANN., chs. 51, 61-64; TEX. EST. CODE ANN. chs. 32, 34, 1022; TEX. FAM. CODE ANN. §§ 51.04, 51.0413; TEX. GOV'T CODE ANN. chs. 24-27; Tex. Prop. Code Ann. § 115.001.

[11] *See* TEX. R. CIV. PROC. 120a (discussing special appearances); TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014 (a)(8) (discussing pleas to the jurisdiction), 101.001 *et seq.* (titled the Texas Tort Claims Act in section 101.002).

[12] "A defendant establishes minimum contacts with a state when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). *See also Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005).

[13] *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019); *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004).

"unfavorable."[14] Chapter 15 of the Texas Civil Practice and Remedies Code provides a party may move for transfer of venue based upon general, mandatory, or permissive statutory venue provisions.[15] However, depending on one's perception of whether a federal court may be a more favorable climate, it may benefit a party defendant to file a petition to "remove" the state court lawsuit to federal court. Reasons for removal include: avoiding local prejudice, seeking a different judge, obtaining greater expertise on federal questions, delaying trial, favorable procedural rules, different trial procedures such as very limited voir dire,[16] different jury pools, and more likely enforcement of arbitration and jury waiver clauses.

Removal may be pursued only when the federal court has jurisdiction, such as where there is diversity of citizenship or

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[14] Tex. Rule Civ. Proc. 255, 257-261. *See also Roberts v. Allen,* 2013 Tex. App. LEXIS 3966, * 4 (Tex. App.-Beaumont 2013, no pet.) (explaining that "Texas Rule of Civil Procedure 257 . . . provides that '[a] change of venue may be granted in civil causes upon motion of either party ... [if] . . . there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial.'"; *Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex. 1990) (holding that "Texas Rule of Civil Procedure 258 provides that "reasonable discovery" in support of a motion to change venue 'shall be permitted' and expressly provides that deposition testimony and other discovery products may be attached to affidavits on the motion").

[15] TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001 *et seq*. (providing for general venue rules, mandatory venue rules and permissive venue rules), 15.066 (providing that, "Subject to Section 22.004, Government Code, to the extent that this chapter conflicts with the Texas Rules of Civil Procedure, this chapter controls"), 15.063-.064 (requiring that a motion to transfer be "filed and served concurrently with or before the filing of an answer . . . ."). *See also* TEX. R. CIV. PROC. 86-89, 257-259, 261.

[16] FED. R. CIV. P. 47(a) (providing that the "court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper"). However, as a practical matter, jury selection in some federal court is conducted by the judge. Any questioning by lawyers is typically limited in scope and as to time allotted.

the case involves a federal question.[17] When a removal petition is filed, the state case is stayed and transfer to the federal court for the district where the state case was filed occurs immediately.[18] The timing for filing a removal petition is critical. Generally, the defendant must file notice of removal within 30 days after the receipt of the initial pleading or within 30 days after the service of summons, whichever period is shorter.[19] In addition, a party whose case has been removed by an adversary should consider whether to seek remand.[20]

d. Enforcing Arbitration Agreements

The foundational issue as to whether arbitration may be compelled is: do the parties have a valid, enforceable agreement to arbitrate.[21] That question, in itself, is the subject of an abundance of litigation. While federal and Texas law have strong policies favoring arbitration,[22] only arbitration agreements that comport with traditional principles of contract law are upheld.[23] The burden of proof as to the validity of the agreement is on the party seeking to enforce the arbitration agreement. Yet, defenses to enforcement of the agreement may be raised as in any contract litigation.[24] For instance, an arbitration agreement

[17] 28 U.S.C §§ 1441-1446.

[18] *Id*. § 1446(d).

[19] *Id*. § 1446(b).

[20] *See id*. § 1447 (addressing grounds and procedure).

[21] "It is the policy of this state to encourage the peaceable resolution of disputes . . . through voluntary settlement procedures," including binding and nonbinding arbitration. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002. "A court shall order the parties to arbitrate on application of a party showing . . . an agreement to arbitrate;" otherwise, "the court shall deny the application." *Id.* § 171.021(a)(1), (b).

[22] *Prudential Sec. Inc. v. Marshall,* 909 S.W.2d 896, 898 (Tex. 1995). *See also In re FirstMerit Bank, N.A.,* 52 S.W.3d 749, 753 (Tex. 2001).

[23] *In re D. Wilson Constr. Co.,* 196 S.W.3d 774, 779-781 (Tex. 2006). *See also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

[24] *See Halliburton Energy Servs. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530 (5th Cir. 2019).

procured by fraud, or that is unconscionable, is unenforceable.[25] Should the trial court determine an arbitration agreement is valid and enforceable, in many situations, that court must determine if a party's claim falls within the scope of that agreement. If the claim falls within the scope of the agreement, the "court has no discretion but to compel arbitration and stay its own proceedings."[26]

Unless the parties have voluntarily engaged in an arbitration proceeding, the first step in the process of enforcing an arbitration agreement is to apply to the trial court to compel arbitration.[27] Once the motion to compel arbitration is filed, as indicated above, the moving party has the burden to prove the agreement is valid.[28] Then, the burden shifts to a party opposing

[25] TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001(b) ("A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract."), 171.021, 171.022 (providing that unconscionable agreements are unenforceable). *See also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 6872 (1996); *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 738 (Tex. 2005); *In re FirstMerit Bank, N.A.,* 52 S.W.3d at 753-54; *Henry v. Gonzalez*, 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. dism'd).

[26] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). *See also In re FirstMerit Bank, N.A.*, 52 S.W.3d at 758. *Cf. First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("The U.S. Supreme Court has explained that there are three types of disagreements in the arbitration context: (1) the merits of the dispute; (2) whether the merits are arbitrable; and (3) who decides the second question."). The default rule for the third question is that arbitrability is a threshold matter for the court to decide. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008). But a contractual agreement to submit the arbitrability question to an arbitrator is valid and must be treated like any other arbitral agreement. *First Options*, 514 U.S. at 943. Arbitration clauses that assign gateway questions such as the arbitrability of the dispute are an established feature of arbitration law. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). The Texas Supreme Court has held that courts must enforce a valid arbitration agreement that places arbitrability with the arbitrator rather than a court. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018).

[27] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.021-171.026; 9 U.S.C. §§ 3, 4.

[28] *Halliburton Energy Servs.*, 921 F.3d at 530 (describing federal procedure for motion to compel arbitration and discussing Texas state law that governs whether the arbitration agreement is valid).

enforcement of the agreement to raise affirmative defenses to enforcement.[29] Should the trial court deny the motion to compel, the aggrieved party may perfect an interlocutory appeal.[30] However, should the trial court grant the motion to compel arbitration, the statutes, the TGAA and FAA do not provide for an interlocutory appeal. Otherwise, one is left with one option for review of an order compelling arbitration. That is mandamus.[31] As a general rule, mandamus will issue to correct a clear abuse of discretion for which the remedy by appeal is inadequate.[32]

e. Discovery and Evidence Introduction Plan

Every case has its unique needs for discovery. Again, write it down. List the document discovery, depositions, and other discovery that will yield the evidence to prove each element of each claim or defense. Then, plan to use the discovery tools required to obtain the evidence.[33] Next, catalogue the evidence for each element of each claim or defense, and set forth in detail

[29] *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (as to the Federal Arbitration Act ("FAA")); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (as to the Texas General Arbitration Act ("TGAA")).

[30] TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a)(1). *See also* Royston, *Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015); *Chambers v. O'Quinn*, 242 S.W.3d 30, 31 (Tex. 2007); *In re Palacios*, 221 S.W.3d 564, 565 (Tex. 2006). *See also* 9 U.S.C. § 16.

[31] *See In re Poly-America, L.P.*, 262 S.W.3d 337 345-346 (Tex. 2008) (holding that the appellate court had no jurisdiction to hear an interlocutory appeal from an order compelling arbitration; such an appeal does not lie under section 51.014 or 171.098 of the Texas Civil Practice and Remedies Code or the FAA).

[32] *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462 (Tex. 2008); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004).

[33] *See, e.g.*, TEX, R. CIV. P. 192.7 (requests for production), 199.2, 205.1(c) (non-party production at oral deposition), 194.2(j), (k), 204, 510(d)(5) (medical records), 191, 192, 194 (request for disclosure), 197 (interrogatories), 198 (requests for admissions), 199, 200 (depositions), 202 (depositions before suit or to investigate claims), 205.3(b) (non-party notice of production). *See also* TEX. R. EVID. 509(e)(4).

precisely how to introduce the evidence at trial.[34] Use textbooks to obtain clear, step-by-step directions on how to present and offer the evidence.[35] Remember, write it down.

f. Preservation of error as to evidence and in general.

Appellate Courts typically define error preservation in these terms, "Preservation of error requires a party to make a 'timely request, objection, or motion' and either obtain a ruling or object to the trial court's refusal to rule."[36] Further, appellate courts typically decline to review an issue that was not preserved.[37] Be mindful that, on appeal, the party claiming error

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[34] *Id.* R. 1001-1009.

[35] J. C. LORE AND STEVEN LUBET, MODERN TRIAL ADVOCACY (5th ed. 2015); THOMAS MAUET, TRIAL TECHNIQUES AND TRIALS (10th ed. 2017).

[36] *Superior Healthplan v. Badawo*, No. 03-18-00691-CV, 2019 WL 3721327, at *2 (Tex. App.—Austin Aug. 8, 2019, no pet.) (quoting Tex. R. App. 33.1(a)). *See also Am. Heritage Capital, LP v. Gonzalez,* 436 S.W.3d 865, 874 (Tex. App—Dallas 2014, no pet.); *Banks v. Ramin Equities, LLC*, No. 01-18-00401-CV 2019 WL 1246334, at *8 (Tex. App.—Houston [1st Dist.] Mar. 19, 2019, no pet.). *See also Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Polara Eng'g, Inc. v. Campbell Co.,* 894 F.3d 1339, 1355 (Fed. Cir. 2018).

[37] For instance:

> Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds. *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999). In addition, our preservation rules promote fairness among litigants. A party "should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam). Moreover, we further the goal of accuracy in judicial decision-making when lower courts have the opportunity to first consider and rule on error. Not only do the parties have the opportunity to develop and refine their arguments, but we have the benefit of other judicial review to focus and further analyze the questions at issue. Accordingly, we follow our procedural rules, which bar review of this complaint, unless a recognized exception exists.
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> *In the Interest of B.L.D.,* 113 S.W.3d 340, 350 (Tex. 2003).

must demonstrate that the exclusion of evidence "probably caused the rendition of an improper judgment."[38]

When the claimed error is the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court. That is not all. The proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal.[39]

Two cardinal methods for preservation of the record as to excluded evidence are as follows:

1. Offer of Proof. "An *offer of proof* preserves error for appeal if: (1) it is made before the court, the court reporter, and opposing counsel, outside the presence of the jury; (2) it is preserved in the reporter's record; and (3) it is made before the charge is read to the jury."[40]
2. Formal Bill of Exceptions. "When no offer of proof is made before the trial court, the party must introduce the excluded testimony into the record by *a formal bill of exception*. See Sw. Country Enters., Inc. v. Lucky Lady Oil Co., 991 S.W.2d 490, 494-95 (Tex. App.—Fort Worth 1999, pet. denied). A formal bill of exception must be presented to the trial court for its approval, and, if the parties agree to the contents of the bill, the trial court must sign the bill and file it with the trial court clerk. Tex. R. App. P. 33.2(c); Bryan v. Watumull, 230 S.W.3d 503, 516 (Tex. App.—Dallas 2007, pet. denied). Failure to demonstrate the substance of the excluded evidence results in waiver. Tex. R. App. P. 33.1(a)(1)(B); Sw. Country Enters., Inc., 991 S.W.2d at 494." [41] (Emphasis added).

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[38] TEX. R. APP. PROC. 44.1(a)(1), 61.1(a). *See also Morale v. State*, 557 S.W.3d 569, 576 (Tex. 2018).

[39] TEX. R. EVID. 103(a);

[40] *Williams v. FlexFrac Transp., LLC*, No. 05-16-01032-CV, 2018 WL 1887440, at *5-6 (Tex. App.—Dallas Apr. 20, 2018, pet. denied) (quoting Bobbora v. Unitrim Ins. Servs., 255 S.W.3d 331, 335 (Tex. App.—Dallas 2008, no pet.) (emphasis added). *See also In re Estate of Whetstone*, No. 05-18-00165-CV, 2019 WL 698090, at *13-14 (Tex. App.—Dallas Feb. 20, 2019, pet. denied).

[41] *In re Estate of Whetstone*, 2019 WL 698090, at *13-14.

g. Preservation of error in motions and responses.

In order for written motions and responses to motions to be understood and effective, one must prepare them with proper citation to and discussion of the law and cite to and attach copies of any relevant evidence, case law, statues, or rules.[42] Once again, this process will clearly advise the trial court of the parties' position and show the appellate court the trial court was fully appraised of the position for which error is claimed on appeal.[43]

h. Preservation of error as to the jury charge.

Each party must meet its burden to submit a jury charge in accordance with the law. Any objection to the charge must be presented to the trial judge in writing or dictated into the record so that the trial judge is apprised of the law supporting the proffered charge or the objections made to the adversary's proposed charge.[44] Any requested question, definition, or instruction must be submitted to opposing counsel and the trial court in writing.[45] Any such request must be separate and apart from the party's objections to the charge.[46] This process will not only advise the trial court of the proper path to follow to avoid error, but will also demonstrate to the appellate court that the trial court had an opportunity to draft a charge in accordance with the law.[47]

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[42] *See, e.g.*, TEX. R. CIV. P. 166a. *See also id.* R. 215.6 (providing that motions and responses "may have exhibits attached including affidavits, discovery pleadings, or any other documents."). *Cf. id.* R. 91a.6 (prohibiting consideration of evidence on the motion.). *But see id.* R. 91a.7 (requiring the trial court to consider evidence regarding any award of costs and reasonable and necessary attorney fees).

[43] *See In re Poly-America, L.P.*, 262 S.W.3d at 345-46.

[44] TEX. R. CIV. P. 272.

[45] *Id.* R. 273.

[46] *Id.*

[47] *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d, 817, 819 (Tex. 2012). *See also* TEX. R. APP. P. 33.1.

i. Post-verdict or judgment motions.

Any motions to disregard answers to the jury questions, to modify the judgment, or for new trial must be filed in writing, in a fashion that is thorough, clear, and that does not include meritless arguments. As in the instances set out above, the claimed error must be clearly shown to demonstrate the trial court was informed and had a full opportunity to correct an error. Such motions will also be useful to focus the appellate courts on the error claimed to be prejudicial.[48]

j. Interlocutory Appeals

Interlocutory appeals, when permitted, can afford review of a pivotal trial court ruling without the necessity of waiting until final judgment is rendered. At this stage, a decision by the court of appeals should set the trial court proceedings in a proper course. Generally, a party may not appeal an interlocutory order.[49] However, some statutes authorize interlocutory appeals in limited situations. Such statutory provisions are strictly construed.[50]

There are two types of interlocutory appeals. One is a permissive appeal which requires compliance with a trial court rule, an appellate rule, and a statute, Texas Civil Practice and Remedies section 51.014 (d). The other is an appeal of right, but only as specifically authorized by section 51.014 (a).

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[48] TEX. R. CIV. P. 320-329b. *See also* TEX. R. APP. P. 44.1, 61.1.

[49] Generally, appellate courts have jurisdiction only over appeals from final judgments. *Marsh v. Coldiron*, No. 07-16-00319-CV, 2016 WL 4548088 (Tex. App.—Amarillo 2009, no pet.) (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001)). That being so, a party may not appeal an interlocutory order unless specifically authorized by statute. *Id.* (citing *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). Because interlocutory appeals are allowed only in limited circumstances, courts strictly construe statutory provisions permitting interlocutory appeals. *Id.* (citing *State Fair of Tex. v. Iron Mountain Info. Mgmt., Inc.*, 299 S.W.3d 261, 262-63 (Tex. App.—Dallas 2009, no pet.)).

[50] *Id.*

The rules and the statute authorizing a permissive interlocutory appeal set out slightly different requirements, but are complementary. First, one must comply with Texas Rule of Civil Procedure 168, which requires the filing of a motion by a party seeking permission to appeal a controlling question of law that is not otherwise appealable by statute. If the motion is granted, the trial court's order must "identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation."[51] Also, the trial court may initiate such appeal on its own motion.[52]

Second, in order to prosecute review of the "controlling question of law," the appeal must comply with Texas Civil Practice and Remedies Code section 51.014(a). This section repeats the requirements of Rule 168, but adds that a permissive appeal under this section does not stay proceeding in the trial court unless the parties agree or the trial court so orders.[53] Further, the statute makes it clear the appeal is not automatic. The party seeking appellate court construction of the "question of law" must file an "application for interlocutory appeal" in the court of appeals that has jurisdiction "not later than the 15th day after the date the trial court signs the order to be appealed."[54] The application must explain "why an appeal is warranted."[55] Typically, the scope of review does not include an appeal from a summary judgment where the facts are disputed.[56] Should the

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[51] TEX. R. CIV. PROC. 168.

[52] *Id.* 168.

[53] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(e).

[54] *d.* § 51.01 (f).

[55] *Id.*

[56] The scope of a permissive appeal does not include an appeal of a summary judgment when the facts are disputed. *King-A Corp. v. Wehling*, No. 03-13-001000-CV, 2013 WL 1092209, at *8 (Tex. App.—Corpus Christi-Edinburg 2013, no pet.). It is possible that, in some cases, a controlling question of law as to which there is substantial ground for difference of opinion might arise in the context of determining whether a fact issue exists in a summary-judgment context. *Id* (citing *Diamond Prods. Int'l,*

court of appeals "accept" the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal."[57]

The third rubric directing the process is Texas Rule of Appellate Procedure 28.3. It repeats the two requirements stated in the Civil Practice and Remedies Code as to filing the petition with the clerk of the court in the court of appeals with jurisdiction.

The trial court rule and the remedies code state the same basis for an appeal. However, the remedies code specifies the critical limit for filing the petition of 15 days from when the trial court order is signed. [58] There is no provision for appeal of a trial court's denial of a motion for permissive appeal.

Statutory appeals from interlocutory orders pursuant to Texas Civil Practice and Remedies Code section 51.014(e) are strictly limited to the 14 types of trial court orders identified. Further, the denial of a motion to compel arbitration is subject to appeal.[59] Appeals typically pursued are regarding orders which grant or refuse a temporary injunction,[60] deny a motion for summary judgment based on an assertion of immunity,[61]

Inc. v. Handsel, 142 S.W.3d 491, 495-96 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). In denying permission to appeal in that case, however, statutory criteria may not be satisfied because of the absence of evidence supporting the motion for summary judgment and because of factual issues related to the asserted grounds for summary judgment. *Id.*

[57] TEX. CIV. PRAC. & REM. CODE ANN. § 51.01 (f); "The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal . . . ."

[58] *Id.*

[59] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1).

[60] "(a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: . . . (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65 . . . ." *Id.* § 51.014.

[61] An order that "(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state . . . ." *Id.*

grant or deny a special appearance,[62] deny a motion to compel arbitration,[63] and grants or denies a plea to the jurisdiction by a governmental unit.[64] Section 51.014 (b) and (c) provide when an appeal under this section stays the underlying action in the trial court.[65]

k. Mandamus.

During the pre-trial stage, if error is committed by the trial court that may be prejudicial to the outcome of the case, and an interlocutory appeal is not permitted, one should consider filing a petition for writ of mandamus with the court of appeals to correct the error and put the case back on the proper course. If the court of appeals denies relief, then one may consider seeking mandamus relief from the Texas Supreme Court. [66] If

[62] An order that "(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code . . . ." *Id.*

[63] *See supra* note 58.

[64] An order that "(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001 . . . ." *Id.*

[65] *Id.* § 51.014(b), (c).

[66] The procedural requirements for mandamus proceedings in both the Supreme Court and the courts of appeals are set out Texas Rule of Appellate Procedure 52. The party seeking relief in a mandamus proceeding is the relator and the person against whom relief is sought is the respondent. TEX. R. APP. P. 52.2. A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case. *Id.* If the Supreme Court and a court of appeals have concurrent mandamus jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so, which reason must be stated in the petition. *See Id.* R. 52.3(e). *See also State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015) (orig. proceeding) ("a party may not circumvent the court of appeals simply by arguing futility"). Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief. TEX. GOV'T CODE ANN. § 22.002(b)-(c). The mandamus jurisdiction of the Texas courts of appeals is less broad than that of the Supreme Court. Specifically, each of the fourteen courts of appeals or a justice thereof "may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of

granted by an appellate court, mandamus orders will direct the trial court to modify or reverse an erroneous ruling. Generally, in order to obtain mandamus relief, one must show the trial court abused its discretion in making its order and the party seeking correction by mandamus has no adequate remedy by appeal on the merits at the end of the case.[67]

l. Appellate Issues Stated in Briefs.

The issues on appeal must be carefully designed to grasp and hold the attention of the reader. At the same time, the issues must state clearly the errors claimed. However, it is recommended that the issue state more than something like, "Did the trial court err in granting summary judgment." The issue should focus on the specific problem, *e.g.*, "Did the trial court err in granting summary judgment because there is a material issue of fact as to . . . ." In addition, a party must raise only issues that are material. That is, courts of appeals will be skeptical of a party that raises, for instance, a dozen issue, when there are only three real, pivotal issues. One must be aware that any issues not included in a party's opening brief are waived.[68]

m. Appellate Briefs.

The appellate rules set limits on the length of briefs. In a Texas civil appeal, the length of a brief is limited 15,000 words, while the total word count for all briefs, including the opening

the court." *Id.* § 22.221(a). Each court of appeals may also issue writs of mandamus against "a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district" and certain magistrates and associate judges. *Id.* § 22.221(b).

[67] *See In re Prudential Ins.,* 148 S.W.3d 124, 135-36 (Tex. 2004); *See* Douglas S. Lang and Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 66 SMU L. Rev. 1155 (Winter 2013); 2 SMU Ann. Tex. Survey 261 (2016); 3 SMU Ann. Tex. Survey 265 (2017); 5 SMU Ann. Tex. Survey 407 (2019).

[68] *See,* Tex. R. App. P. 38.3. *See also St. John Missionary Baptist Church v. Flakes*, 547 S.W.3d 311, 312-313 (Tex. App.—Dallas 2018, pet. filed) (en banc).

brief, response, and replies must not exceed 27,000 words for each side.[69] Appellees must raise any cross issues in their response.[70]

In light of the limits on the length of briefs, a party must be precise. At least three points are important here: a) the law cited must be on point and concisely explained, b) The statement of facts must not include irrelevant information, and c) The argument must get to the point, quickly and clearly. Imprecise or even excessive treatise style analysis in briefs may leave a justice unimpressed.

Parties to an appeal must be aware of what must or may be included in an appendix to the brief. The appendix must include: a) the trial court's judgment or other appealable order from which relief is sought, b) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and c) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.[71] Optional contents of an appendix may include "other items pertinent to the issues" including copies of court opinions, laws, documents upon which the suit is based, pleadings, or excerpts from the reporter's record. However, items "should not be included" that are an attempt to avoid brief page limits.[72]

n. Motions for Rehearing.

When an opinion is issued in a case, a motion for rehearing may be filed within 15 days after the court of appeals' judgment is rendered.[73] A further motion for rehearing may be filed within

[69] TEX. R. APP. P. 9.4(i)(2)(B).

[70] *Id.* R. 38.2(b).

[71] TEX. R. APP. P. 9.4(h), 38.1(k)(1), 38.1(k)(2). Many judges print copies of the briefs when they prepare. So, providing pivotal materials in an appendix can allow a judge to consider case law, statutes, and documents without having to search the trial court record.

[72] *Id.* R. 38.1(k)(2). *See,* also, R. 38.2.

[73] *Id.* R. 49.1.

15 days after the court of appeals modifies a judgment, vacates a judgment and renders a new judgment, or issues a different opinion.[74] Also, a motion for rehearing *en banc* may be filed whether or not a motion for rehearing has previously been filed. However, such a motion must be filed within 15 days after the court of appeals' judgment or order, when permitted, within 15 days after the denial of the party's last timely filed motion for rehearing or rehearing *en banc* reconsideration.[75] It is important to note that a motion for rehearing is not a prerequisite to filing a petition for review.[76] A motion for rehearing or motion for rehearing *en banc* that very precisely sets out how the court of appeals erred in its opinion could persuade the court of appeals to issue a revised opinion. A well-crafted motion for rehearing that is focused on the precise error of the court of appeals will highlight the error of the court of appeals and may lend support for a petition for review to the Texas Supreme Court.[77]

4. Conclusion

Effective trial and appellate practice is accomplished by hard work and attention to detail. That detail must include meticulous planning for, at the very least, preservation of error for review. Without careful and thorough attention to error preservation, an appeal is lost before it begins. Write it down, or it never will happen.

Attachment 1: Texas State Court *Gotchas* and Other Dilemmas—Checklist

(Caveat: Other Texas rules not listed may apply to your case!)

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[74] *Id.* R. 49.5.

[75] *Id.* R. 49.7.

[76] *Id.* R. 49.9.

[77] See *id.* R. 53.2(b)(9) (expressly requiring a party to file a petition for review to state the disposition of the case by the court of appeals including disposition of any motions for rehearing or en banc reconsideration).

1. Statute of limitations! (There are many different ones!!! This is "A Death Knell *Gotcha*!"),
2. Rule 11 agreements (To be enforceable, must be filed in the court or read into the record in the trial court),
3. Petition to remove to federal court and remand (Generally, notice of removal must be filed within 30 days after the receipt by the defendant of a copy of the initial pleading or within 30 days after the service of summons, whichever period is shorter. *See* 28 U.S.C. § 1446(b)),
4. Special appearance (Tex. R. Civ. P. 120a), (This attack as to jurisdictional over the person must be filed before other pleadings or motions).
5. Motion to transfer venue (Tex. R. Civ. Proc. 86), (Must file either contemporaneously with or before any pleading or motion, but after any special appearance).
6. Plea to the jurisdiction (Tex. R. Civ. Proc. 85) (Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014 (a)(8); and 101.001 *et seq.*).
7. Motion to dismiss - Really Big *Gotcha* - Must be filed within 60 days after the first pleading containing the "challenged cause of action"- (Tex. R. Civ. P. 91a),
8. Special exceptions (Tex. R. Civ. P. 90-91),
9. Plaintiff's petition (Tex. R. Civ. P. 47, 78-82),
10. Defendant's answer (Tex. R. Civ. P. 83-85, 92-98),
11. Big *Glitches-Gotchas* (Tex. R. Civ. P. 93 "Certain Pleas to be Verified," 94 Affirmative defenses, and 95 "Pleas of Payment"),
12. "Big Gotcha" – a motion for continuance *must be* in writing and verified. Tex. R. Civ. Proc. 251-254; *see also*, Tex. R. civ. Proc. 247, 330(d).
13. Third-party designations: Tex. R. Civ. P. 38 (leave not required if filed within 30 days after serving original answer, leave of court required thereafter. Any party may move to strike.). *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 33.004 (Defendant files motion to designate third party on or before the 60th day before the trial date unless the court finds good cause to file a later motion. Other time

limits are set out in section.).

14. (Tex. Civ. Prac. & Rem. Code Ann. § 33.004),
15. Counter claims, cross-claims (Tex. R. Civ. P. 97),
16. Jury demand (Tex. R. Civ. P. 216, 248),
17. Motion to compel arbitration (Tex. Civ. Prac. & Rem. Code Ann. §§ 171.021-171.026; 9 U.S.C. §§ 3, 4),
18. Suit on account or sworn account (Another answer that must be sworn *Gotcha*, Tex. R. Civ. P. 186),
19. Request for disclosure (Tex. R. Civ. P. 194),
20. Discovery (Tex. R. Civ. P. 192-215),
21. Motions for summary judgment (Traditional, No evidence, Tex. R. Civ. P. 166a, time before hearing (21 days), time for response (7 days)),
22. Motion for instructed (directed) verdict (Tex. R. Civ. P. 268, Tex. R. App. P. 33.1 (Preservation of Appellate Complaints)),
23. Instructions to the jury panel and jury (Tex. R. Civ. P. 226a, See Texas Supreme Court's ordered "Instructions" noted after the rule),
24. Jury charge (Tex. R. Civ. P. 271-279); (Rule 272 objections must be in writing or dictated into the record. The trial court must rule on each objection or request. Rule 273 requests for questions, definitions, and instructions must be submitted in writing to both opposing counsel and trial court. Rule 274 objections must be specific as to each question, definition, or instruction.).
25. Verdict (Tex. R. Civ. P. 290-295),
26. Non-jury trial (Tex. R. Civ. P. 296-299a),
27. Judgment (Tex. R. Civ. P. 296-316), Computation of time (Tex. R. Civ. P. 4),
28. Time to run from signing of order or judgment (Tex. R. Civ. P. 306a),
29. Time for filing post judgment potions (Another ***Gotcha*** - times are drop dead dates, Tex. R. Civ. P. 329b-30 days after judgment signed),
30. Motion for new trial, to modify correct or reform judgment (Tex. R. Civ. P. 320-329a, 329b); motion notwithstanding

the verdict (TEX. R. CIV. P. 301); (Another ***Gotcha*** - When is a MNT a "prerequisite" for appeal? *See* TEX. R. CIV. P. 324b ***"****Motion for New Trial Required.* --A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
(2) A complaint of factual insufficiency of the evidence to support a jury finding;
(3) A complaint that a jury finding is against the overwhelming weight of the evidence;
(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or
(5) Incurable jury argument if not otherwise ruled on by the trial court."

31. Judgment finality (A final judgment must dispose of all issues and all parties. *Lehmann v. Har-Con Corp.,* 39 S.W.3d 191 (Tex. 2001)),
32. Time for filing notice of appeal (More "Death Knell ***Gotchas***!"), from interlocutory order (TEX. R. APP. P. 26.1(b) 20 days from order), from final judgment (TEX. R. APP. P. 26.1 30 days from finality of judgment).

Texas's Transitioning Judiciary: A Few Appellate & Ethical Considerations

*Michael J. Ritter**

This month, due to retirements and the 2018 judicial elections, Texas welcomed an historic number of new judges in trial and appellate courts.[1] In both civil and criminal cases, a change in judgeship can raise questions about what a new judge may or may not do, and about the impact the change in judgeship might have on pending proceedings in the appellate court. This article attempts to address some of those questions and identify potential ethical issues that might arise as a result of a change in judgeship in both civil and criminal cases.

Although Texas's "judiciary" (as used in this article's title) technically includes officials other than judges (such as elected prosecutors, constables, clerks, sheriffs, and even state bar officers),[2] this article focuses primarily on appellate and ethical considerations that can arise with a change in judgeship in

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1 *See* Mark Curridan, *Substantive Changes Coming to Courts of Appeals in Austin, Dallas & Houston*, The Texas Lawbook, Nov. 12, 2018, https://texaslawbook.net/substantive-changes-coming-to-courts-of-appeal-in-austin-dallas-houston; Mark Curridan, *Updated – Democrats Seize Control of Dallas Court of Appeals, Win Houston Appellate Judgeships*, The Texas Lawbook, Nov. 7, 2018, https://texaslawbook.net/democrats-appear-to-seize-dallas-court-of-appeals-dems-win-houston-judgeships-tx-lawyers-score-big-congressional-upsets. Hon. Nathan L. Hecht, The State of the Judiciary in Texas: An Address to the 86th Texas Legislature, Feb. 6, 2019, at 5–6, https://www.txcourts.gov/media/1443500/soj2019.pdf

2 Tex. Const. art. V, §§ 18, 20, 21, 23 (providing for elected constables, county clerks, county attorneys, district attorneys, and sheriffs within the state's "Judicial Department"); Tex. Gov't Code § 81.011(a)–(c) (providing for state bar directors and officers within the judicial agency).

trial and appellate courts in both civil and criminal cases. The number of changes in judges resulting from retirements and the 2018 judicial elections prompted this article, but this article can be helpful whenever any new or a different judge takes office, whether due to a regular or special election, appointment, or through a rotating docket or presiding system. However, different rules apply when a successor judge takes office after a prior judge dies, resigns, or becomes disabled.[3]

Generally speaking, a change in judgeship fundamentally does not increase or decrease the trial court's authority or responsibilities, or a party's appellate options. But such a change can alter or modify how attorneys use existing appellate options and provide an occasion for lawyers to re-familiarize themselves with those appellate options. This article takes no position on the prudence or propriety of these options in any particular case or category of cases, and is intended to inform readers on case law and relevant rules.

The appellate considerations that this article addresses are: (1) having a newly elected trial judge reconsider a ruling, order, or judgment of a prior judge; (2) appealing or seeking extraordinary relief in an appellate court if a trial judge does reconsider or refuses to reconsider a ruling, order, or judgment of the prior judge; and (3) having newly elected appellate justices reconsider a prior order or judgment of the appellate court. In addition to these appellate options, this article highlights other appellate issues that have arisen with a change in judgeship. In discussing these topics, this article highlights potential ethical issues that can arise in pursuing appellate options with a newly elected trial or appellate court judge. This article also touches briefly on newly elected prosecutors, but begins with reconsideration in the trial court.

I
Reconsideration in the Trial Court

If a party desires to challenge a trial court's ruling, order, or judgment, one of the first appellate considerations is whether

[3] Tex. R. Civ. P. 18.

the party must or may seek further redress in the trial court first. Generally, for state courts, Texas law regards the trial court as an office, and does not distinguish between officeholders.[4] When a newly elected judge holds the office of the trial court, the new judge generally has the same authority and responsibilities as the prior judge.[5] The difference is that the parties have a different decisionmaker exercising the authority and executing the responsibilities of that office. This difference raises the question as to whether a party may seek reconsideration of the prior ruling, order, or judgment in the trial court and whether, to preserve error for an appeal, the party must do so before seeking relief in an appellate court. This article refers to the former as "discretionary reconsideration," and the latter as "mandatory reconsideration."

A. Mandatory Reconsideration

Reconsideration is not mandatory to preserve error for a direct appeal. As discussed in Part IV.A of this article, reconsideration might be required if a party has pursued extraordinary relief in an original proceeding in an appellate court. Typically, for purposes of an direct appeal, if a party has preserved error regarding a prior judge's ruling, order, or judgment, the party need not preserve error again after the newly elected trial judge takes office. Error preservation rules, which are (at the most basic level) the same in civil and criminal cases, typically require a ruling by the trial court.[6] Once the trial court has ruled on the complaint, objection, or motion, error

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[4] Texas appellate courts usually refer to a trial judge's official actions as done by the "trial court." However, the Court of Criminal Appeals generally refers to actions of the "trial judge" for readability, and when considering original proceedings that typically involve seeking relief against the officeholder instead of from an appealed order or judgment.

[5] In re Wolff, 231 S.W.3d 466, 470–71 (Tex. App.—Dallas 2007, no pet.) (holding a newly elected judge abused his discretion by failing to conduct de novo hearing of matter decided by an associate judge when the prior judge was in office).

[6] *See generally* TEX. R. APP. P. 33.1; TEX. R. EVID. 103.

preservation rules generally do not require a subsequent ruling by the new trial judge.

In other words, if a party desires to appeal a prior judge's order or judgment, and *has* preserved a complaint for appellate review regarding that prior judge's order or judgment, reconsideration of the order or judgment by the new trial judge is not mandatory. Conversely, if the trial court has already ruled or signed an order or judgment and a party *has not* preserved error, then the party might be unable to preserve error regarding the prior ruling, order, or judgment[7] unless the new judge actually reconsiders the ruling, order, or judgment in light of the party's further request, objection, or motion as discussed in Part I.C. Consequently, while the election of a new judge might not require reconsideration to preserve error, it might create an opportunity to pursue the new judge's discretionary reconsideration by which a party may preserve error that was previously not preserved.

B. Discretionary Reconsideration

Although a party is not required to re-preserve a previously-preserved complaint for appellate review after a newly elected judge takes office, a party might be able to seek a newly elected judge's reconsideration of a prior judge's ruling, order, or judgment while the trial court has plenary power. One case that exemplifies discretionary reconsideration is *State v. $50,600.00*.[8] In *State v. $50,600.00*, after the newly elected trial judge took office, the new judge *sua sponte* vacated an agreed judgment that the prior judge had rendered, and then rendered a new judgment.[9] On appeal, the new judgment was challenged on two bases: (1) the trial court lacked authority to render the

[7] This might be the case because the complaint, objection, or motion or grounds therefor will not have been timely. An untimely objection does not preserve error for review. *See* TEX. R. APP. 33.1(a)(1) (requiring that the complaint, objection, or motion be made "timely").

[8] 800 S.W.2d 872 (Tex. App.—San Antonio 1990, writ denied) (op. on reh'g).

[9] *Id.* at 874.

new judgment; and (2) the trial court erred by rendering the new judgment.[10] Although *State v. $50,600.00* is a civil asset forfeiture case, the same general principles might apply in criminal cases.

State v. $50,600.00 demonstrates that even if a newly elected trial judge has the authority reconsider or vacate a prior order or judgment while the trial court has plenary power, doing so may be appropriate in some cases and inappropriate in others. The court of appeals in *State v. $50,600.00* held the trial court had the authority to render the new judgment because the new judgment was rendered within thirty days of the day that the prior judge rendered the agreed final judgment.[11] However, the court of appeals held that the trial court nevertheless erred by rendering the new judgment because it did not conform to the parties' pleadings.[12] Thus, under *State v. $50,600.00*, a newly elected trial judge can reconsider a prior judge's ruling, order, or judgment so long as the trial court retains plenary power, and the new ruling, order, or judgment could be reviewed on appeal for compliance with the applicable substantive law. Although *State v. $50,600.00* demonstrates two steps of discretionary reconsideration in the trial court, there are other legal and ethical considerations in seeking a newly elected trial judge's reconsideration of the prior judge's ruling, order, or judgment.

1. *Is the new judge recused, disqualified, or otherwise prohibited from acting?*

In any case, an issue that can arise when any trial judge first considers a matter is disqualification or recusal.[13] If a judge is disqualified from the case, the judge's orders or rulings are void and error need not be preserved to challenge the actions

[10] *Id.* at 876–77.

[11] *Id.* at 876.

[12] *Id.* at 876–77.

[13] TEX. CONST. art. V §11; TEX. CODE CRIM. PROC. arts. 30.01–3.08. TEX. R. CIV. P. 18a, 18b.

of a disqualified judge.[14] If a judge should have recused from the case, error must be preserved in the trial court to raise the issue on appeal.[15] However, even if a new judge is not recused or disqualified, a new judge may otherwise be prohibited from reconsidering a ruling, order, or judgment if the order has been appealed and, in civil cases, the appellate court has issued a stay[16] or, in criminal cases, the record on appeal has been filed.[17] If the new judge is not disqualified or recused, and is otherwise able to rule, the next question is whether the trial court retains plenary power over the case.

2. Does the trial court still have plenary power?

As previously noted, Texas law generally treats the trial court as an office and, for most appellate matters, does not distinguish between officeholders. With a few exceptions, if the former judge could have reconsidered the ruling, order, or judgment, then the new judge may do so; if the former judge could not have reconsidered the ruling, order, or judgment, the new judge may not do so. Thus, if the new judge is not disqualified or recused, the next question is whether the trial court, as an office, retains the legal authority to act.

The trial court's legal authority to act is usually referred to as

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[14] Davis v. Crist Indus., Inc., 98 S.W.3d 338, 342 (Tex. App.—Fort Worth 2003, pet. denied) ("If, however, the complaint is that the judge acted in a case without statutory or procedural authority, the alleged error is not void, but voidable, and must therefore be raised by objection or complaint to be preserved for appellate review."); Mata v. State, 991 S.W.2d 900, 902 (Tex. App.— Beaumont 1999, pet. ref'd) ("The actions of a judge without authority are void if the judge is either disqualified, or is not qualified. Otherwise, the actions are merely voidable and must have been objected to in order to be preserved for appeal.") (citation omitted).

[15] *See Davis*, 98 S.W.3d at 342; *Mata*, 991 S.W.2d at 902.

[16] Tex. Civ. Prac. & Rem. Code § 51.014(b), (c), (e).

[17] *See* Green v. State, 906 S.W.2d 937, 940 (Tex. Crim. App. 1995) (holding actions taken by the trial judge after the record on appeal is filed are null and void).

the trial court's plenary power.[18] In civil cases, a trial court has plenary power over case for thirty days after the trial court signs a final judgment.[19] In criminal cases, a trial court has plenary power over the case for thirty days after the trial court either dismisses the charges, or imposes or suspends the defendant's sentence.[20] In all cases, if a party files a proper, timely post-judgment motion, the trial court retains plenary power until thirty days after the post-judgment is denied by the trial court or is overruled by operation of law seventy-five days after the final judgment was signed or after sentence is suspended or imposed.[21] After the trial court loses plenary power, a new judge may not set aside a prior judge's ruling, order, or judgment in that same proceeding. However, in civil cases, a new trial judge may set aside a prior judge's ruling if a timely filed bill of review establishes sufficient cause.[22] In criminal cases, a new trial judge may set aside a prior judge's order or judgment if the defendant/applicant is entitled to habeas relief.[23]

3. Should the new trial judge reconsider the prior judge's ruling, order, or judgment?

If a new trial judge is not disqualified or recused, and the trial court retains plenary power over the case and is otherwise able to act, the next question is whether the trial judge should

[18] *See, e.g.*, TEX. R. CIV. P. 329b(d)–(h); Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P., 540 S.W.3d 577, 581 (Tex. 2018) ("[P]lenary power . . . generally only lasts for thirty days after final judgment, ..."); State v. Davis, 349 S.W.3d 535, 537 (Tex. Crim. App. 2011) (explaining a trial court retains plenary power to modify a sentence if a motion for new trial or motion in arrest of judgment is filed within thirty days of sentencing).

[19] *See* TEX. R. CIV. P. 329b(a); *Alexander Dubose Jefferson & Townsend*, 540 S.W.3d at 581.

[20] *See Davis*, 349 S.W.3d at 537.

[21] *See* TEX. R. CIV. P. 329b(c) (civil rule); TEX. R. APP. P. 21.8(a), (c) (criminal rule).

[22] TEX. R. CIV. P. 329b(f).

[23] *See* Rubio v. State, 203 S.W.3d 448, 454–55 (Tex. App.—El Paso 2006, pet. ref'd).3

reconsider the prior judge's action. There are varying views about the propriety of a newly elected judge reconsidering the prior judge's rulings, orders, and judgments. No view is necessarily correct or incorrect. Rather, these views are generally formed by the individual officeholder weighing the sometimes-competing goals of promoting judicial efficiency, protecting institutional legitimacy, and ensuring justice for the parties. Factors that can weigh against reconsidering a prior judge's ruling include: (1) using additional judicial resources to hold another hearing to reconsider a matter that has already been heard and decided by another elected judge; (2) if applicable, avoiding the perception that the newly elected judge's political affiliation or opposition to the prior judge motivated the change; and (3) in counties that have a rotating docket or presiding system, the need for comity among the judges not to disturb other judges' decisions, regardless of whether they are newly elected judges or not.

On the other hand, one factor that could weigh in favor of reconsideration by the new judge is that the party seeking reconsideration reasonably believed a prior judge would not have been amenable to the argument. One example of such an issue might be the issue of a prior judge's recusal.[24] Other examples of the prior judge not being amenable to a particular argument will likely be likewise case- and judge-specific. That said, any explanation for why counsel failed to raise an argument or issue before a prior judge might require that the new judge to assess the credibility of counsel's explanation. In presenting such an explanation, counsel should keep in mind Texas Disciplinary Rule of Professional Conduct 3.03, which prohibits lawyers from knowingly making false statements of material facts to a tribunal.[25]

Depending upon the case, the biggest factor weighing in favor of reconsidering a prior judge's decision, however, might be ensuring justice is served when the prior judge's ruling appears

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[24] *See, e.g.*, Bank of Tex., N.A., Trustee v. Mexia, 135 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied) (providing an example of a party waiting until after a prior judge left office to raise an issue with the prior judge's disqualification/recusal).

to be erroneous and the ruling might a significant impact either on the case going forward or on the aggrieved party. Although the aggrieved party might have options available in the appellate court, a newly elected trial judge might conclude those appellate options are or could be inadequate under the circumstances. Different judges might weigh these factors differently, resulting in some judges almost never reconsidering a prior judge's actions and some judges frequently reconsidering the prior judge's actions depending upon the circumstances. However, if the trial court retains plenary power and the newly elected judge is not disqualified or recused and is otherwise able to act, a newly elected judge's decision to reconsider a prior order is, as if the newly elected judge were the former judge, entirely discretionary in most cases.

4. What is the proper scope of a new trial judge's permissive reconsideration?

If a newly elected judge exercises their[26] discretion to reconsider the prior judge's ruling, then the new judge must determine whether the prior judge's ruling, order, or judgment was proper. As demonstrated by *State v. $50,600.00*, determining whether a prior judge's ruling, order, or judgment was proper requires considering the pleadings, any evidence properly submitted, and the applicable law.[27] A motion to reconsider might add further grounds and responses, and include additional evidence not included in the motion to be reconsidered. The trial court may (1) deny reconsideration altogether; (2) reconsider the prior motion on its original grounds, responses, and evidence; or (3) reconsider the prior motion on its original grounds and evidence and any new

[25] TEX. DISC. R. PROF. CONDUCT 3.03(a)(1).

[26] This article uses "their" as a gender-neutral pronoun. *See The singular gender-neutral pronoun 'they' added to the Associated Press Stylebook*, WASH. POST, Mar. 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/03/28/the-singular-gender-neutral- they-added-to-the-associated-press-stylebook.

[27] 800 S.W.2d 872 (Tex. App.—San Antonio 1990, writ denied) (op. on reh'g).

grounds raised and evidence submitted with the motion for reconsideration and response thereto.[28] As explained in Part I.C, the option the new trial judge chooses can significantly affect the scope of appellate review if the trial court's ruling, order, or judgment is subsequently challenged in an appellate court.

5. Further Limits on Discretionary Reconsideration

In addition to the trial court losing plenary power or the trial judge being disqualified, recused, or otherwise unable to act based on the appellate posture of the case, there are some further limits on discretionary reconsideration. In civil cases, some motions, such as a motion to transfer venue, generally might not be subject to reconsideration.[29] Other statutory or rule-based deadlines can preclude a newly elected trial judge from reconsidering a prior ruling, order, or judgment. Some motions have deadlines for filing and for the trial court to rule on those motions. In civil cases, these motions include a Rule 91a motion to dismiss, a motion to dismiss under the Texas Citizens Participation Act (TCPA or the anti- SLAPP statute), and a motion for new trial. A Rule 91a motion must be filed within sixty days of service and ruled on within forty-five days of the Rule 91a motion being filed.[30] A TCPA motion must be filed within sixty days of service and ruled on within thirty days of the hearing on the TCPA motion.[31] In both civil and criminal cases, a motion for new trial must be filed within thirty days and ruled on within seventy-five days of the challenged judgment.[32]

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[28] PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723, 729–30 (Tex. App.—San Antonio 2014, pet. denied).[29] TEX. R. CIV. P. 87.5.

[30] TEX. R. CIV. P. 91a3(a)

[31] TEX. CIV. PRAC. & REM. CODE §§ 27.003(b), 27.005(a).

[32] Martins v. State, 52 S.W.3d 459, 467 n.5 (Tex. App.—Corpus Christi 2001, no pet.) (citing TEX. R. APP. P. 21.4(b)) (stating the thirty-day deadline to file a motion for new trial cannot "be circumvented by filing a 'motion to reconsider' which contains new grounds and new evidence after the statutory deadline for an amended motion"); *see generally* TEX. R. CIV. P. 329b.

Thus, a trial court might abuse its discretion by granting a motion to reconsider with further grounds or arguments, or reconsidering an order denying such a motion, outside of the applicable statutory or rule-based deadlines for filing and ruling on the motion.

C. Appellate Issues Regarding Trial Court Reconsideration

If a newly elected judge grants or denies a motion to reconsider, a few appellate issues might arise. As noted above, when ruling on a motion to reconsider, a trial court may (1) deny altogether; (2) reconsider the original motion on the original filings and evidence; or (3) reconsider the original motion in light of any new grounds raised in and evidence submitted with the motion for reconsideration and response.[33] If a trial court's order simply denies the motion to reconsider, the simple denial raises a rebuttable presumption that the trial court either did not reconsider the prior motion or that the trial court reconsidered the prior motion without considering any new grounds, responses, or evidence presented with the motion to reconsider.[34] The presumption may be rebutted by an affirmative indication (such as statements the trial judge makes or recitations in the order) that the new trial judge actually considered the merits of the new grounds, responses, or evidence presented with the motion for reconsideration and response thereto.[35] If the new trial judge's order contains language such as "After considering the pleadings and evidence on file," the court of appeals might presume in an appeal that the new trial judge reconsidered the motion in light of any new grounds and evidence presented in the motion to reconsider and response. Because the language in the trial court's order

[33] PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723, 729–30 (Tex. App.—San Antonio 2014, pet. denied).

[34] *See id.*

[35] *See id.* at 730; *see also* Tooker v. Alief Indep. Sch. Dist., 522 S.W.3d 545, 553–54 (Tex. App.—Houston [14th Dist.] 2017, no pet.); Pritchett v. Gold's Gym Franchising, LLC, No. 05-13- 00464-CV, 2014 WL 465450, at *2 n.2 (Tex. App.—Dallas Feb. 4, 2014, pet. denied) (mem. op.).

can affect the scope of an appellate court's review, and the scope of the review may be outcome determinative in an appellate court proceeding, one might want to carefully review an order for such language before submitting, or approving the form of, an order on a motion to reconsider.

If a new trial judge denies a motion to reconsider a prior appealable interlocutory order, with or without considering additional arguments or evidence, the order denying the motion to reconsider might not restart the appellate deadlines for an interlocutory appeal. For instance, in a civil case, if a prior judge denied a plea to the jurisdiction, and a new judge denies a motion to reconsider that very same plea to the jurisdiction, this might not restart the clock for appealing the trial court's denial of the plea to the jurisdiction.[36] A similar rule might apply in criminal cases. For example, if a prior judge grants a motion to suppress, and the new judge denies a motion to reconsider, the new judge's denial of the motion to reconsider might not restart the clock for appealing the trial court's order granting the motion to suppress.[37]

Conversely, if a new trial judge grants a motion to reconsider and either grants or denies a prior motion, then the order granting the motion to reconsider might, in some cases, result in the entry of an appealable order or judgment. The trial court's new order may constitute an interlocutory order that the party has the right to appeal.[38] In a civil case, for example, if a new trial judge were to grant a motion to reconsider a motion for summary judgment denied by the prior judge and then grant the motion for summary judgment, a subsequently entered order granting the motion for summary judgment might be an appealable judgment. In a criminal case for example, if a new trial

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[36] Moorhead v. E. Chambers Indep. Sch. Dist., No. 01-03-01234-CV, 2004 WL 1470787, at *4 (Tex. App.—Houston [1st Dist.] July 1, 2004, pet. denied) (mem. op.); London v. London, 349 S.W.3d 672, 675 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (applying this principle to a turnover order).

[37] *See* Tex. Code Crim. Proc. art. 44.01(a)(5); Tex. R. App. P. 26.2(b).

[38] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a).

judge were to grant a motion to reconsider a motion to quash a charging instrument that was denied by the prior judge and then grant the motion to quash, a subsequently entered order dismissing some or all of the charges might be appealable.[39]

D. Conclusion

In summary, if the trial court still has plenary power, the new trial judge is not disqualified or otherwise unable to act, and there is no other statutory or rule-based deadline for filing or ruling on a motion, a new judge usually has the discretion to reconsider or not reconsider the prior judge's rulings, orders, and judgments. However, the new judge's ruling, order, or judgment might be erroneous if the prior judge's ruling, order, or judgment was proper, unless a new valid ground or response or new material evidence is submitted and considered by the new judge. When a new trial judge does reconsider a prior judge's action, the scope of the new judge's reconsideration can also affect the scope of review in a subsequent appeal.

II.
Options for Relief in the Appellate Court

If a newly elected trial judge reconsiders a prior judge's ruling, order, or judgment, or declines to do so, the non-prevailing party might consider pursuing relief in an appellate court. Or, if a newly elected trial judge has a different view of the case and changes course of the proceedings from when the prior judge was presiding, there might be options for relief in the appellate court. The type of relief that can be sought in an appellate court, and the proper procedure for pursuing that relief, generally turns on whether the case is a civil or criminal case and whether the order to be appealed is an appealable interlocutory order or, in a civil case, a final judgment. In other words, if the ruling, order, or judgment is appealable, a direct appeal is generally

[39] *See* Tex. Code Crim. Proc. arts. 44.01(a)(1), 44.02.

available. If not, an original proceeding in an appellate court can sometimes be an option to seek extraordinary relief.

A. Direct Appeals

One option for challenging a trial court's order or judgment is through a direct appeal. A "direct appeal" refers to the ordinary appellate process by which a party express its desire to challenge a trial court's judgment or other appealable action in an appellate court, usually a court of appeals but in some rare circumstances in the Supreme Court of Texas or Court of Criminal Appeals.[40] A party expresses its desire to challenge such appealable actions by filing a notice of appeal.[41] This article uses the term appealable "action" for purposes of including appealable interlocutory orders, final judgments in civil cases, and an order terminating prosecution or imposing or suspending a sentence in criminal cases. "Courts of appeals" refer to the fourteen intermediate courts of appeals, and "appellate courts" include all courts of appeals, the Supreme Court of Texas, and the Court of Criminal Appeals.[42]

1. Civil Appeals

In civil cases, direct appeals in the courts of appeals are limited to appealable interlocutory orders and final judgments.[43] Appealability is ultimately an issue of appellate court jurisdiction, which generally corresponds with a party's right to appeal.[44] Courts of appeals' jurisdiction is created by the Texas Constitution, which authorizes the Texas Legislature to confer courts with judicial authority and appellate jurisdiction.

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[40] *See* Tex. R. App. P. 31.2(a), 57, 71.

[41] *See id.* R. 25.1(d), 25.2(b).

[42] *See* Tex. Gov't Code § 22.201; Tex. R. App. P. 3.1(b).

[43] *See* Tex. Civ. Prac. & Rem. Code §§ 51.012, 51.014.

[44] *See* Black v. Shor, 443 S.W.3d 170, 178 (Tex. App.—Corpus Christi 2013, no pet.); McFadden v. State, 283 S.W.3d 14, 16–17 (Tex. App.—San Antonio 2009, no pet.).

Because a party has no inherent or constitutional right to appeal, the Texas Legislature has given courts of appeals jurisdiction over appeals by statutorily giving individuals the right to appeal certain orders and judgments.

Generally, if a person has the right to appeal, the court of appeals' jurisdiction is mandatory, and the court of appeals must hear and decide the case. The Legislature has given individuals the right to appeal from a final judgment and other specific interlocutory orders.[45] As noted above, if a new trial judge reconsiders a prior judge's ruling and changes course, the new judge's order may constitute a final judgment or an appealable interlocutory order.

a. Final Judgments

A party has a right to appeal from a final judgment.[46] A "judgment" typically refers to an order that disposes of a party's request for the ultimate relief sought in the case, either by denying, granting, or dismissing the request for relief. So, under this definition, all judgments are orders, but not all orders are judgments. The test for whether a judgment is final and appealable as a matter of right turns on the test set out by *Lehmann v. Har-Con Corp.*[47] Under *Lehmann*, a judgment is "final" if:

(1) it actually disposes of all claims and all parties in the lawsuit; or (2) states with unmistakable clarity that it is a final judgment as to all parties and all claims.[48] A judgment rendered after a conventional trial on the merits is presumed to be a final judgment, but that presumption may be rebutted by specific language in the judgment or by the record of the trial.[49] If a newly elected trial judge grants the ultimately relief requested in a case, either before or after a conventional trial on the merits, the judgment might be final and appealable.

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[45] *See* Tex. Civ. Prac. & Rem. Code §§ 51.012, 51.014.

[46] *See id.* § 51.012.

[47] 39 S.W.3d 191, 195 (Tex. 2001).

[48] *Id.* at 192–93.

[49] *Id.* at 198.

b. Appealable Interlocutory Orders & Permissive Appeals

If the order a party desires to appeal is not a final judgment, the order may be appealed if the Texas Legislature has provided the party the right to appeal the order. Most of the orders that a party may appeal as a matter of right are contained in section 51.014 of the Texas Civil Practice & Remedies Code.[50] However, the Texas Legislature often buries the right to appeal within other statutes.[51] So, if a newly elected trial judge signs an order, section 51.014 or other applicable statutes might provide the right to appeal that order. Also notable is that when the Legislature provides that a party "may" appeal, the use of the word "may" typically confers the right to appeal.[52]

If the Legislature has not provided a right to appeal the order, there is an alternative discretionary procedure contained in section 51.014, specifically in subsections (d) through (f).[53] In those provisions, the Texas Legislature deviated from the general rule of appeals as a matter of right, and corresponding mandatory jurisdiction for the courts of appeals, by providing an alternative, discretionary review procedure in the intermediate appellate courts. Under this discretionary review procedure, a party may seek permission from the trial court to appeal an otherwise non-appealable order or judgment.[54] Generally, the trial court must conclude the order involves a substantial ground for difference of opinion as to a controlling question of law[55]

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[50] *See* TEX. CIV. PRAC. & REM. CODE § 51.014.

[51] *See, e.g.*, *id.* § 171.098 (providing the right to appeal certain orders regarding arbitration).

[52] *See id.* §§ 51.012, 51.014.

[53] *See id.* § 51.014(d)–(f).

[54] *See id.* § 51.014(d).

[55] The permissive appeal procedure is not a certified question procedure, but an ordinarily interlocutory appeal of an order that is not otherwise appealable. *See* Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207 (Tex. App.—San Antonio 2011, no pet.) ("Under our reading of the statute, section 51.014(d) does not contemplate use of an immediate appeal as a mechanism to present, in effect, a 'certified question' to this Court

and that an immediate appeal would materially advance the ultimate termination of the litigation.[56] If the trial court grants permission to appeal, the party desiring to appeal must timely file a petition for permissive appeal in the court of appeals; the court of appeals then has the discretion as to whether to take the case.[57]

2. Criminal Appeals

In criminal cases, direct appeals are generally limited to the trial court's imposition or suspension of the defendant's sentence and appealable interlocutory orders.[58] Unlike civil cases, in which the appealable action is the written order or judgment that is signed by the trial judge, when the appealable action in criminal cases is not the signing of an interlocutory order, the appealable action is the imposition or suspension of the defendant's sentence.[59] If a newly elected judge imposes or suspends sentence, then the imposition or suspension of the sentence is the appealable action.[60]

If a newly elected judge changes course or otherwise makes another ruling, the appealability of the ruling turns on, initially, which party is seeking to appeal. A criminal defendant's right to appeal is provided in article 44.02 of the Texas Code of Criminal Procedure:

A defendant in any criminal action has the right of appeal

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similar to the procedure used by federal appellate courts in certifying a determinative question of state law to the Texas Supreme Court.").

[56] *See id.* § 51.014(d).

[57] *See id.* § 51.014(f). The Supreme Court of Texas is currently considering whether a court of appeals actually has discretion to refuse to hear a permissive appeal if it concludes there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. *See* Sabre Travel Int'l v. Deutsche Lufthansa AG, 17-0538 (Tex.) (oral argument held on Oct. 30, 2018)

[58] *See* TEX. CODE CRIM. PROC. arts. 44.01, 44.02.

[59] *See* TEX. R. APP. P. 21.4(b), 26.1(a)(1).

[60] *See id.* R. 21.4(b), 26.1(a)(1).

under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.[61]

Interestingly, article 44.02 is different from the right to appeal conferred in civil cases and the State's right to appeal in criminal cases because it provides, unlike all the other relevant statutory provisions, that the defendant has the right to appeal "under the rules hereinafter prescribed," which appears to delegate to the Court of Criminal Appeals the authority to determine by rule what else a defendant may appeal.[62] The Court of Criminal Appeals has, for example, promulgated Rule 31, which appears to authorize a criminal defendant to appeal certain bond and habeas rulings.[63] The State may appeal as per article 44.01 of the Code of Criminal Procedure. Article 44.01 provides:

> The state is entitled to appeal an order of a court in a criminal case if the order: (1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint; (2) arrests or modifies a judgment; (3) grants a new trial; (4) sustains a claim of former jeopardy; (5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case; or (6) is issued under Chapter 64.[64]

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[61] *See* TEX. CODE CRIM. PROC. art. 44.02.

[62] *See id.*

[63] *See* TEX. R. APP. P. 31.

[64] *See* TEX. CODE CRIM. PROC. art. 44.01.

In addition to articles 44.01 and 44.02, as in civil cases, the Legislature has buried statutory rights to appeal within different statutory provisions in the Code of Criminal Procedure.[65] So, if a newly elected trial judge changes course from the prior judge and signs an order, articles 44.01 and 44.02 and other applicable provisions of the Code of Criminal Procedure might provide the right to appeal for that particular order.

3. Further Review in the Supreme Court of Texas & Court of Criminal Appeals

After the court of appeals decides a direct appeal, further appellate options exist in the Supreme Court of Texas and the Court of Criminal Appeals.[66] The procedure for pursuing further appellate relief in civil cases is by petition for review in the supreme court.[67] The typical procedure for pursuing further appellate relief in criminal cases is by petition for discretionary review in the Court of Criminal Appeals.[68] Although the procedure for criminal cases includes the word "discretionary" and the civil procedure does not, both procedures are discretionary review procedures and the high courts may decline to grant review in their sole discretion.

B. Extraordinary Relief

Another option for challenging a trial court's ruling, order, or judgment is by initiating an original proceeding in an appellate court and seeking extraordinary relief. "Extraordinary relief" typically refers to the issuance of an extraordinary writ, including writs of mandamus, prohibition, habeas corpus, and others.[69] A party may request that an appellate court issue an extraordinary writ by filing a petition in an appellate

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[65] *See, e.g.*, *id.* art. 64.05.

[66] *See* TEX. R. APP. P. §§ 3–5.

[67] *See id.* R. 53.

[68] *See id.* R. 66.

[69] *See id.* R. 52.1.

court, and equitable principles generally govern those original proceedings.[70] Technically speaking, extraordinary relief may first be sought in the supreme court or Court of Criminal Appeals because the proceedings are "original" proceedings.[71] But because the high courts will generally deny relief if a party has not first pursued relief in the court of appeals or showed that extraordinary circumstances justified not having done so, the typical practice is to pursue extraordinary relief in the court of appeals.

The standards governing the issuance of extraordinary writs depend on the type of writ sought and whether the case is a civil or criminal case. Although there are other extraordinary writs, this article focuses on three: mandamus, prohibition, and habeas corpus. The purpose or function of writs of mandamus and prohibition are generally the same regardless of the type of case; a writ of mandamus compels an official to take an action, whereas a writ of prohibition prohibits an official from taking an action.[72] Writs of mandamus and prohibition are closely related and are governed by similar standards. Conversely, a writ of habeas corpus serves the purpose of challenging an order under which an individual is confined for being in contempt of court.

1. Writs of Habeas Corpus

One issue that can arise with any change in judgeship is a change in courtroom expectations. Although parties sometimes violate a judge's expectations, rules, or orders for courtroom conduct, judges in Texas tend to be somewhat reluctant to hold parties and attorneys in contempt. But it does happen occasionally. When a trial judge errs by holding a party or lawyer in contempt, an original proceeding in an appellate is the usual appellate remedy. If the party or lawyer is not confined as

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[70] *See generally id.* R. 52, 72; In re Medina, 475 S.W.3d 291, 297–98 (Tex. Crim. App. 2015) (orig. proceeding); Callahan v. Giles, 137 Tex. 571, 155 S.W.2d 793 (1941) (orig. proceeding).

[71] *See* Tex. R. App. P. 52, 72.

[72] *See In re Medina*, 475 S.W.3d at 297–98.

a result of an order of contempt, the appropriate writ to seek is a writ of mandamus in the court of appeals. If the party or lawyer is confined as a result of a contempt order, the appropriate writ to seek is a writ of habeas corpus in the court of appeals in civil cases or the Court of Criminal Appeals in criminal cases.[73]

The standards governing the issuance of writs of habeas corpus are generally the same regardless of whether the underlying case in which the contempt order arises is a civil case or a criminal case. "A criminal contempt conviction for violation of a court order requires proof beyond a reasonable doubt of: (1) a reasonably specific order; (2) a violation of the order; and (3) the willful intent to violate the order."[74]

2. Writs of Mandamus & Prohibition in Criminal Appeals

In criminal appeals, the issuance of writs of mandamus and prohibition are governed by the same general principles.[75] The relator must show: (1) a clear right to relief; and (2) the relator lacks an adequate remedy at law (or by appeal).[76] The first requirement generally mandates that the relator establish the trial judge had a mandatory duty to do something or refrain from doing something, but failed to comply with that duty. This first requirement is alternatively phrased as an "abuse of discretion." The Court of Criminal Appeals has explained that the modifier "clear" in the "clear right to relief" requirement is not a superfluous term; the alleged abuse of discretion must

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[73] *See, e.g.*, Cline v. Cline, 557 S.W.3d 810, 812 (Tex. App.—Houston [1st Dist.] 2018, no pet.); Ramirez v. State, 36 S.W.3d 660, 664 (Tex. App.—Waco 2001, pet. ref'd) (stating courts of appeals have no original habeas jurisdiction in criminal cases).

[74] In re Mayorga, 538 S.W.3d 174, 178 (Tex. App.—El Paso 2017, orig. proceeding) (citing Ex parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding)); *see also* Ex parte Kearby, 35 Tex. Crim. 531, 538, 34 S.W. 635 (1896) (orig. proceeding).

[75] In re Medina, 475 S.W.3d 291, 297 (Tex. Crim. App. 2015) (orig. proceeding).

[76] State ex rel. Mau v. Third Court of Appeals, WR-87,818-01, 2018 WL 5623985, at *3 (Tex. Crim. App. Oct. 31, 2018) (orig. proceeding).

be clear as a matter of fact and as a matter of law. If it is unclear from the record what exactly the trial judge did or failed to do, or if the law that applies to what the trial judge did is unclear, then a request for an extraordinary writ of mandamus or prohibition must be denied.[77] Although the Court of Criminal Appeals has framed the first requirement as an abuse of discretion, the most frequent abuse of discretion alleged is the misapplication of the law or a failure to apply the law, issues that are reviewed de novo.

For the second requirement, there must be no adequate remedy at law (or by appeal). "In some cases, a remedy at law may technically exist but may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate."[78] "To establish no adequate remedy by appeal, the relator must show there is no adequate remedy at law to address the alleged harm and that the act requested is a ministerial act, not involving a discretionary or judicial decision."[79] In criminal cases, Texas courts often note, "The extraordinary nature of the writ of prohibition requires caution in its use."[80]

And they mean it. As a result, a writ of mandamus or prohibition might not issue to address a newly elected judge's abuse of discretion in criminal cases unless the case is truly extraordinary. The same cannot be said for civil appeals.

3. Writs of Mandamus & Prohibition in Civil Appeals

To obtain mandamus relief in civil cases, the relator must show: (1) the trial judge abused their discretion, and (2) the relator lacks an adequate remedy by appeal.[81] Counterintuitively,

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[77] *Id.*

[78] In re Ford, 553 S.W.3d 728, 732 (Tex. App.—Waco 2018, orig. proceeding).

[79] In re Hesse, 552 S.W.3d 893, 896 (Tex. App.—Amarillo 2018, orig. proceeding).

[80] In re State ex rel. Escamilla, No. 03-18-00351-CV, 2018 WL 4844100, at *3 (Tex. App.—Austin Oct. 5, 2018, orig. proceeding) (mem. op.).

although the first requirement for these extraordinary writs in civil and criminal appeals are phrased differently, they are very similar tests in application. And, although the second requirement is phrased almost identically in both the civil and criminal contexts, the standards for what constitutes lacking an adequate remedy at law or by appeal are very different.

In civil appeals, the first requirement is a "clear" abuse of discretion. Like criminal appeals, this issue ultimately boils down to whether the trial judge misapplied the law, failed to apply the law correctly, or failed to perform a ministerial duty, such as by failing to rule on a properly presented motion. But unlike criminal appeals, and despite the words used to describe the standard, trial judge's abuse of discretion and the right to relief need not be clear.[82] The record must clearly show what the trial judge did or failed to do, but the law need not be clear. Instead, the Supreme Court of Texas has explained that clarifying the law on issues that do not tend to arise in the ordinary appellate process is one of the benefits, if not purposes, of the ready availability of writs of mandamus.[83] In civil cases, the law applicable to whether a trial judge abused their discretion may be unclear, but that lack of clarity is not a bar to the issuance of a writ of mandamus or prohibition as it might be in a criminal case.[84] In sum, in civil cases, the first, "abuse of discretion" requirement often requires the court of appeals to conclude the trial court misapplied the applicable law, whatever the court of appeals eventually determines the law to be.

Conversely, the "no adequate remedy at law" and "no adequate remedy by appeal" standards very different. On this requirement, the Supreme Court of Texas's jurisprudence has evolved so radically that the "no adequate remedy by appeal" standard in civil cases has become synonymous with there

[81] In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

[82] *Id.* at 135 ("[E]ven when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion.")

[83] *Id.* at 138 (stating mandamus is beneficial to address issues that generally evade the normal appellate process).

[84] *Id.* at 135.

simply being no right to appeal.[85] In other words, according to the supreme court's most recent jurisprudence on this legal standard, if the Texas Legislature has provided a right of appeal, then a trial court's ruling, order, or judgment might not be challenged in the court of appeals in an original proceeding seeking an extraordinary writ. But if the Legislature has declined to provide a right of appeal, a party may nevertheless seek review of the trial court's ruling, but it must be done through the alternative original proceeding process (which is often preferable to the regular appellate process because it sometimes produces a faster result at less of a cost to the parties).[86] In most cases in which the supreme court itself grants mandamus relief, it does not even address the second requirement, which sets a less stringent model for courts of appeals' analyses.

This trend in the supreme court's jurisprudence has essentially allowed every trial court ruling, order, or judgment in a civil case to be reviewable by the court of appeals in one way (by a direct appeal as a matter of right) or another (by a permissive appeal or an original proceeding in an appellate court). As a result, while there used to be some attempt to outline the specific rulings and orders for which an appeal was not an adequate remedy, and those for which an appeal was an adequate remedy, writs of mandamus and prohibition now simply represent the flip side of appealability.[87] A party can obtain "extraordinary" relief in a civil case almost any time

[85] In re Sassin, 511 S.W.3d 121, 125 (Tex. App.—El Paso 2014, orig. proceeding) ("A non- party to a suit has no right to appeal a discovery order in that suit and therefore has no adequate remedy by appeal.").

[86] *Fees for the Supreme Court of Texas, Texas Courts of Appeals, and Multidistrict Litigation Panel*, Misc. Docket. No. 15-0158, Aug. 28, 2015, www.txcourts.gov/media/1057441/fees-for-supreme-court-of-texas-coas-and-mdl.pdf (showing the fee for filing an original proceeding is $155, and $205 for filing a regular appeal).

[87] *See, e.g.*, Justice Marialyn Barnard, Lorien Whyte & Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY'S L.J. 143 (2014) (providing a non-exhaustive list of recent issues subject to mandamus); *see also* In re Brown, No. 02-07-071-CV, 2007 WL 2460361, at *3 (Tex. App.—Fort Worth Aug. 29, 2007, orig. proceeding) (mem. op.) (explaining

there is no right of appeal. In other words, for nearly every single ruling, order, or judgment a new judge might make or render, the order or judgment is either (1) an appealable final judgment or interlocutory as a matter of right, or (2) subject to the discretionary review proceedings of (a) a permissive appeal and (b) an original proceeding in an appellate court for a writ of mandamus or prohibition.

C. Conclusion

In both civil and criminal cases, if a newly elected trial judge reconsiders a prior judge's ruling, order, or judgment, the same general appellate options are available: direct appeals and original proceedings in the appellate courts seeking extraordinary relief. However, with the exception of writs of habeas corpus, trial court actions that are appealable and the standards governing obtaining relief in the appellate court, will differ based on whether the case is civil or criminal.

III
Reconsideration ("Rehearing") in the Court of Appeals

This month, there was a change in judgeships for approximately one-third of justices in the courts of appeals.[88] Similar questions about reconsideration on appeal can arise with a change in judgeship on the courts of appeals. The Texas Rules of Appellate Procedure provide two methods for reconsideration or "rehearing" in the courts of appeals: a motion for panel rehearing and a motion for en banc reconsideration.[89] This Part addresses those options in the court of appeals when there is a change in judgeship. This Part also addresses the timeliness for

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mandamus is an appropriate remedy when newly elected trial judge erroneously grants a motion for new trial).

[88] *See supra* n.1.

[89] *See* Tex. R. App. P. 49.1, 49.8.

such motions, but begins with a few notes about the terminology used by this article and the Texas Rules of Appellate Procedure (or TRAPs).

A. Terminology

The Texas Rules of Appellate Procedure refer to "motions for rehearing," "motions for en banc reconsideration," and motions for "rehearing en banc."[90] The TRAP Rules use "en banc rehearing" and "en banc reconsideration" interchangeably,[91] and both of these terms refer to the same type of motion: a motion for rehearing addressed to the en banc court. Unless context indicates a narrower meaning, a "motion for rehearing" includes both a motion for panel rehearing and a motion for en banc rehearing.[92] Some TRAP rules refer to a "motion for rehearing or en banc reconsideration," indicating that "motion for rehearing" refers to a motion for panel rehearing.[93] For clarity, this article refers to panel motions as "motions for panel rehearing" and en banc motions as "motions for en banc rehearing." Both motions for panel rehearing and motions for en banc rehearing are "motions for rehearing"; the primary difference is that motions for en banc rehearing are addressed to the en banc court and ask the en banc court to reconsider the panel's opinion and judgment.

B. Reconsideration of Orders that Do Not Dispose of the Appeal

Most of this Part addresses traditional motions for panel

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[90] *See id.*

[91] City of San Antonio v. Hartman, 201 S.W.3d 667, 670 (Tex. 2006) ("[T]he appellate rules use 'rehearing' and 'reconsideration' interchangeably.").

[92] *See* TEX. R. APP. P. 49, cmt. to 2008 change ("Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration.").

[93] *Id.* R. 49.6, 49.7, 49.8, 49.11.

and en banc rehearing that are filed after a court of appeals has issued an order or judgment disposing of an appeal with a written opinion. The TRAP Rules regarding motions for panel and en banc rehearing contemplate that a motion for rehearing will be filed after the court of appeals issues its opinion and disposes of the appeal.[94] However, Texas appellate courts have traditionally entertained motions to reconsider other orders that do not dispose of the appeal. It is unclear whether such motions to reconsider are governed by the TRAP Rules that specifically govern "motions for rehearing." Although a court of appeals can reconsider and vacate orders while it retains plenary power over an appeal, it is not clear what rules and timelines—if any— govern motions to reconsider orders that do not dispose of the appeal. The rest of this Part addresses motions for panel and en banc rehearing of a judgment or order that disposes of an appeal with a written opinion.

C. Timeliness

TRAP Rule 49 provides deadlines for both a motion for panel rehearing and a motion for en banc rehearing.[95] A motion for panel rehearing "may be filed within 15 days after the court of appeals' judgment or order is rendered."[96] Similarly, a motion for en banc rehearing "must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration."[97] After a "motion for rehearing" is ruled on, "a further motion for rehearing may be filed within 15 days of the court's [ruling]

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[94] This appears to be the intent of Rule 49 when all provisions are construed as a whole. Also, structurally, the rules are numbered in a sequence in which appeals generally proceed chronologically. *See generally id.* R. 20 (starting with initial filing fees and indigence) to R. 51 (ending with enforcement of judgment after mandate issues).

[95] *Id.* R. 49.1, 49.7, 49,8.

[96] *Id.* R. 49.1.

[97] *Id.* R. 49.7

if the court" changes its opinion or judgment.[98] "A motion for rehearing or en banc reconsideration may be amended as a matter of right any time before the 15-day period allowed for filing the motion expires, and with leave of the court, any time before the court of appeals decides the motion."[99]

Rule 49.8 provides a party may file a motion for an extension of time to file a motion for panel and/or en banc rehearing "no later than 15 days after the last date for filing the motion."[100] The motion must comply with the requirements for all motions for an extension of time, which are set out in Rule 10.5(b).[101] Thus, reading Rule 49.8 together with the other provisions of Rule 49, a party may file a motion for an extension of time to file a motion for panel or en banc rehearing up to 30 days after the court of appeals' judgment or order is rendered. Unlike other rules regarding motions for an extension, the motion for panel or en banc rehearing need not necessarily be filed with the motion for an extension.[102]

B. Motions for Panel Rehearing

When it comes to a change in judgeship on the court of appeals, different rules might apply to motions for panel rehearing than the rules that apply to motions for en banc rehearing. Most significantly, Rule 49.3 appears to limit a newly elected judge's authority to vote to grant a motion for panel rehearing. Rule 49.3 provides, "A motion for rehearing may be granted by a majority of the justices who participated in the

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[98] *Id.* R. 49.5. Nothing in Rule 49 indicates that 49.5's uses "motion to rehearing" to refer only to motions for panel rehearing. Rather, a comment to the rule states, "Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration." *Id.* R. 49.5, cmt. to 2008 change.

[99] *Id.* R. 49.6.

[100] *Id.* R. 49.8.

[101] *Id.* R. 10.5.

[102] *Compare id.* R. 49.8, *with id.* R. 10.5(b)(2) (allowing a motion for an extension of time to file a notice of appeal), *and* R. 26.3 (authoring the

decision of the case. Otherwise, it must be denied."[103] For cases decided by a panel with a former judge, the newly elected judge will not have "participated in the decision of the case."

One implication Rule 49.3 is that a change in judgeship can actually hurt one's chances of obtaining relief via a motion for panel rehearing. A newly elected judge's vote cannot count toward a majority required to grant the motion for panel rehearing, and the outgoing justice is unable to reconsider the case. Instead, in order for a motion for panel rehearing to be granted when there is a change in judgeship, the two remaining justices who participated in the decision of the case must both vote to grant the motion for rehearing. Otherwise, the motion for panel rehearing must be denied.[104] If there is only one new justice on the panel, a change in judgeship can reduce the chances of relief being granted on the motion for rehearing if the former justice was more likely to have voted to grant the motion for rehearing. And, it seems to be a logical consequence of Rule 49.3 that if more than one justice on the panel is now a former justice, the motion for panel rehearing likely cannot be granted under Rule 49.

One plausible workaround of Rule 49.3's limit on motions for panel rehearing is when a motion for panel rehearing convinces the panel, with the newly elected justice or justices, to grant rehearing on its own motion. By its plain terms, Rule

49.3 only limits when a "motion" for rehearing may be granted and when the motion must be denied. However, under Rule 19.2, "the court of appeals retains plenary power to vacate or modify its judgment" while the court of appeals has plenary power.[105] If the court of appeals vacates its judgment, the appeal remains pending in the court of appeals and the panel must proceed to issue a new judgment, which may or may not be the same as the prior judgment. However, a panel of

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appellate court to extend time to file a notice of appeal if the party has also filed the notice of appeal).

[103] *Id.* R. 49.3

[104] *See id.* R (requiring majority to grant, "Otherwise, it must be denied.")

[105] *Id.* R. 19.2.

newly elected justices might be unlikely to review the prior panel's decisions without an issue being brought to the panel's attention.

That said, if a panel cannot, as a matter of law, grant a motion for panel rehearing, the filing may be considered frivolous. Rule 3.01 of the Texas

Disciplinary Rules of Professional Conduct (TDRPC) prohibits a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[106] A filing "is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[107] A party filing a motion for rehearing addressed to a panel with more than one justice who did not participate in the decision of the case might be unable to believe in good faith that the request could be granted due to Rule 49.3. But Texas Rule of Appellate Procedure 2 allows for most rules to be suspended for good cause. If there is a good faith belief that good cause exists under TRAP Rule 2 for suspending TRAP Rule 49.3, then depending upon the facts of the case, the ethical obligation in TDRPC Rule 3.01 might be satisfied.

There are a couple caveats about TRAP Rule 2. First, court of appeals rarely use Rule 2 because the TRAP Rules generally provide the standard procedure for appeals. Second, the use of Rule 2 might be even less viable in criminal appeals. Generally, in civil appeals, "good cause" has been construed broadly.[108] But for criminal appeals, the Court of Criminal Appeals has noted that "to expedite a case or other good cause" does not justify "lengthen[ing] procedural time limits . . . even in an effort

[106] TEX. DISC. R. PROF. CONDUCT 3.01.

[107] *Id.* cmt. 2.

[108] *See* Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA, 937 S.W.2d 455, 456 (Tex. 1996) (holding TRAP Rules should be liberally construed so that the right of appeal is not lost); Mills v. Haggard, 17 S.W.3d 462, 463 (Tex. App.—Waco 2000, no pet.) (applying good cause standard under TRAP Rule 2).

to protect the substantive rights of litigants."[109] As a result, in criminal appeals, Rule 2 generally might be unavailable to alter procedures that would lengthen the duration of the appeal "absent truly extraordinary circumstances."[110]

C. Motions for En Banc Rehearing

Although Rule 49.3 applies to "motions to rehearing," and a "motion for rehearing" generally includes a motion for en banc rehearing, Rule 49.3 likely does not apply to all motions for en banc rehearing. Rule 49.3 limits when a motion for rehearing may be granted by justices who participated in the decision of the case. Unlike Rule 49.3, Rule 49.7, which governs en banc motions, provides: "While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision."[111] Motions for en banc rehearing are typically addressed to and often decided by justices who did not participate in the decision of the case (i.e., the justices who were not on the panel). It therefore seems Rule 49.3 applies only to motions for rehearing addressed to the panel that participated in the decision of the case or to the en banc court when the en banc court decided the case initially.

If a newly elected justice substitutes in for a justice who did participate in the decision of the case, Rule 49.3 does not appear to preclude the new justice's vote from being considered part of the majority of the court for an en banc motion because 49.7 is more specific to en banc motions and does not contain Rule 49.3's restriction. Reading Rule 49.3 otherwise would seem to effectively prohibit en banc reconsideration of a panel decision because the other justices did not participate in the decision of the case. Consequently, even if a newly elected justice's vote might not count towards a majority in considering a motion for panel rehearing, a newly elected justice's vote would might

[109] Oldham v. State, 977 S.W.2d 354, 359–60 (Tex. Crim. App. 1998).

[110] *Id.* at 360.

[111] Tex. R. App. P. 49.7.

count toward the majority for a motion for en banc rehearing.

Unlike a motion for panel rehearing, which is typically more appropriate for identifying clear errors by a panel, motions for en banc rehearing are generally regarded as requiring something more than a mere error. For example, Rule 41.2, which might appear to govern en banc consideration of a case in the first instance (as opposed to the case being first decided by a panel), provides that "en banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration."[112] As a form of consideration of a case, en banc reconsideration is regarded by some as being subject to Rule 41.2's requirements.[113] As a practical matter, it might not be clear to the en banc court until after a panel decides a case, that the panel's decision is not in uniformity with prior decisions of the court or that the case presents circumstances sufficiently extraordinary to justify the resources of the en banc court.

When a court of appeals is determining whether to reconsider a case en banc, the court might determine whether the panel's decision conflicts with a prior decision of the court or whether other extraordinary circumstances justify en banc rehearing. And court of appeals justices might have widely differing views of what constitutes extraordinary circumstances or a sufficient lack of uniformity. In light of Rule 41.2's express statement that en banc consideration is "disfavored,"[114] the "uniformity" and "extraordinary circumstances" bases for en banc rehearing might be narrowly construed. Such a narrow construction might include, for uniformity, a panel's holding that conflicts directly with a holding of the court in a prior case and, for extraordinary circumstances, the inability of the

[112] *Id.* R. 41.2(c)

[113] *See, e.g.*, Guimaraes v. Brann, No. 01-16-00093-CV, 2018 WL 6696769, at *22 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet. h.) (Keyes, J., dissenting to denial of en banc reconsideration) ("I conclude that the case fully satisfies the requirements for en banc reconsideration set out in Texas Rule of Appellate Procedure 41.2(c).").

[114] TEX. R. APP. P. 41.2(c).

panel to obtain a majority on the reasoning for its decision[115] or a panel error that will either likely impact the case substantially in its subsequent phases or result in a significant loss to the non-prevailing party.

F. Conclusion

In the vast majority of cases in which any motion for rehearing is filed, the motion is ultimately denied. When there is a change in judgeship on the court of appeals, this might in some cases further reduce the likelihood of success for a motion for panel or en banc rehearing. Newly elected justices' votes toward a motion for panel rehearing might not count toward a majority needed to grant the motion for panel rehearing, although the panel might be able to grant rehearing on its own motion. And for a motion for en banc rehearing, newly elected justices might either be disinclined to start reviewing decisions of their predecessors, or they might take a narrow view of what is sufficient to justify the resources of the en banc court to review a previously decided case.

That said, there has been some success in filing a motion for en banc reconsideration with an appellate court that has newly elected judges. In *State v. Rosenbaum*, the Court of Criminal Appeals decided a case by a vote of five to four.[116] The following month, two judges left the court and were replaced by two newly elected judges.[117] The newly constituted court granted a motion for rehearing, adopted the dissenting opinion, and flipped the prior judgment of the court.[118] *Rosenbaum* shows that newly elected judges may flip a prior decision of the court

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[115] If a panel cannot agree on the judgment, then the case may go en banc if there are more than three justices on the court. *See id.* R. 41.1(b). If a majority of the en banc court cannot agree on a judgment, the chief justice must request appointment of a visiting justice. *See id.* R. 41.2(b).

[116] 910 S.W.2d 934, 949 (Tex. Crim. App. 1994) (op. on reh'g) (Baird, J., dissenting).

[117] *Id.*

[118] *Id.*

by granting a motion for rehearing.[119]

Even if an appellate court with newly elected justice is unlikely to grant a motion for panel or en banc rehearing, further appellate options include filing a petition for review in the Supreme Court of Texas in civil appeals, or a petition for discretionary review in the Court of Criminal Appeals in criminal appeals. A motion for panel or en banc rehearing in the court of appeals "is not a prerequisite to filing a petition for review in the Supreme Court or a petition for discretionary review in the Court of Criminal Appeals."[120] Such motions are also not required to preserve error for further review.[121]

IV
Special Applications & Miscellaneous Issues

Although a change in judgeship generally does not change the appellate remedies that are usually available, it can affect how those appellate remedies are pursued. This Part addresses how a change in judgeship can change or alter the typical course of procedures in appellate courts.

A. Newly elected trial judges usually must reconsider a prior judge's ruling before an appellate court will issue an extraordinary writ, such as mandamus.

In Part I, which addresses reconsideration in the trial court, this article notes that if error has been preserved with the former judge, the issue need not be preserved again with the new judge for error to be preserved on appeal. This is true for the ordinary appellate process because the law generally treats the trial court as an office and does not distinguish between officeholders. Writs are different.

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[119] *See id.*

[120] Tex. R. App. P. 49.9.

[121] *Id.*

1. Automatic Substitution of Judges under Rule 7.2

Elected judges are public officers. Under Rule 7.2(a), "When a public officer is a party in an official capacity to an appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate."[122] Extraordinary writs, such as writs of mandamus, prohibition, and habeas corpus, are directed to the individual holding the office. Extraordinary writ proceedings in the appellate courts are "original" proceedings, which means that while they directly relate to the proceedings in the trial court, the proceeding and the parties are different.[123] The parties in an original proceeding are the relator— the party seeking relief—and the respondent—the public official against whom relief is sought, as well as the real party in interest.[124] Because an extraordinary writ is addressed to the individual officeholder to correct that officeholder's failure to carry out their duties, extraordinary relief usually cannot be granted against an officeholder who did not abuse their discretion. The Supreme Court of Texas explained in *In re Blevins*, "Although a particular respondent is not critical in a mandamus proceeding, the writ must be directed to someone. And generally a writ will not issue against one judge for what another did."[125]

If a petition for an extraordinary writ has been filed in the court of appeals, and the individual holding the office of the trial court changes, the new judge is automatically substituted for the prior judge, and the court of appeals abates the original proceeding under Rule 7.2(b) for the newly elected trial judge to reconsider the ruling, order, or judgment. Rule 7.2(b) provides, "If the case is an original proceeding . . . , the court must abate the proceeding to allow the successor to reconsider the original

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[122] TEX. R. APP. P. 7.2(a).

[123] *See id.* R. § 3 ("Original Proceedings in the Supreme Court and the Courts of Appeals").

[124] *Id.* R. 3.1(h)(2).

[125] 480 S.W.3d 542, 543 (Tex. 2013) (citation omitted).

party's decision. In all other cases, the suit will not abate, and the successor will be bound by the appellate court's judgment or order as if the successor were the original party."[126] If the newly elected trial judge vacates or changes the ruling, order, or judgment, then the court of appeals will typically dismiss the original proceeding as moot.[127] If the newly elected trial judge does not vacate or change the ruling, order, or judgment, then the original proceeding in the court of appeals does not become moot and will be reinstated.[128] The proceeding will remain in the court of appeals until the court disposes of the petition.

If the original proceeding continues in the court of appeals after the new trial judge takes office, then the new judge "is automatically substituted as a party if appropriate" under TRAP Rule 7.2.[129] Although the substitution should occur automatically, the relator may request that the new judge be substituted in the former judge's stead. But even if the proceedings following substitution are not in the name of the substituted party, "any misnomer that does not affect the substantial rights of the parties may be disregarded. Substitution may be ordered at any time, but failure to order substitution of the successor does not affect the substitution."[130]

This discussion assumes, however, that the petition for an extraordinary writ is filed in the appellate court before the prior judge leaves office.

2. Petition Not Filed Before Prior Judge Leaves Office

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[126] TEX. R. APP. P. 7.2(b).

[127] Ex parte Pion, No. 04-15-00274-CV, 2015 WL 4638097, at *1 (Tex. App.—San Antonio July 15, 2015, no pet.) (per curiam) (mem. op.); In re Parra, No. 04-13-00123-CV, 2013 WL 1760676, at *1 (Tex. App.—San Antonio Apr. 24, 2013, no pet.) (mem. op.); In re Trevino, No. 04-12-00862-CV, 2013 WL 1342461, at *1 (Tex. App.—San Antonio Apr. 3, 2013, no pet.) (mem. op.).

[128] In re Xeller, 6 S.W.3d 618, 623 (Tex. App.—Houston [14th Dist.] 1999, no pet.)

[129] TEX. R. APP. P. 7.2(a).

[130] *Id.*

The proper procedure is not immediately apparent for when a trial judge issues an order for which there is no adequate remedy by appeal and an adversely affected party does not file a petition for an extraordinary writ before that judge leaves office. Suppose, for example, Judge Pryor abuses her discretion and signs a non-appealable order on December 31st, and Judge Nu succeeds Judge Pryor and takes office on January 1st. A party contemplating filing a petition for writ of mandamus likely cannot, in good faith, request that court of appeals issue a writ of mandamus directing Judge Pryor to vacate the order because Judge Pryor is no longer able to exercise authority as a judge of the court. Conversely, the Supreme Court of Texas has stated unequivocally that "[m]andamus will not issue against a new judge for what a former one did."[131] And, Rule 7.2's automatic substitution rule appears to apply only "[w]hen a public officer is a party in an official capacity to an appeal or original proceeding, and . . . that person ceases to hold office before the appeal or original proceeding is finally disposed of."[132] Because most extraordinary writs are generally governed by equitable principles, this situation likely does not leave an adversely affected party without any remedy at all. The answer might ultimately differ depending on whether the case is civil or criminal. In civil cases, extraordinary writs are extraordinarily flexible; but significantly less so in criminal cases.[133]

In a civil case, *In re Newby*, the court of appeals addressed a similar situation when a trial judge had been indefinitely suspended.[134] The court addressed the issue in the failure-to-rule context as follows:

Here relator asks us to order Judge McCoy to rule on pending motions. But this is not possible since, under current circumstances, Judge Forbis and not Judge McCoy will preside over relator's case in the 100th District Court. The interests of the parties and judicial economy in the trial court and this

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[131] In re Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 228 (Tex. 2008)

[132] TEX. R. APP. P. 7.2(a).

[133] In re Reece, 341 S.W.3d 360, 374 (Tex. 2011) (citing In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding))

[134] 280 S.W.3d 298, 300 (Tex. App.—Amarillo 2007, no pet.) (per curiam).

court are not served if we merely await a final determination of Judge McCoy's suspension. Under the unique facts at bar we find the purpose of Rule 7 is best served by substituting Judge Forbis as respondent and abating the case so that relator may present his complaints to Judge Forbis. By ordering abatement of this proceeding, we express no opinion concerning the form or merit of relator's petition.[135]

Thus, *In re Newby* shows that when a party might lack a remedy under traditional mandamus principles, a court in a civil case might relax the rules to serve the interests of the parties and judicial economy.[136] However, in *In re Newby*, the court took judicial notice that a new judge had been appointed and taken office, and then substituted the new judge for the prior judge, and then abated for the new judge to consider the pending issues.[137]

3. Mandamus vs. Permissive Reconsideration

In theory, an abatement of an original proceeding in the court of appeals appears to provide a possible opportunity to bypass a newly elected trial judge's discretion not to reconsider a prior judge's ruling. In a prior section, this article addresses permissive reconsideration of a prior judge's ruling, order, or judgment, explaining that a new judge may exercise their discretion to refuse to reconsider a former judge's rulings, orders, or judgments. But TRAP Rule 7.2 appears to require a new judge to reconsider a prior judge's ruling, order, or judgment.[138] And even if Rule 7.2 did not apply, and a party were to file a petition for writ of mandamus challenging the former judge's ruling, a court of appeals may nevertheless exercise its discretion to abate for the new judge to reconsider the merits of the prior judge's ruling, order, or judgment.[139]

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[135] *Id.* at 300–01.

[136] *Id.*

[137] *Id.* at 301–02 (order on abatement) (per curiam).

[138] Tex. R. App. P. 7.2(b).

[139] In re Blevins, 480 S.W.3d 542, 544 (Tex. 2013) (orig. proceeding)

When an appellate court abates an original proceeding for a new judge to reconsider, the appellate court may simply order a party to pursue reconsideration from new judge by a certain date. Alternatively, the appellate court might actually direct the trial judge to reconsider the challenged ruling, order, or judgment. For example, in *In re Blevins*, the Supreme Court of Texas, apparently without a request from either party, ordered the following:

We direct the trial judge assigned to the case to take whatever actions and hold whatever hearings it determines are necessary for it to reconsider the [challenged] order and those matters underlying it. We do not intend to limit the trial court to considering only the evidence on which the [challenged] order was based. The trial court is directed to proceed in accordance with this opinion and, subject to any requests for extension of time by that court, cause its order on reconsideration of the [challenged] order to be filed with the clerk of this Court . . . .[140]

And in *In re Baylor Medical Center at Garland*, the Supreme Court of Texas abated the original proceeding for the newly elected trial judge to reconsider the merits of a motion for new trial that the prior judge had granted.[141] The supreme court noted in *Baylor Medical Center* that if the trial court had lost plenary power, mandamus could not issue to direct the trial judge take an action that the judge lacked the authority to take. However, as with permissive reconsideration, the supreme court concluded a trial judge should be able to reconsider any order so long as the trial court has plenary power.[142]

Filing a petition for writ of mandamus in an appellate court when a new trial judge takes office might therefore be an alternative to seeking permissive reconsideration with the new judge. Such an attempt to bypass the trial judge's discretion to refuse to reconsider a former judge's ruling could raise an

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(stating court of appeals has discretion to either deny outright or abate for reconsideration).

[140] *Id.*

[141] 280 S.W.3d 227, 228 (Tex. 2008).

[142] *Id.* at 228.

ethical issue in cases in which mandamus would clearly be inappropriate. As noted above, Disciplinary Rule 3.01 prohibits a lawyer from bringing a proceeding for which "the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[143] Here again, the assessment of frivolity will depend on whether the case is a civil case or a criminal case because the Supreme Court of Texas has all but eliminated the "no adequate remedy by appeal" requirement, whereas the Court of Criminal Appeals has not. For criminal appeals, there might be fewer rulings for which bringing a mandamus proceeding would be appropriate. But for civil cases, there are few rulings for which bringing a mandamus proceeding in an appellate court would be inappropriate. Unless there is a clear right of appeal for the objectionable ruling, order, or judgment, mandamus in a civil case might arguably be available. That said, an appellate court has the discretion, instead of abating for reconsideration by the new trial judge, to simply deny the petition for writ of mandamus.

Alternatively, a party could seek permissive reconsideration by the new trial judge before filing a petition for writ of mandamus. The procedure in such a case seems unclear, and this approach might have adverse consequences for a subsequent mandamus proceeding. As an illustration, suppose Judge Pryor abuses her discretion and signs a non-appealable order, and then leaves office on December 31st. In January, a party files a motion for reconsideration, Judge Nu hears the motion, and then Judge Nu denies the motion for reconsideration, refusing to reconsider at all. In a petition for writ of mandamus, there would be two possible trial court orders to challenge: (1) Judge Pryor's original order; and (2) Judge Nu's order denying the motion for reconsideration of Judge Pryor's order. Generally, a trial judge has no mandatory duty to reconsider a prior order of the court, and it might be difficult to view an order denying a motion to reconsider a prior order as an abuse of discretion.

[143] Tex. Disc. R. Prof. Conduct 3.01, cmt. 2.

That does not preclude challenging the prior order as an abuse of discretion in an original proceeding in an appellate court. However, if the former judge has left office and cannot be directed to change the ruling, order, or judgment, the new judge has already declined to reconsider, and a petition for writ of mandamus has been filed in the appellate court, then the appellate court might simply deny the petition as opposed to abating for the trial judge to address the issue once again.

B. When the newly elected judge takes office, mandamus will not issue for a failure to rule without presenting the matter to the new judge.

In Part I, which concerns reconsideration in the trial court, this article notes that matters generally need not be presented again to a new judge for preservation of error purposes. But, as Part IV.A demonstrates, extraordinary writs and the original proceedings by which they are obtained are different because they are directed to the officeholder, not to the office. Consequently, when a prior judge has refused to rule on a motion, and a new judge takes office, the new officeholder has not necessarily abused their discretion and mandamus generally will be inappropriate until it is clear that the new judge has refused to rule on the motion within a reasonable time.

If the former judge refused to rule, and a new judge takes office, mandamus will not issue to require the new judge to rule until the relator presents the issue to the newly elected judge. This principle is demonstrated by *In re Cooper*.[144] In *Cooper*, a former judge held a hearing on an application for temporary injunction on November 7th.[145] The trial judge had not granted or denied the application by December 31st, when the judge left office.[146] The party applying for a temporary injunction filed petition for writ of mandamus in the court of appeals,

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[144] In re Cooper, No. 05-07-00015-CV, 2007 WL 80590 (Tex. App.—Dallas Jan. 11, 2007, orig. proceeding) (mem. op.).

[145] *Id.* at *1.

[146] *Id.*

seeking a writ to direct the newly elected trial judge to rule on the motion.[147] The court of appeals denied the petition for writ of mandamus because the mandamus record did not show the application for temporary injunction had been presented to the newly elected judge.[148] *Cooper* demonstrates that if a former judge abuses their discretion or fails to execute their ministerial duties to rule on a properly presented motion, and if a new judge takes office, extraordinary relief in the court of appeals will generally be unavailable until the issue is presented to the new trial judge, and the new trial judge also abuses their discretion by failing to execute their ministerial duties to rule on a properly presented motion.[149]

If a new judge hears and rules on motion that the former judge refused to rule on, then the new judge's ruling will moot out any issue about the refusal to rule. This principle is demonstrated by *In re Hatley*.[150] In *Hatley*, the former judge refused to rule on a motion for post-conviction DNA testing.[151] The new judge ruled on the motion.[152] The court of appeals did not grant relief because it concluded that the new judge's ruling on the motion mooted the complaint about the lack of a ruling.[153] Notably, the court in *Hatley* stated it was reinstating the mandamus proceeding, and the case history shows the court of appeals had abated the proceeding.[154] Although it is unclear from the short opinion in *Hatley* why the court had to reinstate the mandamus proceeding, it is possible (if not likely) that court of appeals abated the mandamus proceeding to give the new trial judge the opportunity to decide whether to rule on the motion. Even if *Hatley* does not itself support that a mandamus

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[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] No. 05-07-00460-CV, 2007 WL 2421549, at *1 (Tex. App.—Dallas Aug. 28, 2007, orig. proceeding).

[151] *Id.* at *1.

[152] *Id.*

[153] *Id.*

[154] *Id.*

proceeding should be abated for the new trial judge to decide whether to rule, such a procedure might be an extension of *Blevins* and *Baylor Medical Center*.

If a former judge has refused to rule on a properly presented motion, a newly elected judge takes office, and a petition for writ of mandamus has not been filed in the court of appeals, then *Cooper* suggests the proper procedure is to present the request for relief to the new trial judge before seeking mandamus relief. If a former judge has refused to rule on a properly presented motion, a petition for writ of mandamus has been filed in the court of appeals, and a newly elected judge takes office, it appears the court of appeals may (consistent with *Blevins* and *Baylor Medical Center*) either follow *Cooper* and deny relief or follow *Hatley* and abate the mandamus proceeding for the new judge to have an opportunity to rule on the motion.

C. When a former judge was the factfinder at a bench trial in a civil case, and a newly elected judge takes office, the new judge cannot make findings of fact and conclusions of law.

In Part I.A, this article explains that generally, the law treats the trial court as an office and does not distinguish between officeholders, and the newly elected judge may exercise the authority of the court to the same extent the former judge could have if the former judge were still in office. Part IV.A notes that original proceedings are one exception to this general rule. Findings of fact and conclusions of law after a civil bench trial present another exception.

The newly elected judge cannot make findings of fact and conclusions of law if the new judge did not preside at trial, but the former judge might retain the authority to do so even after the judge has left office. This principle was articulated recently by the Supreme Court of Texas in *Ad Villarai, LLC v. Chan Il Pak*.[155] In *Ad Villarai*, the former trial judge lost the primary election to the new judge, and then presided over a bench trial in

[155] 519 S.W.3d 132 (Tex. 2017) (per curiam)

the case in October and rendered a final judgment on November 24th. The proper procedure for obtaining findings of fact and conclusions of law was followed before the judge left office.[156] The primary challenger won the general election and took office on January 1st.[157] The new judge reviewed the record and timely made findings of fact and conclusions of law.[158] The court of appeals reversed and remanded for a new trial, holding that neither judge had the authority to make findings of fact and conclusion of law.[159]

The supreme court agreed the new judge lacked the authority to make the findings of fact and conclusions of law, but disagreed as to the former judge.[160] The supreme court first rejected the applicability of TRCP Rule 18 and Civil Practice & Remedies Code section 30.002(b) because they govern when a trial judge dies, resigns, or is disabled.[161] The supreme court held that under 30.002(a), however, that the former judge retained the authority to file findings of fact and conclusions of law in the case, even if the trial court's plenary power had expired.[162] The supreme court noted that under section 30.002(a), a former judge who has left office may file findings of fact and conclusions of law if the end of the former judge's term falls within the forty-day period to file findings of fact and conclusion of law under the applicable rules of civil procedure.[163] The supreme court reversed the court of appeals' judgment, and remanded the case to that court with instructions for that court to abate the appeal and to direct the new judge to request that the former judge make findings of fact and conclusions of law.[164]

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[156] *Ad Villarai*, 519 S.W.3d at 136.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 137–43.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *See* 4 Roy W. McDonald & Elaine A. Grafton Carlson, Tex. Civ. Prac. § 20:12 (2d. ed.). ("[C]ommon sense suggests

Ad Villarai involved a bench trial, and it is unclear whether the same rules would apply to hearings on pretrial matters involving disputed factual matters. Initially, the procedure provided in the Texas Rules of Civil Procedure for filing of the findings of fact and conclusions of law is not mandatory except for a bench trial.[165] Furthermore, while there generally may be only one trial on the merits in a civil and criminal case, a trial court has the authority to reconsider previously decided pretrial matters. *Ad Villarai* also involved preserved complaints about the authority and propriety of a former judge and a new judge making findings of fact and conclusions of law. It is unclear whether an appellate court is bound by findings of fact and conclusions of law that were made by the wrong judge and a complaint for appeal is not preserved. For example, in *AmWest Savings Association v. Winchester*, the court of appeals noted that the newly elected judge made findings of fact and conclusion of law on the appellees' affirmative defenses three months after trial.[166] *AmWest Savings*'s case history shows the trial in the case occured on November 28th. The court of appeals proceeded to analyze the sufficiency of the evidence to support the trial court's findings on the appellees' affirmative defenses.[167]

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that reliable findings and conclusions can not be obtained from a judge who did not try the case, and some case authority suggests that in this situation reversal and remand is the appropriate remedy."). It appears that the remedy for when findings of fact and conclusions of law cannot be obtained is a reversal and remand for a new trial. Corpus Christi Hous. Auth. v. Esquivel, No. 13-10-00145-CV, 2011 WL 2395461, at *2 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op.); Liberty Mut. Fire Ins. v. Laca, 243 S.W.3d 791, 796 (Tex. App.—El Paso 2007, no pet.) ("Because the judge who handled the case has been replaced as the result of an election, we must reverse and remand the case for a new trial."); Roberts v. Roberts, 999 S.W.2d 424, 442 (Tex. App.—El Paso 1999, no pet.); Fed. Deposit Ins. Corp. v. Morris, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ); Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied).

[165] IKB Indus. (Nigeria) Ltd. v. Pro–Line Corp., 938 S.W.2d 440, 442 (Tex. 1997).

[166] No. 05-95-00374-CV, 1998 WL 51849 (Tex. App.—Dallas Feb. 10, 1998, pet. denied) (mem. op.).

[167] *Id.* at *2–6.

Considering *Ad Villarai*, the Fort Worth court of appeals recently addressed whether a newly elected judge may set aside findings from a jury trial over which the former judge presided. In *Estate of Luce*, the court of appeals rejected a challenge to a newly elected judge setting aside jury findings from a trial over which the new judge did not preside.[168] The court distinguished *Ad Villarai* because the case at bar did not involve findings of fact and conclusions of law or the new trial judge deciding disputed factual matters.[169] The court in *Luce* explained that because the new judge was making a legal determination about the sufficiency of the evidence to support the jury's findings, *Ad Villarai* did not control and the decision fell within the new judge's authority as the judge of the trial court.[170]

It appears that *Ad Villarai* has very limited application. The procedure the supreme court approved applies only if the procedure for obtaining findings and conclusions of law is properly followed and the former judge leaves before the end of the forty-day deadline to file findings of fact and conclusions of law. Furthermore, the limits on newly elected trial judge's authority to making findings of fact and conclusions of law are not necessarily the same when the prior judge dies, resigns, or becomes disabled.[171] Additionally, as demonstrated by *Estate of Luce*, *Ad Villarai* does not appear to limit a newly elected trial judge's authority in a civil case to make matter-of-law determinations while the trial court retains plenary power. And, of course, because *Ad Villarai* was a civil case governed by the rules of civil procedure and provisions of the Texas Civil Practice & Remedies Code, it might not be instructive necessarily for criminal cases.

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[168] No. 02-17-00097-CV, 2018 WL 5993577, at *16–17 (Tex. App.—Fort Worth Nov. 15, 2018, no pet. h.) (mem. op.).

[169] *Id.*

[170] *Id.* at 17. These holdings are consistent with other case law, under which a newly elected trial judge may preside over a retrial of a case when a court of appeals reverse and remands the case for a new trial. *See, e.g.*, In re Marriage of Slanker, No. 06-11-00029-CV, 2011 WL 5600568, at *1 (Tex. App.—Texarkana Nov. 18, 2011, no pet.) (mem. op.).

[171] *See* Tex. Civ. Prac. & Rem. Code §30.002; Tex. R. Civ. P. 18.

D. In a civil case, if a trial judge presides over a trial and leaves office before rendering judgment, the judge may not thereafter render judgment and a new trial might be required.

What if a trial judge presides over a trial, but does not render a judgment before leaving office and being replaced by a successor? A court of appeals addressed this situation in *Martinez v. Martinez*.[172] In *Martinez*, a district court judge presided over a trial.[173] Before rendering a judgment in the case, the judge was replaced by a successor judge through an election.[174] The prior judge, after leaving office, rendered a judgment.[175] The court of appeals explained that "a district judge who has been properly replaced by a successor has the authority to sign a written judgment after he has been replaced, provided he heard the cause and entered his judgment in the docket sheet of the cause before the expiration of his term."[176]

However, in *Martinez*, nothing in the appellate record indicated that the judge had rendered judgment before leaving office.[177] The court of appeals reversed and set aside the judgment of the prior judge, and remanded for a new trial before the newly elected judge.[178]

E. In a habeas corpus proceeding, a newly elected judge may make findings of fact and credibility determinations from a cold record.

Shifting between the civil and criminal contexts can

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[172] 759 S.W.2d 522 (Tex. App.—San Antonio 1988, no writ).

[173] *Id.* at 523

[174] *Id.*

[175] *Id.*

[176] *Id.* (citing Crawford v. Crawford, 315 S.W.2d 190, 192 (Tex. Civ. App.—Waco, 1958, no writ); Tex. Life Ins. Co. v. Tex. Building Co., 307 S.W.2d 149, 154 (Tex. Civ. App.—Fort Worth, 1957, no writ)).

[177] *Id.*

[178] *Id.*

sometimes seem like shifting between alternate universes. As noted above, a newly elected judge generally lacks discretion in a civil case to make findings of fact and conclusions of law from a cold record, at which the former judge presided. The same is not true in all criminal cases, where a trial judge (as well as the appellate courts) can make credibility determinations without live testimony. This principle is illustrated by *Ex parte McBride*.[179] In *McBride*, Donna Ruth McBride was charged with and convicted of aggravated sexual assault of a child.[180] McBride filed an application for writ of habeas corpus, arguing that she was entitled to an out-of-time appeal because her counsel rendered ineffective assistance.[181] The trial judge made fact findings and a recommendation to the Court of Criminal Appeals, which is the ultimate finder of fact in certain habeas proceedings.[182] The Court of Criminal Appeals determined the trial judge's fact findings were insufficient, remanded the case for more findings, and remanded a second time for further findings.[183] After the second remand, a newly elected trial judge took office, and the new judge entered findings of fact and conclusions of law after reviewing the transcripts from the writ hearing.[184] The new judge recommended that relief be granted, but the Court of Criminal Appeals concluded otherwise, reasoning that although it found the attorney's explanation credible, there was no evidence that McBridge informed her attorney or the trial judge that she desired to appeal.[185] *McBride* shows how the criminal context can differ from the civil context on whether a newly elected trial judge can make findings of fact and conclusions of law when the former judge presided over and was a factfinder at a hearing where fact issues were disputed.

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[179] WR-63,072-01, 2008 WL 11383718, at *2 (Tex. Crim. App. June 18, 2008) (per curiam) (mem. op., not designated for publication).

[180] *Id.* at *1.

[181] *Id.*

[182] *Id.* at *2.

[183] *Id.*

[184] *Id.*

[185] *Id.* at *2–4.

F. In a criminal case, a newly elected judge cannot refuse to enforce a plea agreement approved by the former trial judge.

Generally, a plea agreement between the prosecution and the defense that is accepted by the trial court is a binding contract, and the trial court must enforce the agreement. This principle is demonstrated by *Wright v. State*.[186] In *Wright*, the defendant and the State reached a plea agreement, which was approved by the trial judge.[187] The trial judge later rejected the plea agreement.[188] A newly elected judge took office and also refuse to enforce the plea agreement, and the case went to trial.[189] The defendant was convicted.[190] On appeal, the court of appeals reversed the conviction based on the jury's verdict, rejecting the State's argument that the new judge simply carried out the former judge's disapproval of the agreement, which the State characterized as a withdrawal of its plea bargain offer.[191] The court of appeals explained that once a plea agreement is reached by the parties and approved by a trial judge, the defendant is entitled to specific enforcement of the plea agreement.[192] The court of appeals therefore reversed the judgment of the new trial judge and remanded with instructions to reinstate the defendant's plea of no contest to the charged offense and to re-sentence the defendant in accordance with the terms of the original plea agreement.[193] *Wright* demonstrates that in a criminal case, a newly elected judge cannot refuse to enforce a plea agreement approved by the former judge, even when the former judge would have done the same.

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[186] 158 S.W.3d 590, 595 (Tex. App.—San Antonio 2005, pet. ref'd).

[187] *Id.* at 592.

[188] *Id.*

[189] *Id.* at 592–93.

[190] *Id.* at 593.

[191] *Id.* at 594–95.

[192] *Id.*

[193] *Id.*

G. A change in judgeship can affect the analysis of a defendant's Speedy Trial claim.

A change in judgeship can result in a change in pace of the docket, which can affect the analysis of a speedy trial claim in a criminal case. This principle is demonstrated somewhat by *Ennis v. State*.[194] In *Ennis*, the defendant complained on appeal that the numerous delays of his trial date violated his right to a speedy trial.[195] Speedy trial claims are governed by balancing four factors under *Barker v. Wingo*, one of which is the reason for the delay.[196] Deliberate delay by the State weighs heavily in favor in the defendant's speedy trial claim, negligence weighs against the State moderately, but a reasonably explained delay does not weight against the State.[197] In *Ennis*, the Dallas court of appeals rejected the defendant's speedy trial claim, noting that the reason for the delay was docket overcrowding, which could be a result of State's conduct.[198] However, the court of appeals noted the newly elected judge had significantly reduced the overcrowding of the docket, so this factor did not weigh heavily against the State.[199] Thus, *Ennis* demonstrates a change in judgeship can affect the analysis or weighing of the *Barker* factors when assessing a speedy trial claim.

H. A Note on Newly Elected Prosecutors

The cases involving newly elected officials in the judiciary include many cases related to newly elected prosecutors, who are part of the judicial branch in Texas. Many of the cases involved conflicts of interests from the newly elected prosectuor's prior law practice; thus, the number of these cases suggests that one of

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[194] No. 05-97-01638-CR, 2000 WL 420709, at *3 (Tex. App.—Dallas Apr. 19, 2000, no pet.) (mem. op., not designated for publication)

[195] *Id.* at *2–5.

[196] *Id.* at *2.

[197] *Id.* at *3.

[198] *Id.*

[199] *Id.*

the most significant legal concern for newly elected prosecutors will be conflicts issues.[200] However, the newly elected prosecutor retains prosecutorial discretion to decline to prosecute existing cases, including those on appeal. This principle is demonstrated by *State v. Rickhoff*.[201] *Rickhoff* stemmed from a civil quo warranto proceeding challenging the authority of district court judge.[202] The quo warranto proceeding was initiated by the District Attorney, who appealed after not prevailing in the trial court.[203] While the case was on appeal, the newly elected District Attorney filed a motion to voluntarily dismiss the appeal over the former District Attorney's objection.[204] The court of appeals held the new District Attorney held the office, which had the authority to discontinue to the prosecution of the appeal, even over the former District Attorney's objection.[205] The court of appeals granted the new District Attorney's motion and dismissed the appeal.[206]

V
Conclusion

With the significant number of new trial and appellate court judges who recently took office, a significant percentage of Texas's judges is relatively new, especially in courts in the Dallas, Houston, San Antonio, and Austin areas. Although the significant number of judges itself does not increase or decrease the appellate options available, a change in judgeship may affect whether and how the existing appellate options are pursued in civil and criminal cases. As with all conduct in court, attorneys should consider their ethical obligations in pursuing their appellate options with Texas's transitioning judiciary.

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[200] *See, e.g.*, Landers v. State, 256 S.W.3d 295, 303–04 (Tex. Crim. App. 2008).
[201] 648 S.W.2d 409 (Tex. App.—San Antonio 1983, no writ).
[202] *Id.* at 409.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

An Interview of Justice H. Bryan Poff

Tim Newsom, Young & Newsom, P.C., Amarillo, Texas

The following is an excerpt of an interview of Justice H. Bryan Poff (**BP**) conducted on September 8, 2015, by Tim Newsom (**TN**). Justice Poff's interview is part of an ongoing effort by the State Bar of Texas Appellate Section to preserve and document matters of historical interest to members of the bar. The video of Justice Poff's oral history is available at this link on the Section's website: https://vimeopro.com/user45474482/oralhistoryproject/video/205808746

TN: Judge Poff, what was it that led you to decide that you wanted to be become an attorney?

BP: I got out of college with a degree in business. That and a dime will get you a cup of coffee. I had a chance to work for [Montgomery] Wards and Sears [Roebuck and Company]. I thought I wanted to be in the oil business, but that business was in the tank. It turned out I could make as much money working part-time in Austin as I could working full-time for one of these companies, so I said, what the heck. It was not something I had planned on in my life and never gave it that much thought.

TN: Where did you do your undergraduate work?

BP: TCU.

TN: Where did you go to law school?

BP: UT. I went there in the fall of 1962, after graduating from TCU.

TN: Where did you begin your legal profession?

BP: I stayed in Austin at first and worked for the Texas Legislative Council, rewriting the Water Code. But, I

was bored, like all young lawyers, and decided I wanted to be in the courtroom. I had options in Amarillo, Lubbock, El Paso and Midland. Although I grew up in Fort Worth, I did not want to go back to a large city. I had been going to the mountains since I was about ten, which is what swung Amarillo in my favor.

TN: What type of practice did you have there?

BP: I just hung out my shingle.

TN: Tell us about when you were in the legislature.

BP: '71 through '74. The most fun I ever had. I was in the Constitutional Convention in '74. The first day you're down there, in the old days, you would go to the old Stephen F. Austin Hotel and eat the quail and eggs. Kind of a tradition. Then, the speaker would speak to you for a minute, and we all would walk up to Congress, which was pretty impressive. I don't think they do that anymore because everything has gotten so partisan. When I was in the legislature, you could count all the Republicans on two hands. Everybody was conservative, basically.

The speaker said some of the most impressive things I had ever heard. He said we would be impressed walking into the capitol and into the great chamber. I still get broken up about it. He told us we would raise our right hands and swear to uphold the laws of the State of Texas and [with our family and friends there] we would feel as though we were not qualified and shouldn't be there.

The speaker told us not everyone would be our friend. He reminded us that every person sitting in the chamber represented 100,000 people, that each of us had won an election and must give each other the respect that the 100,000 people deserve.

[The speaker's words] have stuck with me all my life.

When you are in the legislature, everybody loves you.

The longer you're in the legislature, the more you vote on things. If you can't get elected three or four times, you're not trying. But, after about four or five times, it gets a little harder.

TN: Which district court were you elected to?

BP: I was elected to the [47th District Court] in 1974 and I was fortunate to be there and to do the best job I could. I decided I wanted to run for district judge. I had an advantage. I knew how to run a campaign and how to get elected.

Some judges refer to the court as "my court." It's not your court. But, trial judges have a tendency to do that more than appellate judges. No, it was not my court. It was the 47th District Court. There are a lot of pictures of other judges [who sat on that court to remind us of that].

I served on the trial bench for 12 years.

TN: What are some of the things you enjoyed the most about being a trial judge?

BP: Good lawyers: You, Tim Newsom; the Lovells; Tom Morris.

The hardest thing is when you get two lawyers in there that don't exactly know what they're doing, and it's very, very difficult.

TN: Are there any cases you tried that stick out in your mind?

BP: Criminal trials were always hard. I've tried four capital cases and ended up having two people executed. That's hard.

TN: What words of wisdom do you have for lawyers who appear in trial?

BP: Racehorse Haynes appeared for docket call in my

courtroom. It was very relaxed there, with everyone sitting around and making jokes, sitting in the jury box before I would come in. Haynes is sitting behind the rail, three-piece suit, briefcase. Everyone is pretty much having a good time. I called Haynes's case and he stands up, ram-rod straight, introduces himself and asks to approach the bench.

Later, after docket call, he comes back with local counsel and they introduced him. Haynes insisted on being called Racehorse, which you probably shouldn't. I told him I was a little taken aback by the fact that he didn't understand we were a little less formal in my courtroom.

Haynes said, well, Judge, I've tried cases in courts all over the United States and I learned early on, you can start out formal and then relax, but you better never start out relaxed when you should have been formal.

TN: That's good advice.

BP: He was exactly right.

The other advice I got when I was a young lawyer. Bob Wilson told me, you're going to see judges all over this part of the world. They have varying degrees of expertise. But, you understand, they are the judge. I don't care what you think about them. They are the system and you respect them.

TN: What was it that led you to decide you wanted to be a judge of the Court of Appeals?

BP: I don't know. I mean, the vacancy came open. I knew that Judge Gleason wanted it, but I had an advantage over Judge Gleason. He knew Amarillo, but I knew the area better than he did. And I knew how to work with Judge Reynolds.

TN: How would you describe what you see as some of the biggest differences in being a judge at the trial court

level versus being a judge at the Court of Appeals?

BP: You can make better decisions for the Court of Appeals, obviously, because you have more time. At the trial court, you basically just try to do what's fair. Now, obviously, you read what they give you.

TN: When you were elected to the Court of Appeals, Judge Reynolds was the chief justice?

BP: Right.

TN: And then Judge Dodson and Judge Boyd was there?

BP: Right. I took Countiss's place.

TN: Do you think that serving as a trial judge [is good experience to have before becoming an appellate judge]?

BP: Oh, yeah. I think you've got to. The answer to that question is you shouldn't do it if you don't [have that experience]. As a matter of fact, you also ought to be forty, in my opinion, before you go on the trial bench. I think you ought to be on the trial bench eight years maybe.

TN: Has that then helped you be an appellate judge?

BP: You know when you look at that record, and you say there is something going on here. I can't read it, but I know it. I know Judge Newsom. He's not that crazy. And then when you dig through it, and you find it. You find what Judge Newsom knew.

TN: What would be some of the advice you would give to lawyers to make them better appellate lawyers?

BP: Be honest as you can. The worst thing you can do on appeal is play games. Maybe you can play a game or two in the trial court. When you're on appeal, you can't. You can't manufacture evidence. The one thing that

the appellate court can't do, it can't play with the facts. Now, if you start playing fast and loose with the facts, you're not a good appellate justice. I think you just have to be candid and honest.

TN: I have heard it said that you can lose your appeal at oral argument but it's very hard to win your appeal at oral argument. Do you think that is true?

BP: I agree. I don't think there's any question.

TN: What are some of the things that you think would be important for appellate lawyers to know when they're coming in to deliver the oral argument? What they should focus in on to help the court?

BP: Charles Alan Wright taught me con law. He said that the United States Constitution in closely argued cases is what one person says. Charlie Wright was exactly right.

Now, the same one is not true in Austin. When I went to [argue in] Austin, I had nine guys. I had studied them enough. I knew who they were. If the guy's with me, I don't worry about a thing. But if I've got [a justice who's] the swing vote, I want to read that justice's opinions and understand the way [he or she] thinks and I want to tailor my argument to where he or she is likely to be favorable.

TN: You were on the trial bench [for 12 years] and you were on the appellate bench [for six years]. Now you're doing some visiting judging. Is that on the trial bench or the appellate bench or both?

BP: I'm doing basically trial. I did appellate in Dallas and Fort Worth for about six or seven years.

Did they ever tell you about when we would go to Houston?

TN: Is this with the Amarillo Court?

BP: Yes. They would assign us thirty cases. Twenty-six of them were summary judgments. Finally, I asked somebody down on the 1st or the 14th, what's going on down here. He said that's the way we settle cases. They summary judged everything in those days because their dockets were so complex. And then, the court on appeal would reverse the judgment and the case would settle. They used it as a way to buy time.

TN: You seem like you've really enjoyed your time as an attorney and as a judge both at the trial bench and the appellate bench?

BP: I was blessed. You enjoy it. It's not a job. As a matter of fact, that's what's wrong with the legal profession now. And I will give that credit to Oth Miller. He said, to be practiced properly, the law must be a gentleman's hobby. He said, if you go back in history to the Romans and the Greeks and even as late as the English earls, they didn't do it for the money. Money had nothing to do with it. I mean, you enjoy the money you make, but the problem now is it's become too commercial. It's just a lot more fun if you could be a lawyer and just try a case and get a chicken or a turkey or whatever they give you for trying a case.

It should be fun to try cases. Fewer cases are being tried. Leon Green said you're entitled to your day in court. I can count on both hands every time I would see the jury do something completely wrong. They do things I don't agree with. But, generally, they know what they are doing.

TN: Judge, it's been a privilege and an honor to get to interview you for the Appellate Section of the State Bar. Thank you for coming

BP: I appreciate you. You are old school. Tom Morris would be proud of you.

United States Supreme Court Update

Matthew Frederick, Deputy Solicitor General, Office of the Solicitor General of Texas
Andrew Guthrie, Associate, Haynes and Boone, LLP, Dallas
Taylor Whitlow Hoang, Assistant Attorney General, Office of the Attorney General of Texas
Ryan Paulsen, Counsel, Haynes and Boone, LLP, Dallas

Administrative Law

***Smith v. Berryhill*, 139 S. Ct. 1765 (2019)**

Ricky Smith filed a claim for disability benefits under Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq*. After the claim was denied, Smith pursued administrative remedies by seeking reconsideration, which was denied, and requesting a hearing before an administrative law judge, who also denied his claim. At that point, he sought review by the Social Security Administration Appeals Court, but the court did not receive his letter requesting review until after the 60-day deadline and thus dismissed the request as untimely. Smith then sought judicial review in federal court. The district court ruled that it lacked jurisdiction to decide the case, and the Sixth Circuit affirmed, holding that the Appeals Court's ruling was not a final decision subject to federal court review.

The Supreme Court held that dismissal for untimeliness in the last tier of administrative review qualified as a final decision capable of federal court review pursuant to the Social Security Act.

The Supreme Court reversed in an opinion by Justice Sotomayor. The Court held that an order by the Appeals Court dismissing a case after a hearing on the merits by an administrative judge qualifies as a final decision capable of federal court review. The Social Security Act permits federal review of "any final decision" that is "made after a hearing." 42 U.S.C. § 405(g). The Appeals Court's decision to dismiss Smith's request for review of the administrative

law judge's decision denying his claim based on a hearing on the merits fits that language. This conclusion is bolstered by comparison to the Administrative Procedures Act, which considers agency review final when a decision marks the consummation of the decisionmaking process and gives rise to rights, obligations, or legal consequences. It is also consistent with the strong presumption in favor of judicial review over administrative actions. Having reached this conclusion, the Court noted that a reviewing federal court that disagrees on procedural grounds with an order of dismissal should remand to the agency to address the merits in the first instance, consistent with administrative law principles.

***Gundy v. United States*, 139 S. Ct. 2116 (2019)**

Congress passed the Sex Offender Registration and Notification Act (the "Act") to provide uniformity to the prior patchwork of sex offender registration systems. Under the Act, Congress delegated authority to the Attorney General to prescribe rules governing the registration of individuals convicted of a sex offense before the effective date of the Act. The Attorney General subsequently issued a rule applying the Act's requirements in full to pre-Act offenders. Herman Gundy, a pre-Act offender, challenged his conviction for failing to register, arguing that the rule was made pursuant to an unconstitutional delegation of legislative authority. The district court rejected his argument, and the Second Circuit affirmed.

Justice Kagan wrote a plurality opinion joined by Justices Ginsburg, Breyer, and Sotomayor. The Court held that the delegation of authority to the Attorney General under the Act was constitutional. Article I of the Constitution vests legislative power in Congress, which is barred from transferring powers that are strictly and exclusively legislative to another branch of government. But Congress may delegate to the executive agencies substantial discretion to implement and enforce the laws. Thus, a statutory delegation is constitutional as long as it provides an intelligible principle by which the agency is directed to conform. The Court concluded that the Act satisfied this requirement.

Contrary to Gundy's arguments, the Act did not permit the Attorney General to take any action regarding pre-Act offenders, nor did it allow them to be exempted from registration. The Act defined sex offenders as one convicted of a sex offense, indicating an intent to cover both past and future convicts. Similarly, the purpose behind the Act was to institute a "comprehensive" registration scheme, and the legislative history demonstrates that Congress focused on the need to register pre- as well as post-Act offenders. Thus, the instruction to the Attorney General to "specify the applicability" of the Act meant to specify how, not whether, it would apply to pre-Act offenders.

Justice Alito concurred in the judgment. He expressed his willingness to reconsider the Court's approach to nondelegation arguments, but in the absence of a majority willing to do so in this case, he concluded that the statute passed muster under existing standards.

Justice Gorsuch dissented in an opinion joined by Chief Justice Roberts and Justice Thomas. The dissenting justices, unlike Justice Alito, concluded that the Court should address problems with the nondelegation doctrine in this case. The provision of the Act granted the Attorney General "to specify the applicability of" the Act to and "to prescribe rules for the registration of" pre-Act offenders. Congress could not reach a decision on how to apply the Act to pre-Act offenders given the potential of costly and unpopular burdens on states to overhaul their registration schemes, so it passed the decision to the Attorney General. As reflected by this unlimited delegation of authority, different Attorney Generals have applied different requirements to pre-Act offenders. This is precisely what Article I was designed to prevent.

Justice Kavanaugh took no part in the consideration or decision of the case.

The Supreme Court affirmed lower court decisions that Congress's delegation of authority to the Attorney General to set registration requirements for sex offenders convicted before enactment of the registration statute at issue did not violate the constitution.

***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)**

By the Court's admission, the facts of the underlying case have little bearing on its opinion. The question presented was whether the Court should overrule its decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), both of which employed the practice of deferring to an agency's reasonable interpretation of an ambiguous regulation. In the case at bar, the Federal Circuit had affirmed the denial of a claim for disability benefits by the Department of Veterans Affairs based on deference to the interpretation of a VA rule by the Board of Veterans' Appeals. The Supreme Court granted certiorari to decide whether to overrule *Auer* and *Seminole Rock*.

The Court declined to overrule these cases in a decision authored by Justice Kagan, joined in full by Justices Ginsburg, Breyer, and Sotomayor, and in part by Chief Justice Roberts. The majority held that principles of *stare decisis* outweighed the arguments raised by petitioner for overruling this long line of precedents, noting that Congress remains free to alter this rule. In doing so, it reiterated that the scope of *Auer* deference is cabined in various ways, including because it only arises if a regulation is genuinely ambiguous (after a court has resorted to all the standard tools of interpretation) and because it does not apply in all cases (like when a court concludes the challenged interpretation does not reflect an agency's authoritative, expertise-based, fair, or considered judgment). Under those standards, the Court reversed and remanded because the Federal Circuit jumped the gun in finding the regulation ambiguous and that *Auer* deference necessarily applies here.

The Supreme Court reaffirmed its practice of "*Auer* deference"—deferring to agencies' reasonable readings of ambiguous regulations—while reinforcing its limits.

Chief Justice Roberts wrote separately to suggest that the distance between the majority and Justice Gorsuch's dissent is not as great as it appears.

Justice Gorsuch concurred in the judgment, writing separately—in an opinion joined in full by Justice Thomas and in part by Justices Kavanaugh and Alito—to state his view that *Auer* deference should be overruled and that agency interpretations should be merely persuasive, not controlling.

Justice Kavanaugh also concurred in the judgment, writing separately—in an opinion joined by Justice Alito—to state that he would overrule *Auer* deference but that he agrees with the Chief Justice's concurring view.

Admiralty

Dutra Group v. Batterton, 139 S. Ct. 2275 (2019)

In *Dutra Group v. Batterton*, the Court considered its power, as a federal court sitting in admiralty, to fashion general maritime law "in the manner of a common law court." Batterton was working on a ship owned by the defendant Dutra Group when a hatch blew open and injured his hand. He sued Dutra alleging unseaworthiness, among other claims, and sought general and punitive damages. Dutra moved to dismiss the claim, arguing that punitive damages are not available on a claim of unseaworthiness. The district court denied the motion, and the Ninth Circuit affirmed.

In a 6-3 decision, the Court reversed the Ninth Circuit, holding that punitive damages are not available on a claim of unseaworthiness. Writing for the Court, Justice Alito noted that the two major considerations that guide the Court's development of maritime law are historic practice and uniformity with statutory causes of action (especially as written in the Jones Act).

In this case, the Court concluded that the "overwhelming" historic evidence suggested that punitive damages were unavailable for unseaworthiness claims. The absence of any contrary evidence was "practically dispositive" in this case. Authorizing punitive damages would therefore create only a "novel remedy" to preserve "uniformity with Congress's

clearly expressed policies." However, the Jones Act also precluded the recovery of punitive damages in this situation. Thus, the Court rejected the plaintiff's numerous public policy arguments and, in spite of the Court's historic "special solicitude" towards sailors, concluded that punitive damages were unavailable to the plaintiff.

Justice Ginsburg dissented in an opinion joined by Justices Breyer and Sotomayor. The dissent started from the contrary premise that punitive damages are normally available in maritime cases. In the dissent's view, history showed that punitive damages had a long pedigree that had not been abrogated by the Court or by Congress. Thus, the general availability of punitive damages in maritime actions should also apply to unseaworthiness claims.

Antitrust

Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019)

The App Store is an electronic store where iPhone owners can purchase iPhone applications from Apple. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps. For the most part, Apple does not itself create apps. Independent app developers create apps and then contract with Apple to make the apps available in the App Store. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. Apple makes a 30 percent commission on every sale. Plaintiffs in this case sued Apple alleging that it has monopolized the retail market for apps and unlawfully charges higher-than-competitive prices. Apple moved to dismiss, claiming that the consumers were not "direct purchasers" under *Illinois Brick* and the District Court

The Supreme Court held that consumers who buy iPhone applications on Apple's App Store are "direct purchasers" entitled to sue Apple for alleged monopolization under *Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977).

agreed. The Ninth Circuit reversed.

The Supreme Court affirmed in an opinion authored by Justice Kavanaugh, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court found the conclusion to be straightforward: because the plaintiffs bought apps directly from Apple, on its App Store, they were direct purchasers who may sue Apple for alleged monopolization. *Illinois Brick* held only that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. But there is no intermediary in this case. The Court concluded it makes no difference that the app developers set the prices initially. If Apple's conduct has not caused the consumer to pay a higher-than-competitive price, then the consumer's damages will be zero. But if it has, the Court concluded that the consumer should not be barred from suing simply because the app developer set the price in the first place.

Justice Gorsuch dissented in an opinion—joined by Chief Justice Roberts and Justice Alito—arguing that the majority misread *Illinois Brick* and in so doing, improperly replaced a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity.

Bankruptcy

Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (2019)

In *Mission Product Holdings, Inc.*, the Court resolved a circuit split concerning the effect of a debtor's rejection of a trademark licensing agreement. Section 365 of the Bankruptcy Code allows a debtor to "reject any executory contract," and it provides that the debtor's rejection "constitutes a breach of such contract." The question presented was whether a debtor's rejection of an executory contract also constitutes rescission of the contract, thus depriving the licensee of its rights to use the trademark.

In an opinion by Justice Kagan, the Court held that the debtor's rejection under Section 365 breaches the contract

but does not rescind it. The majority reasoned that Section 365 explicitly states that rejection "constitutes a breach" of the executory contract; "'breach' is neither a defined term nor a specialized bankruptcy term"; and the Court therefore assumes the term "means in the [Bankruptcy] Code what it means in contract law outside bankruptcy." Accordingly, when a breach results from rejection under Section 365, the normal rights of the non-breaching counterparty survive, such as a suit for damages.

The debtor argued that its rejection of the contract also functioned as a rescission, terminating the licensee's right to use its trademarks. This argument was based on a negative inference from other provisions in Section 365 that allowed parties to specific types of contracts to continue exercising their rights after rejection. Because the statute did include a similar grant for trademark licensees, the debtor argued, rejection of the licensing agreement must terminate the licensee's rights.

The majority rejected this view as inconsistent with the plain text of Section 365 as well as the core purposes of bankruptcy law. As to the text, the majority explained that the debtor's argument would read section 365's statement that rejection "constitutes a breach" to mean something entirely different—that rejection has different consequences than breach. To the extent Congress had expressly provided that rejection of specific types of contracts does not constitute rescission, the circumstances of those provisions showed that they were enacted to correct court decisions holding that rejection constituted rescission, as the debtor asked the Court to read Section 365. Moreover, the Court explained, the debtor's rejection-as-rescission argument would conflict with the general rule that the bankruptcy estate can possess no more than the debtor possessed before bankruptcy. Treating rejection as rescission would effectively "roll back a prior transfer," thus expanding rights of avoidance that Congress had deliberately limited to narrow circumstances.

Justice Sotomayor wrote a separate concurrence to note potential limits on the Court's holding. Specifically, she

cautioned that the Court did not hold that a trademark licensee necessarily retains all rights in the trademark following rejection of the licensing agreement. A particular licensee's rights may vary based on state law and the terms of the licensing agreement. She also noted that the rights of trademark licensees following rejection are more expansive than the rights of licensees to other types of intellectual property, such as patents, which are subject to limitations under Section 365(n).

Justice Gorsuch dissented. He contended that the case was moot because the underlying license agreement had expired on its own terms. The majority had held, to the contrary, that the licensee's claim for damages preserved a live case or controversy, however unlikely it was to prevail. Justice Gorsuch countered that the licensee's argument could not keep the case alive because it had failed to articulate a plausible claim for damages. Given the doubts about the Court's jurisdiction, he argued, the Court should have declined to reach the merits.

***Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019)**

Bradley Taggart was sued by a company in which he formerly owned an interest, along with two of its owners, for allegedly breaching the company's operating agreement. Before trial on that lawsuit, he filed for Chapter 7 bankruptcy. The bankruptcy court ultimately issued a discharge order. Afterwards, the state court entered judgment against Taggart in the pre-bankruptcy lawsuit and awarded attorneys' fees against him. When the judgment creditors tried to collect on those fees, Taggart sought sanctions against them in the bankruptcy court for violating the discharge order. The bankruptcy court found the judgment creditors in civil contempt, but the Bankruptcy Appellate Panel vacated the sanctions and the Ninth Circuit affirmed, holding that the judgment creditors' good faith belief that they were entitled to collect on the judgment, even if unreasonable,

The Supreme Court held that a defendant seeking to avoid civil contempt for violation of a bankruptcy discharge order must show an objectively fair doubt as to the wrongfulness of the conduct.

was enough to preclude sanctions.

The Supreme Court vacated the lower court judgment and remanded in an opinion by Justice Breyer. The Court held that the standard applied by the Ninth Circuit was inconsistent with traditional civil contempt principles. Those principles, incorporated by provisions of the bankruptcy statute treating discharge orders like injunctions, apply an objective test to determine whether there is a fair ground of doubt as to the wrongfulness of the defendant's conduct. Under this test, a party's subjective belief that it is complying with a court order is not enough to avoid contempt if that belief is objectively unreasonable. In applying this standard, the Court rejected Taggart's request for a strict liability standard similar to that applied to violations of automatic stays, concluding that his argument ignored key differences in the text and objectives of the bankruptcy law provisions governing automatic stays and discharge orders.

Civil Procedure

Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019)

Gilbert Hyatt filed tort claims against the Franchise Tax Board of California (the "Board") in Nevada state court. The Board argued that it was entitled to immunity under California law, but the Nevada Supreme Court disagreed, holding that the Board was only entitled to the same immunities enjoyed by Nevada agencies under Nevada law. The Supreme Court affirmed. On remand, the Nevada Supreme Court refused to apply a damages cap on tort liability applicable to Nevada state agencies. The Supreme Court reversed, and the Nevada Supreme Court instructed the trial court to apply the statutory damages cap. The Board petitioned for writ of certiorari a third time

The Supreme Court overruled its prior precedent and held that the states retain their sovereign immunity when sued by private citizens in the courts of another state.

seeking to overrule Court precedent (*Nevada v. Hall*, 440 U.S. 410 (1979)) that the Constitution does not bar suits brought by an individual against one state in the courts of another state.

The Supreme Court reversed in an opinion by Justice Thomas. The Court overruled *Hall*. *Hall* was decided based on the idea that the states continued to enjoy the freedom of foreign sovereigns to disregard each other's sovereignty, but other provisions of the Constitution confirm that the states no longer enjoyed the full panoply of rights afforded to independent sovereigns and no longer related to each other as true foreign sovereigns. While the Constitution preserved the sovereign immunity of the states, it also altered the states' relationship with each other and limited their ability to refuse to recognize each other's immunity. Thus, the states surrendered some of their immunity by being amenable to suit in federal court for claims brought by the federal government and by other states. The Eleventh Amendment, however, confirmed the states' continuing immunity from suits by private individuals. Recognizing that the doctrine of *stare decisis* is weakest when interpreting the Constitution, and determining that errors in *Hall*'s reasoning and further development since *Hall* weighed against following it, the Court overruled *Hall*.

Justice Breyer dissented in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan. The dissenting justices disagreed that *Hall* was wrongly decided, finding nothing in the Constitution requiring the states to accord each other sovereign immunity. The dissenters further disagreed that subsequent development of the law warranted overruling *Hall*.

***Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)**

When Secretary of Commerce Wilbur Ross announced that the 2020 census would include a question about citizenship, several state and local governments and various non-governmental organizations brought suit to enjoin the Secretary from adding a citizenship question. The plaintiffs claimed that the Secretary's action violated the Enumeration Clause, the Equal Protection Clause, and the Administrative Procedure Act

("APA"). They alleged that a citizenship question would lead to an inaccurate census count because non-citizens would be reluctant or unwilling to respond to the census questionnaire. As a result, States with a high number of non-citizens could lose billions in federal funding and potentially lose representation in the U.S. House of Representatives. Secretary Ross countered that citizenship data were needed to help the Department of Justice enforce federal voting-rights laws.

The dispute initially came before the Court after the district court granted the plaintiffs' motion to compel the depositions of Secretary Ross and a senior Department of Justice official. The Court granted the government's motion to stay Secretary Ross's deposition but allowed the other deposition to proceed. The Court also declined to stay the district court's order authorizing the plaintiffs to conduct additional discovery outside of the administrative record.

After a bench trial, the district court found that Secretary Ross's action was arbitrary and capricious and based on a pretextual rationale in violation of the APA and that it violated the Census Act. It denied relief on the plaintiffs' equal protection claim, however, concluding that the plaintiffs had failed to prove that the Secretary acted with discriminatory intent. The district court vacated the Secretary's decision and enjoined him from adding the citizenship question.

The government filed a petition for certiorari before judgment, contending that time was of the essence because it needed to finalize the questionnaire by the end of June. The Court granted the petition. In a fractured opinion by Chief Justice Roberts, the Court addressed three questions: (1) whether the challengers had standing; (2) whether the citizenship question violated the Enumeration Clause; and (3) whether the Department's reasoning for the rule was pretextual in violation of the APA.

The Court held unanimously that the plaintiffs had standing because the States faced a potential loss of funding based on the outcome of the census. The threat of injury rested on more than mere speculation; it was based on "the predictable effect

of Government action on the decisions of third parties."

In a section of the opinion joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Court held that the citizenship question did not violate the Enumeration Clause. In addition to Congress's broad authority over the census, the Court relied on historical evidence showing a longstanding consensus that the Constitution allows Congress to go beyond a simple enumeration to collect demographic information through the census.

In a section of the opinion joined by Justices Thomas, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh, the Court held that the Secretary's discretion under the Census Act was not "unbounded" because the taking of the census was not traditionally committed to agency discretion. As a result, the Secretary's decision to include a citizenship question was subject to judicial review under the Administrative Procedure Act.

Turning to the Secretary's decision to include a citizenship question, Justices Thomas, Alito, Gorsuch, and Kavanaugh joined Chief Justice Roberts in concluding that the Secretary did not abuse his discretion because his decision was not arbitrary and capricious. Insofar as he weighed the risks and benefits in various approaches to the citizenship question, the Court held that the Secretary considered the evidence and gave reasons for his choice of action, and the Court was not entitled to second-guess his judgment. Nor, the Court held, did the Secretary violate the Census Act in his selection of data or his reporting to Congress. Even if the Secretary had failed to comply with specific technical requirements, the Court held that any such error would be harmless because the Secretary had "fully informed Congress of, and explained, his decision."

Finally, in a section of the opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Court held that the Secretary's proffered reason for the citizenship question—enforcement of federal-voting rights laws—was pretextual. Considering all of the evidence, including the administrative record and extra-record discovery, the Court found "a

significant mismatch between the decision the Secretary made and the rationale he provided." In particular, the record showed that the the proferred rationale—that the Department of Justice requested citizenship data to better enforce voting laws—"seems to have been contrived" because the Secretary's decision to include a citizenship question predated the Justice Department's request, and that the request was itself prompted by the Secretary. Cautioning that deferential review did not require the courts to "exhibit a naivete from which ordinary citizens are free," the Court found the proffered explanation was merely a "distraction." The Court did not hold that the agency's decision was invalid, but given the unusual circumstances, it and affirmed the district court's decision to remand to the agency for a better explanation.

Justice Thomas, joined by Justices Gorsuch and Kavanaugh, concurred in part and dissented in part. In his view, the Court's role was to determine whether the Secretary complied with the law and gave "a reasoned explanation for his decision." Concluding that he had done so, Justice Thomas argued that the inquiry should have ended there. He expressed concern that digging into political motivations could cause "judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes."

Justice Alito wrote separately, concurring in part and dissenting in part. Justice Alito would have held that the inclusion of the citizenship question was within the complete discretion of the Department of Commerce and could not be challenged at all.

Justice Breyer filed an opinion concurring in part and dissenting in part, joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Breyer argued that the Secretary's decision was arbitrary and capricious in violation of the APA, even if his reasoning was not pretextual, because the record showed that including a citizenship question would produce data less accurate than the data available from existing sources.

Civil Rights

***Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019)**

Lois Davis, an employee of Fort Bend County, filed a charge with the Equal Employment Opportunity Commission ("EEOC") on the basis of sexual harassment and retaliation for reporting the harassment. While her EEOC charge was pending, Davis was told to report to work on a Sunday and was fired after she did not go to work due to a church commitment. Davis attempted to supplement the allegations in her charge by handwriting "religion" on the "Employment Harms or Actions" part of her intake questionnaire, but she failed to make any changes to the formal charge document. After receiving notice of her right sue, Davis sued, alleging discrimination on the basis of religion and retaliation for reporting sexual harassment. After years of litigation, Fort Bend asserted for the first time that the district court lacked jurisdiction over Davis's religion-based discrimination claim because she had not stated the claim in her EEOC charge. The district court granted Fort Bend's motion to dismiss. The Fifth Circuit reversed, holding that Title VII's charge-filing requirement was not jurisdictional.

In a unanimous opinion written by Justice Ginsburg, the Court affirmed. The Court distinguished between jurisdictional prescriptions and nonjurisdictional claim-processing rules, which promote the orderly process of litigation by requiring that parties take certain steps at certain times. A claim-processing rule may be mandatory in the sense that a court must enforce the rule if a party properly raises it. However, an objection to a mandatory claim-processing rule may be waived if the party asserting it takes too long to raise the issue. Title VII's jurisdictional provisions are separate from its charge-filing requirement. The charge-filing provisions speak to a party's procedural obligations, not to federal courts' jurisdiction over Title VII actions.

The Supreme Court held that the charge-filing requirement in Title VII of the Civil Rights Act of 1964 is not jurisdictional.

***McDonough v. Smith*, 139 S. Ct. 2149 (2019)**

Edward McDonough was a commissioner of the county board of elections and processed absentee ballots. Youel Smith was appointed to investigate forged absentee ballots submitted in a primary election in Troy, New York. McDonough claimed that Smith fabricated evidence to secure a grand jury indictment. The first trial ended in a mistrial, and McDonough was acquitted on all charges in the second trial. Almost three years after his acquittal, McDonough sued Smith under § 1983 for fabrication of evidence and malicious prosecution without cause. The district court dismissed the malicious prosecution claim as barred by prosecutorial immunity and dismissed the fabrication of the evidence claim as untimely. The Second Circuit affirmed, holding that the three-year limitations period began to run after (1) McDonough learned that the evidence was false and was being used against him in the criminal proceedings and (2) suffered a loss of liberty as a result of the evidence.

In an opinion written by Justice Sotomayor, the Court reversed and remanded. The statute of limitations for a § 1983 claim is a question of federal law and conforms to common-law tort principles, which provide that the time begins to run when the plaintiff has a complete and present cause of action. The accrual analysis begins with identifying the specific constitutional right alleged to have been infringed. The Second Circuit treated McDonough's claim as arising under the Due Process Clause. The Court assumed, without deciding, that the constitutional right at issue concerned due process. The Court then noted that malicious prosecution is the most analogous common-law tort to fabrication of the evidence. Because a malicious prosecution claim accrues when the underlying criminal proceedings have resolved in the plaintiff's favor, the favorable-termination

The Supreme Court held that the statute of limitations for a 42 U.S.C. § 1983 claim for fabrication of evidence begins to run when the criminal proceedings against the plaintiff have terminated in his or her favor.

requirement also applies to fabrication of the evidence. The favorable-termination requirement avoids parallel criminal and civil litigation over the same subject matter, the possibility of conflicting civil and criminal judgments, and allowing collateral attacks on criminal judgments through civil litigation.

Justice Thomas, joined by Justices Kagan and Gorsuch, filed a dissenting opinion and asserted that McDonough failed to take a definitive position on which constitutional right Smith allegedly violated. Because the threshold question in determining when the statute of limitations begins to run in a § 1983 case depends on what specific constitutional right at issue, Justice Thomas would have dismissed the certiorari as improvidently granted.

***Nieves v. Bartlett*, 139 S. ct. 1715 (2019)**

Respondent was arrested for disorderly conduct and resisting arrest when he allegedly yelled at officers and lunged toward them in an aggressive manner. After the state dismissed the charges, respondent sued the officers under 42 USC § 1983, claiming that they violated his First Amendment rights by arresting him in retaliation for his speech. The District Court granted summary judgment for the officers, finding that they had probable cause to arrest respondent and that this precluded his retaliatory arrest claim. The Ninth Circuit reversed and held that a plaintiff can prevail on a retaliatory arrest claim even if there was probable cause.

The Supreme Court reversed in an opinion authored by Chief Justice Roberts, joined in full by Justices Breyer, Alito, Kagan, and Kavanaugh and in part by Justice Thomas. To prevail on a retaliatory arrest claim, a plaintiff must prove that the government defendant's retaliatory animus caused injury—meaning that the adverse action against plaintiff would not have been taken without the retaliatory motive. In light of this requirement, the

The Supreme Court held that a plaintiff asserting a retaliatory arrest claim for violations of the First Amendment generally must plead and prove the absence of probable cause for arrest.

Court concluded that the existence of probable cause for arrest—apart from retaliatory motive—will typically disprove that causal link. So, if a plaintiff does not plead and prove the absence of probable cause, the retaliatory arrest claim almost always fails. If the plaintiff meets this requirement, he must show that the retaliation was a substantial or motivating factor behind the arrest. If plaintiff he does, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation.

Justice Thomas concurred in part and concurred in the judgment, writing separately to disagree with the "narrow exception" adopted by the majority in which probable cause alone may not defeat a retaliation claim if the plaintiff shows that officers in similar situations typically decline to make arrests.

Justice Gorsuch concurred in part and dissented in part. He would hold that the presence or absence of probable cause is not dispositive, but that it may bear on the issue of causation.

Justice Ginsberg also concurred in part—because of the absence of evidence for one of the officers in this case—but dissented in part because she would hold that a lack of probable cause does not alone defeat a retaliation claim.

Justice Sotomayor dissented to say that the majority's rule lacks any grounding in the First Amendment and risks letting flagrant violations go unremedied. She would instead apply the well-established, carefully calibrated standards that govern First Amendment retaliation claims in other contexts.

COMMERCE

Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019)

In *Tennessee Wine & Spirits*, the Supreme Court considered whether state regulation of alcohol was exempted from the dormant Commerce Clause by Section 2 of the 21st Amendment, which reads: "The transportation or importation into any state, territory, or possession of the United States for

delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Sixth Circuit struck down Tennessee's two-year residential requirement to obtain a retail liquor license on the ground that it unconstitutionally discriminated against out-of-state retailers. The Supreme Court affirmed in a 7-2 decision.

In an opinion by Justice Alito, the Court held that the 21st Amendment gives States leeway to regulate alcohol to protect public health and safety and for other legitimate reasons, but Section 2 does not insulate state laws from constitutional challenges. Rejecting Tennessee's arguments to the contrary as having a "highly attenuated relationship to public health or safety," Justice Alito found that the primary effect of the residency requirement was to protect in-state retailers from out-of-state competition in violation of the usual tenets of the dormant Commerce Clause.

Justice Gorsuch dissented in an opinion joined by Justice Thomas. Noting the "peculiar" doctrine of the dormant Commerce Clause, the dissent argued that the history of the 21st Amendment shows that Congress, empowered by the actual written Commerce Clause, authorized states to engage in regulation of alcohol that favored in-state residents, as evidenced by the existence of state residential requirements for more than 150 years. Justice Gorsuch concluded that "those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for 'cabbages and candlesticks' should not be applied to alcohol."

Constitutional Law

North Carolina Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 (2019)

Joseph Lee Rice III formed a trust for the benefit of his children. He appointed a New York resident as the trustee and

gave the trustee absolute discretion to distribute the trust's assets. Rice's daughter, Kimberley Rice Kaestner, moved to North Carolina. A few years later, the trustee divided Rice's trust into three subtrusts. The Kimberley Rice Kaestner 1992 Family Trust (the "Kaestner Trust") was formed for the benefit of Kaestner and her three children. The North Carolina Department of Revenue assessed a tax of more than $1.3 million on the full proceeds of the Kaestner Trust. The trustee paid the tax under protest and sued in state court, arguing that the tax as applied to the Kaestner Trust violates the Due Process Clause of the Fourteenth Amendment. The North Carolina courts agreed.

In an opinion written by Justice Sotomayor, the Court affirmed. The Court applied a two-step process to determine whether the North Carolina tax satisfies the Due Process Clause. First, there must be some definite link or minimum connection between the state and the person, property, or transaction the state seeks to tax. Second, the income attributed to the state for tax purposes must be rationally related to values connected with the state. North Carolina taxed any trust income that "is for the benefit of" a North Carolina resident. The North Carolina Supreme Court interpreted the tax as applying on the sole basis that the trust beneficiary resides in North Carolina. While Court precedent is clear that a tax on trust income distributed to an in-state resident and that a tax based on a trustee's in-state residence pass the Due Process Clause, this case presents a different scenario. In the context of beneficiary contacts, the focus is on the extent of the beneficiary's right to control, possess, enjoy, or receive trust assets. The Kaestner Trust made no distributions to any North Carolina resident. The trustee resided in New York, and administration of the Kaestner Trust was split between New York and Massachusetts. Therefore, the presence of an in-state

The Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits states from taxing trusts based solely on the in-state residency of a trust beneficiary.

beneficiary alone was not enough for a state to tax trust income that has not yet been distributed and where the beneficiary has no right to demand the income.

Justice Alito, joined by Chief Justice Roberts and Justice Gorsuch, filed a concurring opinion to make clear that the Court's opinion merely applies existing precedent and does not open the Court's prior decisions for reconsideration.

***United States v. Haymond*, 139 S. Ct. 2369 (2019)**

A jury found Andre Haymond guilty of possessing child pornography. The judge sentenced him to prison for 38 months with 10 years of supervised release. Haymond was caught with child pornography while on supervised release. At a hearing to revoke his supervised release, a district judge imposed a sentence of 5 years under 18 U.S.C. § 3583(k), which provides that if a district judge finds by a preponderance of the evidence that a defendant has violated the conditions of his supervised release and has committed an enumerated offense, including the possession of child pornography, the judge must impose an additional prison term of at least five years. The Tenth Circuit held that § 3583(k) violated the Fifth and Sixth Amendments and remanded for resentencing. The district court resentenced Haymond to time served.

Justice Gorsuch announced the judgment of the Court and delivered an opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Gorsuch determined that a jury must find beyond a reasonable doubt every fact that the law makes essential to a punishment that a judge might later impose. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that a sentencing scheme that allowed a judge to increase a defendant's sentence beyond the mandatory maximum based on the judge's finding of new facts by a preponderance of the evidence was unconstitutional. In this case, a judge, acting without a jury and based on a

The Supreme Court held that 18 U.S.C. § 3583(k)'s five-year mandatory minimum sentence for violations of supervised release violates the Fifth and Sixth Amendments.

preponderance of the evidence, found that Haymond engaged in conduct in violation of the terms of his supervised release and imposed a new punishment of 5 years in prison. Because the facts as found by the judge increased the range of allowable sentences, Haymond's Fifth and Sixth Amendment rights were violated. As a result, the Court remanded to the Tenth Circuit to address the parties' remedial arguments in the first instance.

Justice Breyer concurred in the judgment. He would not have applied *Apprendi* to the supervised release context but agrees that § 3583(k) is unconstitutional because it operates more like punishment for a new offense, to which the jury right should attach, rather than an ordinary revocation of supervised release.

Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Kavanaugh, filed a dissenting opinion, asserting that the procedures that must be followed at a supervised release revocation proceeding are the same procedures that had to be followed at a parole revocation proceeding and do not implicate the Sixth Amendment right to a jury trial. Haymond is not being charged with a new crime but rather with violating the terms of a jury sentence flowing from his original conviction.

Criminal Law

Mont v. United States, 139 S. Ct. 1826 (2019)

After petitioner Jason Mont was convicted of drug and firearm offenses, he was sentenced to a term of imprisonment followed by 5 years of supervised release. During his period of supervised release, Mont was arrested on new drug charges and incarcerated pending trial. He later pled guilty to the new charges and the judge credited the roughly ten months of pretrial detention as time served. When the initial court revoked Mont's supervised release and ordered him to serve an additional 42 months' imprisonment, he claimed that his supervised release had expired. The court rejected that argument and the Sixth Circuit affirmed, holding that Mont's

supervised-release period was tolled while he was in pretrial detention under 18 USC § 3624(e), which says the period of supervised release "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." Because the Courts of Appeals disagreed on whether § 3624(e) applies in this scenario, the Court granted certiorari.

The Supreme Court affirmed in an opinion authored by Justice Thomas, joined by Chief Justice Roberts and Justices Ginsburg, Alito, and Kavanaugh. The Court held that in light of the statutory text and the context of § 3624(e), pretrial detention qualifies as "imprison[ment] in connection with a conviction" if a later imposed sentence credits that detention as time served for the new offense. The Court concluded it was not a problem that the District Court could only make this determination after the fact because the statute, by its terms, already requires courts to retrospectively calculate whether a 30-day minimum was met. Applying those principles, the Court held that Mont still had about nine months remaining on his term of supervised release when the District Court extended his sentence.

The Supreme Court held that a convicted criminal's period of supervised release is tolled during a pretrial detention of 30 days or more if a later imposed sentence credits that period as time served for the new offense.

Justice Sotomayor dissented in an opinion joined by Justices Breyer, Kagan, and Gorsuch to state her view that the majority's backward-looking approach misconstrues the operative text and fosters needless uncertainty and unfairness.

***Quarles v. United States*, 139 S. Ct. 1872 (2019)**

Jamar Quarles was convicted for being a felon in possession of a firearm. Because he had at least three prior convictions for violent felonies, he was subject to enhanced sentencing under the Armed Career Criminal Act (the "Act"). He challenged the enhanced sentencing, arguing that one of the prior convictions for home invasion did not qualify as a form of burglary under

the Act. He argued that generic burglary under the Act occurs when the defendant remains in a dwelling unlawfully with an intent to commit a crime. By contrast, the burglary statute under which he was convicted allowed conviction for remaining unlawfully in a dwelling even if the intent to commit a crime was formed later than the moment of unlawful remaining. The district court rejected the argument and the Sixth Circuit affirmed.

The Supreme Court affirmed in an opinion by Justice Kavanaugh. The Court held that generic remaining-in burglary is not limited to instances where criminal intent and unlawful remaining are engaged in simultaneously. Instead, because the meaning of "remaining" signifies a continuous event, generic remaining-in burglary occurs when a defendant forms a criminal intent at any time while unlawfully remaining in the dwelling. Because the state statute used to convict Quarles substantially corresponds to or is narrower than generic burglary, it qualified as a violent felony for purposes of the enhanced sentencing provision of the Act.

The Supreme Court held that generic remaining-in burglary as referred to by the Armed Career Criminal Act is met when the defendant forms an intent to commit a crime at any time while remaining unlawfully in a dwelling.

Justice Thomas filed a concurring opinion. While he agreed with the Court's analysis, he wrote separately to question the "categorical approach" employed in these cases. In his view, the categorical approach is not compelled by the text of the Act, and it would be better to allow a jury to determine whether a particular offense fell within the scope of the Act rather than to permit judicial factfinding that violates the Sixth Amendment.

***Rehaif v. United States*, 139 S. Ct. 2191 (2019)**

18 USC § 922(g) makes it unlawful for certain individuals to possess firearms, including felons and aliens who are illegally or unlawfully in the United States. 18 USC § 924(a)(2) provides for up to 10 years' imprisonment for any person who "knowingly" violates § 922(g). Petitioner was convicted

under these statutes after he visited a firing range and shot two firearms. The government's theory was that, although he had previously entered the country on a nonimmigrant student visa, he had been dismissed from university and told that his immigration status would be terminated unless he transferred to a different university or left the country. He did neither. At trial, the judge instructed the jury that the government was not required to prove that he "knew" he was illegally or unlawfully in the United States, only that he knew he had possessed a firearm. Petitioner was convicted and the Eleventh Circuit affirmed.

The Supreme Court held that under a federal statute prohibiting the knowing possession of a firearm by certain categories of people, the defendant must "know" both of his possession of the firearm *and* that he belongs to a relevant category.

The Supreme Court reversed in an opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, Gorsuch, and Kavanaugh. The Court applied its longstanding presumption that Congress intends to require a culpable mental state regarding each of the statutory elements of a crime, and concluded that the term "knowingly" applied to both the firearm element and the status element of § 922(g) (i.e., whether the defendant is an alien illegally or unlawfully in the United States). Because Petitioner claimed he was not aware of his illegal status, the Court reversed and remanded for further proceedings.

Justice Alito dissented in an opinion joined by Justice Thomas to say that the majority's view is unsupported by the text of the statute and that it unnecessarily overturns the long-established interpretation of an important criminal statute by every single Court of Appeals to address the question.

United States v. Davis, 139 S. Ct. 2319 (2019)

Maurice Davis and an accomplice were charged with multiple counts of robbery affecting interstate commerce and

one count of conspiracy to commit robbery affecting interstate commerce. The men were further charged with using a firearm in connection with a crime of violence. The men challenged their convictions for firearm use, arguing that the statutory provision defining "crime of violence" (18 U.S.C. § 924(c)(3)(B) (the "residual clause")) was unconstitutionally vague. The Fifth Circuit initially affirmed, but the Supreme Court vacated the decision in light of its decision striking a similar provision in a different statute. On remand, the Fifth Circuit overturned the conspiracy conviction based on its holding that the residual clause is unconstitutionally vague.

The Court affirmed in part and vacated in part in an opinion by Justice Gorsuch. The Court agreed with the Fifth Circuit that the residual clause is unconstitutionally vague. The residual clause in § 924(c) is substantially similar to residual clauses in two other statutes that the Court recently found unconstitutionally vague. In each of those cases, the Court held that application of the categorical approach, whereby courts assess the degree of risk posed by the "ordinary case" of the crime charged, was insufficient to support criminal punishments. The residual clause in § 924(c) has long been interpreted to impose a similar categorical approach, and the Court rejected the government's argument in favor of a case-specific approach to reading the statute. The residual clause defines a "crime of violence" in terms of an "offense that by its nature" involves a risk of personal force. The Court has previously interpreted nearly identical language to mandate the categorical approach. Further, the language of the provision referring to the "nature" of the "offense" supports this interpretation. Giving the language a different meaning in § 924(c) would upset numerous other provisions in the federal criminal code that cross-reference or use similar language to § 924(c). Finally, the

The Supreme Court held that a residual clause allowing for additional criminal punishment where firearms were used to commit a crime of violence was unconstitutionally vague because it defined the violent crime in terms of a categorical "offense."

doctrine of constitutional avoidance cannot save the residual provision here where application of the doctrine would require expanding rather than limiting the reach of a criminal statute.

Justice Kavanaugh dissented in an opinion joined by Chief Justice Roberts and Justices Thomas and Alito. The dissenting justices would have distinguished the Court's prior cases addressing other residual clauses because unlike those clauses, which imposed additional penalties for past behavior, the residual clause of § 924(c) focuses on the defendant's current conduct during the charged crime.

Criminal Procedure

Flowers v. Mississippi, 139 S. Ct. 2228 (2019)

Curtis Flowers, a black man, was tried six separate times for the murder of four employees of a Mississippi furniture store. The first two convictions were reversed for prosecutorial misconduct. The third conviction was set aside based on the Mississippi Supreme Court's holding that the prosecution exercised its peremptory strikes on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The fourth and fifth trials ended in mistrial. In the sixth trial, Flowers was again convicted and sentenced to death. He challenged the conviction by arguing that the prosecution once again violated the constitution by exercising five of its six peremptory strikes on black jurors. The trial court ruled against him, finding that the strikes were based on race-neutral grounds. The Mississippi Supreme Court affirmed.

The Supreme Court reversed in an opinion by Justice Kavanaugh. The Court held that the strikes exercised by the prosecution in this case, considered against the history of the case, were made with discriminatory intent. A defendant such as Flowers asserting a *Batson* challenge has the burden to establish a prima facie case of discrimination. The trial court then assesses whether prosecutions' race-neutral reasons for the strikes are the actual reasons or pretext for discrimination.

The Court concluded that the circumstances surrounding the history of this case demonstrate discriminatory intent. During the first four trials, the prosecution tried to strike all 36 black prospective jurors, a pattern it followed in the sixth trial. Additionally, during the sixth trial, the prosecution engaged in disparate questioning, asking 145 questions of the 5 black prospective jurors compared to only 12 questions of the 11 white seated jurors. With one prospective black juror in particular, the prosecution probed her relationships with defense witnesses and Flowers' family while neglecting to question white prospective jurors who also knew defense witnesses and had connections with Flowers' family. The Court also noted several factually inaccurate statements for striking the black prospective jurors.

Justice Alito concurred in the judgment and wrote separately to state that in an ordinary case, he would have affirmed based on the race-neutral grounds. But the unusual circumstances in this case, including the continued involvement of the same prosecutor in the same county, support reversal of the conviction.

Justice Thomas dissented in an opinion joined by Justice Gorsuch. The dissenting justices highlighted procedural and factual problems with the Court's approach. Procedurally, the dissenting justices found no basis for taking the case under the Court's standards because it presented no legal question. In fact, the Court changed the question presented to focus on whether *Batson* was misapplied in this case—the kind of case involving specific facts and concurrent findings of fact by lower courts that the Court historically has avoided. On the facts, the dissenting justices took issue with the Court's failure to address the race-neutral grounds supporting 49 of the 50

The Supreme Court held that the circumstances in past trials, taken together with a pattern of disparate questioning and factually inaccurate reasons for peremptory strikes made in the current trial, supported a finding that the prosecution had a discriminatory intent in striking black prospective jurors.

peremptory strikes in the history of the case, including the latest case, which involved jurors struck because they: (1) had been sued by the store where the murders took place and which was owned by a victim and one of the trial witnesses, (2) lied about working with Flowers' sister, (3) were related to Flowers, and (4) worked with Flowers' family members and would not consider the evidence presented.

Double Jeopardy

Gamble v. United States, 139 S. Ct. 1960 (2019)

After petitioner was arrested for the unlawful possession of a handgun, he pleaded guilty under Alabama state law. Federal prosecutors later indicted him for the same instance of possession under federal law. Petitioner moved to dismiss on the ground that the indictment violated the Double Jeopardy Clause, which provides that no person may be "twice put in jeopardy for the same offence." But because the Supreme Court has long held that two offenses are not "the same" for double jeopardy purposes if prosecuted by different sovereigns (the "dual-sovereignty doctrine"), the District Court denied his motion. Petitioner pleaded guilty and appealed, but the Eleventh Circuit affirmed. The Supreme Court granted certiorari to determine whether to overturn the dual-sovereignty doctrine.

The Supreme Court affirmed—both the result below and the viability of the dual-sovereignty doctrine—in a decision authored by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Breyer, Sotomayor, Kagan, and Kavanaugh. Petitioner contended that the dual-sovereignty doctrine departs from the founding-era understanding of the Double Jeopardy Clause, but the Court concluded that his historical evidence was feeble. Pointing the other way were the text of the

The Supreme Court reaffirmed the dual-sovereignty doctrine: that the Double Jeopardy Clause of the Fifth Amendment allows successive prosecutions by separate sovereigns.

Clause, other historical evidence, and 170 years of precedent. In short, the Court reiterated that the dual-sovereignty doctrine is consistent with the sovereign-specific original meaning of "offence" and honors the substantive differences between the interests that two sovereigns can have in punishing the same act.

Justice Thomas concurred to note that while the historical record does not bear out his initial skepticism of the dual-sovereignty doctrine, he questioned the Court's interpretation of the doctrine of *stare decisis*.

Justice Ginsburg dissented, concluding that the dual-sovereignty doctrine should be overturned because it diminishes the individual rights the Double Jeopardy Clause is supposed to protect and overstates the separate sovereignty of state and federal governments.

Justice Gorsuch also dissented to say that the dual-sovereignty doctrine finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history.

Election Law

Rucho v. Common Cause, 139 S. Ct. 2484 (2019)

Voters in North Carolina and Maryland filed suits challenging their states' respective congressional districting maps as unconstitutional. The district court in both cases ruled in favor of the plaintiffs. The defendants then appealed directly to the Supreme Court.

The Supreme Court vacated and remanded in an opinion by Chief Justice Roberts. The Supreme Court held that partisan gerrymandering cases present political questions outside the reach of the court system. Political questions are nonjusticiable when they lack judicially discoverable and manageable standards to govern their resolution. In the case of political gerrymandering cases, then, the question is where there is a judicially manageable standard for deciding how much political

domination is too much. That is because a jurisdiction may engage in political gerrymandering under the Constitution. Political gerrymandering was an issue prior to independence, and it was a problem of which the Founders were aware. To alleviate the issue, the Constitution places control over districting with the states but empowers Congress to regulate the issue, a power it has used in the past to address partisan gerrymandering.

The problem with involving courts in this question is that they are neither equipped nor authorized to apportion political power. Moreover, it is unclear what standard they would apply to do so. Fairness could reasonably be perceived as achieving more competitive districts, or ensuring an appropriate share of safe seats to each party according to their representation, or adhering to traditional standards in creating districts. In any event, the tests applied by the district courts do not qualify as limited, precise, and capable of judicial management.

The test applied in the North Carolina case borrowed the "predominant intent" element from racial gerrymandering cases, but unlike race-based criteria, political criteria may be used to draw district lines. Further, the element of the test asking to determine whether vote dilution is likely to persist in the future is outside the expertise of judges. The First Amendment-based tests applied in both cases likewise focus on intent without providing a clear and manageable way of distinguishing permissible and impermissible partisan motivation. Finally, the Court has already determined that neither Article I or Article IV do not provide a basis for justiciable redistricting claims.

The Supreme Court held that questions of partisan gerrymandering are nonjusticiable political questions outside the reach of the judiciary.

While holding that partisan gerrymandering claims are not justiciable, the Court noted that there are other avenues for reform through the bodies appointed by the Constitution to govern districting: the states and Congress.

Justice Kagan dissented in an opinion joined by Justices

Ginsburg, Breyer, and Sotomayor. In the dissenters' view, the constitutional harms imposed by partisan gerrymandering schemes like those at issue in the case are significant and warrant judicial intervention. Contrary to the Court's reasoning, the dissenters concluded that tests adopted by the lower courts satisfy justiciability requirements because they are clear and manageable, focus on limiting egregious gerrymanders, and bar courts from applying their own ideas of electoral fairness.

Eminent Domain

Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162 (2019)

In *Knick v. Township of Scott, Pennsylvania*, the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which held that plaintiffs could not bring a takings claim in federal court unless they had pursued a claim for just compensation in state court. Rose Mary Knick had a small family graveyard on her rural property. The local township attempted to enforce an ordinance which required all cemeteries to be kept open and accessible to the general public during daylight hours. Knick brought an action under 42 U.S.C. § 1983 in federal district court alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The district court dismissed her suit because she had not first sought compensation in state court as required by *Williamson County*, a 34-year-old precedent. The Third Circuit affirmed.

In *Williamson County*, the Court had concluded that no violation of the Fifth Amendment occurs until a state or local government denies just compensation for a taking. This holding rested on two principles. First, the Court viewed the Fifth Amendment as not being violated until the government refused to pay "just compensation." The mere seizure of the property was not a constitutional violation in and of itself. Second, in 1890, the Court held in *Cherokee Nation* that the government

need not pay compensation at the time of the taking so long as a "reasonable, certain, and adequate" mechanism was available for recovering compensation.

Thus, under *Williamson County*, a plaintiff could not bring a § 1983 claim based on a taking until he had exhausted his remedies in state court. But in a twist unforeseen by the *Williamson County* opinion, the Court's 2005 decision in *San Remo Hotel* held that federal courts must give preclusive effect to state-court judgments in takings cases under the full faith and credit statute. Thus, if plaintiffs lost in state court, they would be precluded from bringing their constitutional claim in federal court.

In a 5-4 opinion by the Chief Justice, joined by Justices Thomas, Kavanaugh, Gorsuch, and Alito, the Court overruled *Williamson County*. The Court explained that *San Remo* potentially put a takings plaintiff "in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court." This "*San Remo* preclusion trap" lead the Court to conclude that *Williamson* reflected "a mistaken view of the Fifth Amendment" that put takings plaintiffs in a less favorable position than other plaintiffs bringing claims under § 1983, which does not require exhaustion of state remedies. Stating that *Williamson County*'s "state-litigation requirement imposes an unjustifiable burden on takings plaintiffs," the Court held that a constitutional violation occurs at the time of the taking even if mechanisms for compensation are available. Thus, a property owner can now bring a Fifth Amendment claim under § 1983 in federal court immediately upon the taking.

In a brief concurring opinion, Justice Thomas addressed the United States' concern about injunctive relief against takings. He emphasized that this concern was overstated because federal courts have an adequate remedy at law, *i.e.* ordering the government to pay just compensation rather than ordering injunctive relief of the taking itself.

In a dissent joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan argued that the Court should have

held to the principles espoused in *Williamson County*. The dissent laid out negative consequences of the majority's opinion, such as federal courts being overly involved in quintessential state-law cases involving property law. Faulting the majority opinion for "smash[ing] a hundred-plus years of legal rulings to smithereens[,]" the dissent disparaged the majority's view of stare decisis. Referencing last year's decision in *Janus*, the dissent warned that "if that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all."

Environmental Law

Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019)

Virginia state law bans uranium mining. Virginia Uranium, Inc. filed suit, alleging that the AEA preempts state uranium mining laws and infringes upon the Nuclear Regulatory Commission's ("NCR") authority over the milling, transfer, use, and disposal of uranium. Both the district court and the Fourth Circuit rejected Virginia Uranium's pre-emption argument.

Justice Gorsuch, joined by Justices Thomas and Kavanaugh, announced the judgment of the Court and affirmed. Justice Gorsuch determined that the AEA contains no provision preempting state law and does not grant the NRC exclusive authority to regulate mining. After discussing the statutory context of the AEA, Justice Gorsuch rejected the argument that the Court's precedent interpreting the AEA supported Virginia Uranium's preemption argument, as well as the argument that Virginia's mining law is an impermissible obstacle to the accomplishment and execution of the purposes and objectives of Congress.

The Supreme Court held that the Atomic Energy Act ("AEA") does not preempt state laws banning uranium mining.

Justice Ginsburg, joined by Justices

Sotomayor and Kagan, concurred in the judgment. Because Virginia Uranium's preemption argument fails under the provisions of the AEA and the Court's precedent, Justice Ginsburg opined that the Court did not need to address the doctrine of obstacle preemption.

Chief Justice Roberts, joined by Justices Breyer and Alito, dissented. Because no party disputes that uranium mining safety is not preempted under the AEA, Chief Justice Roberts asserted that the question that should have been addressed was whether a state can attempt to regulate a field that is not preempted, such as uranium mining, as an indirect means of regulating other fields that are preempted, such as uranium millings and tailings. The AEA clearly prohibits state laws that have the purpose and effect of regulating preempted fields.

Establishment Clause

American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019)

Since 1925, the Bladensburg Peace Cross has stood in Prince George's County, Maryland, as a tribute to 49 area soldiers who gave their lives in World War I. Eighty-nine years after the dedication of the cross, Respondents filed this lawsuit claiming that they are offended by the maintenance of the memorial on public land and that its presence there violates the Establishment Clause. The District Court dismissed these claims, but the Fourth Circuit reversed, concluding that the memorial is unconstitutional.

The Supreme Court reversed in a fractured decision marked by seven different writings. Justice Alito delivered the majority opinion, joined in full by Chief Justice Roberts and Justices Breyer and Kavanaugh, and in part by Justice Kagan. The majority did not expressly apply or reject the oft-criticized test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), opting instead for a presumption of constitutionality for long-established—if religiously expressive—monuments, symbols,

and practices. The majority concluded that the purposes of maintaining such monuments, and the messages conveyed thereby, often multiply over time to include historical and community significance. Further, when the passage of time grants this kind of historical significance, removing such a monument no longer appears to be religiously neutral, but rather aggressively hostile to religion. Under these principles, the majority concluded that the Bladensburg Peace Cross does not violate the Establishment Clause.

Justice Breyer wrote a concurring opinion joined by Justice Kagan in which he argued that this cross does not violate the Establishment Clause but that the case might have been different if there were evidence that the organizers "deliberately disrespected" members of minority faiths or if the cross had been erected recently.

Justice Kavanaugh concurred, stating that the Court no longer applies the *Lemon* test and that the Court's opinion does not require the State of Maryland to maintain the cross on public land.

Justice Kagan also concurred. She would preserve the *Lemon* test's focus on "purposes and effects" while looking to history for guidance only on a case-by-case basis.

Justice Thomas concurred only in the judgment, concluding that this cross is "clearly constitutional" because it does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion.

Justice Gorsuch also concurred in the judgment in an opinion—joined by Justice Thomas—that would hold this suit should be dismissed for lack of standing.

Justice Ginsburg dissented in an opinion joined by Justice Sotomayor. The dissenters would hold that the cross violates the Establishment Clause because it elevates Christianity over other faiths and religion over nonreligion.

The Supreme Court held that a longstanding cross on public land, erected as a monument to fallen soldiers in World War I, does not violate the Establishment Clause of the First Amendment.

Federal Courts

Box v. Planned Parenthood of Indiana and Kentucky, Inc., 139 S. Ct. 1780 (2019)

Box v. Planned Parenthood was a challenge to two separate provisions of an Indiana Law regulating abortion. The first provision required fetal remains to be buried or cremated to respect the dignity of the unborn. The second, framed by the State as a nondiscrimination provision, banned abortions based on the sex, race, or disability of the unborn child.

Planned Parenthood brought suit. The district court declared the law unconstitutional, holding that the State did not have a valid interest in requiring fetal remains to be treated like other human remains. It reasoned that the Supreme Court has held that fetuses are not persons. The district court also struck down the second provision, holding that the state cannot prohibit a woman from getting an abortion before the unborn child is viable, regardless of the reason. The Seventh Circuit affirmed.

In a per curiam opinion, the Supreme Court reversed the Seventh Circuit as to the first provision. Reasoning that disposal of fetal remains does not pose an undue burden on a woman's right to obtain an abortion, the Court held that the law was subject only to rational-basis review. The Court had already acknowledged that States have an interest in the proper disposal of fetal remains, and the law was clearly rationally related to that interest.

The Court refused, however, to overturn the Seventh Circuit's decision regarding the nondiscrimination provision. Expressing "no view on the merits," the Court followed its "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals," as the Seventh Circuit was the only circuit to address this particular type of provision.

Writing separately, Justice Ginsburg agreed with the denial of review of the nondiscrimination provision; however, she stressed her belief that the rational basis test was the wrong

test to apply in this case. Justice Sotomayor would have denied review of both provisions.

In a concurring opinion, Justice Thomas argued that Planned Parenthood's effort to "[e]nshrin[e] a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child . . . would constitutionalize the views of the 20th-century eugenics movement." He concluded, "[h]aving created the constitutional right to an abortion, this Court is dutybound to address its scope."

***Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019)**

Citibank, N.A. filed a debt-collection action against George Jackson in state court. Jackson answered and filed a counterclaim against Citibank, as well as a third-party class action claim against Home Depot, U.S.A., Inc. and Carolina Water Systems, Inc. for unlawful referral sales and deceptive and unfair trade practices. Citibank dismissed its claims against Jackson. Home Depot filed a notice of removal, but the district court granted Jackson's motion to remand. The Fourth Circuit affirmed.

In an opinion written by Justice Thomas, the Court affirmed. Section 1441(a) permits "the defendant or the defendants" in a state-court action to remove the action if the federal courts would have original jurisdiction. Section 1453(b) allows the removal of a class action "by any defendant without the consent of all defendants." The Court determined that the term "defendant" in both statutes refers only to the party sued by the original plaintiff. Removal is based on whether a federal court has original jurisdiction over the action as defined by the plaintiff's complaint, and the defendant to that action is the defendant named by the plaintiff's complaint. Neither statutory provision allows a third-party counterclaim defendant to remove a counterclaim filed against it.

The Supreme Court held that 28 U.S.C. § 1441(a) and 28 U.S.C. § 1453(b) do not allow a third-party counterclaim defendant to remove a counterclaim filed against it.

Additionally, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. Congress has also allowed "any party" to remove cases in other statutory provisions but has kept the limit on removal in § 1441(a). Lastly, this holding follows *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), which suggests that third-party counterclaim defendants are not "the defendant or the defendants" who can remove under § 1441(a).

Justice Alito, joined by Chief Justice Roberts and Justices Gorsuch and Kavanaugh, dissented. According to Justice Alito, the term "defendant" as used in § 1441(a) and § 1453(b) includes a third-party counterclaim defendant. Under the standard dictionary definition of "defendant," Home Depot is a defendant because it is not a plaintiff and is the party being sued. Additionally, § 1453(b) makes several changes specific to class actions that allow removal by third-party defendants. Justice Alito also distinguished *Shamrock Oil* as only holding that once a plaintiff sues in state court, the plaintiff cannot remove a counterclaim brought by the defendant to federal court.

***PDR Network, LLC v. Carlton Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019)**

PDR Network, LLC v. Carlton Harris Chiropractic, Inc. presented a question about the interaction of two statutes: (1) the Telephone Consumer Protection Act of 1991 (TCPA), which prohibits sending an "unsolicited advertisement" by fax; and (2) the Administrative Orders Review Act (Hobbs Act), which grants federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission." In 2006, the FCC issued an order interpreting the term "unsolicited advertisement" in the TCPA to include faxes that "promote goods or services even at no cost." The question presented to the Court was whether the Hobbs Act's exclusive-jurisdiction provision required a federal district court to adopt the FCC's interpretation of "unsolicited

advertisement."

The case arose when PDR Network sent faxes informing health care providers that they could reserve a free copy of the *Physician's Desk Reference* on PDR's website. One recipient filed a putative class action alleging that PDR's fax violated the Telephone Act. The district court held that the exclusive-jurisdiction provision of the Hobbs Act did not apply because neither party challenged the validity of the FCC's order; that it was not bound to follow the FCC's order even if it were valid; and that PDR's fax did not constitute an "unsolicited advertisement" in any event. The Fourth Circuit held that the Hobbs Act required the district court to adopt the FCC's interpretation and that PDR's fax qualified as an "unsolicited advertisement."

In a unanimous opinion by Justice Breyer, the Supreme Court declined to decide the question presented because the binding effect of the FCC's order might depend on two preliminary questions not reached below. The first question was whether the FCC's order amounted to a "legislative rule," having the force and effect of law, or an "interpretive rule," which might not bind the district court even if it did fall within the Hobbs Act's exclusive-jurisdiction provision. The second question was whether PDR had a "prior" and "adequate" opportunity to challenge the FCC's order under the Hobbs Act's exclusive-jurisdiction provision, which vests exclusive jurisdiction in the courts of appeals and imposes a 60-day deadline to challenge certain FCC orders. If PDR did not have a prior and adequate opportunity to challenge the order, the Court explained, the Administrative Procedure Act might entitle PDR to challenge the order regardless of whether it constituted a legislative or interpretive rule.

Justice Kavanaugh, in a concurring opinion joined by Justices Thomas, Alito, and Gorsuch, wrote that the case had a "straightforward" answer. Namely, the general rule is that defendants can challenge an agency's interpretation during an enforcement action unless Congress has "expressly precluded the defendant from advancing such an argument." In the view of

the concurrence, the Hobbs Act did not clearly preclude judicial review during an enforcement action, so PDR Network should be allowed to challenge the 2006 order during the enforcement action in the district court. The concurrence argued that there should be a clear-statement rule for jurisdiction-stripping statutes like the Hobbs Act.

Justice Thomas wrote a separate concurrence, joined by Justice Gorsuch, challenging the Fourth Circuit's assumption that "Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the text of the governing statute." Giving interpretative power to agencies and barring judicial review encroached on the Article III power of the courts to say what the law is. Concluding that this same assumption underlies *Chevron* deference, Justice Thomas called for the Court to reconsider its holdings in this case and in *Chevron*.

Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019)

In *Virginia House of Delegates v. Bethune-Hill*, the Court considered whether the Virginia House of Delegates had standing to appeal the invalidation on racial-gerrymandering grounds of Virginia's House redistricting plan. In a 5-4 decision, the Court held that the House did not have standing.

After a federal district court struck down Virginia's House map, Virginia's Attorney General declined to appeal. The Virginia House then filed its own notice of appeal to challenge the district court's determination that certain legislative districts were the products of racial gerrymandering.

The majority opinion by Justice Ginsburg, joined by Justices Thomas, Sotomayor, Gorsuch, and Kagan, dismissed the appeal and rejected both of the House's standing arguments. First, the House of Delegates claimed it represented Virginia's interest as a state. The majority concluded, however, that Virginia law clearly assigned exclusive authority to the attorney general to represent the Commonwealth in civil litigation. To reinforce this point, Justice Ginsburg noted that in the district

court, the House had acted as a party representing its own interests, not the Commonwealth's.

In the alternative, the House of Delegates claimed it had standing to appeal in its own right. The House contended that the district court's order injured it in two distinct ways. First, the order removed redistricting power from the House and placed it in the district court when it drew new lines. Second, the House suffered an injury because different lines would lead to different membership.

Addressing the first claim of injury, the majority distinguished several cases by looking at the structure of the Commonwealth's government. Noting that the redistricting power was lodged in the bicameral General Assembly, composed of a House and a Senate, the majority held that one house, acting alone, lacks the capacity to "assert interests belonging to the legislature as a whole."

Turning to the claim that the House would be injured by a change in membership, Justice Ginsburg explained that "changes to its membership brought about by the voting public . . . inflict no cognizable injury on the House." Additionally, the majority held that a change in the "content" of future legislation caused by a different House membership is not a legally cognizable injury.

Justice Alito dissented in an opinion joined by Chief Justice Roberts and Justices Breyer and Kavanaugh. Justice Alito would have held that the House had standing in its own right to challenge the use of the court-ordered map. The dissent also maintained that the change in legislation caused by a different membership is indeed an injury that "harms the House in a very fundamental way." Noting the contentiousness with which maps are drawn, Justice Alito said it would be "quite astounding" to think that no injury occurred when the membership was changed. Furthermore, the dissent was not convinced that a single house of a bicameral legislature did not have standing to pursue its legislative interest because states are not bound by the federal constitution's separation of powers doctrine.

Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507 (2019)

In *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, the Court considered how to calculate the limitations period for *qui tam* actions under the False Claims Act where the United States declined to intervene. The False Claims Act contains two limitations periods. Under 31 U.S.C. § 3731(b)(1), the claim must be brought within six years of the statutory violation. Under § 3731(b)(2), an action must be brought three years after "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation. The later of the two dates serves as the limitation period.

Hunt brought a *qui tam* action alleging that Cochise Consultancy defrauded the government in a contract for securities devices provided in Iraq in early 2007. Hunt brought his claims in November of 2013. He conceded that his claim was untimely under § 3731(b)(1) because it was filed more than six years after the violation occurred. He argued, however, that his claim subject to and timely under § 3731(b)(2) because he told federal officials about the fraudulent scheme on November 30, 2010, which was within three years of the date he filed suit. The district court dismissed the action as untimely holding that § 3731(b)(2) does not apply when the government elects not to intervene. The Eleventh Circuit reversed and remanded holding the action was timely under § 3731(b)(2).

In a unanimous opinion by Justice Thomas, the Court held that the plain text of the statute makes the two limitations periods applicable in both government-initiated and relator-initiated suits. In either case, the suit is a civil action under the False Claims Act, and nothing in the statute restricts the limitations period under § 3731(b)(2) to suits in which the United States intervenes. The Court rejected Cochise's argument that the *qui tam* relator should be considered "the official of the United States" whose knowledge triggers §

3731(b)(2)'s 3-year limitations period. First, a private relator is neither appointed nor employed as an officer of the United States. Second, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." Finally, the statute refers to the official "charged with responsibility to act in the circumstances," but private persons are not "charged with responsibility to act," as they are not required to investigate or prosecute under the False Claims Act.

***Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881 (2019)**

Respondent worked on drilling platforms off the coast of California. He sued his employer in California state court for alleged violations of California wage-and-hour laws. Petitioner removed to federal court and moved to dismiss, arguing that California state law did not apply under the OCSLA, which extends federal law to the subsoil and seabed of the Outer Continental Shelf (OCS). The OCSLA deems the adjacent State's laws to be federal law "[t]o the extent that they are applicable and not inconsistent with" other federal law. 43 USC § 1333(a)(2)(A). The District Court concluded that federal wage-and-hour laws leave no gap for state law to fill and dismissed the case on the pleadings. The Ninth Circuit reversed, holding that state law is applicable where there is no inconsistency with federal laws.

The Supreme Court reversed in a unanimous opinion authored by Justice Thomas. After reviewing the text of the OCSLA, the Court concluded that state laws are only "applicable and not inconsistent with federal law" when federal law does not address the relevant issue. If federal law has already addressed the relevant issue, any state law on that issue is necessarily inconsistent. To hold otherwise would undermine the primacy of federal law on the OCS and result in the same kind of pre-emption analysis

The Supreme Court held that state law does not apply under the Outer Continental Shelf Lands Act (OCSLA) where federal law addresses the relevant issue.

that applies in normal cases of overlapping state and federal jurisdiction.

Federal Records

Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019)

Argus Leader Media filed a FOIA request with the U.S. Department of Agriculture ("USDA") and asked for the names and addresses of all retail stores that participate in the Supplemental Nutrition Assistance Program ("SNAP"), as well as each store's annual SNAP redemption data. The USDA released the names and addresses of the participating stores but refused to release the store-level SNAP data under the FOIA's Exemption 4. Argus sued. The district court determined that disclosure would not rise to the level of substantial competitive harm and ordered disclosure. The Food Marketing Institute intervened and filed an appeal. The Eighth Circuit affirmed.

In an opinion written by Justice Gorsuch, the Court first determined that the Institute had standing to bring the appeal. The Court then turned to the statutory language in Exemption 4, which shields from mandatory disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Because the FOIA does not define the term "confidential," the Court looked to the ordinary meaning, which is "private" or "secret." Thus, information communicated to another person remains confidential if the information is customarily kept private and if the party receiving the information provides some assurance that it will remain secret. The Institute satisfied both requirements by establishing that retailers

The Supreme Court held that where commercial or financial information is treated by its owner as private and is provided to the government under an assurance of privacy, the information is confidential within the meaning of Exemption 4 of the Freedom of Information Act ("FOIA").

do not disclose store-level SNAP data and that the government has long promised retailers that it would keep the data private. The "substantial competitive harm" test that the lower courts relied on has no statutory basis but was instead based on an erroneous D.C. Circuit opinion in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Contrary to Argus Leader's assertions, Congress had not reenacted Exemption 4 and therefore had not ratified the test. Lastly, though FOIA exemptions should be narrowly construed, the Court will not give statutory exemptions additional limits that are not found in a fair reading of the text.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, filed an opinion concurring in part and dissenting in part. Justice Breyer opined that, in addition to the two conditions detailed by the Court in determining whether information is confidential, there needs to be a third condition: the release of commercial or financial information must also cause genuine harm to the owner's economic or business interests.

First Amendment

Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921 (2019)

DeeDee Halleck co-produced a film critical of Manhattan Neighborhood Network (the "Network"), the entity designated by New York City to operate public access television channels in Manhattan. The Network aired the film but then suspended Halleck and her co-producer from using any of its services and facilities. The producers sued, claiming that these restrictions violated their First Amendment rights. The district court dismissed the claims, ruling that the Network was not a state actor subject to the First Amendment, but the Second Circuit reversed.

The Supreme Court held that the private operator of local public access television channels did not qualify as a state actor subject to the First Amendment.

The Supreme Court reversed in an opinion by Justice Kavanaugh. The Court held that the Network did not qualify as a state actor and thus was not subject to First Amendment requirements. The touchstone for this inquiry is whether a private party exercises powers that traditionally have been reserved exclusively for the state. The Court concluded that this test was not met here. Operation of a public access channel is not an exclusive state action given the forty-year history of private actors operating such channels. Similarly, provision of a forum for speech is not an exclusive government action. And there is no evidence that New York City had a property interest in the channels at issue. Finally, the fact that the channels were regulated by city and state does not by itself convert the actions of the Network into state actions.

Justice Sotomayor dissented in an opinion joined by Justices Ginsburg, Breyer, and Kagan. The dissenting justices would have found the Network to be a state actor because the Network stepped into the shoes of New York City when it agreed to operate the public access channels in which New York City had a property interest and which New York State required be made open to the public as a public forum.

Fourth Amendment

Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019)

This case involved an arrest of a man suspected of drunk driving. When the police found him, he had abandoned his car and was wandering near a lake. He could hardly stand. The responding officer gave the man a preliminary breath test and arrested him when it registered triple the legal limit. On the way to the station, the man became too lethargic for a full breath test. So the officer drove him to the hospital for a blood test. On the way over, the man lost consciousness. After being charged with drunk-driving related offenses, the man moved to suppress the blood test evidence, claiming it was an unreasonable search under the Fourth Amendment because it was done without a

warrant. The trial court denied the motion and the man was convicted. The Wisconsin appellate courts affirmed.

The Supreme Court ultimately vacated the decisions below and remanded to the Wisconsin courts for further consideration. The plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, concluded that in situations where the driver's unconsciousness or stupor requires him to be taken to a hospital before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test under the exigent-circumstances exception of the Fourth Amendment. The plurality noted that, in an unusual case, a defendant may be able to show that there were no exigent circumstances despite his unconsciousness, and it remanded for that determination. Justice Thomas concurred and joined in the judgment, but wrote separately to state his view that the natural metabolization of alcohol in the blood stream is itself the exigency.

Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan, to state their view that—because the State conceded that it had time to get a warrant in this case—there were no exigent circumstances.

Justice Gorsuch also dissented, finding that the case should have been dismissed as improvidently granted because the exigent-circumstances issues on which the Court granted certiorari were not fully addressed below.

A plurality of the Supreme Court concluded the exigent-circumstances exception of the Fourth Amendment almost always permits a warrantless blood test of a motorist who appears to have been driving under the influence of alcohol.

Healthcare

Azar v. Allina Health Services, 139 S. Ct. 1804 (2019)

The question in this case was whether the Department of Health and Human Services could change a reimbursement

formula for hospitals treating low-income patients without the notice-and-comment procedure contemplated by the Medicare Act. The majority opinion by Justice Gorsuch concluded that the outcome "hinge[d] on the meaning of a single phrase in the notice-and-comment statute Congress drafted specially for Medicare in 1987."

The operative phrase in the Medicare Act requires notice and comment for any "rule, requirement, or other statement of policy" that establishes or changes a "substantive legal standard." The phrase "substantive legal standard" does not appear in any other part of the U.S. Code, but the government argued that it had the same meaning as the term "substantive rule" under the APA.

Rejecting the government's argument, the Court held that Congress had created a unique notice-and-comment requirement in the Medicare Act. It noted that the APA uses the term "substantive rule," whereas the Medicare Act—rather than simply cross-referencing the APA—uses the distinct term "substantive legal standards." Because the Medicare Act did not use the term "substantive" in the same way as the APA, the Court could not assume that Congress meant to incorporate the APA's exemption of "interpretive rules" from the notice-and-comment procedure. The Court therefore could not limit the notice-and-comment obligation imposed by the Medicaid Act to actions that would meet the definition of "substantive rules" under the APA. In other words, the text did not support the government's argument that the Medicare Act "borrows the APA's interpretive-rule exception." Accordingly, it held that the Department of Health and Human Services was required to provide the public with notice and an opportunity to comment before changing the reimbursement formula.

Justice Breyer dissented. Based on legislative history and policy considerations, he argued that Congress meant to apply the APA's exception to notice-and-comment under the Medicare Act. The majority dismissed the legislative history as "ambiguous at best" and countered that policy concerns are at their nadir when the statutory language is clear.

Patents

***Return Mail, Inc. v. Postal Service*, 139 S. ct. 1853 (2019)**

Return Mail, Inc. owns a patent for a method of processing undeliverable mail. When the United States Postal Service began using a service to process undeliverable mail, Return Mail claimed that the service infringed on their patent. The Postal Service petitioned for ex parte reexamination of the patent. The Patent and Trademark Office (the "Patent Office") canceled the original claims but issued new ones confirming the validity of the patent. Return Mail then sued the Postal Service and sought compensation for the unauthorized use of its invention. While the suit was pending, the Postal Service petitioned the Patent Office for covered-business-method review. The Patent Trial and Appeal Board determined that the subject matter of Return Mail's patent claims was ineligible to be patented and canceled the claims. The Court of Appeals for the Federal Circuit affirmed.

In an opinion written by Justice Sotomayor, the Court reversed and remanded, holding that a federal agency is not a "person" who may petition for administrative proceedings before the Patent Office under the AIA. The AIA provides that only "a person" other than the patent owner may institute an AIA review proceeding. Because the AIA does not define the term "person," the Court applied the presumption that "person" does not include the Government. The Postal Service failed to carry its burden to show that the AIA's text or context indicates otherwise. Though some Government-inclusive references in the AIA exist, the consistent-usage canon of statutory interpretation breaks down where Congress uses the same word in a statute in conflicting ways. Additionally,

The Supreme Court held that the Government is not a "person" capable of instituting one of the three types of administrative review proceedings—inter partes review, post-grant review, and covered-business-method review—under the Leahy-Smith America Invents Act ("AIA") of 2011.

the Government's ability to obtain a patent does not speak to whether Congress meant for the Government to participate as a third-party challenger in AIA review proceedings. The Court also noted that the Government is still able to defend itself in a patent infringement suit and only lacks the additional tool of initiating an administrative proceeding.

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented, asserting that various provisions in the AIA include the Government when using the term "person," and the use of the term "person" in the provisions regarding administrative review proceedings should not be interpreted differently. Because the Government has numerous rights and responsibilities regarding patents, including being forced to defend their own patents when a private party invokes one of the AIA procedures, there is no reason why the Government does not also have the power to invoke the same AIA procedures.

Products Liability

Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019)

Merck Sharp & Dohme Corp. ("Merck") manufactures Fosamax, which is a drug that treats and prevents osteoporosis in postmenopausal women. In 1995, the FDA approved a Fosamax label. When evidence developed that connected Fosamax to atypical femoral fractures, Merck applied to add references to "low-energy femoral shaft fracture," which the FDA approved, and references to a risk of "stress fractures," which the FDA rejected. In 2011, after its own studies, the FDA ordered that the warning include "atypical femoral fractures." Respondents, who are more than 500 individuals who took Fosamax and suffered atypical femoral fractures between 1999 and 2010, filed suit seeking tort damages based on a state law failure-to-warn cause of action and invoked federal diversity jurisdiction. The district court granted Merck's motion for summary judgment, which argued that the cause of action was

pre-empted by federal law. The Third Circuit vacated and remanded.

Justice Breyer wrote for the Court and clarified that state law failure-to-warn claims are pre-empted when there is clear evidence that the FDA would not have approved the warning that state law requires. Clear evidence is "evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." The determination of whether there is clear evidence is for a judge, not the jury. The Court vacated and remanded for renewed consideration under the clarified standard.

In a concurring opinion, Justice Thomas discussed pre-emption principles and opined that Merck's impossibility pre-emption defense fails because Merck failed to show that federal law prohibited it from adding a warning that would satisfy state law.

Justice Alito, joined by Chief Justice Roberts and Justice Kavanaugh, filed an opinion concurring in the judgment only. Justice Alito clarified several issues of law and fact that he believes were misleading in the Court's opinion.

The Supreme Court clarified that when determining whether federal law preempts a state law failure-to-warn claim, the question of whether there is clear evidence that the Federal Food and Drug Administration ("FDA") would not have approved a change to a drug's label is a question of law for a judge to decide.

Trademarks

Iancu v. Brunetti, 139 S. Ct. 2294 (2019)

Respondent founded a clothing line that uses the trademark FUCT. When he attempted to register his mark with the United States Patent and Trademark Office (PTO), he was denied under 15 USC § 1052(a), which prohibits registration of marks

that "[c]onsist[] of or comprise[] immoral[] or scandalous matter[.]" To determine whether that test is met, the PTO asks, among other things, whether a substantial composite of the general public would find the mark shocking to the sense of truth, decency, or propriety, disgraceful, offensive, disreputable, or vulgar. When both the PTO examining attorney and the Trademark Trial and Appeal Board found this mark flunked that test, respondent brought a facial challenge in the Federal Circuit, which held the statutory bar violated the First Amendment.

The Supreme Court agreed and affirmed in an opinion authored by Justice Kagan and joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. The Court considered its prior opinion in *Matal v. Tam*, 137 S. Ct. 1744 (2017), which invalidated the Lanham Act's related prohibition on "disparage[ing]" trademarks. Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. The Court found the same was true of the "immoral and scandalous" bar: it too disfavors certain ideas, i.e., those aligned with conventional moral standards and those hostile to them. Because the First Amendment plainly bars such viewpoint discrimination, the Court found this statute facially unconstitutional.

The Supreme Court held that the Lanham Act's bar on the registration of "immoral or scandalous" trademarks violates the First Amendment because it discriminates on the basis of viewpoint.

Justice Alito authored a concurring opinion to emphasize that the decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of vulgar marks that play no real part in the expression of ideas.

Chief Justice Roberts, Justice Breyer, and Justice Sotomayor all concurred in part and dissented in part, writing separately to state the same basic view: that the "scandalous" portion of the statute could be preserved to bar obscenity and vulgarity consistent with the First Amendment.

Tribal Law

Herrera v. Wyoming, 139 S. Ct. 1686 (2019)

Clayvin Herrera was charged with illegally hunting in the Bighorn National Forest. He argued that he was entitled to hunt in the area under the terms of an 1868 treaty between the United States and the Crow Tribe, but the state court rejected his argument and a jury convicted him. On appeal, the state appellate court affirmed the conviction on three grounds: (1) the treaty expired when Wyoming became a state, (2) Herrera was precluded from relying on the treaty because the Crow Tribe had already litigated, and lost, the issue at the Tenth Circuit, and (3) under the terms of the treaty, hunting on national forest land was forbidden because it was categorically occupied.

The Supreme Court vacated the lower court judgment and remanded in an opinion by Justice Sotomayor. The Court rejected the three grounds relied on by the state appellate court. Although the Court long ago ruled that Wyoming statehood extinguished a similar treaty with the Shoshone and Bannock Tribes, a subsequent case repudiated the reasoning underlying that decision. Under the Court's more recent jurisprudence, the controlling question is whether Congress clearly expressed an intent to abrogate an Indian treaty right. Because of this change in the law, Herrera was not precluded from relying on the treaty under issue preclusion standards. And there is no suggestion in the act admitting Wyoming as a state that Congress intended to abrogate the treaty's hunting rights or that those rights expired under the terms of the treaty. The Court also rejected the argument that bringing the land within the national forest rendered it categorically occupied. The context of the treaty and the meaning of the term itself indicates that "unoccupied" land is land free of residence or settlement by non-

The Supreme Court held that an 1868 treaty between the United States and the Crow Tribe was not abrogated by Wyoming's admission to statehood and that the petitioner was entitled to rely on the treaty to challenge his conviction for illegal hunting.

Indians. In reaching this decision, the Court left undecided whether specific areas of the national forest qualify as occupied and also did not reach whether Wyoming could nonetheless regulate the land in the interest of conservation as ruled by the trial court and not subsequently addressed on appeal.

Justice Alito dissented in an opinion joined by Chief Justice Roberts and Justices Thomas and Kavanaugh. The dissenting justices called into question the Court's reading of its prior precedent, contending that the ruling extinguishing the rights of the Shoshone and Bannock Tribes was reached on two alternative bases, one of which had continued vitality. The dissenters also questioned the failure to apply issue preclusion here, and noted that the alternative holding of the Tenth Circuit, that the Crow treaty did not apply because the forest lands were occupied, remains a valid ground for the lower courts to apply issue preclusion on remand.

Fifth Circuit Update

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Administrative Law

***Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127 (5th Cir. 2018)**

In fiscal year 2012, Texas made available roughly $33.3 million less for special education and related services than it did the previous year. The U.S. Department of Education ("DOE") determined that this reduction violated a provision of the Individuals with Disabilities Education Act ("IDEA") known as the "maintenance of state financial support" ("MFS") clause. Under the MFS clause, a state is forbidden from reducing the amount of state financial support for special education below the amount of that support for the preceding fiscal year. If such a reduction occurs, DOE is required to reduce the funds given to that state by the same amount the state reduced its financial support for special education. DOE determined through an administrative proceeding that Texas violated the MFS clause, and Texas petitioned the Fifth Circuit to review the agency's decision.

Because Texas violated the Individuals with Disabilities Education Act by reducing the amount of state funding for special education by $33.3 million, the US Department of Education's corresponding reduction in future federal funding was lawful.

The Fifth Circuit denied Texas's petition for review and held Texas had violated the plain text of the MFS Clause. Texas argued it had not violated the MFS clause because it had used a "weighted-student model" that determined its special education funding based on individual needs of each student with a disability, but the Court rejected this argument, finding it conflicted with the statute's requirement that a state not reduce the amount of its

financial support for special education. The Court also found such a methodology was inconsistent with another provision of IDEA that allowed the Secretary to waive the penalties under the MFS clause if DOE determines special education is being adequately funded by the state. Under Texas's methodology, a state—rather than DOE—would be the one determining if special education was properly funded. Finally, the Court rejected Texas's argument that the MFS clause violated the Spending Clause because the statute's plain text provided clear notice that Texas's weighted-student model contravened the statute's requirements.

***Forrest Gen. Hosp. v. Azar*, 926 F.3d 221 (5th Cir. 2019)**

Two Mississippi hospitals ("Hospitals") sued the U.S. Department of Health and Human Services ("HHS"), arguing that the federal government underpaid the Hospitals by incorrectly calculating their Disproportionate Share Hospital ("DSH") payments in the wake of Hurricane Katrina; these payments were designed to compensate hospitals that serve a significantly disproportionate number of low-income patients. In addition, in 2005 Congress approved additional Medicaid reimbursement for some hospitals, including the Hospitals, which provided coverage to evacuees displaced by Hurricane Katrina. Under this scheme, certain Medicaid benefits would be extended to providers serving patients who were not technically eligible for Medicaid. The Hospitals argued that HHS incorrectly interpreted federal statutory and regulatory law and selected too small of a numerator for the fraction of Medicaid reimbursement payments due to the Hospitals by reducing counts of patients who were not strictly eligible for Medicaid. The Hospitals challenged the exclusion of funding in an initial appeal to the Provider Reimbursement Review

Neither *Chevron* nor *Auer* deference applied to interpretations by the Department of Health and Human Services of a Medicaid statute and regulation concerning calculations for reimbursement of Disproportionate Share Hospitals.

Board, which agreed with Hospitals. HHS then appealed to the Centers for Medicare & Medicaid Services Administrator, who sided with HHS. This finding was affirmed by a federal district court, which gave substantial deference to HHS under the *Chevron* and *Auer* doctrines.

The Fifth Circuit Court of Appeals reversed, holding that both *Chevron* and *Auer* require textual ambiguity, and that the disputed DSH statute and regulation unambiguously cut the Hospitals' way and that absent ambiguity, judges—not regulators—must interpret the law. Starting its analysis with *Chevron*, the Court noted precedent requiring deference to agency interpretations of ambiguous statutes unless they are arbitrary, capricious, or manifestly contrary to the statute. The Court concluded that the applicable DSH statute unambiguously provided for a binary formula for calculating DSH eligibility. According to the plain meaning of the text, patients who are not actually Medicaid-eligible can still count toward the Hospitals' DHS numerator based on exceptions Congress made to address the healthcare needs of evacuees displaced by Hurricane Katrina. Similar analysis applied to *Auer* deference. Because the DHS regulation was not ambiguous, the district court erred in deferring to the interpretation of HHS. As with the DHS statute, the DHS regulation clearly contemplated that DHS reimbursement could be made available for patients who were not actually Medicaid-eligible.

Not only did the district court err in applying *Chevron* and *Auer* deference to HHS's interpretation of the DHS statute and regulation, but the unambiguous texts of both favored the Hospitals' argument that they were entitled to additional DHS reimbursement. Therefore, the Court reversed and remanded the case to the Medicaid contractor responsible for reimbursement of the plaintiff hospitals, with instructions to increase the share of funds to which the Hospitals were entitled under the DHS statute and regulation.

Arbitration

***In re JPMorgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019)**

Plaintiffs, former call-center employees at Defendant JPMorgan Chase, alleged that Chase violated the Fair Labor Standards Act ("FLSA") and moved to certify a collective action with 42,000 current and former employees. Chase contended that 35,000 of the employees signed arbitration agreements. Plaintiffs did not contest that employees who had signed arbitration agreements should settle their disputes through arbitration, not the collective action.

The district court certified the collective action and ordered that all 42,000 current and former employees receive notice of the litigation. It reasoned that even if some of the employees had signed arbitration agreements, the court would not be able to make that determination until Chase filed a motion to compel arbitration. Thus, all 42,000 employees should receive notice. Chase petitioned to the Fifth Circuit for a writ of mandamus.

The Fifth Circuit denied mandamus, but it held that the district court erred in ordering notice to the employees who had signed the arbitration agreement. Unlike class actions, collective actions require members to affirmatively opt in and, thus, district courts have some discretion about when to facilitate notice to potential plaintiffs. However, the 35,000 employees with arbitration agreements were not potential plaintiffs. A district court may not require notice of litigation to employees who have signed valid arbitration agreements unless the record shows that the arbitration agreements would not prohibit the employees from participating in the collective action.

Employees who have signed arbitration agreements should not receive notice of collective action litigation.

The Fifth Circuit criticized the district court's decision as violating judicial neutrality, pointing to the district court's language that withholding notice about potentially "illegal" practices might "disenfranchise" the employees. However, the

Court ruled that the district court did not err so "clearly and indisputably" as to justify mandamus, which is only granted in extraordinary cases. Nonetheless, the Court published its opinion as a holding on the legal issues under its supervisory authority to correct errant caselaw, and it ordered the district court to revisit its decision in light of the opinion.

***Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320 (5th Cir. 2019)**

Attorney Clifford Ashcroft-Smith and Light-Age, Inc. arbitrated a legal-fee dispute through the Houston Bar Association's fee-dispute program. As part of their arbitration agreement, they agreed to be bound by the Fee Dispute Committee's ("FDC") rules and regulations. One of those rules authorized the Committee Chair to appoint arbitration panels consisting of three arbitrators, one of whom must be a non-lawyer member. The FDC selected Ana Davis as the non-lawyer member of the parties' arbitration panel. Davis is not a lawyer, but a full-time payroll manager for a law firm. Even though Davis exchanged multiple emails with the parties that listed the law firm as her employer in the signature line, Light-Age claimed it did not discover that Davis was a law-firm employee until after the arbitration hearing. Light-Age's CEO then called the FDC Chair to object to the panel. The panel issued its decision, awarding Ashcroft-Smith attorney's fees. Light-Age petitioned the district court to vacate the award, but the district court confirmed it.

A party with constructive knowledge waives a challenge to the composition of an arbitration panel by failing to object during the arbitration hearing.

The Fifth Circuit affirmed, finding that Light Age had constructive knowledge of Davis's employment and therefore waived its challenge to her appointment to the panel by failing to raise it at the arbitration hearing. The Court had previously recognized in an unpublished opinion that a party to an arbitration waives an objection to an arbitrator's conflict of interest if the party has constructive knowledge of the conflict at the time of the arbitration hearing

but fails to object. Other circuits also apply this constructive-knowledge standard to such objections. The Court did not find persuasive Light-Age's attempt to distinguish this authority because it involved a conflict of interest, which may be vacated under 9 U.S.C. § 10(a)(2), rather than an arbitrator not selected in accordance with the parties' agreement, which may be vacated under 9 U.S.C. § 5. Rather, applying a constructive-knowledge standard would serve the same policy interests—efficiency and finality of the arbitration process. Under that standard, Light Age had constructive knowledge because it could have discovered that Davis worked for a law firm by simply clicking on the link provided in her email signature or running a brief internet search.

***Papalote Creek II, L.L.C. v. Lower Colo. River Auth.*, 918 F.3d 450 (5th Cir. 2019)**

Lower Colorado River Authority ("LCRA"), a conservation and reclamation district, filed a petition to compel arbitration in a dispute against Papalote Creek, a windfarm operator. The disputed question was whether ambiguous language in LCRA and Papalote's agreement limited LCRA's potential liability to $60 million. The agreement included a clause mandating arbitration for disputes arising with respect to either party's "performance." The district court compelled arbitration.

The Fifth Circuit reversed, explaining that the arbitration clause only required arbitration for disputes related to performance, and that the dispute over liability limitation was interpretative. Clauses using standard, broad arbitration provisions give rise to a presumption in favor of arbitrability. However, parties may use narrower language to limit arbitration to disputes related to interpretation or performance, at the exclusion of other categories of disputes. Papalote and LCRA's dispute was interpretative because the parties disagreed over the meaning of the text in their agreement.

An arbitration clause for "performance" disputes does not compel arbitration for other disputes.

***YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815 (5th Cir. 2019)**

Defendant Apache agreed to sell certain assets to Plaintiff YPF under a Sale and Purchase Agreement ("SPA"), whereby the parties agreed to accept certain adjustments to the sales price and stipulated that any dispute about the price adjustments would be arbitrated. The parties selected KPMG as the "Independent Accountant" that would reach a "determination" on the appropriate adjustment. KPMG was required to "include the reasoning supporting the determination," and the parties would have a five-day review period following the determination to call attention to any "arithmetical inaccuracy in the determination." The engagement letter specified that the determination would be completed by KPMG partners Ginger Menown and Diego Bleger.

After a dispute arose, KPMG issued a determination concluding Apache owed YPF $9.8 million, which Apache objected to within the review period. Then Apache challenged the arbitration award on two grounds: (1) the replacement of Menown with a different KPMG partner during the review period was invalid, and (2) KPMG violated the requirement to provide its "reasoning" because it explained its methodological reasoning only, but not its arithmetical calculations. The district court rejected both arguments and confirmed the arbitration award set by KPMG.

A "reasoned" arbitration award only requires greater detail then what is required by a "standard" arbitration award (which is a mere announcement), and not as much detail as "findings and conclusions."

The Fifth Circuit affirmed. First, although the engagement letter specified "Menown and Bleger" shall conduct the "determination," the letter stated that "KPMG" shall conduct the review period. Thus, Menown was not required to participate in the review period.

Second, the reasoning supplied by KPMG was sufficient to meet the requirements of the SPA and the engagement letter. A "reasoned award" requires arbitrators to submit "something short of findings and conclusions but more than a simple

result." That is, the level of detail required by an arbitration award lies on a continuum, with "findings and conclusions" on one end (which is the exacting standard familiar to federal courts), the "standard award" on the other end (which is a mere announcement of the decision)—and a "reasoned award" in the middle. Also, because neither the SPA nor the engagement letter required KPMG to provide detailed mathematical calculations, the Court declined to read an implied provision requiring this level of detail into the agreements.

Constitutional Law

Okorie v. Crawford, 921 F.3d 430 (5th Cir. 2019)

In 2010, the Mississippi State Board of Medical Licensure began investigating whether Dr. Ikechukwo Okorie was overprescribing opioids and other pain substances. The Board eventually revoked Okorie's certification. Okorie sought recertification in 2014 after completing new pain management training. He received a temporary license, but the Board requested he appear at its next meeting to assist in its final determination. Before that meeting, a state court judge authorized an administrative inspection and issued a search warrant for medical records. No criminal sanctions were associated with any of the provisions relied on for the warrant. According to Okorie's complaint, a team of 9 law enforcement officials executed the warrant. On entering the clinic, Board investigator Jonathan Dalton brandished his gun and pushed Okorie into his office, then serving him the warrant. Okorie attempted to leave his office to discuss the warrant with his staff, but Dalton stopped him and pushed him down. Dalton eventually allowed Okorie to instruct his staff to fax the warrant to his lawyers and print the requested records, but Dalton stood next to him with his gun drawn. Okorie was detained in his office for the remainder of the search. After two hours, Okorie asked to go to the bathroom and Dalton refused. After Okorie pleaded with him, Dalton escorted Okorie to the bathroom

with his gun drawn, forcing Okorie to leave the bathroom door open and keep his hands visible. Three to four hours later, after the agents were done executing the search, Okorie was allowed to leave the clinic.

Okorie filed a 42 U.S.C. § 1983 lawsuit based on alleged Fourth Amendment violations. The district court dismissed the claims against all of the defendants except Dalton, who filed a Rule 12(c) motion to dismiss on the pleadings based on qualified immunity. The district court granted the motion, finding no constitutional violation and, in any event, that any violation would not be clearly established.

The Fifth Circuit ultimately affirmed, finding that Okorie did plead a Fourth Amendment unreasonable search, but because the law was not clearly established, Dalton was entitled to qualified immunity. Under *Michigan v. Summers*, 452 U.S. 692, 705 (1981), law enforcement may detain the occupant of a residence where a criminal search warrant is being executed, as long as the scope of the detention is reasonable. The Supreme Court has applied *Summers* to allow the seizure of occupants of a residence where officers searched for documents and computer files, not just contraband. The Court agreed with the prevailing view that *Summers* applies when the warrant is seeking evidence. However, here, the search warrant sought evidence only of civil violations, where the objective justification for seizing an occupant is more attenuated. In the criminal setting, a search warrant requires a judicial determination of probable cause to believe that someone in the home is committing a crime, meaning that it is not difficult to suspect that an occupant may be involved in that criminal activity. This level of suspicion is not far removed from the probable cause that allows a warrantless arrest. But probable cause of a civil violation generally does not allow a warrantless arrest. Given this fundamental distinction between criminal and

An hours-long detention of a person during an administrative search of a medical clinic or similar establishment, during which a gun is drawn, is unlawful absent heightened security concerns.

civil violations, the Court noted significant doubt on *Summers*' application to administrative searches, which generally involve lower stakes and less likelihood that someone present during the search will hide evidence or act violently.

Although not resolving whether detention incident to execution of an administrative warrant is allowed as a general matter, the Court concluded that the intrusiveness of this search rendered it unconstitutional. The scope of the detention here was more significant, as Okorie was detained at his medial office, in sight of his staff, rather than in the privacy of his own home. Beyond that, the detention lasted for three to four hours, a prolonged time given the relatively low level of danger attached to searching a medical clinic. The force applied and displayed was unreasonable, including Dalton's pushing, yelling, and drawing his gun while escorting Okorie into the hallway to instruct his staff and later to the bathroom. There was no indication that Okorie posed a safety threat to officers, and law enforcement's interest in administrative searches is less significant as compared to criminal ones. Nevertheless, because the law in this underdeveloped area was not clear enough when Dalton detained Okorie, Dalton had qualified immunity.

***Robinson v. Hunt County, Texas*, 921 F.3d 440 (5th Cir. 2019)**

Plaintiff Deanna Robinson brought a § 1983 claim against Hunt County and various employees of the Hunt County Sheriff's Office in their official and individual capacities after a post criticizing the Sherriff's Office was deleted from the Office's official Facebook page and Robinson, along with others who posted similar critical posts, were banned from the Facebook page. Robinson claimed the actions constituted impermissible viewpoint discrimination under the First and Fourteenth Amendments. The district court dismissed Robinson's claims and denied her request for a preliminary injunction.

Censorship of critical posts on the Hunt County Sheriff's Office's Facebook page was unconstitutional viewpoint discrimination.

On appeal, the Fifth Circuit affirmed in part and reversed in part. After affirming the dismissal of claims against the individuals because the rulings were not appealed, the Fifth Circuit examined whether deleting Robinson's Facebook post constituted viewpoint discrimination. Without deciding whether the Facebook page constituted a public or limited forum, the Court held deleting posts criticizing the Sherriff's Office and banning users for posting such remarks was impermissible viewpoint discrimination. The Court went on to hold the Sherriff of Hunt County was the final policymaker with authority over the Facebook page and that Robinson had plausibly pleaded that the policy of deleting critical comments was attributable to Hunt County based on a post from the Facebook page threatening to ban any "inappropriate" comments and the actions of actually deleting posts and banning users from the page for this reason. Finally, the Court reversed the district court's dismissal of Robinson's request for declaratory relief and remanded its denial of Robinson's motion for a preliminary injunction.

Employment Law

Nall v. BNSF Ry. Co., 917 F.3d 335 (5th Cir. 2019)

Plaintiff Michael Nall, a trainman, sued his employer, Defendant BNSF Railway Company, for disability discrimination and retaliation after he was diagnosed with Parkinson's disease and placed on medical leave. Nall presented evidence from doctors that he was capable of performing his job despite his Parkinson's disease. However, BNSF presented evidence that he had failed a field test and was placed on medical leave due to concerns about his ability to work safely. The district court granted summary judgment to BNSF.

The Fifth Circuit reversed the grant of summary judgment on the disability discrimination claim. Judge Elrod, writing for the panel, held that Nall had presented insufficient direct evidence of discriminatory animus and, thus, applied the *McDonnell*

Douglas burden-shifting framework for circumstantial evidence of discrimination. Under this framework, Nall needed to make the prima facie case for discrimination by showing: (1) he had a disability, (2) he was qualified for his job, and (3) he was subject to an adverse employment decision due to his disability. If he met the prima facie case, then the burden would shift to BNSF to articulate a legitimate, non-discriminatory reason for the adverse employment decision. If BNSF did so, then the burden would shift back to Nall to produce evidence that the articulated reason was pretextual. Here, summary judgment was improper because Nall satisfied his prima facie case and, even assuming BNSF established a non-discriminatory reason, there was a genuine material dispute about pretext. As to the retaliation claim, the Court affirmed.

Judges disagreed about whether the *McDonnell Douglas* burden-shifting framework applied in a discrimination case.

Judge Costa wrote a concurrence criticizing courts' frequent use of the *McDonnell-Douglas* framework. His concurring opinion argued that there was no doubt that Nall was fired due to safety concerns arising from his disability and, thus, there should be no dispute about the existence of discriminatory intent, direct evidence of discrimination, and causation. Rather, the question should be whether this discrimination was justified. Judge Costa stated, "This case should be an example of why *McDonnel Douglas* is not the be-all and end-all of proving discrimination."

Judge Ho dissented based on case-specific evidentiary reasons.

***Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019)**

Plaintiff Nicole Wittmer, a transgender woman, sued Defendant Phillips 66, her employer, for discrimination on the basis of transgender status under Title VII. The district court granted summary judgment for Phillips 66 because Wittmer failed to state a prima facie case of discrimination. The district court assumed that Title VII applies to transgender status and

sexual orientation, based on out-of-circuit rulings.

The panel majority (Judge Higginbotham, Judge Elrod, and Judge Ho) affirmed based on failure to state a prima facie case. However, Judge Ho, writing for the majority, also stated that Title VII does not prohibit transgender or sexual orientation discrimination. The district court should have applied a Fifth Circuit case from 1979, *Blum v. Gulf Oil Corp.*, which held that Title VII does not prohibit discrimination on the basis of sexual orientation.

Judge Higginbotham filed a concurrence, in which he disagreed that *Blum v. Gulf Oil Corp.* had "continued vitality" today, particularly after *Lawrence v. Texas* invalidated laws criminalizing same-sex sexual conduct. Since *Lawrence*, the Court has never relied on *Blum*. According to Judge Higginbotham, the Court in this case did not resolve whether Title VII today proscribes discrimination against someone because of transgender or sexual orientation status, "even with elegant asides" in the majority opinion.

Judge Ho then wrote a separate concurring opinion, in which he explained why he thinks *Blum* is correct. He interprets Title VII as prohibiting favoritism on the basis of sex, rather than requiring blindness to sex. Title VII could apply to transgender status and sexual orientation under the second theory, but not the first.

Title VII does not apply to discrimination on the basis of sexual orientation or transgender status.

Federal Law

Benjamin v. U.S. Soc. Sec. Admin. (In re Benjamin), 932 F.3d 293 (5th Cir. 2019)

Kenneth Benjamin was the designated beneficiary of his sister's Social Security disability benefits until the Social Security Administration ("SSA") determined the benefits had expired in April 2012 and sought to recoup over $19,000 of overpayment. Eventually, SSA's recoup efforts caused Benjamin to file

Chapter 7 bankruptcy, and he then filed an action in a federal bankruptcy court against SSA alleging it had illegally collected $6,000 from him in violation of its own regulations. Both the bankruptcy and the district court dismissed Benjamin's claims for lack of subject matter jurisdiction. Benjamin appealed to the Fifth Circuit.

The sole question on appeal was whether 42 U.S.C. § 405(h), which defines federal courts' jurisdiction to hear claims arising under the Social Security Act, barred Benjamin's claim. The relevant text states no claims arising under SSA's old-age, survivors, and disability insurance programs could be brought in federal court under 28 U.S.C. §§ 1331 and 1346. Benjamin argued his claim was not barred because it was brought under 28 U.S.C. § 1334, and SSA disagreed. Before this appeal, only the Ninth Circuit had adopted Benjamin's position, and decisions from the Third, Seventh, Eighth, and Eleventh Circuits supported SSA's interpretation.

42 U.S.C. § 405(h)—which states that no claim arising under the Social Security Act can be brought under 28 U.S.C. §§ 1331 and 1346—does not bar bankruptcy courts from exercising their jurisdiction under 28 U.S.C. § 1334.

The Fifth Circuit agreed with Benjamin. Relying on the statute's text, the Court explained that the text in no way prohibited an assertion of jurisdiction under § 1334 and instead only barred actions under §§ 1331 and 1346. The Court was critical of other Circuits' decision to apply a statutory interpretation tool known as the recodification canon—under which courts generally presume that no substantive change is intended in connection with a legislature's codification of existing law—just because the current version of § 405(h) was a codification of previously existing law. While acknowledging the utility of the recodification canon as a useful tool in some instances, the Court held that new and unambiguous text must govern even when the legislative history expresses an intent to make no change. Because § 405(h)'s text was not ambiguous, it could not be interpreted to bar actions under a section it did

not list. The Court therefore held the district court erred in holding the bankruptcy court's jurisdiction was barred.

The court remanded with instructions for the district court to determine whether Benjamin's claims were otherwise barred by a different portion of § 405(h) bar on all suits challenging SSA's disability determinations other than under a specific procedure outlined by the statute. As guidance for remand, the Court briefly analyzed the statute and determined this bar only applied to SSA's findings on a determination of disability, which means any claim not challenging a decision on a disability determination was not required to follow the statute's prescribed procedure. Thus, the Court reversed and remanded for further proceedings.

Jurisdiction and Procedure

***Carmona v. Leo Ship Mgmt., Inc.*, 924 F.3d 190 (5th Cir. 2019)**

Jose Carmona sued Leo Ship Management, Inc. after Carmona was injured unloading cargo from a ship docked outside of Houston and managed by the company. Leo is a Philippine corporation with its principal place of business in Manila. The company does not own or rent property in Texas, solicits no business in Texas, and has never contracted with a Texas resident to render performance there. Nor have any of its employees, officers, shareholders, or directors ever resided in Texas. Leo had contracted with the owners of the ship at issue to serve as the manager. In that capacity, Leo had no ownership interest in the ship and could not direct where it traveled, what it carried, or for whom it worked. But Leo and the ship's owners were required to maintain close communication, and Leo had advance notice that the ship would be docking in Texas to unload its cargo. The district court dismissed Carmona's suit for lack of personal jurisdiction after finding that Leo had no control over the ship's ports of call.

The Fifth Circuit affirmed in part, but also vacated and remanded in part. Texas's long-arm statute is coextensive with

the Due Process Clause of the Fourteenth Amendment, so the question was whether, for purposes of specific jurisdiction, (1) the defendant had minimum contacts with the forum state; (2) the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the exercise of personal jurisdiction is fair and reasonable. There was no dispute that Leo made contacts with Texas when the vessel, containing its employees, docked outside Houston. In most cases, a defendant's commission of a tort while physically present in a state will readily confer specific jurisdiction. Yet, physical presence is not dispositive of the minimum contacts analysis. Rather, the defendant must have purposefully availed himself of the privilege of conducting activities in the state. A defendant's contacts with a forum and the purposefulness of those contacts are distinct, but overlapping, inquiries. Leo had purposefully availed itself of Texas when its employees voluntarily entered the jurisdiction aboard the ship, even though Leo had no control over the vessel's course. The management agreement contemplated that the ship would travel to locations throughout the word, and Leo received actual notice that the ship would be departing for Texas. Leo was hardly compelled to travel to Texas against its will given that the contract was freely terminable with two months' notice. Leo permitted its employees to enter Texas with the full knowledge of the intended destination.

Nevertheless, Carmona's claims must stem from Leo's contacts with Texas to find specific jurisdiction. A plaintiff bringing multiple claims arising out of different contacts must establish specific jurisdiction as to each claim. Most of Carmona's claims result from Leo's conduct in Texas after the ship's arrival there. Thus, the district court erred in dismissing those claims. But Leo presented undisputed evidence that a third party stowed the pipes aboard the ship

Foreign manager of a ship docked in Texas purposefully availed itself of Texas when its employees voluntarily entered the state's jurisdiction aboard the ship, but jurisdiction only existed for claim stemming from the defendant's activities in Texas.

while it was outside the United States. Because the claim that the pipes were improperly stowed does not stem from Leo's activities in Texas, the district court correctly dismissed that claim. Based on its holdings, the Fifth Circuit then remanded for consideration of the question of whether the exercise of personal jurisdiction accords with traditional notions of fair play and substantial justice.

***Ekhlassi v. Nat'l Lloyds Ins. Co.*, 926 F.3d 130 (5th Cir. 2019)**

The National Flood Insurance Act (the "Act") allows private insurance companies ("Write-Your-Own" or "WYO" carriers) to issue and administer flood-insurance policies underwritten by the Federal Government. 42 U.S.C. § 4072 provides that actions against such private insurers are subject to "original exclusive jurisdiction" in federal district court and also subject to a one-year limitations period. Ekhlassi insured his house in Houston, Texas, with a flood-insurance policy from Lloyds. Ekhlassi's home subsequently suffered flood damage after a rain storm on May 25, 2015, and Ekhlassi reported the loss to Lloyds the following day. In October 2015, Lloyds stated it would only process the claim for $3,768.26—substantially less than the $200,000+ in estimated repair costs that Ekhlassi suffered. After finishing its investigation, Lloyds affirmed its initial decision in January 2016 and concluded the storm did not cause much of the claimed damage. One year after this denial, Ekhlassi filed suit in Texas state court, claiming breach of contract by Lloyds. The action was removed to federal district court, and the district court granted summary judgment for Lloyds, ruling that Ekhlassi's claim was time-barred because the one-year limitations period under 42 U.S.C. § 4072 was triggered by the initial October 2015 letter rather than the January 2016 rejection of coverage.

42 U.S.C. § 4072 applies to lawsuits against "Write-Your-Own" insurance carriers, requiring such lawsuits to be brought in federal court within one year of the date of a denial of coverage or otherwise be time-barred.

The Court affirmed, holding that 42 U.S.C. § 4072 is applicable to actions against WYO carriers, that the district court had original exclusive jurisdiction, and that the one-year limitations period prescribed in § 4072 barred relief to Ekhlassi. Rejecting arguments by Ekhlassi that federal question jurisdiction applies to the exclusion of 42 U.S.C. § 4072, the Court noted that the applicability of § 1331 does not preclude applicability of § 4072 nor the applicability of the latter's one-year limitations period. Next, the Court noted that—consistent with the language of § 4072—multiple prior Fifth Circuit cases, as well as multiple other federal circuits, have applied § 4072 to WYO carriers. Echoing the Third Circuit's analysis that WYO carriers are functional equivalents to FEMA—due in part to provisions requiring FEMA to reimburse WYO carriers for defense costs and claim payments—as well as analogous language in other portions of the Act, the Fifth Circuit Court of Appeals concluded that a broader reading of § 4072 indicates that Congress intended the section to apply in suits against WYO carriers. Because § 4072 applied to Ekhlassi's suit, Ekhlassi did not timely file his suit in the correct court. In granting federal courts original exclusive jurisdiction over WYO carriers, § 4072 required Ekhlassi's suit to be brought in federal court within one year of receiving the denial letter; his filing in state court did not toll the effect of the statutory limitations period.

Judge Haynes wrote a concurrence agreeing that binding Fifth Circuit precedent mandated the conclusion by the majority that § 4072 applied to WYO carriers, while endorsing an alternative analysis by the Seventh Circuit Court of Appeals to the effect that WYO carriers are fiscal agents of the United States—not general agents—and, therefore, that a WYO carrier does not stand in the shoes of the FEMA administrator. Judge Haynes found the Seventh Circuit's textual analysis of § 4072 and conclusion that § 4072 does not apply to WYO carriers was more persuasive than the textual analysis in prior Fifth Circuit opinions.

***Hoyt v. Lane Constr. Co.*, 927 F.3d 287 (5th Cir. 2019)**

On December 29, 2015, Jeffery Hoyt hit a patch of ice in Wise County, Texas, slid off the road, and landed upside-down in a nearby body of water, drowning. On September 20, 2016, members of Mr. Hoyt's family ("the Hoyts") filed suit in Texas state court against C.E.N. Construction Co. ("CEN"), Storm Water Management, Inc. ("SWMI"), and Lane Construction Corporation ("LCC") based on their roles in constructing the road where the accident occurred. The Hoyts, CEN, and SWMI are citizens of Texas, and Lane is not. The three companies moved for summary judgment in the state district court, and the court granted CEN's motion and entered a "take nothing" judgment in CEN's favor. The Hoyts unsuccessfully engaged in settlement negotiations with SWMI but ultimately voluntarily dismissed SWMI without receiving compensation exactly one year and two days after the suit was filed. LCC immediately removed the case to federal court on the theory that diversity jurisdiction applied, and the Hoyts filed an emergency motion to remand—arguing that the removal was untimely. The federal district court denied the motion and rejected the argument that the voluntary-involuntary rule prohibited removal because CEN had been dismissed against the Hoyts' wishes. LCC then moved for summary judgment, which the federal district court granted—dismissing the Hoyts' claims with prejudice. The Hoyts appealed.

District court did not err in denying remand where it concluded the plaintiff's delay in voluntarily dismissing claims against non-diverse defendant until after the 1-year limit to remand expired constituted bad faith. However, remand was warranted based on multiple fact issues.

The Court affirmed the federal district court's exercise of jurisdiction over LCC but vacated and remanded the district court's grant of summary judgment and dismissal. An exception to the one-year removal time limit in 28 U.S.C. § 1446(c) allows a federal district court to exercise jurisdiction where the district court finds that the plaintiff acted in bad faith. In this case, the district court found that the

Hoyts acted in bad faith by improperly joining SWMI, which prevented complete diversity and precluded removal. The timing of the Hoyts' dismissal of SWMI—two days after the § 1446(c) removal deadline—was sufficient evidence of bad faith to support the district court's finding that the exception applied. Likewise, the voluntary-involuntary rule—which posits that where the case is not removable because of a joinder of defendants, only the voluntary dismissal or nonsuit by the plaintiff of a party or of parties can convert a nonremovable case to a removable one—did not apply because the Hoyts had a fraudulent purpose to defeat removal. Therefore, the district court properly denied the Hoyts' efforts to remand the case.

The Court then concluded that the district court improperly granted summary judgment for LCC, concluding that multiple genuine issues of material fact remain. First, LCC's statutory immunity argument failed because LCC failed to show as a matter of law that LCC complied with Texas Department of Transportation Standards regarding LCC's remedial measures in the wake of Mr. Hoyt's accident. Second, on the Hoyts' premises liability claim, the district court erred in concluding that no genuine issue of material fact existed regarding whether the ice patch where Mr. Hoyt slid off the road was a natural formation and whether LCC lacked actual knowledge of a dangerous premises condition at the time of the accident—LCC employees testified that on multiple occasions they worried that a car would slide off the road in the vicinity of Mr. Hoyt's accident, with or without ice. Finally, the district court erred in granting summary judgment for LCC on the Hoyts' gross negligence claim because the aforementioned evidence of premises liability also sufficed to create a genuine issue of material fact sufficient to show gross negligence.

Judge Haynes dissented on the issue of remand, stating that the district court applied the wrong legal standards in concluding that LCC had successfully demonstrated that the Hoyts improperly joined CEN, and thus that the voluntary-involuntary rule applied to preclude removal and the federal district court lacked jurisdiction under the bad faith exception to § 1446(c).

***In re Deepwater Horizon*, 928 F.3d 394 (5th Cir. 2019)**

In the ongoing series of disputes stemming from the settlement agreement reached regarding the Deepwater Horizon oil spill, an issue arose regarding the Claims Administrator's adjustment of claims for business economic loss—that is, the difference between a business's actual profits during a three-month period after the oil spill and its expected profits over that same period. In making such calculation, the settlement agreement requires that revenue be matched with the expenses *incurred*, which does not necessarily coincide with when revenue and expenses are *recorded*. To implement this, the Claims Administrator established two different methods of correcting unmatched financial statements: the default "AVMM" method and the industry-specific "ISM" method.

On prior appeal, the Fifth Circuit affirmed use of the AVMM method, rejected and reversed use of the ISM method, and remanded for further proceedings. The AVMM method appropriately matched revenues and expenses, but the ISM method inappropriately smoothed profits across an industry in addition to matching. On remand, the district court instructed the Claims Administrator to apply the AVMM method but not to reallocate or move revenues, except for the purpose of correcting errors.

On remand, the district court violated the Circuit's mandate.

The Fifth Circuit reversed the district court's instruction to the Claims Administrator, holding that the district court had not followed the Circuit's mandate on remand. The "mandate rule" is a subspecies of the law-of-the-case doctrine that constricts a lower court vis-à-vis a higher court. Because the Circuit ordered application of the AVMM method and AVMM method may entail revenue movement, the district court erred in prohibiting revenue movement.

***Sentry Select Ins. Co. v. Ruiz*, 770 F. App'x 689 (5th Cir. 2019)**

In an insurance case about the insurer's duty to defend or indemnify the insured, the district court entered findings of

fact and conclusions of law that held the insurer had a duty to defend. The district court deferred decision on the duty to indemnify and administratively closed the case pending conclusion of the underlying state-court litigation. The insurer appealed the deferral of judgment on indemnification.

The Fifth Circuit dismissed for lack of appellate jurisdiction. The Court explained: "'[A] district court order staying and administratively closing a case lacks the finality of an outright dismissal or closure.' By administratively closing the case, the district court retains jurisdiction, meaning it can 'reopen the case—either on its own or at the request of a party—at any time.'" Thus, the district court's deferral order—despite administrative closure—was an interlocutory order that did not provide the appellate court with jurisdiction.

Administrative closure of a district court case does not create an appealable order.

Jury Instructions

***Young v. Bd. of Supervisors of Humphreys Cnty., Miss.*, 927 F.3d 898 (5th Cir. 2019)**

Plaintiff Carl Young purchased three empty houses. Two weeks later, the County Building Inspector posted a condemnation notice on one of the properties—even though all of the properties complied with all applicable rules, ordinances, and laws—at the instruction of the president of the County Board of Supervisors. Then the Board voted unanimously to hold a condemnation hearing for Young's properties. Upon notice of Young's plan to sue the Board, it cancelled the condemnation hearing but never removed the condemnation notice. Young sued the Board under 42 U.S.C. § 1983 for posting a condemnation notice without a legal basis, claiming the Board was liable because it ratified the Inspector's condemnation decision. The jury rendered a verdict for Young, and the district court entered judgment on the verdict.

The Fifth Circuit affirmed, rejecting the Board's challenge to the verdict based on alleged errors in the jury instructions. One such alleged error was an instruction that the Board was liable if one of three things occurred: (1) the Board authorized a violation of Young's property rights, (2) the Board had given its president the authority to take the action he took, or (3) the Board ratified its president's actions after the fact. The Board objected to the second and third liability options. The Fifth Circuit held that there was legally sufficient evidence of option 3 (ratification). Therefore, even assuming the district court erred in providing option 2 to the jury, "any injury resulting from the erroneous instruction is harmless."

A jury instruction on a liability option was harmless—even if erroneous—because there was legally sufficient evidence of a different liability option.

Procedure

***Lopez v. Pompeo*, 923 F.3d 444 (5th Cir. 2019)**

Plaintiff Juan Lopez filed suit twice, seeking a judicial declaration of U.S. citizenship. In the first suit, the district court concluded that the suit was jurisdictionally barred because his claim had previously been rejected in two removal proceedings. On appeal, the Fifth Circuit affirmed the lower court ruling on a different ground, which was that Lopez was not within the United States at the time of the suit. Lopez filed suit a second time. The district court dismissed the second suit based on the res judicata effect of the first district court decision.

The Fifth Circuit reversed, holding that the first district court decision did not have res judicata effect because the appellate court affirmed on different grounds. Only parts of a district court holding affirmed by

When the Fifth Circuit affirms a district court decision on different grounds, the Fifth Circuit decision, not the district court's, has preclusive effect.

the Fifth Circuit have preclusive effect. Because Lopez cured the issue addressed by the Fifth Circuit opinion in his first suit, his second suit was valid.

Statutory Interpretation

***Reed v. Taylor*, 923 F.3d 411 (5th Cir. 2019)**

Plaintiff Jerry Reed was a civilly committed individual who was required under a now-repealed Texas law to use income from Social Security to pay for GPS monitoring or face criminal felony prosecution. Reed sued the state officials of the facility where he was committed under § 1983, alleging that the use of his Social Security income for the GPS monitoring violated a provision of the Social Security Act's anti-attachment provision that protects Social Security benefits from "execution, levy, attachment, garnishment, or other legal process." Reed alleged the threat of criminal prosecution qualified as an "other legal process" under the statute. The district court granted summary judgment on qualified immunity grounds, and Reed appealed.

The Fifth Circuit affirmed the district court. In doing so, the Court emphasized its duty to interpret the text of a statute as written and to interpret words according to surrounding structure and other contextual cues. In doing so, the Court applied the *ejusdem generis* canon, which requires general words following specific words in a list to be construed to include only objects similar in nature to the preceding specific words. Relying on this canon and a previous Supreme Court case analyzing the Social Security provision, the Court therefore held the phrase "other legal process" only included processes like execution, levy, attachment, and garnishment. Because the threat of criminal prosecution was not like any of these processes, the Court held the

Under the statutory interpretation canon of ejusdem generis, the phrase "other legal process" in the Social Security Act's anti-attachment provision did not apply to a Texas law that required civilly committed individuals to pay for GPS monitoring under the threat of criminal prosecution.

threat of prosecution was not an "other legal process."

The Court alternatively held the challenged conduct did not violate a clearly established right and that the officials were therefore entitled to qualified immunity. Judge Elrod concurred in the judgment and wrote separately to state the Court should have affirmed based only on the clearly established prong of the qualified immunity test. Because the law in question no longer existed, Judge Elrod stated resolving whether the Texas law violated the Social Security Act was unnecessary.

Texas Law

Jatera Corp. v. U.S. Bank Nat'l Ass'n, 917 F.3d 831 (5th Cir. 2019)

Through a series of transfers, U.S. Bank National Association became the owner of the note and security interest on Esther Randle Moore's home. After her husband died, all interest in the property was transferred to Moore, who then defaulted on the mortgage payments. The Bank's loan servicer notified Moore of its intent to accelerate the note, demanding full payment of the debt. The Bank then filed a foreclosure proceeding in state court, and Moore signed an agreed final judgment consenting to the foreclosure. Several months later, the Bank's new loan servicer, Select Portfolio Servicing, Inc. ("SPS"), sent a new default notice to Moore, informing her that she could cure the default with a specified payment of less than the full amount or the note would be re-accelerated. Over two years later, Moore conveyed her interest in the property to Scojo Solutions, LLC, which then transferred its interest to Jatera Corporation. SPS re-initiated foreclosure proceedings, and Jatera filed suit against the Bank and SPS, seeking judgment that the lien on the property was void under the four-year statute of limitations. After the Bank and SPS removed the suit to federal

Texas law does not recognize detrimental reliance as an exception to a lender's right to unilaterally withdraw an acceleration notice.

court, Jatera amended its complaint, asserting that Moore's detrimental reliance on the acceleration notice prevented the Bank and SPS from abandoning the acceleration. Moore was joined as a plaintiff and also sought a declaration that the lien was void. On cross-motions for summary judgment, the district court granted SPS's and the Bank's motions, holding that Moore had no standing and Jatera failed to show it detrimentally relied on the acceleration notice.

The Fifth Circuit affirmed. Under Texas law, a foreclosure proceeding on a real property lien has a four-year statute of limitations. If the note securing the property contains an optional acceleration clause, the action accrues when the holder exercises its option to accelerate. If the acceleration is abandoned, the limitations period is suspended until the lender exercises its option to re-accelerate the note. A request for payment of less than the full amount, after initially accelerating the entire obligation, constitutes an intent to abandon or waive the initial acceleration. The parties therefore did not dispute that the second notice of default sent by SPS could have constituted an abandonment of the earlier acceleration.

No Texas court had ever squarely held that detrimental reliance was an exception to a lender's right to unilaterally withdraw its exercise of the option to accelerate. Although a Texas intermediate appellate court opinion contained dicta suggesting such an exception existed, and that dicta had been cited several times, more recent federal and Texas state courts expressed doubts about whether such an exception exists. And in 2015, the Texas legislature enacted a statute providing no exceptions to a lender's right to unilaterally withdraw the acceleration. A statute is presumed to be enacted with complete knowledge of the existing law; yet, the Texas legislature chose not to include any exception in the statute. Making an *Erie* guess, the Court therefore found it unlikely the Texas Supreme Court would be willing to read such language into the statute.

***Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501 (5th Cir. 2019)**

This case involved claims against an attorney under a

respondeat superior theory alleging the attorney conspired with a client to further a fraudulent Ponzi scheme. The attorney moved for a judgment on the pleadings, and the district court granted the attorney's motion on the grounds that attorney immunity under Texas law precluded the plaintiffs' claims. The plaintiffs appealed, arguing that three purported exceptions to attorney immunity should apply because the attorney's acts: (1) were outside of the litigation context, (2) constituted criminal acts, and (3) violated the Texas Securities Act. The plaintiffs also asked the Fifth Circuit to certify the application of these alleged exceptions to attorney immunity to the Texas Supreme Court.

Under Texas law, attorney immunity precluded liability claims brought by non-clients because attorney immunity applies to (1) acts outside of the litigation context, (2) criminal acts while acting within the scope of representation, and (3) acts that violate the Texas Securities Act.

The Fifth Circuit denied the plaintiff's motion for certification and affirmed the district court's dismissal. On the issue of certification, the Court stated that while the Texas Supreme Court had not directly addressed these issues, the Texas court of appeals and arguments by counsel gave sufficient guidance for how the Texas Supreme Court would likely rule. Relying on a growing trend among the Texas courts of appeals, the Court held the attorney immunity doctrine applies outside of the litigation context. The Court next held attorney immunity applies even to criminal acts so long as the attorney was acting within the scope of representation. It based this holding on Texas courts' focus on whether an action was within the scope of representation rather than whether the act was criminal when analyzing attorney immunity. Finally, the Court held the Texas Securities Act did not abrogate attorney immunity. In reaching this conclusion, the Court noted that the Act did not explicitly abrogate immunity and that Texas courts had held attorney immunity applies to a comparable statute—the Texas Deceptive Trade Practices Act. Thus, the Court affirmed the district court's dismissal of the plaintiffs' claims.

Texas Supreme Court Cases

Wes Dutton, Haynes and Boone, LLP
Jason N. Jordan, Haynes and Boone, LLP
Chris Knight, Haynes and Boone, LLP
Patrice Pujol, Forman Watkins & Krutz, LLP

Expert Testimony & Punitive Damages

***Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213 (Tex. 2019).**

Jim Crane and Neil Kelley purchased a Challenger 300 aircraft from Bombardier Aerospace Corporation for $19,850,000 through two companies, SPEP Aircraft Holdings, LLC ("SPEP") and PE 300 Leasing, LLC ("PE"). In the negotiations, Crane and Kelley specified that they were agreeing to purchase a new aircraft. Bombardier, SPEP, and PE entered into purchase and management agreements through Bombardier's subsidiary, Flexjet. The purchase agreement provided that Flexjet would not be liable "for any indirect, special, consequential damages or punitive damages arising out of any lack or loss of use of any aircraft, equipment, spare parts, maintenance, repair or services rendered or delivered under this purchase agreement." The purchase agreement also required SPEP and PE to provide Flexjet with a power of attorney for acceptance and registration of the aircraft, thus giving Bombardier exclusive power over inspection and acceptance of the Challenger aircraft. Under the management agreement, Flexjet agreed to manage and maintain the aircraft with reasonable care and to comply with all laws and regulations concerning the use, operation, and maintenance of the aircraft. The management agreement also contained a limitation-of-liability clause similar to the purchase agreement.

SPEP and PE later canceled Flexjet's management of the aircraft. Thereafter, SPEP and PE learned from logbook records that the Challenger 300's left engine had been repaired for an interstage turbine temperature ("ITT") split and that both the

left and right engines had been installed and removed multiple times on at least two other aircraft. Bombardier never told SPEP or PE about the history of the Challenger 300's engines. One of Flexjet's pilots had noticed the ITT split during the Challenger 300's initial flight and informed the Corporate Aircraft Logistics Manager, who then informed the Vice President of Sales—all of whom believed SPEP and PE should be made aware of the engine history. But Bombardier's Director of Operations and Vice President of Operations told the Bombardier employees that the engine history was not their concern and that they were not to tell SPEP, PE, Crane, or Kelley about it.

SPEP and PE believed they purchased new engines that would each come with a five-year warranty ending in 2015. But a dispute arose about when the engine warranties began—either when the FAA first issued Certificates of Airworthiness (effectively giving SPEP and PE a three-year warranty for each engine, ending in 2013), or when the engines were installed on the Challenger 300 (effectively giving SPEP and PE a five-year warranty, ending in 2015).

SPEP, PE, and six other non-purchasing entities or individuals sued Bombardier for breach of contract, breach of express warranty, and fraud. Plaintiffs tendered Delvin Fogg, a certified aircraft appraiser, as their expert to testify on the diminution of value of the Challenger 300. Fogg testified as to the price SPEP and PE should have paid for the aircraft. The jury found in favor of Plaintiffs on both the breach of contract and fraud claims and awarded $2,694,160 in actual damages and $5,388,320 in exemplary damages. Plaintiffs elected to recover on the fraud claim, enabling them to recover the punitive damages. The parties stipulated at trial, and the judgment reflected, that only SPEP and PE were entitled to recover damages. The court of appeals affirmed the trial court's judgment, and Bombardier petitioned the Texas Supreme Court for review.

Appraisal expert's testimony was sufficient to support actual damages, but a contractual limitation-of-liability clause barred punitive damages.

Justice Green delivered the Court's unanimous opinion upholding the judgment as to actual damages but reversing and rendering a take-nothing judgment as to exemplary damages. The Court first analyzed and rejected Bombardier's argument that there was no basis to uphold the jury's finding that Bombardier committed fraud against each of the eight Plaintiffs, including both the purchasing parties (SPEP and PE) and the non-purchasing parties. The Court observed that although the jury charge defined "Plaintiffs" to include the non-purchasing parties, Bombardier did not object to the definition. Bombardier also affirmatively agreed to the stipulation that "in the event that there [was] a judgment, that said judgment may be, on behalf of all the plaintiffs, may be made payable 50 percent of whatever that final number is to" SPEP and PE. Because Bombardier agreed to the jury charge, stipulated that only SPEP and PE could recover, and did not dispute that SPEP and PE could recover based on the fraud finding, the Court held that the liability findings in favor of the non-purchasers could "simply be disregarded."

The Court next analyzed the issue of actual damages and the sufficiency of Fogg's expert testimony to support that award. After an extensive and detailed recitation of Fogg's testimony, the Court concluded that "although Fogg's reasoning for his valuation could have been more substantive, he sufficiently linked his conclusions about the Challenger 300's value to available facts about its issues and the marketplace." In reaching this conclusion, the Court noted that "the aircraft appraisal industry presents unique challenges," and "Fogg's experience with aircraft alone may be a sufficient basis for his valuation." The Court also rejected Bombardier's no-evidence challenge as to a portion of the actual damages based on lost engine warranties. The Court explained that it did not have the ability to review the legal sufficiency of the evidence to support any particular award of damages to compensate for fraud without disturbing the jury's entire answer because the charge included a single answer blank to which no party objected. The Court added that even if the warranties had not expired in 2013 as a

matter of law, the jury was entitled to determine whether the other issues diminished the value of the remaining warranties.

Finally, the Court turned to the issue of exemplary damages. The Court's analysis largely focused on the limitation-of-liability clauses in the purchase and management agreements. The Court acknowledged that Bombardier owed fiduciary duties to SPEP and PE based on the power of attorney given to Bombardier under the agreements, but there was no breach of fiduciary duty claim and the Plaintiffs did not seek exemplary damages on that basis, so the Court declined to "decide whether a breach of fiduciary duty for fraudulent conduct would affect the validity of a limitation-of-liability clause." The Court further reasoned that "parties can bargain to limit exemplary damages," and although fraud may vitiate an "as is" clause, the "as is" clause at issue here did not affect SPEP's and PE's inability to recover exemplary damages under the plain language of the limitation-of-liability clauses.

Oil & Gas

***Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019).**

Burlington Resources Oil & Gas Co. LP ("Burlington") and Texas Crude Energy, LLC ("Texas Crude") executed a Prospect Development Agreement ("PDA") and a Joint Operating Agreement ("JOA") for leases in an Area of Mutual Interest ("AMI"). Under the PDA, Burlington would operate the entire field, and each party would receive a percentage of the other's working interests in leases either party previously acquired in the AMI. Under the PDA and JOA, on leases Texas Crude originated, it retained an overriding royalty interest, and it assigned these interests to an affiliate, Amber Harvest, LLC ("Amber Harvest"). On leases Burlington originated, Burlington

Operator of oil and gas well could deduct post-production costs when calculating royalty payments.

assigned an overriding royalty interest to Texas Crude, and Texas Crude then assigned the interest to Amber Harvest.

The overriding royalty interest assignments, whether from Texas Crude to Amber Harvest or from Burlington to Texas Crude, contained essentially identical language, including a Granting Clause and a Valuation Clause. The Granting Clause provided that the "overriding royalty interests shall be delivered to ASSIGNEE into the pipelines, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production and other costs. However, ASSIGNEE shall in every case bear and pay all windfall profits, production and severance taxes assessed against such overriding royalty interest" (emphasis added by Court). The Valuation Clause stated that the assignment "shall be subject to the following terms and conditions," including that the "overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit into the pipeline, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto, or ASSIGNOR, at ASSIGNEE's election, shall pay to ASSIGNEE, for ASSIGNEE's overriding royalty oil, gas or other minerals, the applicable percentage of the value of the oil, gas or other minerals, as applicable, produced and saved under the leases" (emphases added by Court). The term "value" was defined as referring to "(i) in the event of an arm's length sale on the leases, the amount realized from such sale of such production and any products thereof, (ii) in the event of an arm's length sale off of the leases, the amount realized for the sale of such production and any products thereof, and (iii) in all other cases, the market value at the wells." The parties agreed the sales at issue were arms-length, so either (i) or (ii) applies.

For nine years, Texas Crude and Amber Harvest accepted royalty payments from which the royalty holder's share of post-production costs had been deducted. But Texas Crude then challenged the deduction of post-production costs and sought

recovery of previously underpaid royalties. Burlington claimed the parties' agreements, when read together, entitled it to deduct Texas Crude's share of post-production costs from the royalty payments. The trial court ruled for Texas Crude on the contract-interpretation issue, concluding that the agreements did not permit Burlington to deduct post-production costs. The trial court did not rule on other claims or damages and authorized an interlocutory appeal of its contract-interpretation ruling. The court of appeals accepted the appeal and affirmed the trial court's ruling.

Justice Blacklock wrote the Court's opinion reversing the court of appeals' judgment and remanding the case for further proceedings. The Court explained that the crux of the dispute was whether Texas Crude holds royalties on products at the well, as Burlington argued, or as treated and transported at the downstream point of sale, as Texas Crude contended. The Court ultimately concluded that Burlington had the more persuasive interpretation of the applicable agreements. Burlington emphasized the general rule that oil and gas interests usually bear post-production costs as well as the parties' course of performance, under which Texas Crude and Amber Harvest acquiesced in the deduction of post-production costs for years. But the Court did not rely on either of these points to reach its conclusion, noting that it would not consider the parties' course of performance when interpreting the unambiguous text of the contracts.

The Court explained that it has never held that an "amount realized" valuation—which can grant a royalty holder the right to a percentage of the sale proceeds with no adjustment for post-production costs—can trump a contractual "at the well" valuation point. And allowing the holder of an "at the well" royalty to avoid responsibility for post-production costs "would improperly convert the royalty interest from a royalty on raw products at the well to a royalty on refined, downstream products" that are more valuable. So, the dispositive question was whether the parties here agreed to an "at the well" valuation point, and the Court concluded they did.

The agreements provide that the royalty interest "shall be delivered . . . into the pipelines, tanks, or other receptacles," and a "sensible reading" of this language is that it refers to the physical spot at which Texas Crude's interest in the product arises. This understanding is consistent with treatises discussing similar language. And terms in the JOA referring to payments based on "actual net proceeds" further supported Burlington's position. Although Texas Crude argued that the "net proceeds" language only applied to working interests, not overriding royalty interests, the Court disagreed. The Court also determined that Texas Crude's interpretation of the "into the pipeline" language was "less convincing than the alternative" for several reasons, including the implausible practical results that would follow from adopting Texas Crude's position.

In sum, the language stating that the royalty interest was delivered "into the pipelines" placed the royalty's valuation "at the physical spot where the interest must be delivered—at the wellhead or nearby—[and] [t]his gives Burlington the right to subtract post-production costs from the 'amount realized' in downstream sales prices in order to calculate the product's value as it flows 'into the pipelines, tanks or other receptacles with which the wells may be connected.'"

Declaratory Judgment

***In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019).**

Houston Specialty Insurance Company ("HSIC") insured South Central Coal Company (the "Coal Company") under a commercial general liability policy ("the Policy"). The Coal Company was sued in Oklahoma by the Carters, and acting on the legal advice of Thompson, Coe, Cousins, & Irons, LLP ("Thompson Coe"), HSIC denied the Coal Company's request for a defense and denied coverage under the Policy. The Coal Company then filed third-party claims against HSIC in the Oklahoma lawsuit. The Oklahoma trial court granted the Coal Company's motion for summary judgment on the issue of

HSIC's duty to defend, and the Oklahoma lawsuit later settled

HSIC accused Thompson Coe of committing legal malpractice by advising HSIC that it did not owe a duty to defend the Coal Company against the Carters' claims. HSIC demanded by letter that Thompson Coe pay more than $2.8 million—roughly the amount of its settlement with the Coal Company—to avoid litigation. Thompson Coe responded by preemptively filing a declaratory judgment suit in Texas state court. As its sole cause of action, Thompson Coe sought declaratory relief, including declarations that it is not liable for any erroneous judicial opinions and was not negligent in issuing the declination letter. HSIC moved to dismiss Thompson Coe's claims under Texas Rule of Civil Procedure 91a, arguing that under *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985), a potential tort defendant may not use the Declaratory Judgment Act to obtain a declaration of nonliability in tort. The trial court denied HSIC's motion, and the court of appeals denied HSIC's petition for writ of mandamus.

The Texas Supreme Court granted conditional mandamus relief in a per curiam opinion. The trial court's denial of HSIC's Rule 91a motion was a clear abuse of discretion under *Abor* because the Court has never recognized an exception or nuance to the rule that a potential tort defendant may not seek a declaration of nonliability in tort. Here, at least two of Thompson Coe's requested declarations expressly seek declarations of nonliability, and each of the others relates to a potential claim for legal malpractice. The Court further concluded that a traditional appeal after a final judgment would not provide HSIC with an adequate remedy. Mandamus is appropriate to spare litigants and the public from time and money wasted on improper proceedings, and a lawsuit that violates *Abor* and thus deprives the real plaintiff of the right to choose the time and place of suit satisfies this standard.

Trial court abused its discretion in denying a motion to dismiss a declaratory judgment action seeking declarations of nonliability for legal malpractice.

Governmental Immunity

***City of Denton v. Rushing*, 570 S.W.3d 708 (Tex. 2019).**

Plaintiffs are hourly-paid employees in the City of Denton's Utilities Department, who are all entitled to overtime pay under the Fair Labor Standards Act and who all worked uncompensated on-call shifts between 2011 and 2015. Policy 106.06 of the City's Policies and Procedures Manual defines the rights and responsibilities of on-call employees. Policy 106.06 was adopted by City Council resolution in 1995 and originally stated that on-call time was not compensated or credited as time worked. In 2013, the City Manager modified Policy 106.06 to remove the portion stating that on-call time was not compensated and added a pay schedule for on-call time. Apart from Policy 106.06, the Policies and Procedures Manual included a general disclaimer that it did not in any way constitute the terms of a contract of employment.

Plaintiffs sued the City when the City would not agree to compensate them for the on-call shifts worked between 2011 and 2015. Plaintiffs alleged that Policy 106.06 was a unilateral contract that the City breached. The City filed a plea to the jurisdiction, contending that governmental immunity was not waived because Policy 106.06 did not meet the statutory definition of a contract under Texas Local Government Code Chapter 271. The trial court denied the City's plea, and the court of appeals affirmed the trial court's order.

City's Policies and Procedures Manual did not create a contract that employees could enforce under the statutory waiver of immunity for certain breach of contract claims.

Justice Devine authored the Court's unanimous opinion reversing the court of appeals' judgment and rendering judgment sustaining the City's jurisdictional plea. The Court reasoned that interpreting Policy 106.06 to be a unilateral contract regarding employment conflicted with the portion of the general disclaimer in the Policies and Procedures Manual that its terms did not in any way constitute the terms of a

contract of employment. The Court rejected the Plaintiffs' reliance on *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011), observing that city ordinances may sometimes create enforceable contract rights, but the Court has not previously held that a municipality's policies and procedures manual can create contract rights—especially when the policies and procedures include a disclaimer that negates the intent to create a contract.

Attorney-Client Privilege & Expert Discovery

***In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019).**

The City of Dickinson purchased an insurance policy from Texas Windstorm Insurance Association. In the underlying litigation, the City alleges that Texas Windstorm has not paid what it owes for property damage. The City filed a motion for summary judgment on the issue of causation, and in responding to the City's motion, Texas Windstorm included the affidavit of its corporate representative and senior claims examiner, Paul Strickland. Strickland's affidavit provided both factual and expert opinion testimony.

When the City later learned in Strickland's deposition that his affidavit had been revised in emails between Strickland and Texas Windstorm's counsel, the City moved to compel production of the email exchanges along with all other documents that were provided to, reviewed by, or prepared by or for Strickland. Texas Windstorm responded that the emails were protected by the attorney-client privilege. Texas Windstorm submitted an affidavit from its counsel regarding the nature of the communications, and in an apparent filing error, Texas Windstorm also e-filed copies of the emails it asserted were privileged. Texas Windstorm discovered the filing error the next day and promptly invoked

Texas's discovery rules do not operate to waive the attorney-client privilege whenever a client or its representative offers expert testimony.

Texas Rule of Civil Procedure 193.3(d)'s snap-back provision.

The trial court denied Texas Windstorm's motion to withdraw the email communications that it had accidentally filed and granted the City's motion to compel. The City sought mandamus relief, which the court of appeals conditionally granted. The City then sought mandamus relief in the Texas Supreme Court.

In a unanimous opinion written by Justice Devine, the Court denied the City's request for mandamus relief. The Court explained that although Texas Rule of Civil Procedure 192.3(e) provides that a party "may discover" testifying-expert materials, nothing in its language permits such discovery when the materials are attorney-client privileged. The Court further reasoned that Texas Rule of Civil Procedure 194.2 regarding requests for disclosure did not require Texas Windstorm to turn over testifying expert materials. Rather, Rule 194.2 merely allowed the City to request those materials, subject to other rules of discovery, including the attorney-client privilege. The Court emphasized that a lawyer's candid advice is no less important when a client also testifies as an expert. Finally, the Court held that Texas Windstorm complied with Rule 193.3(d)'s snap-back provision, so the court of appeals correctly determined that the trial court's failure to sustain Texas Windstorm's snap-back motion was an abuse of discretion.

Attorney Disqualification

***In re RSR Corp.*, 568 S.W.3d 663 (Tex. 2019).**

RSR Corporation and Quemetco Metals, Ltd., Inc. (collectively "RSR") sued Inppamet Ltd. ("Inppamet") about 10 years ago. Inppamet moved to disqualify RSR's counsel about 7 years ago, asserting that RSR and its counsel had obtained Inppamet's privileged and confidential information from a former Inppamet employee. In a motion for sanctions, Inppamet sought disqualification under the fact-intensive disqualification guidelines of *In re Meador*, 968 S.W.2d 346 (Tex. 1998). After

a special master heard arguments on Inppamet's motion, Inppamet filed a letter brief asserting that the disqualification analysis should be governed by the presumptions set forth in *In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998), not the considerations in *Meador*. The special master denied Inppamet's motion, and Inppamet appealed to the trial court.

Relying on the presumptions set forth in *American Home Products*, the trial court disqualified RSR's counsel. In a prior appeal, the Texas Supreme Court held that the trial court erred in applying *American Home Products*' presumptions instead of the *Meador* factors. *In re RSR Corp.*, 475 S.W.3d 775 (Tex. 2015). In conditionally granting mandamus relief from the trial court's order, the Court declined to decide whether disqualification would have been proper under *Meador* because the trial court did not reach that issue and did not resolve all facts relevant to a *Meador* analysis.

Party that previously abandoned a basis for disqualifying opposing counsel was not entitled to reconsideration on the abandoned basis after remand from the Texas Supreme Court.

After the Court's prior ruling, Inppamet again sought disqualification in the trial court, urging reconsideration under *Meador*. The special master denied Inppamet's motion, and the trial court adopted the special master's order, denying the request for reconsideration as "untimely, dilatory in nature, and/or waived." The court of appeals granted Inppamet's petition for mandamus relief, directing the trial court to vacate its order and determine Inppamet's motion to reconsider on the merits under *Meador*.

In a per curiam opinion, the Court granted conditional mandamus relief. The Court held that the court of appeals erred by focusing on Inppamet's actions after the Court's prior opinion issued, instead of Inppamet's actions in advancing and then abandoning and opposing *Meador*'s application. The Court reiterated that failing to timely seek disqualification constitutes waiver, and the same principle applied here where Inppamet timely sought disqualification but made a tactical (ultimately

erroneous) decision to abandon *Meador* as a basis for obtaining disqualification. The Court rejected Inppamet's argument that the Court's prior opinion changed the law, concluding that the law did not change and there were no new factual developments during the period between Inppamet's abandonment and embrace of *Meador* as a basis for disqualification. Finally, the Court concluded that RSR lacked an adequate appellate remedy because absent mandamus relief, another round of costly disqualification litigation would delay the trial and disposition of this dispute.

Public Pensions

***Eddington v. Dall. Police & Fire Pension Sys.*, No. 17-0058, 62 Tex. Sup. Ct. J. 560, ___S.W.3d___ (Tex. Mar. 8, 2019).**

The Dallas Police and Fire Pension System (the "System") provides retirement, disability, and death benefits to Dallas police officers, firefighters, pensioners, and qualified beneficiaries. Officers and firefighters become members of the System when they enter the training academy, and they and the City of Dallas contribute to their accounts while they are in active service. When members reach retirement eligibility, they can leave active service and begin drawing a monthly annuity based on the product of their average pay and length of service, or they can continue working and draw a higher monthly annuity when they eventually leave active service due to the longer term of service and the pay raises received after reaching retirement age.

The Deferred Retirement Option Plan ("DROP") was created in 1993 and gives members who continue working past retirement eligibility another option. The member's annuity is fixed at retirement age and does not increase with continued service, but while the member continues to work, monthly payments are credited to a DROP account. In effect, members working past retirement eligibility can choose between a higher annuity on leaving active service, or a lower annuity plus an

accumulation of payments made to DROP accounts while they continued working.

DROP accounts bore interest, and beginning in 1998, the System guaranteed an interest rate of not less than 8%. In 2014, when the growing disparity between DROP interest owed and the declining return on System investments created a deficit to be made up from the plan's general assets, the retirement plan was amended with the approval of the System's board and 88% of the System's active members voting. Under the amendment, the interest rate for DROP was reduced 1% each year for three years, from 8% to 5%, beginning in 2015, and after that, DROP interest would be based on investment performance and could range between zero and 7%. The reductions were prospective only and did not affect interest already accrued.

Three pensioners who elected DROP before the 2014 amendment sued the System, asserting that the change in interest rate reduced or impaired service retirement benefits granted or accrued in violation of Article XVI, Section 66 of the Texas Constitution. The trial court ultimately ruled that reducing the DROP interest rate prospectively did not violate Section 66. Plaintiffs moved for reconsideration and to reopen the evidence for testimony and legislative history materials regarding the intent of Section 66. The trial court denied Plaintiffs' motion. On appeal, the court of appeals affirmed the trial court's judgment.

In a unanimous opinion written by Chief Justice Hecht, the Texas Supreme Court affirmed the court of appeals' judgment. The Court explained that Section 66 overruled the Court's prior decision in *City of Dallas v. Trammell*, 101 S.W.2d 1009 (Tex. 1937), which held that retirement payments could be reduced after a pensioner had earned them and was due payment. The United States Court of Appeals for the Fifth Circuit found this history significant when it held in *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016), that Section 66 protects

Prospective changes to the interest rate paid on Deferred Retirement Option Plan accounts did not violate the Texas Constitution.

only accrued benefits based on service rendered and not benefits expected but as-yet unearned for future service. The Court found itself in agreement with *Van Houten* and held that lowering the interest rate that as-yet-unearned DROP payments will bear does not affect a benefit accrued or granted in violation of Section 66. Although Section 66 does not define benefits, its language strongly suggests that the protected benefits are the pensioner's annuity payments. Moreover, because the text of Section 66 was plain as it affected this case, the trial court did not err in refusing to reopen the case for evidence about the intent of supporters of the passage of Section 66.

ANTI-SLAPP

S&S Emergency Training Solutions, Inc. v. Elliott, 564 S.W.3d 843 (Tex. 2018)

S & S Emergency Training Solutions, Inc. d/b/a Emergency Medical Training Services ("EMTS") provides courses and training for emergency medical service providers. One of the programs offered by EMTS required it to be nationally accredited, which it secured through a consortium agreement with Arlington Career Institute ("ACI"). EMTS's program director was Sheila Elliott ("Elliott"), who during her nearly three-year tenure signed two nondisclosure agreements ("NDAs") to which both EMTS and ACI were parties. The NDAs provided that Elliott would not use or disclose processes, information, records, or specifications of the consortium except in the course of her employment and for the benefit of the consortium. Near the end of her employment, Elliott sent a letter to EMTS's CEO, Thomas Cellio III, requesting a raise, claiming that she had kept EMTS "running smooth and profitable." The next day, Elliott resigned. Thereafter, Elliott filed complaints with the Texas Department of State Health Services alleging EMTS engaged in unlawful business practices and sent copies of her complaints to ACI's CEO, Jon Vecchio. She also notified potential employers of EMTS's

graduates, as well as some current and former EMTS students, of her pending allegations. She also broadcast this information on the internet. Following Elliott's actions, ACI withdrew from the consortium agreement with EMTS.

EMTS sued Elliott for breach of contract asserting that she violated the NDAs by disclosing confidential information covered by the agreements. In response to the trial court's grant of injunctive relief to EMTS, Elliott filed a motion to dismiss under the Texas Citizens Participation Act ("TCPA") arguing that her actions were an exercise of her right to petition and her right of free speech. The trial court denied her motion without explanation. But the Dallas Court of Appeals reversed, concluding that Elliott was exercising her right to free speech because her communications touched on matters of public concern. Addressing the second step of the TCPA analysis, the appellate court held that EMTS failed to show the disclosures caused it to suffer damages.

The Supreme Court reversed, concluding EMTS established by clear and specific evidence a prima facie case of each essential element of its breach-of-contract claim, including damages. The Court noted that EMTS was not required to provide evidence sufficient to allow an exact calculation of the lost profits, as the court of appeals determined. Instead, EMTS was only required to present evidence sufficient to support a rational inference that Elliott's actions caused it to lose some specific, demonstrable profits. EMTS's evidence included affidavits by Vecchio and Cellio confirming that (1) ACI terminated its agreement with EMTS in large part because of Elliott's disclosures of information, and (2) because of EMTS's loss of ACI as a consortium partner, EMTS could no longer offer paramedic

To establish by clear and specific evidence a prima facie case of the damages element of breach-of-contract claim, a party is only required to present evidence sufficient to support a rational inference that the opponent's actions caused the loss of some specific, demonstrable profits; the party is not required to provide evidence sufficient to allow an exact calculation of the lost profits.

training courses to new students. This, coupled with evidence that EMTS's paramedic classes were profitable before Elliott's disclosures of confidential information, was prima facie proof that Elliott's disclosures caused EMTS to lose profits and was sufficient to preclude dismissal of EMTS's suit. Thus, the Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

Arbitration

***RSL Funding LLC v. Newsome*, 569 S.W.3d 116 (Tex. 2018)**

Rickey Newsome ("Newsome") assigned his structured settlement payments to RSL Funding LLC ("RSL") for a lump sum payment of $53,000. The contract between Newsome and RSL contained a mandatory arbitration clause identifying the Federal Arbitration Act as the controlling law. The clause also delegated to an arbitrator not only contractual disputes but also whether a dispute was arbitrable. Under the Structured Settlement Protection Act ("SSPA"), a court must approve a transfer of structured-settlement payments before the transfer is effective. RSL petitioned a district court in Newsome's resident county to approve the agreement, which the court did in a signed order containing the requisite statutory findings as well as a handwritten note by the judge requiring RSL to pay Newsome within ten days, otherwise RSL would have to pay Newsome double that amount, or $106,000. RSL did not pay the $53,000 within the allotted ten days.

A bill of review attacking approving court orders under the Structured Settlement Protection Act is a dispute that is arbitrable under the Federal Arbitration Act involving an arbitration clause that sends arbitrability disputes to the arbitrator.

Months later and still without a payment, Newsome and RSL attempted to resolve their differences first through mediation and later in court. At mediation, the parties agreed to remove the ten-day payment penalty, which was memorialized in a corrected court order

nunc pro tunc. After more delays, the parties filed competing pleadings. Newsome filed a bill of review that asked the court to void the nunc pro tunc order and, alternatively, to vacate the original approval order. RSL responded by arguing that the delays in payment were caused by Newsome's refusal to sign paperwork required to transfer the structured payments. RSL also filed a motion to compel arbitration. The trial court granted Newsome's motion to void the nunc pro tunc order, reserved judgment on the remaining issues raised by Newsome, and denied RSL's motion to compel. A divided Dallas Court of Appeals affirmed.

The Supreme Court reversed, holding first that the arbitral delegation clause contained in the parties' agreement applied to the dispute over the validity of the approving court orders. That Newsome was pursuing his remedy through a bill of review was immaterial. That a court has jurisdiction over a bill of review to the exclusion of all other courts does not speak to the issue of arbitrability because arbitrators derive their jurisdiction over disputes from parties' consent and the law of contract. Here, Newsome and RSL agreed to send gateway issues such as arbitrability to the arbitrator. As a result, the court had no discretion but to compel arbitration. Moreover, even if the SSPA prohibited arbitration of certain disputes that would arise from the approval of structured-settlement transfers—which the Court rejected—the Federal Arbitration Act would preempt such a restraint on the freedom of contract in arbitration. Thus, the arbitration clause to which Newsome and RSL agreed was valid and enforceable.

In addition, the Court rejected Newsome's argument that he could not be compelled to arbitrate because no enforceable arbitration agreement existed. In other words, argued Newsome, because both of the district court's approval orders were void, the entire transfer agreement never came into existence. Relying on the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conkling Manufacturing Co.*, 388 U.S. 395, 404 (1967), which held that arbitration clauses are separable from the contracts in which they are embedded, the

Court determined that the arbitrator is to decide any challenge to the enforceability of an existing contract. Therefore, any contract defense that attacks the contract as a whole but does not go to the issue of contract formation must be decided by the arbitrator. But Newsome's bill of review sought to have the trial court declare the nunc pro tunc order void so Newsome could enforce the original approval order. Because his bill of review pled that the approval order was valid and created an enforceable contract, Newsome conceded the existence of the agreement to arbitrate. Ultimately, Newsome failed to present any theory, analysis, or authority that put the validity of the original approval order and thus formation of the contract to arbitrate in issue. As a result, the Court concluded the doctrine of separability reserved to the arbitrator all other questions raised in the district court. For these reasons, the Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court with instructions to grant the motion to compel arbitration.

Experts

***Windrum v. Kareh*, 581 S.W.3d 761 (Tex. 2019)**

On February 3, 2010, Lance Windrum ("Lance") suddenly became disoriented and confused, and his speech was slurred. He was taken via ambulance to North Cypress Medical Center, where he underwent a battery of tests and scans. Neurologist Harpaul Gill, M.D. ("Dr. Gill") spoke with Lance, who revealed that he had three similar though less severe episodes recently. After reviewing the MRI results, Dr. Gill determined that Lance had compensated obstructive hydrocephalus, a narrowing of the aqueduct that carried cerebrospinal fluid through the brain. Dr. Gill told Lance's wife, Tracy Windrum ("Windrum"), that a shunt should be inserted the next day by

An expert's opinion based on his professional experience and little supportive literature may be sufficient and not conclusory.

neurosurgeon Victor Kareh, M.D. ("Dr. Kareh"), who would determine how to further treat Lance. The following day, however, Dr. Kareh determined that Lance did not require the immediate placement of a shunt, but that he would probably need one in the future. Twelve days later, Lance experienced a similar episode, again saw Dr. Gill, and underwent additional scans during the following two weeks. The new scans confirmed Lance's aqueductal stenosis had worsened. Dr. Gill learned of these results but did not inform Dr. Kareh of the MRI results or about Lance's latest episode. On May 2, 2010, Lance died in his sleep. The Harris County medical examiner performed an autopsy and concluded that "[c]omplications of hydrocephalus due to aqueductal stenosis" caused Lance's death.

Windrum filed a negligence suit against Drs. Kareh and Gill, among others, in her individual capacity, as the representative of Lance's estate, and on behalf of her three minor children. She retained neurosurgeon Robert Parrish, M.D. to testify about the applicable standard of care and forensic neuropathologist Ljubisa Dragovic, M.D. to testify about causation. At trial, the jury found against both Drs. Kareh and Gill and awarded Windrum and her children nearly $1.9 million. Only Dr. Kareh appealed, arguing that Windrum failed to present legally and factually sufficient evidence that he breached the standard of care by failing to install a shunt in Lance's brain, and that Windrum failed to present legally and factually sufficient evidence that his actions or omissions caused Lance's death. The First Court of Appeals agreed and reversed the trial court's judgment.

The Supreme Court reversed. First, the Court held Dr. Parrish's testimony on the standard of care Dr. Kareh owed to Lance and whether Dr. Kareh's breach of that standard of care caused Lance's death—though hardly supported by medical literature—was not conclusory. An expert's opinion is conclusory when (1) he asks the jury to take his word that his opinion is correct but offers no basis for his opinion or the bases offered do not actually support the opinion, or (2) he offers only his word that the bases offered to support his opinion actually

exist or support his opinion. Experience alone may provide a sufficient basis for an expert opinion, though not in all cases. Moreover, medical

literature is not necessary to support an expert's opinion, although it tends to strengthen the bases for the opinion and therefore is preferred. Here, Dr. Parrish concluded that the "MRI plus classic symptoms" exhibited by Lance "equals a shunt"; therefore, Dr. Kareh breached the standard of care when he failed to insert a shunt. Dr. Parrish based this conclusion on his own experience treating patients with hydrocephalus and intracranial pressure, the experience of other doctors in the field, Lance's own medical records and test results, Lance's autopsy report, and the testimony of Dr. Dragovic. In addition, Dr. Parrish explained how and why all of these bases led him to conclude that Lance required a shunt. Even though Dr. Parrish cited medical literature in support of only some of his opinions and he failed to cite any literature in support of his ultimate conclusion that the standard of care for Lance's condition required insertion of a shunt, he provided enough reasons for his opinion such that the jury could reasonably find him more persuasive than the other expert opinions. Thus, the court of appeals erred in determining that Dr. Parrish's opinions were conclusory.

Next, the Supreme Court held that any breach of the standard of care by Dr. Kareh would not be too remote for a reasonable jury to find proximate cause. Windrum provided a "sufficient causal nexus" between the duty owed to Lance, Dr. Kareh's breach of that duty, and how this could be the proximate cause of Lance's death—that Lance's condition left untreated without the insertion of a shunt caused his death. Indeed, once the jury found that Dr. Kareh breached the standard of care by failing to insert a shunt in Lance's brain weeks before his death, it was also entitled to find that the breach constituted proximate cause because failure to properly diagnose and treat can be a substantial factor in causing injury in a medical malpractice case.

Finally, the Court held that although the court of appeals

identified the correct standard for factual sufficiency review, it failed to explain how it reached the conclusion that Windrum failed to present factually sufficient evidence, explaining and analyzing only the legal sufficiency of the evidence. Although the court of appeals may have intended to convey simply that Dr. Parrish's testimony was legally insufficient and therefore the evidence was also factually insufficient to support the trial court's judgment, the Supreme Court cannot guess at the court of appeals' thought processes as to factual sufficiency. Thus, the Supreme Court reversed the court of appeals' judgment and remanded the case for the court of appeals to decide whether Windrum presented legally and, if necessary, factually sufficient testimony to support the jury's verdict.

Governmental Immunity

***Owens v. City of Tyler*, 564 S.W.3d 850 (Tex. 2018) (per curiam)**

The Owens, Terry, and Chatelain families lease three contiguous lots on Lake Tyler under lease agreements with the City of Tyler ("City"). When the Chatelains sought to build a new pier and boathouse extending from their lot onto the water, the Owens and Terry families objected, but the City eventually approved the Chatelains' request for a construction permit. In response, the Owens and Terry families sued the City and the Chatelains alleging various causes of action, including breach of contract. The City filed a plea to the jurisdiction asserting governmental immunity which the trial court denied. The Tyler Court of Appeals reversed, holding the claims were barred by governmental immunity because they arose from the City's governmental (rather than proprietary) acts.

Governmental immunity based on a breach of contract claim depends on the nature of the contract, not the nature of the breach.

The Supreme Court reversed. Based on its decision in *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 149

(Tex. 2018), which was decided while the City's appeal was pending before the Court, the proper inquiry in determining governmental immunity is—

> whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached that contract. Stated differently, the focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply.

Because the Tyler Court of Appeals was not able to conduct this inquiry, the Supreme Court vacated that court's judgment and remanded the case for further consideration in light of *Wasson*.

Medical Liability Act

Tex. Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126 (Tex. 2018)

After Baby A.A. was delivered with injuries to the network of shoulder nerves, his parents ("Parents") sued obstetrician Marc Wilson, M.D., his practice group, and the hospital (collectively, "Dr. Wilson") for negligence-based medical malpractice. Although the delivery was initially uneventful, the baby had trouble moving through the birth canal and his shoulder became stuck on his mother's pelvis. After several maneuvers failed to bring the baby out, Dr. Wilson reached into the birth canal and physically pulled the baby's arm across his chest, dislodging the baby's shoulder. In the trial court, Dr. Wilson disputed that he or the nurse acted negligently. He also asserted the Parents could not recover based on ordinary negligence, but instead had to prove Dr. Wilson acted with willful and wanton negligence required by section 74.153 of the Texas Medical Liability Act ("Act") because the measures he took to dislodge the baby's shoulder constituted emergency

medical care. The trial court agreed with Dr. Wilson and granted partial summary judgment on this issue. In a permissive appeal to address only the issue of whether the Act required the family to prove willful and wanton negligence, the Fort Worth Court of Appeals reversed and remanded, holding the Act did not require that heightened standard of proof.

The Supreme Court reversed and reinstated the trial court's partial summary judgment. Section 74.153 requires a health-care-liability claimant to prove that the defendant physician or health care provider breached the applicable standard of care with willful and wanton negligence if the claim arises out of the provision of emergency medical care—

> in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.

Dr. Wilson argued that the phrase "immediately following the evaluation or treatment of a patient in a hospital emergency department" modified only "in a surgical suite" and not the first two locations. In contrast, the Parents asserted that the "immediately following" phrase applied to "obstetrical unit." After all, such a reading would remove their claims from the emergency-medical-care provision of the Act. Ultimately, the Supreme Court held that Dr. Wilson's reading of the statute was correct. First, the Parents' proposed reading would require courts to ignore the second use of the prepositional phrase "in a" and render that language meaningless. Moreover, if the "immediately following" phrase modified the entire series, then it would necessarily modify the reference to care provided "in a hospital emergency department." But if that were true, the section would apply when the claim

Claims arising from emergency medical care provided in a hospital's obstetrical unit—regardless of whether the patient was first evaluated or treated in a hospital emergency department—fall under the Texas Medical Liability Act's emergency-medical-care provision, which requires claimants to prove willful and wanton negligence.

arises from "the provision of emergency medical care in a hospital emergency department immediately following the evaluation or treatment of a patient in a hospital emergency department." Because the phrase "emergency medical care" includes medical "treatment" provided under emergency circumstances, this construction would create a redundancy that deprives the phrase of any linguistic sense. For these reasons, the Supreme Court held that section 74.153 requires claimants to prove willful and wanton negligence when their claims arise out of the provision of emergency medical care in a hospital obstetrical unit, regardless of whether that care is provided immediately following an evaluation or treatment in the hospital's emergency department. Thus, the Court reversed the court of appeals' judgment, reinstated the trial court's partial summary judgment, and remanded the case to the trial court for further proceedings.

Negligence - Negligent Training

***JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830 (Tex. 2018)**

Mary Turner ("Turner") was struck and killed by a JBS Carriers, Inc. ("JBS") 18-wheeler tractor-trailer being driven by James Lundry ("Lundry"). Turner's children Trinette Washington, Sophia Lenzy, and Thomas Lenzy (collectively "Family"), sued JBS and Lundry, asserting wrongful death and survival actions. The Family alleged that Lundry, while acting in the course and scope of his employment with JBS, negligently operated the truck and that JBS was independently negligent for, among other things, failing to properly train Lundry. At trial, the court excluded all evidence of Turner's mental health issues that included paranoid schizophrenia and bipolar disorder, her prescription medications to treat these conditions along with her anxiety, and

A cause of action for negligent training requires evidence that had the tortfeasor received the requisite training, the accident would not have occurred.

her alcohol and crack cocaine abuse. The court, however, allowed some evidence as to Turner's autopsy and toxicology reports that revealed the presence of alcohol, cocaine, and oxycodone in her body. The court also allowed in Turner's daughter's statements to the police regarding Turner's mental health issues and defense expert Dr. Keith Miller's testimony on these factors. Ultimately, the jury found that Lundry, JBS, and Turner proximately caused the collision, and apportioned fault 50%, 30%, and 20%, respectively. The trial court rendered judgment on the verdict. Both parties appealed, but a divided San Antonio Court of Appeals affirmed.

The Supreme Court reversed and remanded the case to the trial court. First, the Court concluded that the trial court erred by excluding the toxicology report and Dr. Miller's opinion that Turner's mental health condition and the drugs in her system likely contributed to her actions. The excluded evidence connected Turner's mental health and drug use to her walking into the road outside a cross walk when a large truck was moving toward her. More specifically, the evidence was related to Turner's "vigilance, judgment, and reactions" in walking into the road when and where she did and under circumstances where she had an unrestricted view of a large truck moving toward her. Although the Family argued that the danger of unfair prejudice was high because of the stigma associated with schizophrenia and drug use, the Court noted that the key question in analyzing this argument was not whether the evidence was prejudicial, but whether it was *unfairly* prejudicial. Moreover, it was not outweighed by its probative value given that the Family was allowed to argue that Turner may have walked into the street in response to the hand motions that Lundry testified he directed toward the driver of another vehicle.

Additionally, the Court held the exclusion of the evidence likely would have affected the jury's allocation of responsibility to both Lundry and Turner, at a minimum, and therefore resulted in the rendition of an improper judgment.

As to the negligent training claim against JBS, the Court

reversed and rendered judgment that the Family take nothing against JBS on the direct negligence claim. At trial, evidence was introduced regarding an area Lundry allegedly could not see from the cab of the truck—that is, a "blind spot"—located off the truck's right front fender. Evidence was also introduced regarding JBS's hiring, training, supervision, and maintenance programs, along with evidence that JBS's training manual did not mention that the truck's driver would have a blind spot in the area where Turner was when she and the truck collided. On appeal, JBS argued there was no evidence its training program fell below the level which a reasonably prudent employer in the industry would have provided. Moreover, even if a blind spot was a contributing factor in Turner's death, the Family provided no evidence that if JBS had specifically trained Lundry about the blind spot, the accident would not have happened. The Supreme Court agreed, holding that, "even if a cause of action for negligent training exists, the family presented no evidence that the lack of training regarding a blind spot in front of the truck was a proximate cause of Turner's injuries." Indeed, the Family's own expert witness disagreed that there was a blind spot that prevented Lundry from seeing Turner. Thus, the Supreme Court reversed the judgment of the court of appeals, rendered judgment that the Family take nothing against JBS on the direct negligence claim, and remanded the claims against Lundry and those against JBS based on respondeat superior to the trial court for further proceedings consistent with this opinion.

Uniform Commercial Code

***Compass Bank v. Calleja-Ahedo*, 569 S.W.3d 104 (Tex. 2018)**

Francisco Calleja-Ahedo ("Calleja") opened an account with Compass Bank ("the Bank") in 1988. He lives in Mexico but has a brother to whom the bank statements were sent in The Woodlands. In May 2012, the account balance exceeded $42,000. But in June 2012, an unknown person identified himself as Calleja and instructed the Bank to change the

address on file to a California address and later to another California address and then to two Georgia addresses. Despite not receiving the statements, neither Calleja nor his brother nor two other signatories on the account (Calleja's wife and father) complained to the Bank that statements no longer arrived in The Woodlands. The imposter also ordered checks and began draining the account. By February 2013, the account had a negative balance. In January 2014, when told by an acquaintance that his account had returned a check "account closed," Calleja visited the Bank and signed an affidavit disputing the unauthorized charges. After the Bank refused to pay for the unauthorized withdrawals, Calleja sued. The parties filed cross-motions for summary judgment. An affidavit from a Bank employee listed the numerous options Calleja had at his disposal that, if taken, would have allowed him to monitor his account in a timely manner and without cost and promptly notify the Bank of the fraudulent activity earlier than the 18 months that Calleja took. The trial court granted summary judgment for the Bank, concluding that Calleja's claims were barred by section 4-406 of the Uniform Commercial Code ("UCC"), which the Texas legislature has codified as section 4.406 of the Business and Commerce Code. The trial court reasoned that account statements were "made available" to Calleja under section 4.406 and that Calleja waited too long to notify the Bank of the fraudulent activity. The First Court of Appeals reversed and rendered judgment for Calleja, holding that the Bank did not make the statements available to Calleja by sending them to the imposter, and further held that the UCC provision was trumped by the Bank's deposit agreement with Calleja.

Because an account holder's bank statements—which showed fraudulent withdrawals—were "made available" to him more than one year before he notified the bank of these transactions, he was precluded from recovering the funds from the bank under section 4.406 of the Business and Commerce Code.

The Supreme Court reversed, holding that section 4.406

bars Calleja's claims and that the deposit agreement does not change this outcome. Generally, a bank can be liable to its account holder for losses incurred when an imposter takes over the account. But there are exceptions. One exception, under section 4.406, requires Calleja to bear the losses at issue:

> (c) If a bank … makes available a statement of account … the customer must exercise reasonable promptness in examining the statement … to determine whether any payment was not authorized…. If, based on the statement … the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank….
> * * *
> (f) … [A] customer who does not within one year after the statement … [is] made available … discover and report the customer's unauthorized signature … is precluded from asserting against the bank the unauthorized signature ....

Thus, when a bank customer waits more than one year after a statement has been made available to report an unauthorized signature reflected on the statement, subsection 4.406(f) protects banks from liability "[w]ithout regard to care or lack of care of either the customer or the bank." Applying subsection 4.406(f) to Calleja's claims, the bulk of the transactions he challenges were listed on his bank statements more than one year before he discovered and reported the transactions. Ultimately, subsections 4.406(f) and 4.406(d)(2), which applies to the small amounts at issue, bar Calleja's claims against the Bank. In addition, the Court concluded that the deposit agreements did not alter the portions of section 4.406 that operate to bar Calleja's claims against the Bank. Thus, the Supreme Court reversed the court of appeals' judgment and remanded the case to the court of appeals for further proceedings consistent with this opinion.

Contracts

***Anadarko Petroleum Corp. v. Hous. Cas. Co., et al.*, 573 S.W.3d 187 (Tex. 2019)**

The insureds, Anadarko Petroleum Corporation and Anadarko E&P Company, L.P. (collectively, "Anadarko"), were minority-interest owners in the Deepwater Horizon drilling rig. Pursuant to a joint venture agreement with other owners of interests in the Deepwater Horizon rig, Anadarko held 25% of the ownership interest in the rig and BP was a co-owner. Following the explosion of the rig and subsequent oil spill in 2010, Anadarko incurred hundreds of millions of dollars in legal fees and related expenses defending against a multitude of civil actions related to the accident. Many of these actions were consolidated into a multi-district litigation ("MDL") in the federal district court in the Eastern District of Louisiana, and that court granted a declaratory judgment finding BP and Anadarko jointly and severally liable. BP and Anadarko later reached a settlement agreement in which Anadarko agreed to pay BP $4 billion dollars and transfer a 25% ownership interest to BP in return for BP agreeing to release any claims it had against Anadarko and indemnify Anadarko against all other liabilities arising from the Deepwater Horizon incident. BP did not agree to cover Anadarko's legal fees and other defense expenses, which Anadarko contended were over $100 million.

Insured sued excess insurers to recover under an energy package policy for defense, investigation, and expenses paid in connection with the Deepwater Horizon drilling rig incident. The Supreme Court held that the Joint Venture Provision in the insurance policy did not limit the underwriters' liability for the insured's defense expenses.

Prior to the incident, Anadarko purchased an "energy package" insurance policy on the Lloyd's London market which provided excess-liability coverage limited to $150 million per occurrence. Following the settlement, the Underwriters on the policy paid Anadarko $37.5 million, based on Anadarko's 25% ownership interest in the joint venture that operated

the Deepwater Horizon rig. Anadarko sued, claiming that the Underwriters were obligated to pay all of Anadarko's defense expenses up to the $150 million limit. While the Underwriters agreed that the policy covers the costs Anadarko incurred defending civil actions, the Underwriters contended that a clause in the policy addressing joint ventures limited coverage for Anadarko's liabilities arising from the Deepwater Horizon joint venture to Anadarko's ownership share—25% (25% of $150 million is $37.5 million). Anadarko conceded that the clause limited the Underwriters' obligation to Anadarko's share of the joint venture *liabilities*, but argued that the Underwriters were also liable for Anadarko's *defense expenses*, which would require coverage up to the policy's $150 million limit. Therefore, Anadarko sought the $112.5 million remaining unpaid.

The trial court granted Anadarko's motion for partial summary judgment, concluding that an exception to the joint venture clause applied where Anadarko's share of the joint venture's liabilities exceeded its ownership interest. The court of appeals reversed the trial court's judgment, rendering judgment for the policy holders after concluding that exceptions to the joint venture clause did not apply. The Supreme Court reversed the court of appeals, rendered judgment granting Anadarko's motion for partial summary judgment, and remanded to the trial court for further proceedings.

The Supreme Court held that the joint venture clause in the insurance policy did not limit coverage for defense expenses. Because the policy did not actually define the term "liability," the Supreme Court endeavored to give the term its intended meaning in construing the terms of the policy. While dictionary definitions indicated that the common meaning of "liability" seemed to encompass defense expenses, the Court's interpretation of specific provisions of the disputed policy indicated that the parties intended a narrower definition of the term. Likewise, reference to insurance industry custom corroborated this narrower definition of "liability" as being exclusive of defense expenses. In light of its analysis of the meaning of "liability," the Court concluded that the policy

limited coverage of Anadarko's share of the joint venture's liabilities to 25%, but that the remaining defense expenses nonetheless extended coverage to the $150 million policy limit.

Mootness

***Pressley v. Casar*, 567 S.W.3d 327 (Tex. 2019) (per curiam)**

Gregorio Casar and Laura Pressley finished first and second, respectively, in the 2014 Austin City Council general election for the District 4 council seat. Pressley petitioned the Texas Secretary of State for a manual recount, and the recount confirmed the original results: Casar won by 1,291 votes. Pressley next filed an election contest, arguing that the "cast vote record" (CVR) of each electronic vote cast was not a "ballot image" as the Texas Election Code requires. Pressley also asserted that election officials committed criminal violations by preventing poll watchers from observing the retrieval, sorting, and copying of CVRs, and also that the results of the election were unknowable due to the following irregularities: (1) failure to print tapes used to verify that the election machines had zero votes when the election started, and what the total vote count was at the end of voting; (2) broken seals on election machines; (3) tally machines left open for extended periods of time; (4) statistical anomalies; (5) invalid or corrupt mobile ballot boxes; and (6) election officials preventing poll watchers from observing certain recount activities.

The runner-up in a city council election filed a lawsuit contesting the election. The Supreme Court held that the election contest was moot, but also that the trial court's imposition of sanctions against the plaintiff was an abuse of discretion because there was some legal or factual basis for the plaintiff's claims.

After substantial discovery, Casar filed traditional and no-evidence summary judgment motions and moved for Chapter 10 sanctions against Pressley and her attorney for pleadings that lacked legal or factual support. The trial court granted Casar's no-evidence summary judgment motion and, after a hearing, awarded

$40,000 in sanctions against Pressley, $50,000 against Pressley's attorney, and $7,794.44 against both for Casar's expenses, as well as contingent appellate fees. The court of appeals affirmed on all issues, concluding that the trial court did not abuse its discretion or award excessive sanctions. Pressley appealed again, but by the time her petition was filed for Supreme Court review, Casar had already been reelected and began serving his second term in office on January 6, 2017.

In a per curiam opinion rendered without oral argument, the Texas Supreme Court reversed the lower courts, holding (1) that the election contest was moot due to the contested term having expired, and (2) that the trial court abused its discretion in awarding sanctions against Pressley and her attorney. On the mootness issue, the Court disagreed with Pressley that her claims were subject to the mootness exception as "capable-of-repetition-but-evading-review," due in large part to Pressley's "lack of urgency" in pursuing her appeals during the contested term; Pressley filed eight motions of extension of time and took over a year to file all of her briefing in the Supreme Court alone. Regarding the sanctions, the Supreme Court agreed with Pressley that her claims that the election results were unknowable due to the above-listed irregularities were not frivolous; though Pressley's claims "individually and collectively might have been losing ones" they were at least supported with some evidence and legal basis, including the testimony of a computer-science and data expert, statistics from prior elections, and other evidence. Because Pressley had at least some evidence and legal basis for her claims, her arguments were non-frivolous, and the trial court therefore abused its discretion in sanctioning Pressley and her attorney, and the court of appeals likewise erred in affirming the sanctions.

Statute of Limitations & Mootness

***Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523 (Tex. 2019)**

Glassdoor, Inc. operates a jobs and recruiting website

on which users may post anonymous reviews and ratings of current and former employers. Reviews are available to site users free of charge, but users must agree to the site's terms of service. Glassdoor has no involvement in drafting or editing the reviews that its users post. Between July 2014, and June 2015, 10 negative reviews of an employer, Andra Group, were posted on Glassdoor by anonymous users claiming to be former employees. In August 2015, Andra filed a petition requesting deposition before suit, seeking to depose Glassdoor pursuant to Texas Rule of Civil Procedure 202 for the purpose of obtaining the identities and account information of Glassdoor users who posted anonymous reviews of Andra. In its petition, Andra alleged that it "did not anticipate any claims against Glassdoor" but sought to investigate claims for defamation or business disparagement against the users who posted reviews of Andra on Glassdoor's website. Glassdoor filed an answer opposing Andra's petition and asserting that disclosure of the users' identities would violate the First Amendment, and also filed a motion to dismiss under the TCPA.

Employer filed petition to conduct a pre-suit deposition of the operator of a jobs and recruiting website for the purpose of obtaining identities and account information of anonymous reviewers who posted negative reviews of employers on the operator's website. The operator filed a motion to dismiss under the Texas Citizens Participation Act (TCPA), but the Supreme Court ultimately held that the motion to dismiss was moot because the statute of limitations barred pre-suit discovery by the employer.

The trial court denied Glassdoor's motion to dismiss and granted Andra's request to depose Glassdoor under Rule 202; the trial court found expressly that the benefit of allowing Andra to investigate allegedly defamatory statements outweighed the burden on Glassdoor. The trial court did limit the scope of the deposition to two reviews which alleged racism, sexism, and violations of labor laws. The court of appeals affirmed, holding that the trial court had a reasonable basis for concluding that Andra may be able to develop a viable business disparagement

claim—which, unlike libel, has a two-year statute of limitations—and that the reviews include factual assertions of illegal conduct, and were not merely expressions of opinion or hyperbole, as claimed by Glassdoor. The Supreme Court vacated the judgments of the trial court and court of appeals and dismissed the case for want of jurisdiction, concluding that both the Rule 202 petition and TCPA claim were moot.

Regarding Andra's Rule 202 petition, the Court held that its claims for disparagement were barred by the statute of limitations. Despite Andra's arguments that the reviews—still available on Glassdoor—were effectively "republishe[d]" each time a viewer accessed the site, and alternatively that the discovery rule tolled the statute of limitations until Andra learned the identities of the anonymous users, the Supreme Court held that the claims were stale. The Supreme Court noted the consensus among courts that the "single publication rule" in cases alleging libel in mass print media triggers the running of the limitations period at the time that the libelous matter is made available to the publisher's intended audience. Likewise, the discovery rule only tolls the statute of limitations until the claimant discovers the *injury* underlying its claims, not the identity of the alleged tortfeasor. Because the two-year statute of limitations barred Andra's claims against each of the 10 anonymous reviewers based on reviews published prior to August 2015, Andra's Rule 202 petition is moot.

The Court also held that Glassdoor's TCPA motion was moot. Despite acknowledging that, in some circumstances, a party seeking attorneys' fees under a prevailing-party statute like the TCPA would have a live claim in a suit which was otherwise mooted in all other respects, the Court noted that in this case, Glassdoor lost on its TCPA motion at the trial and intermediate appellate levels. By the time Glassdoor succeeded in dismissing Andra's claims at the Supreme Court, Andra's claims were already barred by the statute of limitations; thus, Glassdoor could not be a "prevailing party" for the purpose of collecting attorneys' fees under the TCPA.

***Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725 (Tex. 2019)**

Sabre Travel International ("Sabre") uses a Global Distribution System ("GDS") to connect airlines with consumers by aggregating ticket offerings by multiple airlines and allowing travel agents to compare prices when shopping. Lufthansa contracted with Sabre to market and sell tickets through GDS; the contract provided that Sabre would receive a booking fee when travel agents book flights on Lufthansa, and also contained non-discrimination provisions preventing Lufthansa from disadvantaging travel agents that use Sabre's GDS rather than a competing GDS. In order to decrease costs from using GDSs (including Sabre's), Lufthansa introduced an $18 surcharge to each airline ticket sold through GDS channels. The surcharge did not apply to tickets purchased through non-GDS channels, such as direct connections and Lufthansa's own website. Sabre protested that the surcharge breached the non-discrimination provision because Lufthansa did not impose surcharges equally across all GDSs. Lufthansa disputed that the surcharges breached its contract with Sabre and sought declaratory judgment on this issue. Additionally, in response to the surcharge, Sabre allegedly began encouraging travel agents to breach their contracts with Lufthansa by directing the travel agents to book travel through Lufthansa's direct connections—where there was no surcharge—and then enter itineraries into Sabre's GDS so that travel agents could avoid the surcharge and Sabre could collect its booking fee. Lufthansa added a claim for tortious interference to its declaratory

Airline brought declaratory judgment action against ticket seller, seeking declaration that the airline's surcharge on certain tickets did not violate the airline's contract with the ticket seller, and also alleging breach of contract and tortious interference by the ticket seller. The seller moved to dismiss the tortious interference claim.

judgment action to address Sabre's alleged workaround.

Sabre filed a motion to dismiss Lufthansa's tortious interference claim, arguing that the Airline Deregulation Act ("ADA") preempted Lufthansa's state law contract claim. The trial court denied the motion but certified the legal question for permissive interlocutory appeal. The court of appeals denied the permissive appeal in a single-sentence memorandum opinion, noting in a footnote that "courts strictly construe the interlocutory appeals statute." Sabre filed a petition for review by the Supreme Court, arguing that the court of appeals abused its discretion by denying the permissive interlocutory appeal and also arguing that the ADA preempted Lufthansa's tortious interference claim. Holding (1) that it had jurisdiction to address the merits of the interlocutory appeal, and (2) that the ADA did not preempt Lufthansa's tortious interference claim, the Court ultimately affirmed the trial court's denial of Sabre's motion to dismiss that claim.

As a preliminary matter, the Court held that the appellate court's denial of Sabre's permissive appeal did not affect the Supreme Court's jurisdiction; even though the court of appeals did not abuse its discretion in denying a permissive interlocutory appeal, the Supreme Court still had jurisdiction to address the merits of the interlocutory appeal because the trial court correctly certified the interlocutory appeal under TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.

Turning to the merits of the interlocutory appeal, the Court held that the ADA did not preempt Lufthansa's tortious interference claim because there was sufficient detail in the record to allow the Court to conclude that Lufthansa's tortious interference claim did not relate to the airline's prices, routes, or services—as required by the ADA. The Court was persuaded by Lufthansa's argument that the tortious interference claim addressed allocation of *costs* of tickets, rather than the *price* of the tickets themselves; in other words, the customer paid the same price for a ticket regardless of whether Sabre's GDS booking fee was applied—the bases for the claim were actions by Sabre to induce travel agents to book the sale in GDS *after* the

sale was already completed in order to avoid the GDS surcharge and allow Sabre to collect its booking fee. While Sabre argued that Lufthansa's claim still triggered preemption by relating to airline *services*, the Court concluded that the connection was too "tenuous, remote, or peripheral" to have a preemptive effect.

Finally, the Court concluded that the tortious interference claim did not have an impermissible regulatory effect on airlines, as prohibited by the ADA. Rather than intruding upon an area of federal airline regulation which Congress sought to preempt, the Court concluded that the tortious interference claim was merely an attempt by Lufthansa to use state law to protect Lufthansa's private contracts with its travel agents.

Implied Warranty of Good and Workmanlike Repair

***Nghiem v. Sajib*, 567 S.W.3d 718 (Tex. 2019)**

Nghiem and Sajib were passengers in Nghiem's small plane when its engine failed and the plane crash-landed, injuring both. The pilot was an employee of Global Aviation Services, Inc. ("GAS"), which serviced the plane for years prior to the accident and also made repairs to the plane immediately before the crash. Sajib sued GAS for negligence several weeks prior to the expiration of the two-year statute of limitations. After the statute of limitations expired, Nghiem petitioned to intervene as a plaintiff in the suit, asserting a claim for negligence and a claim for breach of the implied warranty of good and workmanlike repair of tangible goods and property, and seeking damages for injury to Nghiem's plane as well as for his personal injuries.

GAS moved to strike Nghiem's petition, arguing that both claims were barred by the two-year statute of limitations. Specifically, GAS argued that Nghiem's implied warranty claim was actionable only under the Deceptive Trade Practices Act ("DTPA"), which has a two-year limitations period. While Nghiem conceded that his negligence claim was barred by

the statute of limitations, he argued that his implied warranty claim could be brought under the common law, rather than the DTPA, availing him of the longer four-year limitations period.

The trial court sided with GAS and struck Nghiem's petition to intervene, severing its final order so that the order was immediately appealable. The court of appeals affirmed the trial court's order, concluding that the implied warranty claim could only be brought under the DTPA and its applicable 2-year limitations period. The Supreme Court reversed and remanded for further proceedings, holding that a breach of the implied warranty of workmanlike repairs can be asserted in an action for violations of the DTPA or in a common-law action.

Proposed intervenor who was injured in a plane crash filed a petition to intervene in a pending negligence lawsuit against a company that maintained and repaired the airplane prior to the crash. The intervenor sought to assert a claim for breach of the implied warranty of good and workmanlike repair of tangible goods or property.

The Supreme Court had held in several prior cases that a consumer can maintain an action for breach of an express or implied warranty under the DTPA. However, the Court also previously held that the DTPA is not the exclusive remedy for a breach of warranty, but merely provides a new cause of action separate and apart form a cause of action under the common law. As the Court explained, the DTPA does not create any warranties, but instead offers unique damages and remedies in addition to any other procedures or remedies provided in any other law. The Court agreed with Nghiem that his common-law action for breach of the implied warranty could be brought independently of the DTPA and was therefore not constrained by the DTPA's two-year statute of limitations.

While Nghiem did not dispute that no written contract existed between Nghiem and GAS, Nghiem alleged breach of an oral contract as the basis for his argument that his claim for breach sounded in contract, rather than tort. This was a significant issue for determining whether the shorter two-year statute of limitations for torts applied—barring Nghiem's

claim—or whether the four-year residual statute of limitations for contract claims applied. The Supreme Court noted that no statute of limitations expressly refers to an action for breach of the implied warranty, and that in similar cases courts looked to analogous causes of action to determine which limitations period applied. The Court remarked that causes of action for breach of implied warranties "defy simple categorization" because an implied warranty is "a freak hybrid born of the illicit intercourse of tort and contract."

After reciting a collection of precedents evaluating implied warranty claims as sounding in either tort or contract law on a case-by-case basis, the Court held that the trial court abused its discretion in striking Nghiem's plea in intervention. However, the Court concluded that it did not need to decide the broader issue of whether Nghiem's claim for breach of the implied warranty sounded in tort or contract. Because GAS only argued on appeal that Nghiem's claim could only be brought under the DTPA's two-year statute of limitations, the Court did not consider whether the two-year limit for all tort claims applied to Nghiem's claim for breach of the implied warranty.

Workers' Compensation

***Exxon Mobil Corp. v. Ins. Co. of Penn.*, 568 S.W.3d 650 (Tex. 2019)**

Texas's no-fault workers' compensation system permits insurance carriers to recoup all benefits paid to an injured worker from the "first money" the worker recovers from a liable third party, but carriers may choose to waive this right in exchange for an enhanced premium. Following an accidental discharge of hot water at Exxon's Baytown refinery, two employees of Savage Refinery Services ("Savage")—a subcontractor hired by Exxon to perform work at the facility—were injured. The two injured workers received compensation benefits from the workers' compensation carrier—Insurance Company of the State of Pennsylvania ("Carrier")—and each later settled out of court with Exxon. Exxon did not allege that Savage was

responsible for the accident and agreed to assume liability for it. However, Exxon also filed a third-party action against Carrier seeking declaratory judgment that Carrier had waived all recovery rights against Exxon via an endorsement to Savage's workers' compensation policy.

The endorsement contained the Texas Department of Insurance's standard-form "subrogation" waiver, which specified that Carrier had the right to recover payments from anyone liable for an injury covered by the policy, but that Carrier would not enforce the right against any person or organization named in a schedule attached to the waiver, or otherwise "where [Savage is] required by a written contract to obtain this waiver from us." The primary issue on appeal was whether the quoted language was broad enough to include Exxon, despite the fact that Exxon was not named expressly in the waiver's schedule. Exxon argued that its service contract with Savage was sufficient to entitle Exxon to the subrogation waiver, while Carrier argued that Savage's agreement to provide a subrogation waiver was conditioned on Savage's assumption of liability. Both Exxon and Carrier agreed that Savage had not assumed liability for the workers' injuries, but Exxon argued that the language of the waiver was broad enough to include all contracts—including the service contract—in which Savage agreed to provide workers' compensation coverage for its employees.

Oil refiner owner sued its subcontractor's workers' compensation carrier, seeking declaratory judgment as to whether the carrier waived its subrogation rights against the owner which otherwise entitled the carrier to recoup payments made to the subcontractor's employees who were injured in an oil refinery accident caused by the owner's negligence.

The trial court granted summary judgment for Exxon, declaring that Carrier had waived all subrogation rights against Exxon, but the trial court did not specify the basis for its ruling. The court of appeals reversed and remanded, holding that because Exxon was not required to indemnify Exxon under the terms of the service agreement, it did not "assume liability" for the injuries

to the workers and was not contractually obligated to cause Carrier to waive subrogation rights against Exxon.

The Supreme Court reversed the court of appeals and remanded to the trial court for further proceedings. The Court held that the standard-form subrogation waiver in Savage's workers' compensation policy defined its applicability by reference to extraneous contracts, but only incorporated the terms of extraneous contracts to the extent necessary to determine who may claim the waiver. In consulting the service contract between Exxon and Savage, the Court concluded that the service contract required Savage to obtain a subrogation waiver for Exxon. Next, the Court concluded that the subrogation waiver applied to the type of bodily injuries which were suffered by the workers injured at Exxon's Baytown refinery—bodily injuries "arising out of the operations" of the Baytown refinery where Savage was contractually obligated to provide services. As noted by the Court, a hypothetical injury of a Savage employee at an Exxon refinery in Dallas (beyond the terms of the service contract) might satisfy the waiver's requirements for identifying "who" can claim the waiver and "what" injury is covered by the waiver, but would fail to satisfy the requirement that Savage have a "written contract" obligating it to obtain the waiver.

Thus, the Court concluded that the subrogation waiver operated to waive Carrier's subrogation rights against Exxon for settlements paid to the Savage workers injured in the accident at Exxon's Baytown refinery.

Fraudulent Inducement & Negligent Misrepresentation

Mercedes-Benz USA, LLC v. Carduco, Inc., 583 S.W.3d 553 (Tex. 2019)

In May 2008, Carduco submitted an Asset Purchase Agreement ("APA") to MBUSA along with Carduco's application to become a Mercedes-Benz dealer. The APA

provided that Carduco was "only purchasing the right to conduct a Mercedes-Benz retail sales dealership at Purchaser's present location in Harlingen, Cameron County, Texas." Around the same time, MBUSA engaged Heller-Bird, a successful MBUSA franchisee in Boerne, Texas, in discussions about building a new Mercedes-Benz dealership in the McAllen, Texas area. MBUSA did not inform Carduco of these discussions. Carduco subsequently expressed interest in moving the Harlingen dealership to McAllen, partially due to MBUSA previously encouraging the prior owner of Carduco's dealership to build a new location in McAllen. MBUSA suggested that Carduco submit a second application to operate a Mercedes-Benz franchise in McAllen, but Carduco never submitted a second application and MBUSA continued discussions with Heller-Bird. In May 2009, representatives from MBUSA met with Carduco representatives at the Harlingen dealership, and Carduco once again suggested that MBUSA authorize it to open a new dealership in McAllen, even taking the MBUSA representatives to visit two locations in McAllen. The MBUSA representatives stated that any application to relocate Carduco's dealership would need to be approved by MBUSA's regional franchise manager in Chicago. Carduco's owner later claimed to be unaware of the parallel talks between MBUSA and Heller-Bird during this period.

An automobile dealership franchisee brought action against franchisor for fraudulent inducement and negligent misrepresentation. The Supreme Court held that the dealership agreement negated justifiable reliance by franchisee on the alleged misrepresentation by franchisor.

In June 2009, Carduco signed a Dealer Agreement with MBUSA that identified Harlingen as the dealership location and prohibited Carduco from changing locations without MBUSA's written consent. The Dealer Agreement also stated that Carduco did not have an exclusive right to sell Mercedes-Benz products within its defined "area of influence," and expressly permitted MBUSA to add new dealers or relocate

dealers into Carduco's designated area of influence. Two months later, MBUSA informed Carduco that Heller-Bird would manage a new dealership in McAllen. Carduco formally requested permission to relocate to McAllen, MBUSA denied the request, and Carduco filed suit, alleging that MBUSA, MBUSA's representatives, and MBUSA's regional franchise manager fraudulently induced Carduco to believe that its bargain with MBUSA included the opportunity to relocate to McAllen as the exclusive Mercedes-Benz dealership in the region.

A jury found for Carduco at trial, awarding $15.3 million in compensatory damages and a much larger award of punitive damages of $100 million against MBUSA, $2.5 million against each of the two named MBUSA representatives, and $10 million against MBUSA's regional franchise manager. The court of appeals suggested a remittitur of the punitive damages award to $600,000, but otherwise affirmed the trial court's judgment.

The Supreme Court reversed the court of appeals and rendered a take-nothing judgment for Carduco. The Court held that Carduco's fraudulent inducement claim must fail because any alleged oral misrepresentations by MBUSA or its employees were directly contradicted by the terms of the Dealer Agreement, according to which Carduco was limited to the Harlingen location and MBUSA expressly reserved the right to authorize new dealerships in Carduco's non-exclusive area of influence. Furthermore, the Court noted that Carduco's sole owner and decision-maker, Renato Cardenas, testified that none of the defendants actually made any oral representation to him about Carduco's ability to move the Harlingen dealership to McAllen as the exclusive Mercedes-Benz dealership there. The Court held that it was unreasonable for Carduco to rely on MBUSA's omissions and alleged indirect misrepresentations regarding Carduco's ability to establish a dealership in McAllen; the Court noted that if Carduco was relying on MBUSA not to assign any other dealer to the McAllen area so Carduco could relocate there, "then Carduco should have insisted on these

terms in the parties' contract rather than agreeing in writing to the opposite."

The Court likewise rejected the court of appeals' reasoning that MBUSA had a duty to disclose information regarding its ulterior discussions with Heller-Bird. The Court noted that, generally, no duty to disclose arises without evidence of a confidential or fiduciary relationship, and that the relationship between a franchisor and a prospective franchisee is not a special or fiduciary relationship. In light of the absence of evidence that MBUSA or its employees made any affirmative disclosure or representation to Carduco regarding Carduco's ability to move its dealership to McAllen as the exclusive Mercedes-Benz dealership there, the defendants did not have a duty to disclose arising out of a voluntary disclosure, misrepresentation, or partial disclosure. Finally, the Court concluded that Carduco and its owner—an experienced car dealer with decades of experience and affiliations with several manufacturers—were unjustified in relying on any alleged misrepresentations by MBUSA which were directly contrary to the terms of the Dealer Agreement that Carduco subsequently signed. Because reliance was unjustified as a matter of law, no basis existed for the actual or punitive damages awarded to Carduco, the court of appeals erred in affirming the trial court's judgment, and judgment was rendered by the Supreme Court that Carduco take nothing.

Sovereign Immunity; Abrogation

Hughes v. Tom Green County, 573 S.W.3d 212 (Tex. 2019)

Duwain E. Hughes, Jr. left his mineral interests to SMU for the purpose of establishing an endowed chair in the English Department. Hughes left his home and its contents, including his rare book and music collections, to Tom Green County. He directed that his home should be used as a branch library and was to be called the "Duwain Hughes Branch of the Tom Green County Library," but provided that the library could sell the

house and use the proceeds for new books and materials for the county library. Finally, Hughes devised the residue of his estate to the Tom Green County Library, to pay off any indebtedness on his home, for upkeep, and for new books. By 1991, SMU's proceeds from the Hughes mineral interests were over $1.5 million, the highest level of funding for an English Department chair at the university. SMU's board of trustees thus filed an application to release the restriction on the use of the bequest, seeking authority to use the excess funds for other purposes in the English Department. Tom Green County intervened, arguing the testator's intent to establish an endowed chair had been accomplished, and thus arguing that it was entitled to all excess proceeds under the will's residuary clause. Later, Charles Hughes, the testator's nephew, intervened on behalf of the heirs at law and sought title to the mineral interests. He argued that the will's grant to SMU had been defeated by the funding of the chair, but also that the library's sale of the testator's home and its contents caused the limited purpose of the will's residuary clause to lapse. That meant the heirs at law, not the county or SMU, were entitled to the mineral interests and proceeds.

The probate court directed the parties to mediation. The county and heirs entered into a Mutual Partial Assignment ("MPA") agreement to present a unified defense to SMU's request to lift the restrictions on its bequest, in which they agreed to split any recovery 50/50. The MPA also stated the county would name the library in honor of Hughes "if the commissioners consider the County's ultimate recovery in the cause to be substantial enough for such recognition." Hughes and the county settled their claims against SMU for $1 million. Even with the $500,000 from the settlement, the library project languished for years. More than a decade later, a different family, the Stephenses, started a new fundraising effort in which

County lacks governmental immunity for breach of settlement agreement when the county's immunity in the underlying lawsuit was abrogated under *Reata Construction Co. v. City of Dallas*.

they raised $16 million for the library—including a $3 million donation from the family. The county decided to recognize that gift and attached the Stephenses' name to the library. The commissioners court resolved that the $500,000 recovery from SMU was not substantial enough to name the library for Hughes. Feeling slighted, Hughes' nephew sued the county. The county filed a plea to the jurisdiction based on governmental immunity, which the trial court granted. The trial court did not grant a full final judgment, however, rendering its order interlocutory. Still, the court of appeals affirmed.

The Supreme Court, in a decision by Justice Devine, reversed. Initially, the Court recognized that the order being appealed was interlocutory. Under the Court's former jurisdictional statute, which was in place when the trial court signed the order being reviewed, the Court's jurisdiction depended on the existence of a dissent or conflict. But the Court applies jurisdictional statutes as they exist at the time of its judgment. The 2017 revisions to the Court's jurisdiction grant it jurisdiction over interlocutory orders.

The Court agreed with Hughes that the county lacked immunity from his breach-of-settlement suit. In the underlying dispute with SMU and Hughes, the county's intervention made it a voluntary litigant and invoked jurisdiction over all adverse claims to title. That subjected it to all the same risks, rules, and costs as every other litigant. Under *Reata*, the county therefore had no immunity from Hughes' claim to the same mineral rights, which was germane, connected, and properly defensive and offsetting to the county's affirmative suit for title. And because the county had no immunity in the underlying suit, it likewise had no immunity for a breach of the settlement agreement regarding that underlying suit. A governmental entity cannot create immunity for itself by settling a claim for which it lacks immunity, only to then assert immunity in a later suit to enforce the government's agreement.

Justice Boyd, joined by Justice Lehrmann and Justice Brown, concurred. The county never had immunity in the first case because no claim was ever asserted against it. SMU initiated

an in rem probate proceeding. The county and Hughes merely sought declarations; no one asserted a claim. Thus, the county had no immunity in the underlying suit and could not create it in this one.

Sovereign Immunity; Governmental Entity

***Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738 (Tex. 2019)**

Rosenberg Development Corporation ("RDC") is a Type B economic development corporation ("EDC") created by the City of Rosenberg under the Development Corporation Act. RDC is a statutorily defined "governmental unit" incorporated to promote, assist, and enhance economic and industrial development activities, and to promote or develop new business enterprises, including public facilities. RDC executed a contract with Imperial Performing Arts in which it agreed to pay $500,000 to lease, renovate, and open an arts center and theater, and to promote RDC. RDC paid Imperial as promised, but the contract soon veered off course when it turned out the projects were more time-consuming and expensive than originally thought. Nevertheless, Imperial completed and opened the arts center close to the scheduled date, but it asked RDC to extend the deadline for renovating the theater. RDC said no, and Imperial stopped work. Imperial brought breach-of-contract and declaratory-judgment claims against RDC. RDC filed a plea to the jurisdiction based on immunity from suit, which the trial court largely denied. The court of appeals affirmed, holding that RDC is not immune from suit under the common law.

Economic development corporations are not governmental entities with inherent immunity.

The Supreme Court, in an opinion written by Justice Guzman, affirmed. First, the nature of EDCs is a mixed bag. The Act characterizes EDCs as nonprofits with the powers,

privileges, and functions of a nonprofit corporation. But though they are private entities, they have a governmental flair. For example, the Legislature demands transparency and requires compliance with the Open Meetings Act and Public Information Act. Authorizing municipalities have supervisory control over the EDCs they create. And the Act provides that Type B EDCs are not liable for damages arising from governmental functions, and that EDCs are "governmental units" that perform governmental functions. But it also says that EDCs are not political subdivisions and forbids municipalities from bestowing on an EDC any "attributes of sovereignty."

The question, then, is whether RDC is immune from suit even though it is neither a sovereign entity nor a political subdivision. The answer is no. Where governing statutory authority demonstrates legislative intent to grant an entity the nature, purposes, and powers of an arm of state government, that entity is a governmental unit unto itself and is entitled to immunity when it performs governmental functions. But here the Legislature did not intend EDCs to have discrete governmental-entity status separate and apart from their authorizing municipalities. EDCs are not political subdivisions and cannot be delegated attributes of sovereignty. The statutory scheme thus evidences legislative intent that EDCs are not arms of state government. That EDCs engage in public purposes does not change their nature as private entities.

Chief Justice Hecht concurred, agreeing that EDCs are not governmental entities entitled to immunity from suit. But he wrote to point out the highly unusual features of Class B EDCs, including their statutory immunity from liability.

Interlocutory Appeal; Media Law

***Dall. Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753 (Tex. 2019)**

Jose Reyes was a low-level customer-call-center employee at Bank of America and a longtime volunteer for the Dallas Symphony Orchestra. He acquired a reputation for crashing

events, photobombing, and speaking to the media purportedly on the Orchestra's behalf but without authorization. So the Orchestra told Reyes he was no longer welcome as a volunteer, and it contacted the Bank to inform it of the decision. Reyes, in turn, emailed the Orchestra's CEO, stating that the Bank was "not impressed" by the Orchestra and that he "won't go quietly." The CEO forwarded the email to the Orchestra's Bank contact. Seven days later, the Bank terminated Reyes' employment. The Orchestra also issued a media advisory informing its sponsors and media partners that Reyes was no longer affiliated with the Orchestra. D Magazine investigated, interviewed Reyes, and published an article detailing how Reyes had "duped Dallas society" and concluding by noting that the Orchestra and Bank both fired him.

Reyes sued D Magazine and the Orchestra. Both moved for summary judgment, with D Magazine arguing that many of the statements in its article were constitutionally protected. The trial court issued an order granting D Magazine's motion on some claims but denying it on others; it did the same as to the Orchestra's motion. Invoking Section 51.014(a)(6) of the Civil Practice and Remedies Code, both D Magazine and the Orchestra appealed the interlocutory orders denying their motions for summary judgment. The court of appeals held that that provision, however, only permitted an immediate appeal of claims involving free speech or press issues, and concluded that its review was limited to the denial of summary judgment on such claims. The court dismissed Reyes' claims implicating rights of free speech and free press, but it held it lacked jurisdiction to consider the Orchestra's argument that its motion for summary judgment on Reyes' tortious interference claim should not have been denied. On this last issue, six of the 13 justices on the court of appeals dissented from the denial of the Orchestra's motion for rehearing en banc.

Appeal from interlocutory order denying summary judgment based on constitutional rights of the press permits appeal from entire order, not just order on constitutional issues.

The Supreme Court, in a unanimous decision by the Chief Justice, reversed. The court of appeals relied on a 1979 decision prescribing a strict construction of the interlocutory appeal statute. That may have made sense when such appeals were rare, but no longer. The goal is instead to give the statute a fair construction, and given the interlocutory appeal statute's expansion, "fair" does not mean "strict." The court of appeals then focused on the "purpose" of the statute, which it said was to allow immediate appeals involving free speech or press issues directed at the press or relied on by the press as information sources. For that reason, it held that it lacked jurisdiction over non-constitutional grounds. But the text should have been the focus, and the text permits appeal from "an order," not just the aspects of the order implicating constitutional rights. The Court thus held that "order" means the ruling on the entire motion, including non-constitutional grounds.

With that, the Court considered the merits: whether the Orchestra and D Magazine were indeed entitled to summary judgment, either on constitutional or non-constitutional grounds. It answered yes. There is no evidence that the Orchestra told the Bank anything other than what it announced publicly (which was the truth), no evidence that the Bank did not have the means to access Reyes' email, and no evidence that the Orchestra did or said anything to encourage the Bank to terminate Reyes' employment. The Orchestra was entitled to summary judgment on Reyes' tortious interference claim. So, too, D Magazine was entitled to a total summary judgment. The court of appeals said yes, and the Court agreed with its analysis.

Governmental Immunity: Governmental-Proprietary Dichotomy; Waiver

Hays St. Bridge Restoration Grp. v. City of San Antonio, 570 S.W.3d 697 (Tex. 2019)

The Hays Street Bridge is an historic landmark in San

Antonio, built in the 1880s. But by the 1980s, the Bridge had become unsafe for vehicles and pedestrians. The City ordered it closed, and the railroad made plans to demolish it. Residents, though, formed the Hays Street Bridge Restoration Group to persuade the city to preserve and restore the Bridge for community use, as well as to develop the land around it to feature a park and trail, among other things. And successfully so. The City obtained $2.89 million in federal funds to rehabilitate the bridge; the City's agreement with the Texas Department of Transportation required the City to fund 20% of the project. The City and the Restoration Group then executed a Memorandum of Understanding ("MOU") to outline funding responsibilities. The Restoration Group promised to match funds through grant applications and to transfer those funds to the City; the City agreed to ensure any funds generated by the Restoration Group would go directly to the Hays Street Bridge project. Over the next decade, the Restoration Group raised and transferred nearly $200,000 and arranged for significant in-kind donations—including the Bridge itself and the nearby Cherry Street property by its private owners. In 2010, the City finished restoring the Bridge, but it decided not to use the Cherry Street property for a park. Instead, it decided to sell the property to a beer company, which was to build a brewery on the property.

The Restoration Group sued, alleging that the transfer of the Cherry Street property to the beer company would breach the City's promise in the MOU to apply funds raised by the Restoration Group directly to the Hays Street Bridge project. The City denied that the property was "funds" within the meaning of the MOU. A jury determined that "funds" included in-kind donations—and thus the property—and that the City therefore failed to comply with the MOU. For its breach-of-contract claim, the Restoration Group sought only specific performance. The trial court agreed and ordered the City to apply and use all funds—including the Cherry Street property—directly to the City budget for the Hays Street Bridge project. Following rendition of judgment, the City went on with

its plan to sell the Cherry Street property. The Restoration Group contended that plan was prohibited by the judgment and moved to have the City held in contempt. Before that motion was heard, though, the City appealed the judgment, staying its enforcement. The court of appeals concluded the City was immune from suit, reversed the trial court's judgment, and dismissed the case. That court held the City's functions under the MOU were governmental, and that the Act does not waive the City's immunity from suit for specific performance of a contract.

In a unanimous opinion by the Chief Justice, the Supreme Court reversed. After quickly disposing of a belatedly asserted mootness argument, the Court turned to whether the City was immune from specific performance. First off, the Restoration Group's suit for specific performance may implicate immunity even though no government funds are at issue. Immunity is implicated by any suit that seeks to control governmental action, and this one does. So the next question is whether the City has been sued for governmental acts, for which it is immune, or proprietary acts, for which it is not. Here the City's functions under the MOU were governmental, as the MOU was made to support the city-state funding agreement for the restoration of the Bridge and the surrounding area—and the Tort Claims Act defines "bridge construction and maintenance" and "community development or urban renewal activities" as governmental functions. The project, moreover, is intended to benefit the general public and is funded largely by TXDOT, and the MOU's purpose is sufficiently related to governmental functions listed in the Tort Claims Act.

The waiver of governmental immunity for certain claims provided by the Local Government Contracts Act (the "Act") applies when the remedy sought is specific performance rather than money damages.

The Court then considered whether the Local Government Contract Claims Act waives the City's immunity. That Act waives a City's immunity to adjudicate breach-of-contract

claims like this one, subject to the Act's terms and conditions. Those terms include a limitation on damages. But damages are not equivalent to remedies: "[d]amages is money," whereas specific performance is an equitable remedy. By not mentioning any limit on equitable remedies, the Act does not impliedly prohibit every suit seeking equitable remedies like specific performance. Accordingly, the Court held that the Act waives the City's immunity from suit on the Restoration Group's claim for specific performance.

Governmental Immunity; Waiver

Hillman v. Nueces County, 579 S.W.3d 354 (Tex. 2019)

Eric Hillman was an assistant district attorney in Nueces County. While preparing to prosecute a defendant charged with intoxicated assault and leaving the scene of an accident, Hillman discovered and interviewed a witness who said she was with the defendant the night of the incident and he was not intoxicated. Hillman told his supervisor that he needed to disclose the witness to the defendant's attorney; the supervisor disagreed and told Hillman not to disclose the witness. Hillman called the State Bar Ethics Hotline and Texas Center for Legal Ethics, and both told him to disclose. Hillman told his supervisor that he had decided to disclose the witness to the defense attorney. On the day of trial, Hillman was fired for failing to follow instructions. So Hillman sued the County, the DA's office, and the then-DA in his official capacity. The trial court dismissed the case based on governmental immunity, and the court of appeals affirmed.

Governmental immunity bars assistant district attorney's suit that the county wrongfully terminated his employment because he failed to follow his supervisor's order to withhold exculpatory evidence from a criminal defendant.

The Supreme Court, in an opinion by Justice Boyd, affirmed. Hillman sought money damages from the county, its department, and its official, so

governmental immunity bars the suit unless it has been waived. First, the exception to the at-will employment doctrine that prohibits employers from terminating employees for refusal to perform illegal acts indeed applies to governmental employers, but it does not alter the government's immunity. Second, the Michael Morton Act, which requires prosecutors to disclose to the defendant *Brady* materials, does not waive immunity. That Act does not address governmental immunity or waiver at all, and it certainly does not waive immunity unambiguously, as is required. Finally, abrogation of immunity is not appropriate here. This is not a situation in which the government has interjected itself in litigation to assert affirmative claims. And given that Hillman's claims seek exemplary damages, among other things, an award of damages could certainly disrupt the fiscal planning of the governmental entity here. If the Legislature wants to waive immunity under the Michael Morton Act, it may do so—but the Court will not.

Justice Guzman, joined by Justice Lehrmann and Justice Devine, concurred. She agreed that governmental immunity barred Hillman's claims, and that it was up to the Legislature, not the Court, to waive that immunity. In her view, the Legislature should do so, at least to some extent.

Fraud; Disclaimer of Reliance

Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC, 573 S.W.3d 224 (Tex. 2019)

Lufkin Industries manufactures machinery and equipment in the energy industry. In 2009, it decided to upgrade its business-operations computer-software system. So it looked to IBM. Lufkin told IBM that it needed an out-of-the-box or off-the-shelf system that could quickly replace its old system for less than the cost of upgrading that system. IBM recommended SAP's Express Solution, which it said was a preconfigured system that could be implemented within four to six months and meet 80% of Lufkin's requirements without enhancement.

Though IBM knew that the Express Solution would require extensive customization before it could meet most of Lufkin's needs, it continued to pitch the Express Solution as a "fit" with hopes of landing the Lufkin sale. Relying on IBM's representations, Lufkin agreed to a contract with IBM in March 2010. That contract gave IBM about a year to finalize and implement the system; IBM projected that Lufkin could "go live" in March 2011.

Implementation was a disaster. In November 2010, the new system failed multiple test runs. Thereafter, IBM asked Lufkin to be patient and overall convinced Lufkin to approve nine project change requests, in which Lufkin agreed to delay the go-live date and pay more money. Ultimately, Lufkin paid IBM about $13 million, or $6.6 million over the original price, and it agreed to settle for a go-live-ugly implementation on January 1, 2012. Lufkin only agreed to the delays and cost increases because IBM continued to represent that once implemented, the Express Solution would meet Lufkin's needs without further enhancement, and by then Lufkin had invested so much time and money that it could not start over. On the go-live-ugly date, Lufkin deactivated its old system at IBM's instruction. But the Express Solution had major problems, crippling Lufkin's business. Over the next year and a half, Lufkin worked with SAP and other consultants to construct and stabilize a working system, ultimately paying an additional $7.5 million to salvage IBM's system.

Disclaimers of reliance in agreements by sophisticated parties conclusively negated fraudulent-inducement and fraud claims.

Lufkin sued IBM, claiming fraudulent inducement and breach of contract, among other claims. The jury found IBM liable on all claims and awarded significant damages on Lufkin's fraudulent-inducement and fraud claims, but no damages for negligent misrepresentation or breach of contract. The trial court entered judgment on the verdict. The court of appeals upheld IBM's liability for fraudulent inducement but reversed the alternative fraud claim, concluding it was based on the same

misrepresentations as the fraudulent-inducement claim.

The Supreme Court, in an opinion by Justice Boyd, reversed as to the fraud claims but remanded for a new trial on Lufkin's breach-of-contract claim. Lufkin agreed that it was not relying on any representations made by IBM that were not specified in the agreement, and that the agreement was the complete agreement between Lufkin and IBM and superseded any prior communications between the parties. When sophisticated parties clearly and unequivocally disclaim reliance, the reliance element of fraudulent inducement can be conclusively negated. Lufkin argued that the misrepresentations on which its claim is based were specified in the parties' agreements, meaning the disclaimers were not effective as to them. The Court disagreed. Neither provision pointed to by Lufkin "specified" any relied-on misrepresentation, so neither negated Lufkin's disclaimer of reliance on those misrepresentations. The same is true for Lufkin's fraud claim, which is really just a fraudulent-inducement claim. Each time Lufkin authorized a change by signing a change request, it reaffirmed that it was not relying on IBM's representations in entering into the agreements.

But Lufkin is entitled to a new trial on its breach-of-contract claim. The jury found that IBM breached the contract but awarded $0 for the breach. Lufkin argued both legal and factual insufficiency, and the Court has jurisdiction to address the legal argument. Lufkin conclusively established the fact of damages, as shown by the jury's findings that IBM breached the contract, and that Lufkin suffered out-of-pocket damages. That said, the jury's answer does not show how IBM breached the parties' contract, and the evidence does not conclusively establish that it breached it in every way Lufkin alleged.

Texas Courts of Appeals Update

Andrew B. Bender, The Bender Law Firm PLLC

Discovery • Sanctions

***Corey v. Rankin*, No. 14-18-00111-CV, 2019 WL 2589857 (Tex. App.—Houston [14th Dist.] June 25, 2019, no pet.) (mem. op.).**

The Fourteenth Court of Appeals held that the trial court did not abuse its discretion by imposing monetary sanctions in connection with a failure to appear at a deposition.

After obtaining a judgment against Jack Corey and Corey Supply, Jonathan L. Rankin and RAMS Aviation Company, Inc. ("RAMS") wanted to depose Corey in an effort to collect the judgment. Rankin and RAMS tried repeatedly to schedule the deposition by agreement, but Corey never responded to those attempts. As a result, Rankin and RAMS noticed Corey's deposition for September 20, 2017 at 10:00 a.m.

On the day before the scheduled deposition, Corey and Corey Supply paid cash into the court's registry in lieu of a bond in an effort to cease enforcement of the judgment. Later that day, Corey and Corey Supply told Rankin and RAMS that Corey would not appear for his deposition because the cash deposit had been made.

Rankin and RAMS responded by moving to compel Corey's deposition, claiming that Corey and Corey Supply failed to deposit into the registry of the court sufficient funds to supersede the judgment and, in turn, suspend enforcement proceedings. Rankin and RAMS also sought sanctions against Corey and Corey Supply under Texas Rule of Civil Procedure 215 for Corey's failure to appear at the deposition. Rankin and RAMS attached to the request for sanctions evidence reflecting the attorneys' fees incurred for the time spent preparing for the deposition.

The trial court determined the judgment had been superseded and denied the request to compel the deposition.

The trial court granted the request for sanctions and ordered Corey and Corey Supply to pay the amount of fees sought by Rankin and RAMS.

On appeal, Corey and Corey Supply argued that the trial court abused its discretion by awarding sanctions because they had superseded the judgment before the scheduled deposition. According to Corey and Corey Supply, the deposition notice was no longer effective because they superseded the judgment before the deposition date. And because it was no longer effective, Corey's failure to appear for the deposition did not warrant sanctions under Rule 215.1.

In rejecting the argument advanced by Corey and Corey Supply, the Fourteenth Court of Appeals began its analysis by recognizing that whether the sanctions were proper is not governed by Rule 215.1 alone. The trial court's order did not refer to Rule 215.1 or track its language, so the court of appeals decided that the motion and arguments presented to the trial court were sufficiently broad to affirm the sanctions order under Rule 215.3, which authorizes the trial court to impose sanctions if it finds that "a party is abusing the discovery process in seeking, making, or resisting discovery."

The court of appeals determined that the record supported a finding that Corey and Corey Supply abused the discovery process by resisting discovery. The record indicated that Corey and Corey Supply refused to schedule the deposition by agreement, they did not make their cash deposit in lieu of bond until one day before Corey's deposition, and they did not inform Rankin or RAMS of the deposit until late in the afternoon on the day before the deposition, which was scheduled to take place in the morning. Based on these circumstances, the Fourteenth Court of Appeals held that the trial court did not abuse its discretion in awarding sanctions because it could have reasonably found that Corey and Corey Supply were abusing the discovery process by resisting discovery. The court of appeals affirmed.

***In re Chong*, No. 14-19-00368-CV, 2019 WL 2589968 (Tex. App.—Houston [14th Dist.] June 25, 2019, orig. proceeding) (mem. op.).**

The Fourteenth Court of Appeals held that mandamus relief is proper when a trial court refuses to expunge a notice of lis pendens even though the pleading on which the notice is based does not contain a real property claim.

In November 2013, Plaintiff and Defendants entered into a construction contract to improve 25 apartment units owned by Plaintiff. Plaintiff agreed to pay Defendants $1.5 million, and Defendants agreed to supply all of the labor and materials needed to improve the apartments by the end of 2014.

Over the course of the project, Plaintiff paid Defendants $1.5 million. The project's general contractor, Defendant Euro General Construction, Inc. ("Euro"), hired subcontractors to work on the project. Plaintiff alleged that Euro had a contractual and fiduciary duty to use the payments it received from Plaintiff to pay the subcontractors.

When the project was almost finished, Plaintiff found out that several subcontracts had not been paid and had files nearly $330,000 in liens against the property. The liens prevented Plaintiff from securing the requisite certificate of occupancy from the county. To extinguish the liens, Plaintiff loaned Defendants $330,000 to pay the unpaid subcontractors. Defendants signed an agreement in which they acknowledged they had to pay the subcontractors and agreed to pay back the $330,000 loan. Defendants gave Plaintiff a $330,000 post-dated check and an agreed judgment that Plaintiff could file if the check did not clear. The subcontractors were paid, and they released their liens, but the $330,000 check did not clear due to insufficient funds.

In July 2016, Plaintiff filed suit, alleging that Defendants failed to complete the apartments by the deadline and breached their agreement to pay back the $330,000 loan. In August 2016, Plaintiff filed a notice of lis pendens on the properties that

Defendants had purchased with funds that Plaintiff contends should have been used to pay subcontractors instead.

In September 2017, Intervenor filed a petition to intervene in the underlying suit to assert rights as to six real properties identified in the notice of the lis pendens. Intervenor alleged that he loaned Defendants funds memorialized by promissory notes and secured by first-priority deeds of trust on all six properties and had secured title to two of them through foreclosure. Intervenor filed an amended motion to expunge the lis pendens. On September 10, 2018, the trial court signed an order denying the motion. In May 2019, the Intervenor filed a petition for writ of mandamus, asking the court of appeals to compel the trial court to vacate the trial court's order denying Intervenor's amended motion to expunge the lis pendens.

In his mandamus petition, Intervenor argued that he was entitled to expungement of the lis pendens because the pleading on which the notice of lis pendens was based does not contain a real property claim. For support, Intervenor relied on Section 12.0071(c) of the Property Code, which provides that the "court shall order the notice of lis pendens expunged if the court determines that . . . the pleading on which the notice is based does not contain a real property claim."

The court of appeals found that Plaintiff's Petition—which alleged (1) that Defendants had a fiduciary duty to use funds paid by Plaintiff for the construction project to pay subcontractors, (2) that Defendants breached this fiduciary duty by using these funds, not to pay subcontractors, but to purchase certain real properties for themselves, and (3) that Defendants breached their agreement to repay the $330,000 loan Defendants used to pay subcontractors, and which sought an assignment and an award of Defendants' interest in these real properties on the basis of unjust enrichment—did not fall within the provisions of the lis pendens statute because it did not allege a real property claim.

The court pointed out that the facts alleged in Plaintiff's petition do not state a breach of fiduciary claim that would support the award of real property based on unjust enrichment.

In reaching its decision, the court distinguished two other courts of appeals that have held that a lis pendens is proper when the plaintiff seeks an award of an interest in real property purchased with funds wrongfully obtained from the plaintiff based on unjust enrichment or fraud. The court declined to recognize a material difference between seeking equitable ownership and seeking legal ownership of real property because "they are both means by which the plaintiff seeks to recover judgment against the defendant for fraud or conversion."

Finally, the Intervenor did not need to prove that he lacked an adequate remedy by appeal, to obtain mandamus relief. Because an improper lis pendens is a void action, the availability of other remedies will not prevent issuance of mandamus. As a result, the court of appeals conditionally granted mandamus relief and directed the trial court to expunge Plaintiff's notice of lis pendens as provided by section 12.0071(c).

Texas Court of Criminal Appeals Update

John R. Messinger, Assistant State Prosecuting Attorney
Austin, Texas

Search and Seizure

State v. Martinez, 569 S.W.3d 621 (Tex. Crim. App. 2019)

Martinez was arrested without a warrant for public intoxication. A warrantless arrest for a misdemeanor is permissible if the offense is "committed in [the officer's] presence or within his view." Tex. Code Crim. Proc. art. 14.01(b). Officers Guerrero and Ramirez testified at the suppression hearing and presented evidence of probable cause. Officer Quinn, who physically arrested Martinez, did not. No evidence was presented as to what he observed or was told by the other officers. The trial court granted the motion to suppress, and the court of appeals affirmed. After the Court of Criminal Appeals remanded for abatement for additional findings, the court of appeals again affirmed. The Court of Criminal Appeals reversed.

An arrest may be upheld under the "collective knowledge" doctrine without evidence the arresting officer was told the facts constituting probable cause.

The Court applied the "collective knowledge" doctrine, *i.e.*, that "when several officers are cooperating, their cumulative information may be considered in assessing reasonable suspicion or probable cause." Martinez argued that the crux of the doctrine is communication between officers, which was lacking in this case. Without evidence of communication, he said, the result is a "hive thinking" model with no basis in fact. Martinez was correct that cases applying the doctrine featured communication, and the Court voiced a concern about "overly broad expansion" of the doctrine. But it chose to focus on evidence of cooperation, not communication, as the appropriate standard.

In this case, "all of the officers were responding to the

same call, all were present at the scene, all had some degree of communication with [Martinez], and all were present at the time of the arrest." Because it was clear that the three officers were working as a team, direct evidence of communication between them was not necessary. As it was undisputed that Officers Guerrero and Ramirez's testimony provided probable cause, the Court found that Article 14.01(b)'s exception to the warrant requirement applied.

Beyond the holding, this case revealed a split in the way the judges on the Court approach (or want to approach) the record on appeal from motions to suppress. As mentioned above, this was the second time the Court granted review in this case. In the first, the Court remanded for further findings of fact. No. PD-1337-15, 2016 WL 7234085 (Tex. Crim. App. Dec. 14, 2016) (*Martinez I*). In addition to technical complaints about the findings, a plurality, in an opinion by Judge Yeary, detailed the testimony that would support probable cause for the arrest. Consideration of the "collective knowledge" doctrine became necessary for disposition the second time around because the trial court did not make the findings posited by the plurality in *Martinez I*. Judge Newell wrote a concurring opinion in both cases criticizing the Court's practices.

In *Martinez I*, he agreed that remand for additional "essential findings" was prudent but disagreed with the plurality's preemptive evaluation of probable cause on "facts" that did not yet exist. "[I]f we keep issuing opinions like the one in this case, we may have to revisit whether remanding for essential findings is truly an act of prudence rather than micro-management."

In *Martinez II*, the fact that the Court decided the case on an argument that didn't implicate any of the findings or theories suggested by the *Martinez I* plurality reinforced Judge Newell's belief that addressing them was wrong. Joined by three judges, he said it was "equally clear" to him that the Court's "precedent requiring a remand for 'necessary' findings provides an incentive for reviewing courts to micro-manage trial courts rather than defer to their findings." Expanding upon this

criticism, Judge Newell urged the Court to reconsider its "self-inflicted" precedent. "[W]e should remand for 'essential' findings only if there was some objection in the trial court regarding the inadequacy of the existing findings." In the absence of objection, he says, reviewing courts should presume findings in support of the ruling like it does when findings aren't requested.

Judge Yeary defended the *Martinez I* plurality's identification of potentially dispositive facts and remand for additional findings. First, much of the reasoning and many of the inferences underlying the plurality's guidance appears in the Court's analysis of the "collective knowledge" doctrine. Second, the plurality did not require that the trial court make findings in a certain way; it merely identified the possibility and allowed the trial court to perform its role as fact-finder. "[I]ndeed," Judge Yeary said, "it was the manifestly proper approach" to give the trial court that opportunity.

***State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019)**

Martinez was involved in a traffic accident and taken to the hospital. He was conscious but "not entirely coherent" as the nurses drew his blood. When told he needed to give a urine sample, Martinez said he could not afford tests and needed to find his daughter. He removed the monitors and IVs, got dressed, and left. A Trooper arrived shortly thereafter. He directed hospital staff to preserve the blood and later obtained it with a Grand Jury Subpoena. The blood had not been tested, so DPS did so. Martinez moved to suppress the results of the State's testing after he was charged with intoxication manslaughter. The trial court granted it and the court of appeals affirmed.

Law-enforcement testing of a blood sample taken by a hospital for medical purposes is a search for Fourth Amendment purposes.

The Court agreed. In so doing, it finally answered the threshold question of whether there is a reasonable expectation of privacy in blood. The Court had previously held that a defendant has no privacy interest

in the results of a blood test performed by the hospital solely for medical purposes and only to test blood-alcohol levels. *See State v. Hardy*, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997). It reaffirmed that holding. But only a plurality had held that law enforcement obtaining a sample from the hospital and testing it themselves without a warrant, probable cause, or exigent circumstances was a Fourth Amendment violation. *See State v. Comeaux*, 818 S.W.2d 46, 53 (Tex. Crim. App. 1991) (plurality).

The Court first addressed whether Martinez had a subjective expectation of privacy in his blood. The State argued that Martinez abandoned his blood and therefore had no subjective or objectively reasonable expectation of privacy. Martinez argued that he affirmatively declined to have his blood tested and that it would be unworkable to expect patients to demand their samples as they leave the hospital. The Court saw evidence supporting both arguments but decided against the State for two reasons. First, abandonment is more than leaving something behind; it must be the result of a free and conscious decision. Second, the burden is on the State when defending against a warrantless search or seizure. Given the circumstances, the Court found insufficient evidence to show Martinez had a choice and intentionally abandoned his blood at the hospital. It also found sufficient evidence that he harbored a subjective expectation of privacy in it, largely as a matter of "common sense."

The Court next addressed whether society is prepared to deem that expectation "reasonable." Relying primarily on *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the Court held that the State's exercise of control over and testing of a blood sample constitutes a search. As with cell phones, the rationale is that the thing searched contains far more private information than what the State purports to be after. Unlike a simple breath test, which reveals only the person's blood-alcohol level, a blood sample could reveal pregnancy, diseases, and the like.

The Court also rejected the argument that the third-party doctrine defeated whatever expectation of privacy Martinez

had. The third-party doctrine is premised on the idea that people who voluntarily turn over information to a third-party service provider—transaction information (banks, credit card companies), numbers dialed (phone company)—cannot claim an expectation of privacy when those third parties reveal that information to law enforcement without a warrant. This is nothing like what happened to Martinez. He was taken to the hospital. He was perhaps "not entirely coherent" when his blood was taken, and he told them not to test it. In short, the record does not support a decision to avail himself of third-party services.

Because Martinez retained a reasonable expectation of privacy in his blood, the State needed a warrant or warrant exception to test it.

***Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019)**

Sims killed his grandmother and took her purse, two firearms, and her vehicle. Believing they were a threat, an officer filled out an "Emergency Situation Disclosure" form provided by Verizon to ping Sims's phone, thereby obtaining his location. This information is commonly called cell-site location information, or CSLI. Sims was soon located and arrested. He confessed.

Sims moved to suppress the fruits of his arrest because the use of his real-time CSLI violated, *inter alia*, the federal Stored Communications Act (SCA) and Tex. Code Crim. Proc. art. 18.21 (both of which deal with accessing electronic data), Tex. Code Crim. Proc. art. 38.23(a) (the Texas exclusionary rule), and the Fourth Amendment. The trial court denied his motion, and Sims accepted a plea bargain of 35 years with the right to appeal. The court of appeals affirmed.

There is no expectation of privacy in three hours of real-time tracking of your cell phone.

The Court affirmed. It began by explaining the interaction between the specific data handling statutes and Article 38.23(a). Sims argued that, because Article 38.23(a) prohibits the use of evidence that

was obtained in violation of the law, law enforcement's failure to adhere to the procedures in either the SCA or Article 18.21 should result in exclusion of the evidence obtained through his real-time tracking. His problem was that both statutes provide remedies that do not include exclusion, combined with clauses that say the remedies provided for non-constitutional violations are exclusive. Their language is clear. The Court concluded that the only way to reconcile the specific language of the SCA and Article 18.21 with Article 38.23(a)'s general remedy was to hold that the remedies provided for by these data-handling statutes are exceptions to it. By their plain language, a violation of either the SCA or Article 18.21 would result in exclusion only if the violations also violated the Texas or federal constitution.

The Court found no Fourth Amendment violation. The State argued that police had exigent circumstances to obtain Sims's real-time CSLI without a warrant, but the Court did not have to consider that argument. Instead, it held that Sims did not have a legitimate expectation of privacy in fewer than three hours of real-time CSLI the police obtained before they arrested him. Its analysis was based primarily on *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), in which the Supreme Court said it was "sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." *Id.* at 2217 n.3. The Supreme Court specifically declined to extend *Carpenter*'s holding to real-time CSLI—*Carpenter* was a historic CSLI case—but our Court saw no difference between the two for purposes of assessing legitimate expectations of privacy or the applicability of the third-party doctrine. With both types of CSLI, it explained, a person's interest in the privacy of his location (over sufficient time) is reasonable and there is no "voluntary disclosure" as that term is defined by third-party doctrine cases. In short, no one agrees to long-term tracking when they sign a cell service contract. Whatever the threshold duration for triggering a legitimate privacy interest in movements and location, however, three hours is not enough.

***Rhomer v. State*, 569 S.W.3d 664 (Tex. Crim. App. 2019)**

Rhomer was convicted of felony murder based on felony DWI after striking the decedent's motorcycle with his car. Rhomer and the decedent were traveling in opposite directions. At trial, John Doyle, a San Antonio Police Department detective, gave his opinion that the crash was "more or less" a head-on collision that occurred in the decedent's lane and was due to Rhomer's intoxication. But Doyle, who had extensive training and experience with crash investigations and accident reconstruction, never took a course specifically related to motorcycle accident reconstruction. Doyle visually assessed the damage to the vehicles and the scene—notably the debris field—and used a precision tool to measure and then diagram the scene but he could not calculate the speed of either vehicle because of the weight differential and the fact that Rhomer's car was stopped by the building it struck. The question was whether Doyle's testimony was properly admitted despite his lack of training on and experience with this specific scenario. After a thorough review of the applicable law, the Court affirmed.

The admissibility of an expert opinion is measured by the type of opinion proffered, not the one that could have been.

Rule 702 permits a witness who is qualified as an expert by knowledge, skill, experience, training, or education to give an opinion if the expert's specialized knowledge will help the trier of fact understand the evidence or determine a fact issue. The proponent of expert testimony must show the witness possesses such knowledge, the subject matter of the testimony is an appropriate one for expert testimony, and admitting the expert testimony will assist the fact-finder. This list can be shortened to qualification, reliability, and relevance. The Court addressed the first two.

As to qualification, the Court reiterated that the propriety of a ruling thereon can be measured by three questions: (1) Is the field of expertise complex? (2) How conclusive is the expert's

opinion? (3) How central is the area of expertise to the resolution of the lawsuit? The requisite level of qualification varies directly with all three, but this case was decided on the relative lack of complexity and conclusiveness of the opinion. Doyle did not claim to calculate the speeds of the vehicles or opine on the precise point of impact. Rather, he identified a broader area of impact based on his observations and application of training and experience he had used hundreds of times before. The Court reiterated that, even if Doyle's measurements and diagrams were not scientific methods, "an expert does not need to use scientific methods to be qualified." "[A]ct[ing] as a gatekeeper against expert testimony that would not help the trier of fact . . . is not the same thing as requiring every expert to be the best possible witness." Doyle was qualified to give his opinion because its scope matched his expertise.

Doyle's testimony was reliable for similar reasons. The Court rejected Rhomer's argument that Doyle's testimony should be measured under the *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), standard for hard sciences rather than under *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), which sets out the standard for "soft" sciences. It also rejected the argument that Doyle's failure to calculate the vehicle's speed using the methods available to him would fail *Nenno*, regardless. Had Doyle been able to calculate the speeds of the vehicles, it might have been appropriate to use the *Kelly* standard to assess the application of the scientific and mathematical principles involved. But Doyle could not, making the "failure" irrelevant. Instead, Doyle did what he could: he gave an opinion based on his observation of the physical evidence at the scene and his years of training and experience. This complied with the *Nenno* standard: "(1) the field of accident reconstruction is a legitimate one, (2) the subject matter of Doyle's expert testimony was within the scope of that field, and (3) his testimony properly relied upon and utilized the principles involved in the field, *i.e.*, examining the physical evidence in the context of the crash site to draw conclusions about the location and cause of the crash."

Judge Walker concurred. He had multiple problems with the

Court's analysis but ultimately agreed on the outcome because of what he perceived to be the failings of defense counsel. He refused to classify Doyle's opinion as anything other than "actual accident reconstruction," which is a hard science to be measured under *Kelly*. *Nenno*'s application, he argued, is based on whether the field is characterized as primarily based on training and experience—not whether a witness is qualified to give a suitable opinion under that standard. In his view, the fact that Doyle "cho[se] to avoid scientific analysis" does not make accident-reconstruction-producing opinions like Doyle's a soft science. Judge Walker concluded that Doyle's opinion was "certainly unreliable and, in my opinion, very likely factually incorrect." But he concurred because review for an abuse of discretion is performed in light of what was before the trial court at the time; defense counsel, through lack of effort during Doyle's *voir dire* and cross-examination, "did not give the trial court any reason to believe Doyle's opinion was incorrect or unreliable."

Judge Hervey wrote separately to offer guidance to litigants considering the admissibility of expert testimony or scientific evidence. First, there are statutes governing the requirements for admissibility of some forensic analysis and related testimony. *See* TEX. CODE CRIM. PROC. arts. 38.01 (establishing the Texas Forensic Science Commission), 38.35(d)(1) (requiring accreditation by the Commission for admissibility of forensic analysis and testimony). Second, the applicability of these statutes depends on whether the scientific discipline at issue must be accredited or is otherwise exempted or excluded. *See* 37 TEX. ADMIN. CODE §§ 651.5(b) (listing disciplines subject to accreditation), 615.7(a) (listing exempted disciplines). Accident reconstruction happens to be exempted. Third, Article 38.01 also requires that the analyst who performed the forensic analysis was licensed. TEX. CODE CRIM. PROC. art. 38.01 § 4-a(b). Fourth, it is an open question as to whether the failure to comply with these statutes would render an expert or sponsored analysis inadmissible notwithstanding the gatekeeper's conclusion that Rule 702 is satisfied.

***Milton v. State*, 572 S.W.3d 234 (Tex. Crim. App. 2019)**

Milton was tried for robbery of a drug store. Although he threatened to kill the cashier and told her he had a weapon, he never displayed or reached for one nor was one found on him when he was caught soon after. At trial, the State proved that he perpetrated a nearly identical robbery on the same drug store (and cashier) the day before. The punishment evidence showed six prior convictions, including two for robbery by threat, but nothing that was "particularly brutal or gruesome."

Prior to its closing argument, the State sought permission to play a short YouTube video as a demonstrative aid. The video is of a lion trying to eat a baby through a glass wall at a zoo. [It is available on the Court's website through its new "Media" link.] The State argued that it illustrated that "motive plus opportunity equals behavior," and assured the trial court that it would not compare Milton to the lion or the baby to society. The video was permitted over objection. After the video was played to the jury, the State argued that it was a cute or funny video because the glass stops the lion, but "[n]othing [is] funny when [Milton] is outside of prison." "Keep the glass there, remove the opportunity, and send [Milton] to prison for every second he deserves."

The court of appeals upheld the ruling. It framed the complaint as one of improper argument and held that the State's analogy was a plea for law enforcement. It acknowledged that the analogy to the lion was tenuous, given the benign nature of the offense relative to eating a baby, but concluded that Milton's sustained record of re-offending upon release from confinement justified it.

The Court disagreed. Although the State may have intended to make a simple plea for law enforcement, use of the video "encouraged the jury to draw the very analogy the State claimed it was not trying to draw—that [Milton] was like a hungry lion trying to eat a small child."

Use of demonstrative video during closing argument was improper because it invited an analogy that was not "anchored to the evidence presented at trial."

In explaining the impropriety, the Court realigned the way in which jury argument claims should be reviewed.

Most litigants are familiar with the four areas of proper jury argument: summation of the evidence, reasonable deduction from the evidence, response to arguments of opposing counsel, and pleas for law enforcement. What *Milton* reminds us is that these categories were "born out of the prohibition against introducing matters in argument that were not presented as evidence." Anything else is most likely the unsworn (yet believable) testimony of counsel, which is "generally designed to arouse the passion and prejudice of the jury." The focus of review should be on encouraging jury decisions based in evidence.

These rules apply to demonstrative aids used in argument. Just as a demonstrative exhibit need not be admitted at trial, they are not inherently improper at argument for being outside the record. However, just as a demonstrative exhibit used in trial is relevant only because it assists the jury in understanding evidence that has been admitted, a demonstrative aid used during argument must be derivative of evidence properly before the jury. And it must, like argument, not be overly inflammatory.

The video in this case failed on multiple counts. It was not used to highlight or explain any evidence presented at trial. It was not directly related to any evidence. Instead, it was used purely to illustrate an argument that was linked to Milton's recidivism. The only way it could be used was to analogize Milton to the lion. The Court has sanctioned comparisons of defendants to animals, but only when the conduct of the charged offense warranted it. In this case, the perpetrator of a nonviolent robbery was compared to a lion trying to eat a small child. The risk that jurors might assess his punishment based on passions and prejudices rather than a reasoned consideration of the evidence was too great.

The Government Corner

Sandra Hachem, Harris County Attorney's Office
Cynthia Morales, Texas Attorney General's Office

When Government Mistake Violates Due Process: *Mosley v. Tex. Health & Hum. Servs. Com'n*, No. 17-0345, 2019 WL 1977062 (Tex. May 3, 2019).

In this case a Group Home employee sought review of a decision by an Administrative Law Judge without first filing a timely motion for rehearing—a prerequisite to review under the Administrative Procedure Act. The Texas Supreme Court agreed that the failure to file a motion for rehearing was a jurisdictional defect that precluded review. Nonetheless, it remanded the case to permit the employee to properly seek review because it found the employee's due process rights were violated by a mistaken explanation of the legal process given to him by the Administrative Law Judge and the Department. Namely, the Administrative Law Judge sent the employee a letter after rendering the administrative decision in the case mistakenly stating review could be sought without a motion for rehearing, relying on and quoting an administrative code provision of the Department that was wrong. The Supreme Court held that, because the employee did not file the required motion for rehearing as a result of the mistaken statements of the involved agencies, his right to due process was violated. The concurrence noted that the Health & Human Services Commission took the position on appeal that the employee should have ignored what it was told by the administrative agencies involved and done a better job interpreting the law than the agencies did. The concurrence notes that meant their argument was effectively: "don't trust the government."