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Publication Policies

The Appellate Section is always looking for professional and timely legal articles that are important to appellate practitioners. If you are interested in submitting an article, please email Christina Crozier (cfcrozie@central.uh.edu), *The Appellate Advocate* Editor in Chief for more information about our publishing guidelines, article submission process, and publication timeline.

Authors who submit an article in which the author represents a party in a currently pending matter must include a footnote at the outset of the article disclosing their involvement in the case or matter. Publication of any article is not to be deemed an endorsement of the views expressed therein. The section reserves the right to decline publication of any article, for any reason, without explanation.

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CHAIR'S MESSAGE

By Bill Chriss

Here's hoping you've been getting quite a number of emails from us describing all the professional activities and opportunities your Appellate Section has been sponsoring thus far; everything from investiture of new courts and justices to visiting lectures by distinguished foreign jurists. We are committed to continuing to provide Texas appellate practitioners with valuable networking opportunities, case updates, free CLE, and other initiatives, including this latest *The Appellate Advocate*. Your annual dues of $30 (easily paid with your State Bar dues statement or via your My Bar Page) are quite a bargain in light of the benefits to which they entitle you, including:

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It is an honor and privilege to practice at the appellate bar and to defend "the Constitution of the United States and of this state" we each swore to uphold upon becoming a lawyer. When we pledge allegiance to our flag, may we never forget the unique sanctity of the republic for which it stands. As we serve our clients, let us also bear in mind our responsibility to the rule of law. The Preamble of the Texas Disciplinary Rules of Professional Conduct puts that responsibility this way:

"A lawyer should demonstrate respect for the legal system and for those who serve it, including judges . . . . [I]t is also a lawyer's duty to uphold legal process . . . . As a public citizen, a lawyer should seek improvement of the law . . . . As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education."

EDITOR'S MESSAGE

By Christina Crozier

Summer is nearly here, and we at *The Appellate Advocate* know that there are many things you could be doing with your precious free time: beach, travel, movies, fireworks, and fiction, just to name a few. And so, we promise to make this publication worth a read. In every issue, we aim to tell you something about appeals, procedure, and courts that you did not know before.

Here are a few gems that you will take away from this issue.

- The Texas Supreme Court recently clarified the scope of the Fifteenth Court of Appeals' appellate jurisdiction. Kirk Cooper's article, *The Fifteenth Court of Appeals and the Limits of Concurrent Appellate Jurisdiction*, guides you down this jurisdictional rabbit hole. So you will have an answer when your next client asks, "Can we take this to the Fifteenth Court of Appeals?"

- Although Texas courts of appeals must now explain why they deny permissive interlocutory appeals, those appeals are still rarely granted. Even when trial courts grant permission to appeal, they are accepted by the court of appeals only 43.5% of the time. To learn more about why, and how to counsel your clients about permissive interlocutory appeals, check out Nicholas Bruno's article, *Permissive Appeals: Why Do Appellate Courts Deny Permission to Appeal After the Trial Court Grants Such Permission*?

- It is remarkably difficult to convince the Fifth Circuit to seal judicial proceedings and records, even when the same proceedings and records might have been sealed in the district court. To understand the Fifth Circuit's treatment of record sealing, and more, read Raffi Melkonian's *Fifth Circuit Update.*

That's just a sampling. (We can't spoil it all here, right?) Please consider *The Appellate Advocate* as your next beach read to catch up on other developments regarding appeals, procedure, and courts.

And if you have an idea for an article that belongs in the upcoming *The Appellate Advocate*, please send it to cfcrozie@central.uh.edu.

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THE FIFTEENTH COURT OF APPEALS AND THE LIMITS OF CONCURRENT APPELLATE JURISDICTION

By Kirk Cooper[1]

In *Kelley v. Homminga*, the Texas Supreme Court recently resolved a dispute surrounding the scope of the newly created Fifteenth Court of Appeals' appellate jurisdiction.[2] The Court held that while the Fifteenth Court of Appeals may have technical concurrent jurisdiction with the fourteen regional courts of appeals over civil cases, the Fifteenth Court only has exclusive appellate subject-matter jurisdiction over certain categories of cases. Thus, if an appellant appeals a case outside the Fifteenth Court's exclusive jurisdiction to the Fifteenth Court, and another party moves to transfer the appeal out of the Fifteenth Court and back to the regional court of appeals, the Fifteenth Court has a ministerial duty to transfer that case out to the appropriate regional court of appeals.

Although the final per curiam decision from the Texas Supreme Court in *Kelley* is relatively simple, intuitive, and straightforward, the debate surrounding the limits of the Fifteenth Court of Appeals' jurisdiction leading up to the *Kelley* decision was not. This Article serves not just as a procedural update about which types of cases may be properly litigated in the Fifteenth Court of Appeals, but also as an attempt to preserve the historical record and improve accessibility to materials crucial to the Supreme Court's decision in this unusual jurisdictional dispute.

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[1] Kirk Cooper is the principal attorney at Cooper Appeals, PLLC (cooperappeals.com), an appellate boutique firm based in El Paso serving clients in Texas and New Mexico. He was previously the chief staff attorney at the Texas Eighth Court of Appeals in El Paso, and is board certified in civil appellate law by the Texas Board of Legal Specialization.

[2] *Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025).

Important discussions and debates surrounding the limits of Texas appellate court jurisdiction have been buried in procedural letters exchanged among the justices of different courts of appeals that are contained in the docket files of two cases. While these letters are currently available online, they have not been picked up by commercial databases such as Westlaw and Lexis because they are not in the form of "opinions." As such, copies of the letter decisions issued by the First, Thirteenth, Fourteenth, and Fifteenth Courts of Appeals are attached to this article as appendices to ensure that with the publication of this article in *The Appellate Advocate*, these letter decisions and the reasoning contained in these letters might be more easily found and cited.

I. BACKGROUND

A. Fifteenth Court of Appeals Jurisdiction

Prior to 2024, the State of Texas was divided into fourteen courts of appeals districts based on geographic location. Section 22.220(a) of the Texas Government Code granted each of these court of appeals districts "appellate jurisdiction of all civil cases within its district of which the district courts of county court have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs."[3]

The Fifteenth Court of Appeals was created by S.B. 1045.[4] As the Texas Supreme Court described the Fifteenth Court in assessing its constitutionality, the Fifteenth Court was designed to "exclusively exercise the statewide appellate jurisdiction that the Third Court previously exercised, jurisdiction over some appeals that would have been heard in different courts before S.B. 1045 (because of docket-equalization transfers from the Third Court or because the underlying cases did not have to be litigated in Travis County), and any other jurisdiction conferred by separate statutes, but it will not hear criminal cases."[5]

S.B. 1045 enacted new statutes and made changes to others. Section 22.201(p) created a Fifteenth Court of Appeals with a geographic district embracing the entire state: "the Fifteenth Court of Appeals District is composed of all the counties in this state."[6] S.B. 1045 also amended the general grant of civil appellate jurisdiction in Section 22.220(a) to include caveat language: the courts of appeals had general civil appellate jurisdiction over county and district courts in their districts "[e]xcept as provided by Subsection (d)."[7]

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[3] Tex. Gov't Code Ann. § 22.220(a).
[4] Act of May 21, 2023, 88th Leg., R.S., ch. 459, 2023 Tex. Sess. Law. Serv. 1115.
[5] *In re Dallas Cnty.*, 697 S.W.3d 142, 147–48 (Tex. 2024).
[6] Tex. Gov't Code Ann. § 22.201(p).
[7] *Kelley*, 706 S.W.3d at 831 (describing amendment).

That new Subsection (d)—Texas Government Code § 22.220(d)—vested the Fifteenth Court of Appeals with exclusive jurisdiction over three types of cases:

- Any "matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education . . . or by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct," subject to 15 excluded classes of cases;[8]

- Cases involving challenges to state statutes or regulations in which the state attorney general is a party;[9]

- Other cases as provided by law,[10] including exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court, as provided for by a separate statute.[11]

B. **Inter-Court Transfer Procedure**

As part of S.B. 1045, the Legislature also enacted a new statute (Section 73.001(b)) prohibiting the Texas Supreme Court from "transfer[ing] any case or proceeding properly filed in the Court of Appeals for the Fifteenth Court of Appeals District to another court of appeals for the purpose of equalizing the docket of the courts of appeals."[12] That said, the Legislature also foresaw that there might be situations in which transfer between a regional court and the Fifteenth Court and vice versa might be necessary for other reasons. As such, the Legislature also adopted Section 73.001(c), an enabling statute granting the Texas Supreme Court some rulemaking authority:

> (c) The supreme court shall adopt rules for:
>
> > (1) transferring an appeal inappropriately filed in the Fifteenth Court of Appeals to a court of appeals with jurisdiction over the appeal; and

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[8] Tex. Gov't Code Ann. § 22.220(d)(1).
[9] Tex. Gov't Code Ann. § 22.220(d)(2).
[10] Tex. Gov't Code Ann. § 22.220(d)(3).
[11] Tex. Gov't Code Ann. § 25A.007(a).
[12] Tex. Gov't Code Ann. § 73.001(b).

> (2) transferring to the Fifteenth Court of Appeals from another court of appeals the appeals over which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction under Section 22.220(d).[13]

Relying on this grant of rulemaking authority, in order to address situations where a case that should have been filed in the Fifteenth Court of Appeals was filed in a regional court of appeals and vice versa, the Texas Supreme Court also amended the Texas Rules of Appellate Procedure to establish a procedure where a case had been "improperly taken" to the Fifteenth Court. *See generally* Tex. R. App. P. 27a.

Under Tex. R. App. P. 27a(d), which governs transfers to and from the Fifteenth Court of Appeals, a party may file a motion to transfer an appeal from the court in which the case is pending (the transferor court) within 30 days after an appeal is perfected, but no later than by the date when the appellee's brief is filed.[14] The movant also must immediately notify the transferee court of the motion.[15] The transferor court may transfer an appeal if:

> (i) no party files an objection to the transfer within 10 days *or* the transferor court determines that any filed objections lack merit; *and*
>
> (ii) the transferee court agrees to the transfer.[16]

After the transferor court makes a decision on the motion, "the transferee court must file, within 20 days after receiving notice from the transferor court of its decision on the motion, a letter in the transferor's court explaining whether it agrees with the transferor court's decision."[17]

II. THE DISPUTE

A. Appellants in *Kelley v. Homminga* and *Devon Energy v. Oliver* file notices of appeals to the Fifteenth Court of Appeals, even though the cases do not fall within the Fifteenth Court's exclusive jurisdiction set by statute.

In the wake of the Texas Supreme Court's decision confirming the constitutionality of the Fifteenth Court of Appeals in *In re Dallas County*,[18] two separate sets of defendants in two cases filed appeals to the Fifteenth Court of

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[13] Tex. Gov't Code Ann. § 73.001(c).
[14] Tex. R. App. P. 27a(c)(1)(A).
[15] *Id*.
[16] *Id*. (emphasis added).
[17] Tex. R. App. P. 27a(c)(1)(C).
[18] *In re Dallas Cnty.*, 697 S.W.3d at 147–48.

Appeals. However, neither of the two cases being appealed fell within exclusive jurisdiction of the Fifteenth Court set out in Subsection (d):

- *Kelley v. Homminga*, No. 15-24-00123-CV, involved a judgment totaling more than $1 million in a home construction dispute arising from the 212th District Court of Galveston County, [19] situated in the First/Fourteenth Court of Appeals District.[20]

- *Devon Energy Production Co. v. Oliver*, No. 15-24-00115-CV, involved an oil-and-gas dispute judgment issued in the 135th District Court in Dewitt County,[21] situated in the Thirteenth Court of Appeals district.[22]

In their notices of appeals, the defendants-appellants in *Kelley* and *Devon Energy* each stated that they were appealing to the Fifteenth Court of Appeals, not the respective regional court of appeals. They asserted this was permissible because Texas Government Code § 22.220(a) granted each of the courts of appeals, including the Fifteenth Court, "appellate jurisdiction of all civil cases within its district[.]" Since the Fifteenth Court's district was statewide, and since the creation of a statewide court of appeals district was found to be constitutional in *In re Dallas County*, the Fifteenth Court of Appeals had concurrent jurisdiction with each of the regional courts of appeals. In defendants-appellants' view, this grant of overlapping concurrent jurisdiction made bypass of the regional courts of appeal in favor of appeal to the Fifteenth Court permissible for all civil cases generally, even if the type of case being appealed did not appear on the list of exclusive jurisdiction cases spelled out in Section 22.220(d).

In briefing before the Fifteenth Court, the *Kelley* appellants cited to *In re A.B.*, 676 S.W.3d 11, 114 & n.1 (Tex. 2023) (per curiam), a parental rights termination case in which the Texas Supreme Court observed that there is overlapping jurisdiction over certain counties between the Sixth Court of Appeals in Texarkana and the Twelfth Court of Appeals in Tyler. The appellants asserted that, like the appellants in counties subject to overlapping Texarkana and Tyler court of appeals jurisdiction in *A.B.*, they could notice their appeal either to the Houston regional courts or to the Fourteenth Court, since there was overlapping jurisdiction.[23]

The appellants in *Kelley* also preemptively urged the Fifteenth Court to retain the case and not transfer it to the First or Fourteenth Court of Appeals in the notice of appeal. They stated that although "[t]his appeal does not fall within the Fifteenth

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[19] The Fifteenth Court of Appeals TAMES case file for this case is available online at https://search.txcourts.gov/Case.aspx?cn=15-24-00123-CV&coa=coa15

[20] Tex. Gov't Code Ann. § 22.201(b), (o).

[21] The Fifteenth Court of Appeals TAMES case file for this case is available online at https://search.txcourts.gov/Case.aspx?cn=15-24-00115-CV&coa=coa15.

[22] Tex. Gov't Code Ann. 22.201(n).

[23] App. Resp. to Mtn. to Transfer at 4, *Kelley v. Homminga*, No. 15-24-00123-CV.

Court's exclusive jurisdiction because the suit was commenced before the Business Courts existed," the appeal "presents important issues aligned with the Court's specialization in complex business disputes" on which the Fifteenth Court could opine.[24] However, in the response in opposition to transfer, the *Kelley* appellants later conceded that even if the business courts had been operational at the time of trial, this case would not have fallen within the business courts' jurisdiction because the amount in controversy was too low.[25]

B. The Fifteenth Court denies the motion to transfer without written order and requests a Rule 27a(c)(1)(C) response from the First, Thirteenth, and Fourteenth Courts of Appeals.

The plaintiffs-appellees in both *Kelley* and *Devon Energy* filed Rule 27a(b)(1)(A) motions to transfer the appeals to the respective regional courts of appeals, arguing that the appeals were "improperly taken" to the Fifteenth Court of Appeals because neither *Kelley* nor *Devon Energy* were cases that fell within the Fifteenth Court's exclusive jurisdiction under Section 22.201(d). The *Kelley* plaintiffs-appellees did not explicitly contest the general appellate jurisdiction argument, but instead refuted each of the points raised in the notice of appeal as presenting genuine issues of law falling within the Fifteenth Court's business expertise.[26] However, the *Devon Energy* plaintiffs-appellees did directly contest the assertion that the Fifteenth Court had general civil appellate jurisdiction statewide, arguing that the Fifteenth Court was one of limited jurisdiction and that the case fell outside the scope of the Fifteenth Court's jurisdictional ambit.[27]

The docket sheet in *Kelley* does not show that the Fifteenth Court issued a formal order resolving the plaintiffs-appellees' motion to transfer. Instead, on December 4, 2024 in *Kelley*, the Fifteenth Court of Appeals issued a letter to the Clerk of Court for the First and Fourteenth Court of Appeals, both of which had overlapping jurisdiction over the county from which *Kelley* arose.[28] In the letter, the Fifteenth Court stated that it had decided to deny the motion to transfer, noting that Chief Justice Brister would grant the motion to transfer.[29] The *Kelley* letter did not lay out the Fifteenth Court's reasoning, but it did request that the First and Fourteenth Courts each file a letter with the Fifteenth Court within 20 days explaining whether they agreed with the Fifteenth Court's decision to deny the motion under Tex. R. App. P. 27a(c)(1)(C).

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[24] Notice of Appeal at 2-3, *Kelley v. Homminga*, No. 15-24-00123-CV.
[25] App. Resp. to Mtn. to Transfer at 5, *Kelley v. Homminga*, No. 15-24-00123-CV.
[26] Mtn to Transfer at 4-5, *Kelley v. Homminga*, No. 15-24-00123-CV.
[27] Mtn. to Transfer at 2-3, *Devon Energy* v. Oliver, No. 15-24-00115-CV.
[28] Court Letter dated Dec. 4, 2024, *Kelley v. Homminga*, No. 15-24-00123-CV (Appendix A).
[29] *Id*.

On December 6, 2024, the Fifteenth Court issued a similar letter to the Thirteenth Court requesting that court's opinion in *Devon Energy*.[30]

C. The First Court consents to the Fifteenth Court's retention of *Kelley*, while the Thirteenth and Fourteenth Courts of Appeals file Rule 27a(c)(1)(C) protest letters with the Fifteenth Court urging transfer back to the regional courts of appeals.

The chief justices of the First, Thirteenth, and Fourteenth Courts of Appeals all filed letters in *Kelley* and *Devon Energy* on behalf of their courts. The First and Fourteenth Courts split over whether to consent to the Fifteenth Court's retention of the *Kelley* appeal—the First Court agreed with the Fifteenth Court's decision to retain *Kelley*, while the Fourteenth Court disagreed and asked that *Kelley* be transferred to the Houston regional appellate courts. The Thirteenth Court of Appeals objected to the Fifteenth Court's retention of *Devon Energy* and asked that the Fifteenth Court transfer the case to the regional Corpus Christi appellate court.

Each of the three courts laid out their legal positions interpreting the relevant provisions of Chapter 22. A summary of their respective analyses is set out below.

1. Fourteenth Court of Appeals' position (Chief Justice Christopher)

The Fourteenth Court of Appeals filed its response first in the *Kelley* appeal. On December 16, 2024, Chief Justice Tracy Christopher of the Fourteenth Court of Appeals sent a letter objecting to the Fifteenth Court's retention of *Kelley*.[31]

Chief Justice Christopher opined that although the Fifteenth Court did have concurrent jurisdiction with the Houston courts by virtue of its statewide geographic reach set by Subsection 22.201(p) and the general grant of jurisdiction in Texas Government Code 22.002(d), the appeal in *Kelley* was "inappropriately filed" in or "inappropriately taken" to the Fifteenth Court as contemplated by the rules-enabling statute and Tex. R. App. P. 27a because the appeal did not fall within the category of cases over which the Fifteenth Court had exclusive jurisdiction.[32] Chief Justice Christopher also opined that although the Fifteenth Court of Appeals may generally have concurrent statewide civil jurisdiction with the sister regional courts of appeals, and although language of Rule 27a appears to make transfer from the Fifteenth Court discretionary rather than mandatory, the Fifteenth Court should grant motions to transfer inappropriately filed appeals "absent some specific reason to deny the motion," as doing so "would be more favorable to the Fifteenth Court." Chief Justice Christopher also opined that transfer should be granted because appellants failed to

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[30] Court Letter dated Dec. 6, 2024, *Devon Energy* v. Oliver, No. 15-24-00115-CV (Appendix B).

[31] December 16, 2024 letter from Chief Justice Tracy Christopher, Fourteenth Court of Appeals, *Kelley v. Homminga*, No. 15-24-00123-CV (Appendix C).

[32] *Id*. at 2-3.

raise any meritorious objections to the motion, and because the Fourteenth Court was willing to accept the case transfer.[33]

In sum, the Fourteenth Court's position was that (1) the Fifteenth Court had statewide appellate jurisdiction concurrent with its sister courts of appeals, (2) the Fifteenth Court had the discretion to decide whether a civil case filed before it not within the Fifteenth Court's exclusive jurisdiction should be transferred to the regional court of appeals, but (3) in exercising its transfer discretion, the Fifteenth Court should apply a strong presumption against retention and in favor of consenting to transfer of the appeal to the regional court of appeals.

2. First Court of Appeals' position (Chief Justice Adams)

On December 23, 2024, one week after Fourteenth Court Chief Justice Christopher filed a letter stating that her Houston-based court objected to the Fifteenth Court's retention of *Kelley,* Chief Justice Terry Adams of the First Court filed a letter in *Kelley* stating that his Houston-based court agreed with the Fifteenth Court's decision denying the motion to transfer the appeal out of the Fifteenth Court.[34] The First and Fourteenth Court letters largely overlap on the issue of concurrent jurisdiction, but diverge on how the Fifteenth Court should exercise its discretion in deciding whether to transfer cases to the regional courts.

Chief Justice Adams reasoned that the statutes creating the Fifteenth Court were unambiguous, and that "the plain language of Government Code section 22.220 shows that the Fifteenth Court of Appeals' appellate jurisdiction is statewide . . . [a]nd that its exclusive jurisdiction is not its only appellate jurisdiction. . . . [A]s currently written, Government Code section 22.220 gives the Fifteenth Court of Appeals statewide exclusive appellate jurisdiction and general appellate jurisdiction as described in the statute."[35]

Chief Justice Adams dismissed concerns that an expansive reading of the Fifteenth Court's concurrent jurisdiction could leads to a floodgates problem: "It has been argued by appellees that following the plain statutory language is unworkable and will lead to an overburden docket for the Fifteenth Court of Appeals. We are not in a position to know whether that is true, but it is, in any event, a matter of public policy that belongs to the Legislature."[36] "If," Chief Justice Adams wrote, "the Legislature had intended for the Fifteenth Court of Appeals to have only exclusive jurisdiction—and not also general appellate jurisdiction—it certainly could have written Government Code section 22.220(a) that way. But it did not include that 'legislative restriction' in the statute . . . . Accordingly, if the Legislature wants to

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[33] *Id*. at 3-4.
[34] December 23, 2024 letter from Chief Justice Tracy Adams, First Court of Appeals, *Kelley v. Homminga*, No. 15-24-00123-CV (Appendix D).
[35] *Id*. at 3.
[36] *Id*. at 3-4.

rewrite Government Code section 22.220(a) to restrict the appellate jurisdiction of the Fifteenth Court of Appeals to be only its exclusive jurisdiction—it can do so during the next session that is about to start. But again, we may not do so."[37] In Chief Justice Adams' view, the Legislature's failure to explicitly say that the Fifteenth Court's exclusive appellate jurisdiction was also its *only* appellate jurisdiction meant that the Fifteenth Court could exercise jurisdiction over and hear any civil case appealed to the Fifteenth Court.

As for the question of whether an appeal is "appropriately filed" in the Fifteenth Court for purposes of assessing a transfer to the regional court, Chief Justice Adams stated that "as a general rule" a "case is 'properly filed' in a court when that court has jurisdiction to hear it. And when more than one court has jurisdiction to hear a case, the issue becomes one of dominant jurisdiction. Thus, it necessarily follows that when a civil appeal comes within the Fifteenth Court's general appellate jurisdiction (as described in Government Code section 22.220(a))—that civil appeal can be 'properly filed' in the Fifteenth Court."[38]

Thought not explicitly stated, Chief Justice Adams' letter seems to suggest that grounds for transfer would not exist simply by virtue of the fact that a regional court of appeals would also have jurisdiction—the Fifteenth Court would have dominant jurisdiction by virtue of the appellant's first filing, and transfer could happen only if the Fifteenth Court ceded jurisdiction back to the regional court of appeals as an exercise of discretion. Chief Justice Adams did not enumerate what factors the Fifteenth Court should apply, but his opinion suggested that there should be a presumption *against* transfer back to the regional court of appeals, with the burden being on the moving party to establish plus factors beyond the mere existence of concurrent jurisdiction in a regional court of appeals and the fact that an appeal fell outside the Fifteenth Court's exclusive jurisdiction.

3. Thirteenth Court of Appeals (Chief Justice Contreras)

On December 23, 2024, Chief Justice Dori Contreras of the Thirteenth Court filed a letter in *Devon Energy* stating "[t]he justices of the Thirteenth Court of Appeals unanimously disagree with the decision to deny transfer of the above-referenced appeal, although our individual reasoning may differ in some respects."[39] Unlike the First and Fourteenth Courts, which had agreed that the Fifteenth Court had concurrent jurisdiction with the sister regional courts of appeals, the Thirteenth Court disputed the premise that the Fifteenth Court of Appeals had concurrent jurisdiction with the regional courts of appeals at all. In the letter, the Thirteenth

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[37] *Id*. at 5.
[38] *Id*. at 4 (citation omitted).
[39] December 23, 2024 letter from Chief Justice Dori Contreras, Thirteenth Court of Appeals, *Devon Energy* v. Oliver, No. 15-24-00115-CV (Appendix E).

Court raised three overarching objections to the Fifteenth Court's retention of *Devon Energy*.

First, Chief Justice Contreras argued that the assertion that the Fifteenth Court had concurrent jurisdiction with the regional courts of appeals failed as a matter of statutory construction. She wrote that if Section 22.220(a) were interpreted to provide concurrent jurisdiction to the Fifteenth Court, that interpretation would render the caveating phrase "Except as provided by Subsection (d)" in Section 22.220(a) superfluous.[40] The Thirteenth Court also argued that an interpretation of Section 22.220(a) that gave the Fifteenth Court concurrent jurisdiction statewide was inconsistent with other provisions of the statutory framework suggesting that the Fifteenth Court was a court of limited jurisdiction, including Texas Government Code section 22.21(a)-(c)(1), which limited the Fifteenth Court's original jurisdiction to "writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)."[41] Reading the caveating provision in Section 22.220(a) in the context of the overarching statutory framework applicable to the Fifteenth Court, Chief Justice Contreras concluded that the Fifteenth Court did not have general concurrent statewide jurisdiction with the regional appellate courts; rather, Subsection 22.220(d) set the absolute limits of the Fifteenth Court's appellate jurisdiction.[42]

Second, the Thirteenth Court's letter recounted the legislative history of Section 22.220(d), opining that the framers of the Fifteenth Court did not intend for the Fifteenth Court "to exercise concurrent jurisdiction over all civil cases statewide."[43] The Thirteenth Court wrote:

> The legislature created the Fifteenth Court to address appeals in civil cases of "statewide significance" which require the application of "highly specialized precedent in complex areas of law including sovereign immunity, administrative law, and constitutional law." *See* S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1045, 88th Leg., R.S. (substituted, Mar. 24,2023). Thus, the statement of intent for S.B. 1045 refers to the creation of the Fifteenth Court "with jurisdiction over certain civil cases." *See id*. Construing § 22.220(d) to encompass all civil appeals, regardless of whether they are of statewide significance or require particular expertise, is inconsistent with the legislative objective in creating a specialized court.[44]

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[40] *Id*. at 2.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 2-3.
[44] *Id*.

Third, in addressing the "improperly filed" component of the analysis under Rule 27a, the Thirteenth Court observed that there were other "compelling prudential reasons why the Fifteenth Court should transfer the appeal to the Thirteenth Court," including:

- Appellants offered no compelling reason why the Fifteenth Court of Appeals should hear it, and the Fifteenth Court's exercise of any concurrent jurisdiction should be limited to instances where there is "a compelling reason" to do so;

- The Fifteenth Court's "exercise of jurisdiction over a 'standard' appeal, such as this one, which neither falls within its exclusive jurisdiction or its area of expertise, would impair the effectiveness of that Court by diverting its resources from those cases requiring its expertise";

- Allowing concurrent jurisdiction would increase uncertainty in litigation, "ender forum shopping at the appellate level[,]" and potentially overwhelm the Fifteenth Court with new cases, especially given that Texas Government Code Section 73.001(b) prohibited the Texas Supreme Court from transferring cases filed in the Fifteenth Court out of the Fifteenth Court for the purpose of docket equalization.[45]

D. The Fifteenth Court certifies the dispute to the Texas Supreme Court and lays out the justices' conflicting decisions in the certification letter.

Having received the responses from the chief justices of the First, Thirteenth, and Fourteenth Court of Appeals, on January 6, 2026, and January 15, 2025, pursuant to Texas Rule of Appellate Procedure 27a(d)(1), the Fifteenth Court certified the dispute over the motion to transfer to the Texas Supreme Court in two letters.[46]

Although the Fifteenth Court did not issue a formal opinion analyzing its own jurisdiction, the Fifteenth Court did lay out the justices' respective legal positions in the Rule 27a(d)(1) certification letters. The letters in *Kelley* and *Devon Energy* differ slightly, but the substantive analysis is largely the same, except on the question of the limits of the Fifteenth Court's discretion to deny a transfer request. The majority position in each letter was not signed by a single justice, but Chief Justice Scott Brister issued a dissenting statement in both *Kelley* and *Devon Energy*, leaving the

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[45] *Id*. at 3.

[46] Rule 27a(d)(1) Certification Letter to Supreme Court of Texas dated January 6, 2025, *Kelley v. Homminga*, No. 15-24-00123-CV (Appendix F); Rule 27a(d)(1) Certification Letter to Supreme Court of Texas dated January 13, 2025, *Devon Energy* v. Oliver, No. 15-24-00115-CV (Appendix G).

majority to be formed by the concurrence of the remaining two justices on the court: Justice Scott Field and Justice April Farris. Those positions were as follows.

1. Majority View (Field and Farris, JJ.)

The majority began both letters by analyzing its own jurisdiction, agreeing with the appellants and the First Court of Appeals' position in *Kelley* that although Subsection 22.201(d) granted the Fifteenth Court exclusive jurisdiction over certain classes of appeals, the general grant of civil jurisdiction to all courts of appeals in Subsection 22.220(a) meant that the Fifteenth Court also possessed general civil appellate jurisdiction concurrent with its sister regional courts of appeals.[47] The majority rejected the view that Subsection (d) acted as a limitation on the Fifteenth Court's civil appellate jurisdiction: "Although Subsection (d) divests the other intermediate courts of jurisdiction over the categories of cases that fall within the Fifteenth Court's exclusive jurisdiction, nothing in Subsection (d) purports to divest the Fifteenth Court of the general civil intermediate appellate jurisdiction authorized by Subsection (a)."[48] Furthermore, since the Fifteenth Court's geographic district was statewide, "this Court still possesses general appellate jurisdiction over civil cases that within our district, which encompasses 'all the counties in the state.'"[49]

The majority acknowledged the Legislature had imposed jurisdictional restrictions on the Fifteenth Court, but stated that when it wanted to limit the Fifteenth Court's authority, the Legislature had made those specific jurisdictional restrictions explicit in statutes. For example, Texas Code of Criminal Procedure art. 4.01 expressly divested the Fifteenth Court of jurisdiction in criminal matters,[50] and in Texas Government Code Section 22.221(c-1), the Legislature expressly limited the Fifteenth Court's original jurisdiction to issuing writs "arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." Because Subsection (d) did not explicitly divest the Fifteenth Court of general civil jurisdiction granted all courts of appeals in Subsection (a), the majority reasoned that it retained concurrent jurisdiction statewide.[51]

Next, the Fifteenth Court interpreted the phrase "inappropriately filed" as used in Rule 27a to assess its authority to deny transfer motions. On this point, the *Kelley* and *Devon Energy* letters differed in their characterization of the Fifteenth Court's discretionary authority to rule on motions to transfer cases to the regional

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[47] Rule 27a(d)(1) Certification Letter to Supreme Court of Texas at 3-6, *Kelley v. Homminga*, No. 15-24-00123-CV (majority statement); Rule 27a(d)(1) Certification Letter to Supreme Court of Texas, *Devon Energy* v. Oliver, No. 15-24-00115-CV (majority statement).

[48] *Id*. (both previous sources).

[49] *Id*. (both previous sources).

[50] *Id*. (both previous sources) (citing Tex. Code Crim. Pro. art. 4.01 ("The following courts have jurisdiction in criminal actions . . . Courts of appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District.")).

[51] *Id*. (both previous sources).

courts. In *Kelley*, the majority wrote: "We do not agree that civil appeals falling outside the bounds of this Court's exclusive jurisdiction are 'inappropriately filed' in the Fifteenth Court as a categorical matter."[52] Citing to a Merriam-Webster's Dictionary definition of "inappropriate" to mean "unsuitable," the majority concluded that the mere filing of a non-exclusive jurisdiction appeal with the Fifteenth Court was not sufficient to show inappropriateness under Rule 27a, since "[w]hen the Legislature has determined that a certain type of matter is categorically unsuitable for resolution in the Fifteenth Court of Appeals, it has restricted this Court's jurisdiction to hear it."[53]

The majority noted that overlapping courts of appeals had long been a feature of the Texas appellate system. It analogized the situation of the Fifteenth Court's concurrent jurisdiction with the sister regional courts to that of the concurrent jurisdiction between the Sixth Court of Appeals in Texarkana and the Twelfth Court of Appeals in Tyler, whose districts both embrace several of the same counties. In the counties subject to overlapping Sixth and Twelfth Court jurisdiction, the appellant has the choice of which court of appeals to file in. Similarly, the majority reasoned, because the Legislature had created a statewide civil court of appeals district overlaying the regional court of appeals district, an appellant anywhere in the state could elect to file either in their local court of appeals, or in the Fifteenth Court of Appeals, just like in the counties that could appeal to either Tyler or Texarkana, and such a filing was not necessarily inappropriate.

The majority also cited to Texas Government Code Section 22.202, the specific statute providing for the random assignment of appeals between the overlapping First and Fourteenth Court of Appeals districts.[54] The majority observed that because there is no statutory bar to filing in the Fifteenth Court of Appeals, "[w]e cannot find that the appeal was 'improperly filed' in this Court simply because other Courts of Appeals would also have jurisdiction to hear it."[55] Consequently, the majority voted to deny the motion to transfer *Kelley* to the Houston regional courts of appeals.[56]

In *Devon Energy*, the majority took this analysis one step further, denying that it possessed discretionary authority to grant a request to transfer a case to the regional courts at all: "We further find that Texas Government Code Section 73.001(c) and Texas Rule of Appellate Procedure 27a do not authorize us to transfer this case to the Thirteenth Court of Appeals."[57] This language suggests that the majority in *Devon Energy* viewed the "inappropriately filed" language not just as a discretionary

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[52] Rule 27a(d)(1) Certification Letter to Supreme Court of Texas at 3, *Kelley v. Hommingа*, No. 15-24-00123-CV (majority statement).
[53] *Id*. at 3.
[54] *Id*. at 4.
[55] *Id*. at 4-5.
[56] *Id*.
[57] Rule 27a(d)(1) Certification Letter to Supreme Court of Texas at 3, *Devon Energy* v. *Oliver*, No. 15-24-00115-CV (majority statement).

factor, but also a substantive limitation on authority, preventing the Fifteenth Court from agreeing to transfer out cases even when those cases did not fall within its core exclusive jurisdiction.

Finally, the majority addressed and rejected the floodgates issues:

> Appellees further argue that the Fifteenth Court was designed to focus on the categories of appeals falling within its exclusive appellate jurisdiction, and that this purpose will be thwarted if this Court is found to possess general jurisdiction over all civil cases within its boundaries.
>
> Ultimately, the best proof of the Legislature's design for the Fifteenth Court is the jurisdiction that the Legislature created. "As with any statute," we must apply the law "as written" and "refrain from rewriting text that lawmakers chose." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133 (Tex. 2019) (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009)). In Chapter 220 of the Texas Government Code, the Legislature made a choice to vest the Fifteenth Court with exclusive jurisdiction over some categories of civil appeals and general jurisdiction over others. We are not free to accept the former while deeming the latter improper. Accordingly, we decide to deny the motion to transfer the appeal.[58]

2. Dissenting View (Brister, C.J.)

Chief Justice Brister dissented in both the *Kelley* and *Devon Energy* certification letters, stating that he would not object to transferring either case back to the regional courts.[59] Chief Justice Brister noted a discrepancy between the rules enabling statute—which directed the Supreme Court to adopt transfer rules for transferred appeals "inappropriately filed" with the Fifteenth Court—and Rule 27a, which states that a case should be transferred out of the Fifteenth Court if it is "improperly taken" to the Fifteenth Court.[60] Chief Justice Brister noted that "[i]n many contexts, 'improper' referred to something *not allowed*, while 'inappropriate' refers to something that *ought not* to be allowed."[61] He agreed with his colleagues that an appeal to the Fifteenth Court of Appeals of a general civil case falling outside the Court's exclusive jurisdiction was not "improper" because the statutes granted the Fifteenth Court general concurrent jurisdiction with its sister regional courts.

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[58] *Id*. at 5.
[59] Rule 27a(d)(1) Certification Letter to Supreme Court of Texas at 6-8, *Kelley v. Homminga*, No. 15-24-00123-CV (dissenting statement); Rule 27a(d)(1) Certification Letter to Supreme Court of Texas at 5-7, *Devon Energy* v. Oliver, No. 15-24-00115-CV (dissenting statement).
[60] *Kelley*, Certification Letter at 6-7 (dissenting statement).
[61] *Id*. at 6 (emphasis in original).

However, he believed transfer was justified because the appeal was "inappropriately filed" in the Fifteenth Court:

> [E]ven if it would be *proper* to file such cases here, it would be *inappropriate* for this Court to entertain hundreds of appeals in family law, criminal law, and personal injury cases as they would inevitably shift time and attention away from our primary tasks.
>
> Furthermore, allowing litigants to routinely opt into one court of appeals instead of another could create a practice that, "if tolerated, breeds disrespect for and threatens the integrity of our judicial system." *In re Bennett,* 960 S.W.2d 35, 40 (Tex. 1997). Appellants here do not argue that this appeal involves an issue of statewide importance or a complex business dispute, but only that it is "the appellant's choice where to take the appeal." I doubt the Legislature intended "appellant's choice" on a large scale to be appropriate. *See* Tex. Gov't Code § 22.202(h) (requiring random assignment of appeals between the First and Fourteenth Courts of Appeals).
>
> The Legislature authorized the Supreme Court to adopt rules for transferring an appeal "inappropriately filed" here. *See* Tex. Gov't Code § 73.001(c). Whether Rule 27a does so or not does not matter in this case; given the First Court's agreement to receive this transfer, it will likely occur if we don't object to it under either Rule 27a or the previous practice governed by *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995). I would so inform the Supreme Court; as the Court does otherwise, I respectfully dissent.[62]

3. Reaction

The Fifteenth Court's letter certification of the dispute to the Texas Supreme Court attracted media attention, including a call for a "clean-up" bill from former State Rep. Andrew Murr, the sponsor of the House bill that created the Fifteenth Court of Appeals, to clarify that the Fifteenth Court's jurisdiction was limited. State Rep. Murr was quoted by Bloomberg Law as saying: "I expressly explained to my colleagues in the House that its jurisdiction was not similar to the other 14 existing courts of appeal."[63]

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[62] *Kelley*, Certification Letter at 7-8 (dissenting statement); *accord Devon*, Certification Letter at 6-7 (dissenting statement).

[63] Ryan Autullo, *Texas Court's Wider Authority Invites Shopping, Deluge (Correct)*, Bloomburg Law, https://news.bloomberglaw.com/litigation/texas-courts-unexpected-jurisdiction-invites-shopping-deluge (Feb. 10, 2025).

III. TEXAS SUPREME COURT'S RULING

On March 14, 2025, the Texas Supreme Court in *Kelley v. Homminga* issued a consolidated decision granting the motions to transfer *Kelley* and *Devon Energy* away from the Fifteenth Court and to their respective regional courts of appeals.[64] The opinion is relatively short, but it addresses the key points advanced by the Fifteenth Court majority.

The Texas Supreme Court "agree[d] the Fifteenth Court has jurisdiction over civil cases appealed from every county" because the Legislature wanted to ensure "that all Texas voters have a say in electing the justices who decide cases affecting the State's interests and that cases can be transferred into the Fifteenth Court to equalize its docket."[65] "But this jurisdictional premise alone does not establish that the Legislature intended to grant every civil appellant the option of litigating in the Fifteenth Court. To the contrary, several textual clues indicate that this is not what the Legislature intended at all."[66] The Supreme Court pointed to two textual indications refuting the idea that every civil appellate court could choose to litigate an appeal either locally or with the Fifteenth Court: (1) the title of S.B. 1045 "reflects that the Fifteenth Court was created to hear 'certain cases,'" and (2) the Legislature, by passing a rules-enabling statute, "expressly recognized that some appeals will be 'inappropriately filed' in the Fifteenth Court."[67]

The Supreme Court also rejected the Fifteenth Court's determination that "inappropriately filed" appeals are only those appeals like criminal appeals and certain original proceedings over which the Fifteenth Court lacked jurisdiction entirely:

> That cannot be right because Section 73.001(c) directs that an inappropriately filed appeal be *transferred* to another court of appeals. When a court lacks jurisdiction over a case, the only correct disposition is *dismissal* because the court lacks power to do anything else. By contrast, where an appellate court has jurisdiction over a case but should not exercise it in deference to another court with concurrent jurisdiction, the case is transferred from one court to another.[68]

The Supreme Court also stated that the distinction between "properly filed" and "improperly filed" under the rules-enabling statute did not create jurisdiction; it

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[64] *Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025).
[65] *Id.* at 832.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 833 (citations omitted).

simply controlled whether an appeal filed with the Fifteenth Court could be transferred to a regional court of appeals:[69]

> If the Fifteenth Court could hear any and all civil appeals, then these provisions would have no application. Thus, "properly filed" appeals must have a narrower meaning than all civil appeals. Considering the legislation as a whole, we conclude that the most natural meaning of "properly filed" cases that may not be transferred is supplied by Section 22.220(d), which defines the matters over which the Fifteenth Court has "exclusive intermediate appellate jurisdiction." When appeals regarding matters falling outside this jurisdiction are noticed to the Fifteenth Court, they are "inappropriately filed" and must be transferred.[70]

The Supreme Court also observed that if the Fifteenth Court majority's interpretation was correct, an unintended consequence could arise—each of the state's almost 5,000 civil appeals per year could be filed in the Fifteenth Court, the Supreme Court would be powerless to transfer these cases out of the Fifteenth Court, and the Legislature's purpose is establishing the Fifteenth Court as a specialty court of appeals would be wholly thwarted.[71]

In a footnote, the Supreme Court also rejected the Fifteenth Court majority's premise that the Supreme Court's prior decision in *In re A.B.* established a broad premise that "when multiple appellate courts have overlapping jurisdiction, the appellant can file in the court of its choosing . . . ."[72] The Supreme Court stated that in *A.B.*, the Court "pointed out the statutory oddity that two court of appeals districts . . . have jurisdiction over appeals from Gregg County" and that in appeals from Gregg County specifically, "a party may notice an appeal from a trial court's ruling to either court of appeals."[73] However, "*A.B.* does not support construing S.B. 1045 to create an appellant's-choice scheme" between litigating locally and litigating before the Fifteenth Court.[74]

The Texas Supreme Court closed its opinion with this conclusion:

> We conclude S.B. 1045 is susceptible of only one reasonable construction: the Legislature did not intend the Fifteenth Court to hear every civil appeal within its statewide jurisdiction. Rather, the fair meaning of the act, discerned through a contextual reading of all its provisions, is that the Legislature intended that court to hear (1) appeals and writs within its exclusive intermediate appellate jurisdiction, and

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 833 n.6.
[73] *Id.*
[74] *Id.*

> (2) appeals we transfer into the court for docket-equalization purposes. This is the only interpretation of the statutory scheme that harmonizes all its provisions into a cohesive whole. . . .
>
> Because the appeals here do not fall into either category, the motions to transfer are granted.[75]

IV. CONCLUSION

The Texas Supreme Court's per curiam decision in *Kelley* is relatively short and straightforward. But when viewed in light of the competing views advanced by the parties, three regional court chief justices and their cohorts, and the split decision of the three Fifteenth Court of Appeals justices themselves, *Kelley* represents an interesting balancing act, drawing elements from the opinions of several intermediate court justices.

By endorsing the theory that the Fifteenth Court of Appeals has at least some concurrent statewide jurisdiction with all regional courts of appeals on the one hand, and then by making the Fifteenth Court's duty to transfer cases outside its exclusive jurisdiction ministerial despite the use of ostensibly discretionary language in the transfer statute and rules on the other, the Supreme Court's decision in *Kelley* accomplished three things.

First, *Kelley* forestalled the need for the type of jurisdictional "clean up" bill foreseen by S.B. 1045's sponsor. Though the Fifteenth Court majority and First Court Chief Justice Adams suggested that the apparent drafting defect creating ostensible general concurrent jurisdiction between the regional courts and the Fifteenth Court could have been corrected by the Legislature in the current session, the difficulties of getting on the agenda in Texas' abbreviated legislative session made this option unlikely. And even if the Legislature could get the loose language fixed and clarified, there is always the risk that smoothing out one part of the statute creates a wrinkle in another. *Kelley* filled an apparent drafting gap without requiring the legislative intervention contemplated by the First Court and the Fifteenth Court majority.

Second, *Kelley* advanced the Supreme Court's general policy that the right to appeal should not be lost due to procedural technicalities.[76] It did so by avoiding creating a jurisdictional trap raised as a serious issue in *Devon Energy*. As Chief Justice Contreras said in her opinion on behalf of the Thirteenth Court of Appeals, it seems clear once all parts of the statue are put together that the legislature intended for the Fifteenth Court's subject matter jurisdiction to be limited to a specific class of appeals. However, use of the word "jurisdiction" has harsh procedural implications, which the Court hinted at in its discussion of transfer rather than dismissal being the proper remedy for when an appeal is improperly filed before the Fifteenth Court.

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[75] *Id*. at 834.

[76] *Roccaforte v. Jefferson Cnty*., 341 S.W.3d 919, 924 (Tex. 2011).

If the Supreme Court had held that the Section 22.202(d) "laundry list" defined the absolute limit of the Fifteenth Court's appellate jurisdiction, then any appeal filed in error before the Fifteenth Court of Appeals—including the two appeals in *Kelley* and *Devon Energy*—would have to be dismissed for want of jurisdiction, rather than transferred to the appropriate regional court of appeals as contemplated by the rules-enabling statute. By quietly confirming that the Fifteenth Court had some concurrent jurisdiction with all its sister courts, *Kelley* protects litigants who may have good faith but ultimately non-meritorious arguments for invoking the Fifteenth Court's jurisdiction in close-call cases, making the proper remedy transfer, not dismissal.

Third, by requiring the Fifteenth Court to refrain from exercising any apparent concurrent jurisdiction to do anything except assess its own jurisdiction under Section 22.220(d) and transfer non-exclusive cases to an appropriate regional court of appeals under Rule 27a, *Kelley* by court rule effectively limited the Fifteenth Court's exercise of jurisdiction to its core exclusive jurisdiction, thereby ensuring the historical jurisdiction of the courts of appeals were protected despite S.B.'s 1045 faulty drafting.

Kelley pragmatically threaded a needle, with the Supreme Court interpreting its own rules to provide that the Fifteenth Court of Appeals could function as a specialized statewide court, while also preserving the historical jurisdiction of the regional courts of appeals that should have been left intact as part of a political compromise from the effects of an arguable legislative drafting ambiguity that would unravel the balance between the specialty court and its sister courts.

The bottom line? Render unto the Fifteenth Court that which is the Fifteenth Court's, and render unto your local court of appeals that which is of the local court. Civil cases enumerated in Section 22.220(d) should be filed in the Fifteenth Court, and must be transferred there if they are not. All other civil cases must be filed in the appropriate regional court of appeals.

Chief Justice
SCOTT BRISTER

Justices
SCOTT FIELD
APRIL FARRIS

Clerk
CHRISTOPHER A. PRINE

Fifteenth Court of Appeals

P.O. Box 12852, AUSTIN, TEXAS 78711
www.txcourts.gov/15thcoa.aspx/
512-463-1610

Wednesday, December 4, 2024

The Honorable Deborah Young
Clerk of Court First and
Fourteenth Court of Appeals
301 Fannin St Ste 245
Houston, TX 77002-2062
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 15-24-00123-CV
Trial Court Case Number: 22-CV-0360

Style: Patrick Kelley and PMK Group, LLC
v. Richard Homminga and Chippewa Construction Co., LLC

Dear Ms. Young:

Appellees Richard Homminga and Chippewa Construction Co., LLC filed a motion to transfer this appeal to the First or Fourteenth Court of Appeals on the ground that this Court does not have exclusive intermediate appellate jurisdiction. *See* Tex. Gov't Code § 22.220(d)(1), (2). The Fifteenth Court of Appeals has decided to deny the motion. *See* Tex. R. App. P. 27a(c)(1)(B). Chief Justice Brister would grant the motion to transfer to the First or Fourteenth Court of Appeals.

The First and the Fourteenth Courts of Appeals must, within 20 days after receiving this notice, file a letter in this Court explaining whether they agree with the Fifteenth Court of Appeals' decision to deny the motion. *See* Tex. R. App. P. 27a(c)(1)(C).

Sincerely,

Christopher A. Prine, Clerk

FILE COPY

cc: Kelley Clark Morris (DELIVERED VIA E-MAIL)
David Funderburk (DELIVERED VIA E-MAIL)
Jordan Elton (DELIVERED VIA E-MAIL)
Diane S. Davis (DELIVERED VIA E-MAIL)
Bradley W. Snead (DELIVERED VIA E-MAIL)
Andrew Mytelka (DELIVERED VIA E-MAIL)
Todd C. Collins (DELIVERED VIA E-MAIL)
Victoria Rutherford (DELIVERED VIA E-MAIL)

Chief Justice
SCOTT BRISTER

Justices
SCOTT FIELD
APRIL FARRIS

Clerk
CHRISTOPHER A. PRINE

Fifteenth Court of Appeals

P.O. Box 12852, AUSTIN, TEXAS 78711
www.txcourts.gov/15thcoa.aspx/
512-463-1610

Friday, December 6, 2024

The Honorable Kathy Mills
Clerk of Court
13th Court of Appeals
901 Leopard St 10th Floor
Corpus Christi, TX 78401
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 15-24-00115-CV
Trial Court Case Number: 16-04-23,735

Style: Devon Energy Production Company, L.P.; Devon Energy Corporation; BPX Operating Company; and BPX Production Company v. Robert Leon Oliver, et al.

Dear Ms. Mills:

Appellees Robert Leon Oliver, et al., filed a motion to transfer this appeal to the Thirteenth Court of Appeals on the ground that this Court does not have exclusive intermediate appellate jurisdiction. *See* Tex. Gov't Code § 22.220(d)(1), (2). The Fifteenth Court of Appeals has decided to deny the motion. *See* Tex. R. App. P. 27a(c)(1)(B). Chief Justice Brister would grant the motion to transfer to the Thirteenth Court of Appeals.

The Thirteenth Court of Appeals must, within 20 days after receiving this notice, file a letter in this Court explaining whether they agree with the Fifteenth Court of Appeals' decision to deny the motion. *See* Tex. R. App. P. 27a(c)(1)(C).

Sincerely,

Christopher A. Prine, Clerk

cc: David W. Jones (DELIVERED VIA E-MAIL)
Gregg Laswell (DELIVERED VIA E-MAIL)
Jane M. Webre (DELIVERED VIA E-MAIL)
Michael Sheppard (DELIVERED VIA E-MAIL)
Marcus Schwartz (DELIVERED VIA E-MAIL)

Appendix C

ACCEPTED
15-24-00123-CV
FIFTEENTH COURT OF APPEALS
AUSTIN, TEXAS
12/16/2024 3:01 PM
CHRISTOPHER A. PRINE
CLERK

Justices
KEN WISE
KEVIN D. JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
CHARLES A. SPAIN
MEAGAN HASSAN
MARGARET "MEG" POISSANT
RANDY WILSON

Fourteenth Court of Appeals
301 Fannin Room 245
Houston, Texas 77002

Chief Justice
TRACY CHRISTOPHER

Clerk
CHRISTOPHER A. PRINE
Phone: 713/274-2800

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RECEIVED
15TH COURT OF APPEALS
AUSTIN, TX
December 16, 2024
CHRISTOPHER A. PRINE
CLERK OF COURT

December 16, 2024

The Honorable Christopher A. Prine
Clerk of the Fifteenth Court of Appeals
P.O. Box 12852
Austin, TX 78711
* DELIVERED VIA EMAIL *

RE: Response to the Fifteenth Court of Appeals' Denial of Appellees' Motion to Transfer to the First or Fourteenth Court of Appeals
Court of Appeals No.: 15-24-00123-CV
Trial Court Case No.: 22-CV-0360

Style: Patrick Kelley and PMK Group, LLC
v. Richard Homminga and Chippewa Construction Co., LLC

Dear Mr. Prine:

The Court was notified on December 4, 2024, that the Fifteenth Court of Appeals had decided to deny the appellees' motion to transfer *Kelley v. Homminga*, Cause No. 15-24-00123-CV, to the First or Fourteenth Court of Appeals. In accordance with Texas Rule of Appellate Procedure 27a(c)(1)(C), we write to explain why we disagree with that decision.

With certain exceptions, "each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." TEX. GOV'T CODE § 22.220(a). But "[t]he Fifteenth Court of Appeals District is composed of all counties in this state." *Id.* § 22.201(p). Thus, if a civil appeal is subject to the jurisdiction of any intermediate appellate court, then the appeal is within the concurrent jurisdiction of the Fifteenth Court of Appeals. *See id.* § 22.220(a). In addition, the Fifteenth Court of Appeals has exclusive appellate jurisdiction over appeals from the business court, as well as

over certain cases involving an arm or agent of the executive branch or challenging the constitutionality or validity of a state statute or rule. *See id.* §§ 22.220(d), 25A.007. It is undisputed that the appeal at issue here is within the Fifteenth Court of Appeals' general appellate jurisdiction, not its exclusive jurisdiction.

In creating the Fifteenth Court of Appeals, the legislature directed the Supreme Court of Texas to adopt rules for "transferring an appeal *inappropriately* filed in the Fifteenth Court of Appeals to a court of appeals with jurisdiction over the appeal." TEX. GOV'T CODE § 73.001(c)(1) (emphasis added). The resulting rule provides a procedure for transferring an appeal "*improperly* taken to the Fifteenth Court of Appeals." *See* TEX. R. APP. P. 27a(b)(1)(A) (emphasis added).

The appellees have moved to transfer the appeal to the First or Fourteenth Court of Appeals on the ground that the appeal does not lie within the Fifteenth Court of Appeals' exclusive jurisdiction and, contrary to the appellants' contention, the appeal is not "aligned with [the Fifteenth Court of Appeals'] specialization in complex business disputes." Thus, we understand the appellees' position to be, first, that an "inappropriately filed" appeal is one over which the Fifteenth Court of Appeals lacks exclusive jurisdiction, and second, that this appeal does not require the Court's specialized expertise in complex business disputes. We agree with both of those contentions.

A. The appeal was inappropriately filed in, or improperly taken to, the Fifteenth Court of Appeals.

Neither the legislature nor the Supreme Court of Texas has identified the characteristics of an appeal "inappropriately filed" in, or "improperly taken" to, the Fifteenth Court of Appeals so as to make the appeal subject to transfer. After considering the various possibilities, we conclude that the only construction that makes sense is that an appeal is inappropriately filed in the Fifteenth Court of Appeals if that court lacks exclusive jurisdiction over it.

The Supreme Court of Texas has not determined whether the expression "exclusive jurisdiction," as used in S.B. 1045, entails subject-matter jurisdiction such that the resolution of the appeal by a different intermediate appellate court would be void. *See In re Dallas County*, 697 S.W.3d 142, 161 n.11 (Tex. 2024) (orig. proceeding). It has stated, however, that "[i]f a case that *should* be transferred to the Fifteenth Court is retained and resolved by a different court of appeals, without objection from either party or that court, it would amount to an error of law." *Id.* Because an "inappropriately filed" appeal is properly subject to transfer,

and the transfer would not constitute an error of law, an "inappropriately filed" appeal must be one over which the Fifteenth Court of Appeals lacks exclusive jurisdiction.

Referring to appeals over which the Fifteenth Court of Appeals has only general jurisdiction as "inappropriately filed" with that court makes sense when one considers that an average of around 5,000 civil cases are filed in the Texas intermediate appellate courts every year, many of which are appeals[1]—and the Fifteenth Court of Appeals has concurrent jurisdiction over every one of them. If appeals over which the Fifteenth Court of Appeals has only concurrent jurisdiction can properly be filed in that court, then those cases cannot be transferred as "inappropriately filed." The appeals would remain with the Fifteenth Court of Appeals, and the Supreme Court of Texas is specifically prohibited from transferring appeals from the Fifteenth Court of Appeals for docket equalization purposes. This would be an unworkable situation.

It is therefore appropriate and proper to file a civil appeal in the regional intermediate appellate court rather than in the Fifteenth Court of Appeals, absent some reason such as exclusive jurisdiction or an agreement between the parties. Considering the alternative, it makes sense that the absence of exclusive jurisdiction in the Fifteenth Court of Appeals is both a necessary and sufficient basis on which to determine that a civil appeal was "inappropriately filed" in that court.

Because the Fifteenth Court of Appeals lacks exclusive jurisdiction over this appeal, we conclude that the motion to transfer *can* properly be granted, and we turn next to the question of whether the remaining prerequisites to transfer have been satisfied.

B. The appellants failed to raise meritorious objections, and this Court agrees to the transfer.

The Fifteenth Court of Appeals may transfer an improperly taken appeal on the motion of a party, or on its own motion, if two conditions are met: (1) no party files a timely, meritorious objection to the transfer; and (2) the transferee court agrees to the transfer. *See* TEX. R. APP. P. 27a.

The first condition is met, because although the appellants in this case timely responded to the motion to transfer, their objections are not meritorious.

---

[1] See Annual Statistical Report for the Texas Judiciary, FY 2023, https://www.txcourts.gov/statistics/annual-statistical-reports/2023/. The report does not distinguish appeals from original proceedings.

The appellants first acknowledge that the Fifteenth Court of Appeals does not have exclusive jurisdiction over the appeal, but that is undisputed.

Second, the appellants state that the appellees do not, and cannot, rely in their motion to transfer on the ground that this appeal was inappropriately filed or improperly taken to the Fifteenth Court of Appeals. For the reasons previously explained, we disagree. The appellees' arguments are based on the assumption that a civil appeal is improperly taken to the Fifteenth Court of Appeals if the Court lacks exclusive jurisdiction. That assumption is correct.

Third, the appellants state that if appellate courts have concurrent jurisdiction, then the appellants choose the court to which they appeal (unless the courts with concurrent jurisdiction are the First and Fourteenth Courts of Appeals, to which appeals are randomly assigned). But that is not a meritorious objection as applied to cases filed in the Fifteenth Court of Appeals. Under the rule governing transfers, an appeal "improperly taken to the Fifteenth Court of Appeals" remains where it was filed unless the court or a party seeks a transfer. *See* TEX. R. APP. P. 27a. If that happens, then as stated above, the appeal may be transferred if there is no timely meritorious objection and the transferee court agrees to the transfer. If the mere fact that the appellant chose to file the appeal in the Fifteenth Court of Appeals were a meritorious objection to transfer—that is, if the appellate courts were simply to defer to the appellants' choice to take an appeal to the Fifteenth Court of Appeals—then the Fifteenth Court of Appeals could not transfer any case. The purpose of the motion to transfer is to override the appellants' choice.

The remainder of the appellants' response are not truly objections. They clarify that they do not contend that the case, if brought today, could properly have been litigated in a Texas business court, and they state that they will address the merits of the appeal in their brief. Finally, the appellants suggest that the Fifteenth Court of Appeals carries the motion to transfer with the case or set a special briefing schedule and hear argument on the motion. But, these suggestions are incompatible with Texas Rule of Appellate Procedure 27a, which governs the procedure for deciding the motion to transfer.

Because none of these is a meritorious objection, and because we agree to the transfer of this appeal to the Fourteenth Court of Appeals, both preconditions to transfer are satisfied.

The only remaining question is whether the Fifteenth Court of Appeals should grant the motion.

C. Motions to transfer appeals improperly taken to the Fifteenth Court of Appeals should be routinely granted.

Texas Rule of Appellate Procedure 27a says that the Fifteenth Court of Appeals "may" transfer an appeal where, as here, all preconditions for transfer are satisfied. The use of the word "may" indicates that the decision to transfer is discretionary. S.B. 1045 and Rule 27a provide little guidance on how that discretion is to be exercised, but we know that "a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S. Ct. 704, 710, 163 L. Ed. 2d 547 (2005).

The question then becomes one of identifying the legal principles that should guide the decision to transfer (or in the transferee court's position, the decision to refuse a transfer), so that similar results are reached in similar appeals. And inasmuch as the Fifteenth Court of Appeals shares concurrent jurisdiction over civil appeals with every other intermediate appellate court, it seems best to grant a motion to transfer an inappropriately filed appeal absent some specific reason to deny the motion.

This approach certainly would be more favorable to the Fifteenth Court of Appeals' mission. The Court was created so that appeals of statewide importance would be decided by justices selected on a statewide basis rather than from a more limited geographic region. The Court exercises exclusive jurisdiction over certain kinds of civil appeals, and because it has general jurisdiction, it also can decide appeals that are companion cases to those within its exclusive jurisdiction, or that should be consolidated with them, or have some other relationship to such cases. Equally important, the Fifteenth Court of Appeals' general jurisdiction allows it to hear appeals submitted to it by agreement of parties wishing to avail themselves of the Court's specialized expertise in complex business disputes, regardless of whether the appeal relates to a matter within the Court's exclusive jurisdiction.

But although the Fifteenth Court of Appeals can decide every civil appeal that another intermediate appellate court can, that is not reason enough to do so.

The First through Fourteenth Courts of Appeals can be expected to routinely transfer to the Fifteenth Court of Appeals those civil appeals over which that court

has exclusive jurisdiction and to accept transfers from that court, absent some valid reason to decline transfer of a specific case. If only as a matter of resource allocation, the Fifteenth Court of Appeals should likewise routinely grant motions to transfer, absent a valid reason to deny the motion in a specific case.

The deadlines that apply to a motion to transfer support this conclusion. When a motion to transfer is contested, the transferor must notify the transferee court of its decision, whereupon the transferee court has just twenty days to respond, "explaining whether it agrees with the transferor court's decision." TEX. R. APP. P. 27a(c)(1)(C). If the courts disagree, then the transferor court must forward to the Texas Supreme Court the documents required for that court to decide the motion. TEX. R. APP. P. 27a(d). The documents to be forwarded include a letter explaining the transferor court's decision, and absent exceptional circumstances, the documents are to be submitted to the Supreme Court within twenty days after receipt of the transferee court's letter. *Id.* The brief twenty-day deadlines for each court to explain its position is a further indication that a contested motion to transfer should be granted, and the transfer accepted, unless there is some reason to do otherwise.

Inasmuch as we can identify no reason why this appeal should not be governed by such a general rule, we respectfully disagree with the Fifteenth Court of Appeals' decision to deny the motion.

Respectfully submitted,

Tracy Christopher

Chief Justice Tracy Christopher
Fourteenth Court of Appeals

cc: Kelley Clark Morris (DELIVERED VIA E-MAIL)
David Funderburk (DELIVERED VIA E-MAIL)
Jordan Elton (DELIVERED VIA E-MAIL)
Diane S. Davis (DELIVERED VIA E-MAIL)
Bradley W. Snead (DELIVERED VIA E-MAIL)
Andrew Mytelka (DELIVERED VIA E-MAIL)
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Appendix D

ACCEPTED - 15-24-00123-CV
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DAVID GUNN
JUSTICES

DEBORAH M. YOUNG
CLERK OF THE COURT

ANNE-MARIE GREENWOOD
CHIEF STAFF ATTORNEY

PHONE: 713-274-2700

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Court of Appeals
First District
301 Fannin Street
Houston, Texas 77002-2066

Monday, December 23, 2024

The Honorable Christopher A. Prine
Clerk of the Fifteenth Court of Appeals
P.O. Box 12852
Austin, Texas 78711

RE: Response to the Fifteenth Court of Appeals' Denial of Appellees' Motion to Transfer to the First or Fourteenth Court of Appeals

Court of Appeals Number: 15-24-00123-CV
Trial Court Case Number: 22-CV-0360

Style: Patrick Kelley and PMK Group, LLC v. Richard Homminga and Chippewa Construction Co., LLC

Dear Mr. Prine:

This letter is being submitted to the Fifteenth Court of Appeals pursuant to the transfer procedure set forth in Texas Rule of Appellate Procedure 27a(c)(1)(C). As set forth below, the First Court of Appeals agrees with the decision of the Fifteenth Court to retain this case and deny appellees' motion to transfer to either the First or Fourteenth Court of Appeals. *See* TEX. R. APP. P. 27a(c)(1)(C).

Background

Appellants Patrick Kelly and PMK Group, LLC filed this appeal in the Fifteenth Court of Appeals on the basis that it falls within that court's general appellate jurisdiction. *See* TEX. GOV'T CODE §§ 22.201(p), 22.220(a).

Appellees Richard Homminga and Chippewa Construction Co., LLC objected and moved to transfer the case to either First or Fourteenth Court of Appeals. *See* TEX. R. APP. P. 27a(c)(1)(A).

Appellees argued that this appeal does not fall within the Fifteenth Court's exclusive appellate jurisdiction and therefore it was "inappropriately filed" or "improperly taken" in that court under the transfer statute (Government Code section 73.001(c)) and the corresponding transfer rule (Texas Rule of Appellate Procedure 27a(b))[1]. *See* TEX. GOV'T CODE § 73.001(c)(1); TEX. R. APP. 27a(b)(1); *see also* TEX. GOV'T CODE § 22.220(d)(1), (2).

According to appellees, under the transfer statute and rule, a case that does not invoke the Fifteenth Court of Appeals' exclusive jurisdiction is "inappropriately filed" or "improperly taken" in that court. Thus, any case involving the Fifteenth Court's general appellate jurisdiction can never be "appropriately filed" or "properly taken" there—and must be transferred.

The Fifteenth Court of Appeals denied appellees' motion to transfer. *See* TEX. R. APP. P. 27a(c)(1)(B). Chief Justice Brister would have granted the motion.

In accordance with Rule 27a(c)(1)(C), the First Court of Appeals now explains why it agrees with the Fifteenth Court of Appeals' decision. *See* TEX. R. APP. P. 27a(c)(1)(C).

Reasons for Agreeing with the Fifteenth Court of Appeals' Decision

It is undisputed that the provisions setting forth the appellate jurisdiction of the Fifteenth Court of Appeals are unambiguous. *See* TEX. GOV'T CODE §§ 22.201(a), (p); 22.220(a).

They provide that "[t]he state is organized into 15 courts of appeals districts with a court of appeals in each district." TEX. GOV'T CODE §§ 22.201(a). And

[1] Section 73.001(c)(1) and (2) instructs the Supreme Court of Texas to adopt rules for "transferring an appeal *inappropriately filed* in the Fifteenth Court to a court of appeals with jurisdiction over the appeals" and for "transferring to the Fifteenth Court of Appeals from another court of appeals the appeals over which the Fifteenth Court of Appeals has exclusive jurisdiction" *See* TEX. GOV'T CODE § 73.001(c)(1), (2) (Emphasis added). Rule 27a is the resulting rule and uses the phrase "*improperly taken*." TEX. R. APP. P. 27a(b)(1)(A) (Emphasis added).

"[t]he Fifteenth Court of Appeals District is composed of all counties in this state." TEX. GOV'T CODE §§ 22.201(p).

Government Code section 22.220 then states that, except for cases under the Fifteenth Court's exclusive jurisdiction, "each court of appeals has appellate jurisdiction of *all civil cases within its district* of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." TEX GOV'T CODE § 22.220(a) (Emphasis added).

Because this statutory language is unambiguous, we must interpret it according to the plain language chosen by the Legislature. *City of Denton v. Grim*, 694 S.W.3d 210, 214 (Tex. 2024); *Molinet v. Kimberly*, 356 S.W.3d 407, 414 (Tex. 2011). And we must presume that the Legislature intended for each of the statute's words to have a purpose. That the Legislature purposefully omitted words it did not include—and purposefully included the words it did include. *See Bexar Appraisal District v. Johnson*, 691 S.W.3d 844, 847 (Tex. 2024).

Based on these principles, the plain language of Government Code section 22.220 shows that the Fifteenth Court of Appeals' appellate jurisdiction is statewide. *See In re Dallas County*, 697 S.W.3d 142, 159 (Tex. 2024). And that its exclusive jurisdiction is not its only appellate jurisdiction. The statutory text also states that each court of appeals, which includes the Fifteenth Court of Appeals, has general appellate jurisdiction over "*all civil cases within its district* of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." TEX GOV'T CODE § 22.220(a) (Emphasis added). Thus, as currently written, Government Code section 22.220 gives the Fifteenth Court of Appeals statewide exclusive appellate jurisdiction and general appellate jurisdiction as described in the statute.

Indeed, as our supreme court has noted:

> *The Fifteenth Court, like all other courts of appeals, generally has appellate jurisdiction over cases decided by the district and county courts within its district.* Since the Fifteenth Court's district is statewide, the court may exercise appellate jurisdiction over cases from any district and county court, subject to legislative restriction.

In re Dallas County, 697 S.W.3d at 159 (Emphasis added).

It is settled, as a general rule, that a case is "properly filed" in a court when that court has jurisdiction to hear it. And when more than one court has jurisdiction to hear a case, the issue becomes one of dominant jurisdiction. *See In re Puig*, 351 S.W.3d 301, 305-06 (Tex. 2011). Thus, it necessarily follows that when a civil appeal comes within the Fifteenth Court's general appellate jurisdiction (as described in Government Code section 22.220(a))—that civil appeal can be "properly filed" in the Fifteenth Court of Appeals. Any other reading of the statute requires us to ignore its plain language and impermissibly substitute our meaning for it over that of the Legislature's.

It has been argued by appellees that following the plain statutory language is unworkable and will lead to an overburdened docket for the Fifteenth Court of Appeals. We are not in a position to know whether that is in fact true, but it is, in any event, a matter of public policy that belongs to the Legislature. *See* TEX. CONST. art. 2, § 1. Judicial policy preferences should play no role in statutory interpretation. *See McLane Champions, LLC v. Houston Baseball Partners LLC*, 671 S.W.3d 907, 918 (Tex. 2023).

Additionally, as referenced above, appellees have argued that the transfer statute (Government Code section 73.001(c)), and the corresponding transfer rule (Texas Rule of Appellate Procedure 27a(b)), should be construed as meaning that an "inappropriately filed" or "improperly taken" case in the Fifteenth Court of Appeal is only one in which the Fifteenth Court lacks exclusive jurisdiction.

Based on that, we understand appellees' position to be that any case invoking the Fifteenth Court's general appellate jurisdiction can never be "appropriately filed" or "properly taken" in that court. And, further, that this meaning of the transfer statute and rule should be used to construe section 22.220 of the Government Code as providing only for exclusive jurisdiction to the Fifteenth Court of Appeals. *See* TEX GOV'T CODE § 22.220(a).

Under that view, we would have to disregard the unambiguous language in section 22.220(a) that provides—the Fifteenth Court of Appeals has general appellate jurisdiction over "*all civil cases within its district* of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." TEX GOV'T CODE § 22.220(a) (Emphasis added). We may not do so. We are bound by the

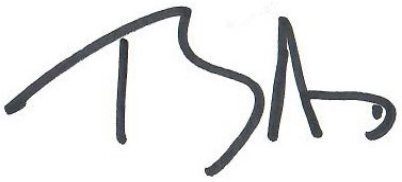
plain meaning of the language used by the Legislature. *City of Denton*, 694 S.W.3d at 214. And because section 22.220(a) is unambiguous, we may not change that language (or its meaning) by looking to a suggested meaning for a different statute and rule. *See Bexar Appraisal District*, 691 S.W.3d at 847.

If the Legislature had intended for the Fifteenth Court of Appeals to have only exclusive jurisdiction—and not also general appellate jurisdiction—it certainly could have written Government Code section 22.220(a) that way. But it did not include that "legislative restriction" in the statute. *See In re Dallas County*, 697 S.W.3d at 159. And "we may not seek a different result by considering what unexpressed purposes, policy considerations, or interests the Legislature may have had in mind" in prescribing the jurisdiction of the Fifteenth Court of Appeals. *See Bonsmara Natural Beef Company, LLC v. Hart of Texas Cattle Feeders, LLC*, 603 S.W.3d 385, 391 (Tex. 2020) ("Separation of powers demands that judge-interpreters be sticklers …about not rewriting statutes under the guise of interpreting them.").

Accordingly, if the Legislature wants to rewrite Government Code section 22.220(a) to restrict the appellate jurisdiction of the Fifteenth Court of Appeals to be only its exclusive jurisdiction—it can do so during the next session that is about to start. But, again, we may not do so. *Id*.

Thus, for all for these reasons, the First Court of Appeals agrees with the decision of the Fifteenth Court to retain this case and deny appellees' motion to transfer to either the First or Fourteenth Court of Appeals.[2]

Sincerely,



Terry Adams
Chief Justice
First Court of Appeals

[2] Justice Gunn, not sitting.

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Court of Appeals

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December 23, 2024

The Honorable Christopher A. Prine
Clerk of the Court
Fifteenth Court of Appeals
P.O. Box 12852
Austin, Texas 78711
DELIVERED VIA EMAIL

Re: Fifteenth Court of Appeals No. 15-24-00115-CV
Trial Court Cause No. 16-04-23,735
Style: *Devon Energy Production Company, L.P.; Devon Energy Corporation; BPX Operating Company, and BPX Production Company v. Robert Leon Oliver, et al.*

Dear Mr. Prine:

On December 6, 2024, you notified us that appellees Robert Leon Oliver, *et al.*, filed a motion to transfer the above-referenced case to the Thirteenth Court of Appeals on the ground that the Fifteenth Court does not have exclusive intermediate appellate jurisdiction over the appeal. *See* TEX. GOV'T CODE ANN. § 22.220(d)(1), (2). You further advised us that the Fifteenth Court has decided to deny the motion; however, Chief Justice Brister would grant the motion to transfer. *See* TEX. R. APP. P. 27a(c)(1)(B). The justices of the Thirteenth Court unanimously disagree with the decision to deny transfer of the above-referenced appeal, although our individual reasoning may differ in some respects. *See id.* R. 27a(c)(1)(C). We provide the following to briefly explain our decision.

I. BACKGROUND

Appellants filed a notice of appeal in the Fifteenth Court from a final judgment rendered in the 135th Judicial District of De Witt County, Texas. Appellants reasoned that since the Fifteenth Court's "district is statewide," and their appeal is not subject to legislative restriction, the Fifteenth Court possesses "concurrent appellate jurisdiction" over their appeal. *See In re Dallas County*, 697 S.W.3d 142, 159 (Tex. 2024) (orig. proceeding) ("Since the Fifteenth Court's district is statewide, the court may exercise appellate jurisdiction over cases from any district and county court, subject to legislative restriction.").

Pursuant to Rule 27a(c)(1)(A), appellees filed a motion to transfer the appeal to the Thirteenth Court on grounds that the case subject to appeal did not fall within the statutory requirements for an appeal to the Fifteenth, and that while the Fifteenth possesses limited exclusive jurisdiction over certain appeals, it does not possess statewide concurrent jurisdiction over all

appeals. *See* TEX. R. APP. P. 27a(c)(1)(A). Appellants thereafter filed an objection to the motion to transfer reiterating and expanding on their argument that the Fifteenth Court has concurrent appellate jurisdiction over all civil cases within the state. *See* TEX. GOV'T CODE ANN. § 22.220(a). Other than their contention that the Fifteenth Court possesses concurrent jurisdiction over the appeal, appellants offer no reason why their appeal should be heard in that court.

II. STATUTORY CONSTRUCTION

As a liminal matter, our rules of statutory construction cast doubt on appellants' contention regarding the interpretation of the government code. Section 22.220(a) of the government code states, "Except as provided by Subsection (d), each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." *Id.* Subsection (d) explains that the Fifteenth Court "has exclusive intermediate appellate jurisdiction" over certain specified matters "arising out of or related to a civil case." *Id.* § 22.220(d).

Here, appellants assert that the Fifteenth Court has "concurrent jurisdiction" over the appeal because each court of appeals has appellate jurisdiction of all civil cases within its district, see *id.* § 22.220(a), and the "Fifteenth Court of Appeals District is composed of all counties in this state." *Id.* § 22.201(p). However, appellants' interpretation renders the phrase "Except as provided by Subsection (d)" in § 22.220(a) superfluous. In other words, if the Fifteenth Court's jurisdiction extends to all cases from any district, then that language is unnecessary and of no effect. It is a fundamental rule of statutory construction that we must endeavor to interpret a statute in a manner that does not render any part of it surplusage. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 581 (Tex. 2022); *see In re Tex. Educ. Agency*, 619 S.W.3d 679, 688 (Tex. 2021) (orig. proceeding) ("[W]e endeavor to afford meaning to all of a statute's language so none is rendered surplusage.").

Appellants' interpretation is also arguably inconsistent with the statutory framework supporting the Fifteenth Court, which is unlike that pertaining to the other intermediate appellate courts. For instance, the Fifteenth Court's original jurisdiction does not extend statewide and "is limited to writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." TEX. GOV'T CODE ANN. § 22.221(a), (b), (c), (c-1).

III. LEGISLATIVE HISTORY

The legislative history of § 22.220(d) does not support the conclusion that its drafters intended the Fifteenth Court to exercise concurrent jurisdiction over all civil cases statewide. The legislature created the Fifteenth Court to address appeals in civil cases of "statewide significance" which require the application of "highly specialized precedent in complex areas of law including sovereign immunity, administrative law, and constitutional law." *See* S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1045, 88th Leg., R.S. (substituted, Mar. 24, 2023). Thus, the statement of intent for S.B. 1045 refers to the creation of the Fifteenth Court "with jurisdiction over certain civil cases." *See id.* Construing § 22.220(d) to encompass all civil appeals, regardless of whether they are of statewide significance or require particular expertise, is inconsistent with the legislative objective in creating a specialized court. *See City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 184 (Tex. 2022) ("In interpreting statutes, we look not only to the statutory language, but also to the objective the Legislature sought to attain and the consequences of a particular construction.").

We further note that the supreme court has already identified that the bill resulting in the Fifteenth Court's creation "does not remotely seek a return to that distant past with one appellate court for the whole State." *In re Dallas County*, 697 S.W.3d at 153. Instead, the bill "involve[d]

restrictions that are more significant, *both for the Fifteenth Court* and for the regional courts of appeals." *Id.* at 161 (emphasis added).

IV. PRUDENTIAL CONSIDERATIONS

There are several compelling prudential reasons why the Fifteenth Court should transfer the appeal to the Thirteenth Court. First, as a procedural matter, appellants offer no reason why the Fifteenth Court of Appeals should hear their appeal other than the generalized concept that the Fifteenth Court has concurrent jurisdiction over the appeal. For the Fifteenth Court to exercise jurisdiction over an appeal for which it lacks exclusive jurisdiction, there should be some compelling reason for it to do so. For instance, the Fifteenth Court may choose to exercise jurisdiction over related or companion cases, or cases filed there by agreement of the parties, or cases which would benefit from that court's special expertise in complex disputes. None of those circumstances are present here. Further, it should be the appellants' burden to provide the Fifteenth Court with appropriate pleadings which enable it to "ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction." TEX. GOV'T CODE ANN. § 22.220(c). Appellants have failed to do so in this case.

Second, the Fifteenth Court's exercise of jurisdiction over a "standard" appeal, such as this one, which neither falls within its exclusive jurisdiction nor its area of expertise, would impair the effectiveness of that Court by diverting its resources from those cases requiring its expertise. *See* S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1045, 88th Leg., R.S. (substituted, Mar. 24, 2023).

Third, allowing all civil appeals statewide to be filed either in a court of appeals district or in the Fifteenth Court of Appeals would increase uncertainty in litigation insofar as the parties would be unable to predict the appellate trajectory of their cases. It could also potentially overwhelm that court with innumerable filings. In this regard, we note that the supreme court may not transfer any case "properly" filed in the Fifteenth Court to another court for the purpose of docket equalization. TEX. GOV'T CODE ANN. § 73.001(b). Moreover, the ability of litigants to indiscriminately pick and choose which appellate court to proceed in would likely engender forum shopping at the appellate level.

V. CONCLUSION

Based upon the foregoing, the Thirteenth Court respectfully disagrees with the Fifteenth Court's decision to deny the motion to transfer in this case. Within twenty days after receiving this notice, and as soon as practicable, please forward a copy of this letter, along with the other requisite items, to the Supreme Court of Texas. *See* Tex. R. APP. P. 27a(d)(1)(A), (2). We further note that it may be helpful for the Fifteenth Court and the Supreme Court to address and define those factors relevant to the Fifteenth Court's exercise of jurisdiction.

Yours truly,

Dori Contreras, Chief Justice

cc: David W. Jones (DELIVERED VIA EMAIL)
Gregg Laswell (DELIVERED VIA EMAIL)

Jane Webre (DELIVERED VIA EMAIL)
Michael Sheppard (DELIVERED VIA EMAIL)
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Chief Justice
SCOTT BRISTER

Justices
SCOTT FIELD
APRIL FARRIS

Clerk
CHRISTOPHER A. PRINE

Fifteenth Court of Appeals

P.O. Box 12852, AUSTIN, TEXAS 78711
www.txcourts.gov/15thcoa.aspx/
512-463-1610

Monday, January 6, 2025
(Corrected Letter)

The Honorable Blake A. Hawthorne
Clerk of Court
The Supreme Court of Texas
PO Box 12248
Austin, TX 78711-2248
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 15-24-00123-CV
Trial Court Case Number: 22-CV-0360

Style: Patrick Kelley and PMK Group, LLC
v. Richard Homminga and Chippewa Construction Co., LLC

Dear Mr. Hawthorne:

Appellees Richard Homminga and Chippewa Construction Co., LLC filed a motion to transfer this appeal to the First or Fourteenth Court of Appeals on the ground that this Court does not have exclusive intermediate appellate jurisdiction. *See* Tex. Gov't Code § 22.220(d)(1), (2). The Fifteenth Court of Appeals decided to deny the motion with Chief Justice Brister noting he would grant the motion. *See* Tex. R. App. P. 27a(c)(1)(B). This Court notified the First and Fourteenth Courts of Appeals of our decision to deny appellees' motion and requested that each court file a letter in this Court stating whether it agreed with the Fifteenth Court of Appeals' decision. *See* Tex. R. App. P. 27a(c)(1)(C).

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On December 16, 2024, this Court received the enclosed letter from Chief Justice Christopher of the Fourteenth Court of Appeals explaining why the Fourteenth Court disagrees with this Court's decision to deny the motion to transfer.

On December 23, 2024, this Court received the enclosed letter from Chief Justice Adams of the First Court of Appeals explaining why the First Court agrees with this Court's decision to deny the motion to transfer.

Because one of the transferee courts disagrees with the Fifteenth Court's decision on the motion, in accordance with Texas Rule of Appellate Procedure 27a(d)(1), we enclose Appellees' motion, Appellants' objection, letters from the transferee courts, and an explanation of this Court's decision on the motion. Please present this transfer motion, along with the recommendations of the First, Fourteenth, and Fifteenth Courts of Appeals, to the Supreme Court for consideration.

The Fifteenth Court of Appeals Recommendation to Deny the Motion to Transfer, with Chief Justice Brister Voting to Grant.

The instant appeal is from a Galveston County final judgment awarding over $1 million in damages on claims pertaining to a construction dispute over alleged defective work on a single-family home.

Appellees Richard Homminga and Chippewa Construction Co., LLC filed a motion to transfer this appeal to the First or Fourteenth Court of Appeals pursuant to Texas Rule of Civil Procedure 27a's procedure for appeals "improperly taken" to the Fifteenth Court of Appeals. *See* Tex. R. App. P. 27a(b)(1) ("The transfer process in this rule applies to appeals: (A) improperly taken to the Fifteenth Court of Appeals…."). Appellees contend that this appeal was "improperly taken" to the Fifteenth Court because this appeal does not fall within this Court's exclusive appellate jurisdiction and no other source of law "mandates" jurisdiction in this Court.

Appellants Patrick Kelley and PMK Group, LLC oppose the motion to transfer. They acknowledge that this appeal does not fall within this court's exclusive intermediate appellate jurisdiction. They argue that the appeal was appropriately filed in the Fifteenth Court because the Fifteenth Court possesses general civil appellate jurisdiction pursuant to Texas Government Code Section 22.220(d)(3) and the Legislature has not deprived Appellants of the choice of

where to file when geographic districts overlap.

At the outset, we first examine whether this Court has jurisdiction over the appeal at issue. *Hous. Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007) ("Courts always have jurisdiction to determine their own jurisdiction."); *see Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 699 (Tex. 2022).

Texas Government Code Section 22.220, entitled "Civil Jurisdiction," states that "[t]he Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction" over particular "matters arising or related to a civil case." Tex. Gov't Code § 22.220(d). This subsection, however, is not the only provision addressing the Fifteenth Court's appellate jurisdiction. Subsection (a) states that "[e]xcept as provided by Subsection (d), each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." *Id.* § 22.220(a). Although Subsection (d) divests the other intermediate courts of jurisdiction over the categories of cases that fall within the Fifteenth Court's exclusive jurisdiction, nothing in Subsection (d) purports to divest the Fifteenth Court of the general civil intermediate appellate jurisdiction authorized by Subsection (a). Consequently, this Court still possesses general appellate jurisdiction over civil cases that fall within our district, which encompasses "all counties in the state." Tex. Gov't Code § 22.201(p).

Appellees do not dispute that this case falls within this Court's general civil intermediate appellate jurisdiction. Rather, Appellees point to Texas Government Code Section 73.001(c) and Texas Rule of Appellate Procedure 27a as providing authority to transfer this case to the First or Fourteenth Court of Appeals. Rule 27a is authorized by Government Code section 73.001(c), which directs the Texas Supreme Court to adopt rules for (1) transferring out "an appeal *inappropriately* filed in the Fifteenth Court of Appeals to a court of appeals with jurisdiction over the appeal"; and (2) transferring in those "appeals over which the Fifteenth Court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." Tex. Gov't Code § 73.001(c) (emphasis added). According to Appellees, an appeal that is not within the Fifteenth Court's exclusive jurisdiction is "inappropriately" filed with the Fifteenth Court and should be transferred to one of the other fourteen Courts of Appeals.

We do not agree that civil appeals falling outside the bounds of this Court's exclusive jurisdiction are "inappropriately filed" in the Fifteenth Court as a categorical matter. The Texas Government Code does not define the term "inappropriately filed," but dictionary definitions can "help inform meaning." *In re Dallas Cnty.*, 697 S.W.3d 142, 156 (Tex. 2024). Merriam-Webster's Dictionary defines the word "inappropriate" to mean "unsuitable." *Inappropriate*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2024). When the Legislature has determined that a certain type of matter is categorically unsuitable for resolution in Fifteenth

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Court of Appeals, it has restricted this Court's jurisdiction to hear it. For example, the Legislature expressly divested the Fifteenth Court of jurisdiction in criminal actions. Tex. Code Crim. Pro. art. 4.01 ("The following courts have jurisdiction in criminal actions . . . Courts of appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District."). The Legislature also restricted the original jurisdiction of the Court of Appeals to issuing writs "arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." Tex. Gov't Code § 22.221(c-1).

By contrast, the Legislature has not restricted the Fifteenth Court's civil appellate jurisdiction to only those matters falling within this Court's exclusive jurisdiction. Rather, the Legislature explicitly vested the Fifteenth Court with "appellate jurisdiction of *all civil cases* within its district . . . when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." Tex. Gov't Code § 22.220(a) (emphasis added).[1] Accordingly, we conclude that civil appeals falling outside this Court's exclusive jurisdiction are not categorically unsuitable for resolution by our Court.

The question then becomes whether this particular appeal nevertheless was "inappropriately filed" in the Fifteenth Court, such that it should have been filed in the First or Fourteenth Courts of Appeals. Tex. Gov't Code § 73.001(c). We do not write on a blank slate in answering this question. Overlapping geographical appellate districts are a distinctive and unique feature of the Texas intermediate appellate system. James T. "Jim" Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas, 1892-2003*, 46 S. TEX. L. REV. 33, 63–64 (2004) ("Texas has the only intermediate appellate system in the nation with overlapping geographical appellate districts."). This overlap has "been part of our system for a century and has survived multiple constitutional amendments without controversy." *In re Dallas Cnty.*, 697 S.W.3d at 158.

It is well settled that when multiple appellate courts have overlapping jurisdiction, the appellant can file in the court of its choosing so long as the Legislature has not restricted the appellant's choice. *In re A.B.*, 676 S.W.3d 112, 114 n.1 (Tex. 2023) (per curiam) ("When there is an option, an appellant selects the court of appeals by denoting it in the notice of appeal.") (citing Tex. Civ. Prac. & Rem. Code § 51.012 and Tex. R. App. P. 25.1(d)(4))); *see also Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 & n.4 (Tex. 1995) (appellants "are free to elect

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[1] Although, the Legislature has limited what appeals may be transferred out of the Fifteenth Court of Appeals pursuant to docket equalization, the Legislature has not exempted the Fifteenth Court from Texas's docket-equalization process authorized by Texas Government Code section 73.001(a) ("Except as provided by Subsection (b), the supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer."). Section 73.001(a) thus creates the potential for the Fifteenth Court to receive appeals from other courts that are not within the Fifteenth Court's exclusive appellate jurisdiction, indicating that such appeals are not unsuitable for resolution by the Fifteenth Court.

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either appellate route" and "control the choice of forum except in the First and Fourteenth Districts, where cases have been randomly assigned since 1983"); *see* Tex. Gov't Code § 22.202(h) ("All civil and criminal cases directed to the First or Fourteenth Court of Appeals shall be filed in either the First or Fourteenth Court of Appeals as provided by this section. The trial clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container. When a notice of appeal or appeal bond is filed, the trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case and any companion cases to the court of appeals for the corresponding number drawn.").

The Texas Supreme Court recently confronted this scenario when examining the overlapping jurisdiction of the Sixth and Twelfth Courts of Appeals. *In re A.B.*, 676 S.W.3d at 114 n.1. The Court recognized that because both courts have jurisdiction over appeals from Gregg County, the appellant could "notice an appeal" from the Gregg County ruling to "either court of appeals." *Id.* Because there is no statutory bar to filing a notice of appeal in the Fifteenth Court, Appellants were free to choose the Fifteenth Court so long as the appeal is within this Court's jurisdiction. We cannot find that the appeal was "improperly taken to" this Court simply because other Courts of Appeals would also have jurisdiction to hear it.

Appellees argue that the language of Rule 27a itself deprived Appellants of the choice of noticing their appeal to the Fifteenth Court. Specifically, Appellees point to Texas Rule of Appellate Procedure 27a's creation of a "transfer process" for appeals "*improperly* taken to the Fifteenth Court of Appeals." Tex. R. App. P. 27a(b) (emphasis added). Merriam-Webster's Dictionary defines "improper" as "not suited to the circumstances, design, or end." *Improper*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2024). Appellees contend that the Fifteenth Court was designed to focus on the categories of appeals falling within its exclusive appellate jurisdiction, and that this purpose will be diminished if the docket is clogged with general jurisdiction appeals.

Ultimately, the best proof of the Legislature's design for the Fifteenth Court is the jurisdiction that the Legislature created. "As with any statute," we must apply the law "as written" and "refrain from rewriting text that lawmakers chose." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133 (Tex. 2019) (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009)). In Chapter 220 of the Texas Government Code, the Legislature made a choice to vest the Fifteenth Court with exclusive jurisdiction over some categories of civil appeals and general jurisdiction over others. We are not free to accept the

former while deeming the latter improper.[2]

Accordingly, we recommend that the Texas Supreme Court deny the motion to transfer the appeal.

Chief Justice Brister's Dissent to the Fifteenth Court of Appeals' Recommendation to Deny the Motion to Transfer

I would not object to transferring this appeal to the First or Fourteenth Courts of Appeals. Because the Court chooses to do so, I respectfully dissent.

Government Code Section 73.001 provides three standards for the Supreme Court to transfer appeals:

- it may transfer cases among the courts of appeals at any time for good cause, TEX. GOV'T CODE § 73.001(a);
- it may not transfer out cases for docket equalization purposes that were "properly filed" in the Fifteenth Court, *id*. § 73.001(b); and
- it shall adopt rules for transferring out appeals "inappropriately filed" in the Fifteenth Court, and transferring in appeals within that court's exclusive jurisdiction, *id*. § 73.001(c).

Rule 27a adopted in response by the Supreme Court provides a back-and-forth process for parties and appellate courts to file letter briefs with the Supreme Court, which then decides the matter. But Rule 27a applies only to appeals "improperly taken" to the Fifteenth Court of Appeals, not those "inappropriately filed" in that court. *Compare* TEX. R. APP. P. 27a(b) *with* TEX. GOV'T CODE § 73.001(c). I have little to add to the opposing letters from my colleagues on three different courts, except to note that the synonyms "improper" and "inappropriate" do not always mean the same thing.

In many contexts, "improper" refers to something *not allowed*, while "inappropriate" refers to something that *ought not* to be allowed. For example, *improper* venue (governed by Chapter 15 of the Civil Practice and Remedies Code) and *inappropriate* venue (governed by Section 71.051 of the same code) are both governed by state law, but the former turns on what state law *allows*, while

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[2] Appellees argue that if the Fifteenth Court considers appeals within its general civil appellate jurisdiction to be "properly filed," then the Fifteenth Court's docket will quickly become overwhelmed with general-jurisdiction cases. This is because the Legislature has prohibited the Texas Supreme Court from transferring "any case or proceeding properly filed in the Court of Appeals for the Fifteenth Court of Appeals District to another court of appeals for the purpose of equalizing the dockets of the courts of appeals." Tex. Gov't Code § 73.001(b). The Legislature, however, retains constitutional authority to "prescribe[]" whatever "restrictions" on the Fifteenth Court the Legislature deems proper. Tex. Const. art. V, § 6(a). This "flexibility is a paramount value of Article V, § 6(a)" that frees the Legislature to adapt Texas's appellate system to address concerns like court congestion, just as the Legislature has done in the past. *See In re Dallas Cnty*., 697 S.W.3d at 158.

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the latter depends on what *ought to be allowed* under the circumstances. Likewise, the rules governing harmful error and jury argument turn on whether a judgment or jury argument was "improper," not whether it was "inappropriate." *See* TEX. R. APP. P. 44.1(a)(1), 61.1(a); TEX. R. CIV. P. 324(c).

By contrast, the Government Code often uses "inappropriate" in cases requiring discretion. For example, it recognizes that historical markers may be "inappropriate" in some cemeteries (TEX. GOV'T CODE § 442.0061(c)), art popular in a prior era may be "inappropriate" in the Governor's Mansion today (*id*. § 442.0071(b)(3)), and state funding may be withheld from films that contain "inappropriate" content (*id*. § 485.022(e)). In this usage, the law recognizes that some things may not always be *improper*, yet may be barred as *inappropriate*.

Assuming the Legislature and the Supreme Court drafted both the statute and the rule here advisedly, I thus agree with the First Court of Appeals' letter that an appeal is not "*improperly* taken" to this Court when it falls within our general jurisdiction. Since we have concurrent general jurisdiction with our sister courts of this appeal, it was not "improperly taken," and Rule 27a does not seem to apply. *See* TEX. R. APP. P. 27a(b)(1)(A) ("The transfer process in this rule applies to appeals … *improperly* taken to the Fifteenth Court of Appeals.").

But I agree with the Fourteenth Court of Appeals' letter that this appeal was "inappropriately filed" in this Court under the present circumstances. The Legislature specified two primary categories of appeals *included* in this Court's exclusive jurisdiction, and fifteen that were *not*. *See* TEX. GOV'T CODE § 22.220(d)(1). This appeal falls into neither category, as it involves alleged construction defects in a single-family home in Galveston. But hundreds of others do, as all fifteen categories excluded from our exclusive jurisdiction nonetheless arguably fall within our general jurisdiction. But even if it would be *proper* to file such cases here, it would be *inappropriate* for this Court to entertain hundreds of appeals in family law, criminal law, and personal injury cases as they would inevitably shift time and attention away from our primary tasks.

Furthermore, allowing litigants to routinely opt into one court of appeals instead of another could create a practice that, "if tolerated, breeds disrespect for and threatens the integrity of our judicial system." *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997). Appellants here do not argue that this appeal involves an issue of statewide importance or a complex business dispute, but only that it is "the appellant's choice where to take the appeal." I doubt the Legislature intended "appellant's choice" on a large scale to be appropriate. *See* TEX. GOV'T CODE § 22.202(h) (requiring random assignment of appeals between the First and Fourteenth Courts of Appeals).

The Legislature authorized the Supreme Court to adopt rules for transferring an appeal "inappropriately filed" here. *See* TEX. GOV'T CODE § 73.001(c). Whether Rule 27a does so or not does not matter in this case; given the First Court's agreement to receive this transfer, it will likely occur if we don't object to it under either Rule 27a or the previous practice governed by *Miles v. Ford Motor Co*., 914 S.W.2d 135, 137 n.2 (Tex. 1995). I would so inform the Supreme Court; as the Court does otherwise, I respectfully dissent.

Pursuant to the procedures for opposed transfers set forth in Rule 27a(d) of the Texas Rules of appellate Procedure, please present this transfer motion and responses, along with the recommendations of the Fifteenth, First and Fourteenth Courts of Appeal, to the Supreme Court for consideration.

Sincerely,

Christopher A. Prine, Clerk

cc: Bradley W. Snead (DELIVERED VIA E-MAIL)
The Honorable Deborah Young (DELIVERED VIA E-MAIL)
Angela Olalde (DELIVERED VIA E-MAIL)
Victoria Rutherford (DELIVERED VIA E-MAIL)

Chief Justice
SCOTT BRISTER
Justices
SCOTT FIELD
APRIL FARRIS

Clerk
CHRISTOPHER A. PRINE

Fifteenth Court of Appeals

P.O. Box 12852, AUSTIN, TEXAS 78711
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512-463-1610

Monday, January 13, 2025

The Honorable Blake A. Hawthorne
Clerk of Court
The Supreme Court of Texas
PO Box 12248
Austin, TX 78711-2248
* DELIVERED VIA E-MAIL *

RE: **Appellees' Opposed TRAP Rule 27a Motion to Transfer**
Court of Appeals Number: 15-24-00115-CV
Trial Court Case Number: 16-04-23,735

Style: Devon Energy Production Company, L.P.; Devon Energy Corporation; BPX Operating Company; and BPX Production Company v. Robert Leon Oliver, et al.

Dear Mr. Hawthorne:

Appellees Robert Leon Oliver, et al. filed a motion to transfer this appeal to the Thirteenth Court of Appeals on the ground that this Court does not have exclusive intermediate appellate jurisdiction. *See* Tex. Gov't Code § 22.220(d)(1), (2). The Fifteenth Court of Appeals decided to deny the motion with Chief Justice Brister noting he would grant the motion. *See* Tex. R. App. P. 27a(c)(1)(B). This Court notified the Thirteenth Court of Appeals of our decision to deny appellees' motion and requested that court to file a letter in this Court whether it agreed with the Fifteenth Court of Appeals' decision. *See* Tex. R. App. P. 27a(c)(1)(C).

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On December 23, 2024, this Court received the enclosed letter from Chief Justice Contreras of the Thirteenth Court of Appeals explaining why the Thirteenth Court disagrees with this Court's decision to deny the motion to transfer.

Because the transferee court disagrees with the Fifteenth Court's decision on the motion, in accordance with Texas Rule of Appellate Procedure 27a(d)(1), we enclose Appellees' motion, Appellants' objection, the letter from the transferee court, and an explanation of this Court's decision on the motion. Please present this transfer motion, along with the recommendations of the Thirteenth and Fifteenth Courts of Appeals, to the Supreme Court for consideration.

* * *

The Fifteenth Court of Appeals Recommendation to Deny the Motion to Transfer, with Chief Justice Brister Voting to Grant.

The instant appeal is from a DeWitt County final judgment awarding damages for unpaid oil royalties, interest, and attorneys' fees over $1 million in damages on claims pertaining to an oil royalty dispute.

Appellees Robert Leon Oliver, et al. filed a motion to transfer this appeal to the Thirteenth Court of Appeals pursuant to Texas Rule of Civil Procedure 27a's procedure for appeals "improperly taken" to the Fifteenth Court of Appeals. *See* Tex. R. App. P. 27a(b)(1) ("The transfer process in this rule applies to appeals: (A) improperly taken to the Fifteenth Court of Appeals."). Appellees contend that this appeal was improperly taken to the Fifteenth Court because "this Court's state-wide jurisdiction is clearly limited to cases involving the parties and subject matter specified in [Texas Government Code] section 22.220(d)."

Appellants Devon Energy Production Company, L.P., Devon Energy Corporation, BPX Operating Company, and BPX Production Company oppose the motion to transfer. They argue that the appeal was appropriately filed in the Fifteenth Court because the Fifteenth Court possesses concurrent civil appellate jurisdiction pursuant to Texas Government Code Section 22.220(d)(3) and the Legislature has not deprived Appellants of the choice of where to file when geographic districts overlap.

At the outset, we first examine whether this Court has jurisdiction over the appeal at issue. *Hous. Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007) ("Courts always have jurisdiction to determine their own jurisdiction."); *see Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 699 (Tex. 2022).

Texas Government Code Section 22.220, entitled "Civil Jurisdiction," states that "the Court of Appeals for the Fifteenth Court of Appeals District has exclusive

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intermediate appellate jurisdiction" over particular "matters arising or related to a civil case." Tex. Gov't Code § 22.220(d). This subsection, however, is not the only provision addressing the Fifteenth Court's appellate jurisdiction. Subsection (a) states that "[e]xcept as provided by Subsection (d), each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs." *Id*. § 22.220(a). Although Subsection (d) divests the other intermediate courts of jurisdiction over the categories of cases that fall within the Fifteenth Court's exclusive jurisdiction, nothing in Subsection (d) purports to divest the Fifteenth Court of the general civil intermediate appellate jurisdiction authorized by Subsection (a). Consequently, this Court still possesses general appellate jurisdiction over civil cases that fall within our district, which encompasses "all counties in the state." Tex. Gov't Code § 22.201(p).

We further find that Texas Government Code Section 73.001(c) and Texas Rule of Appellate Procedure 27a do not authorize us to transfer this case to the Thirteenth Court of Appeals. Rule 27a is authorized by Government Code section 73.001(c), which directs the Texas Supreme Court to adopt rules for (1) transferring out "an appeal *inappropriately* filed in the Fifteenth Court of Appeals to a court of appeals with jurisdiction over the appeal"; and (2) transferring in those "appeals over which the Fifteenth Court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." Tex. Gov't Code § 73.001(c) (emphasis added).

We cannot conclude that appeals falling outside the bounds of this Court's exclusive jurisdiction are "inappropriately filed" in the Fifteenth Court as a categorical matter. The Texas Government Code does not define the term "inappropriately filed," but dictionary definitions can "help inform meaning." *In re Dallas Cnty*., 697 S.W.3d 142, 156 (Tex. 2024). Merriam-Webster's Dictionary defines the word "inappropriate" to mean "unsuitable." *Inappropriate*, Merriam-Webster's Dictionary (2024). When the Legislature has determined that a certain type of matter is categorically unsuitable for resolution in Fifteenth Court of Appeals, it has restricted this Court's jurisdiction to hear it. For example, the Legislature expressly divested the Fifteenth Court of jurisdiction in criminal actions. Tex. Code Crim. Pro. art. 4.01 ("The following courts have jurisdiction in criminal actions . . . Courts of appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District."). The Legislature also restricted the original jurisdiction of the Court of Appeals to issuing writs "arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)." Tex. Gov't Code § 22.221(c-1).

By contrast, the Legislature has not restricted the Fifteenth Court's civil appellate jurisdiction to only those matters falling within this Court's exclusive jurisdiction. Rather, the Legislature explicitly vested the Fifteenth Court with "appellate jurisdiction of *all civil cases* within its district . . . when the amount in

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controversy or the judgment rendered exceeds $250, exclusive of interest and costs." Tex. Gov't Code § 22.220(a) (emphasis added).[1] Accordingly, we conclude that civil appeals falling outside this Court's exclusive jurisdiction are not categorically unsuitable for resolution by our Court.

The question then becomes whether this particular appeal nevertheless was "inappropriately filed" in the Fifteenth Court, such that it should have been filed in the Thirteenth Court of Appeals. Tex. Gov't Code § 73.001(c). We do not write on a blank slate in answering this question. Overlapping geographical appellate districts are a unique and distinctive feature of the Texas intermediate appellate system. James T. "Jim" Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas*, 1892-2003, 46 S. TEX. L. REV. 33, 63–64 (2004) ("Texas has the only intermediate appellate system in the nation with overlapping geographical appellate districts."). This overlap has "been part of our system for a century and has survived multiple constitutional amendments without controversy." *In re Dallas Cnty.*, 697 S.W.3d at 158.

It is well settled that when multiple appellate courts have overlapping jurisdiction, the appellant can file in the court of its choosing so long as the Legislature has not restricted the appellant's choice. *In re A.B.*, 676 S.W.3d 112, 114 n.1 (Tex. 2023) (per curiam) ("When there is an option, an appellant selects the court of appeals by denoting it in the notice of appeal.") (citing Tex. Civ. Prac. & Rem. Code § 51.012 and Tex. R. App. P. 25.1(d)(4))); *see also Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 & n.4 (Tex. 1995) (appellants "are free to elect either appellate route" and "control the choice of forum except in the First and Fourteenth Districts, where cases have been randomly assigned since 1983"); *see* Tex. Gov't Code § 22.202 ("All civil and criminal cases directed to the First or Fourteenth Court of Appeals shall be filed in either the First or Fourteenth Court of Appeals as provided by this section. The trial clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container. When a notice of appeal or appeal bond is filed, the trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case and any companion cases to the court of appeals for the corresponding number drawn.").

The Texas Supreme Court recently confronted this scenario when examining the overlapping jurisdiction of the Sixth and Twelfth Courts of Appeals. *In re A.B.*, 676 S.W.3d at 114 n.1. The Court recognized that because both courts have jurisdiction over appeals from Gregg County, the appellant could "notice an

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[1] Although, the Legislature has limited what appeals may be transferred out of the Fifteenth Court of Appeals pursuant to docket equalization, the Legislature has not exempted the Fifteenth Court from Texas's docket-equalization process authorized by Texas Government Code section 73.001(a) ("Except as provided by Subsection (b), the supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer."). Section 73.001(a) thus creates the potential for the Fifteenth Court to receive appeals from other courts that are not within the Fifteenth Court's exclusive appellate jurisdiction, indicating that such appeals are not unsuitable for resolution by the Fifteenth Court.

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appeal" from the Gregg County ruling to "either court of appeals." *Id.* Because there is no statutory bar to filing a notice of appeal in the Fifteenth Court, Appellants were free to choose the Fifteenth Court so long as it fell within this Court's jurisdiction. We cannot find that the appeal was "improperly filed" in this Court simply because other Courts of Appeals would also have jurisdiction to hear it.

Appellees further argue that the Fifteenth Court was designed to focus on the categories of appeals falling within its exclusive appellate jurisdiction, and that this purpose will be thwarted if this Court is found to possess general jurisdiction over all civil cases within its boundaries.

Ultimately, the best proof of the Legislature's design for the Fifteenth Court is the jurisdiction that the Legislature created. "As with any statute," we must apply the law "as written" and "refrain from rewriting text that lawmakers chose." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133 (Tex. 2019) (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009)). In Chapter 220 of the Texas Government Code, the Legislature made a choice to vest the Fifteenth Court with exclusive jurisdiction over some categories of civil appeals and general jurisdiction over others. We are not free to accept the former while deeming the latter improper. Accordingly, we decide to deny the motion to transfer the appeal.

* * *

Chief Justice Brister's Dissent to the Fifteenth Court of Appeals' Recommendation to Deny the Motion to Transfer

I would not object to transferring this appeal to the Thirteenth Court of Appeals. Because the Court chooses to do so, I respectfully dissent.

Government Code Section 73.001 provides three standards for the Supreme Court to transfer appeals:

- it may transfer cases among the courts of appeals at any time for good cause, TEX. GOV'T CODE § 73.001(a);
- it may not transfer out cases for docket equalization purposes that were "properly filed" in the Fifteenth Court, *id*. § 73.001(b); and
- it shall adopt rules for transferring out appeals "inappropriately filed" in the Fifteenth Court, and transferring in appeals within that court's exclusive jurisdiction, *id*. § 73.001(c).

Rule 27a adopted in response by the Supreme Court provides a back-and-forth process for parties and appellate courts to file letter briefs with the Supreme Court, which then decides the matter. But Rule 27a applies only to appeals "improperly taken" to the Fifteenth Court of Appeals, not those "inappropriately filed" in that court. *Compare* TEX. R. APP. P. 27a(b) *with* TEX. GOV'T CODE § 73.001(c). I have little to add to the letter from my colleagues except to note that

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the synonyms "improperly" and "inappropriately" do not always mean the same thing.

In many contexts, "improper" refers to something *not allowed*, while "inappropriate" refers to something that *ought not* to be allowed. For example, *improper* venue (governed by Chapter 15 of the Civil Practice and Remedies Code) and *inappropriate* venue (governed by Section 71.051 of the same code) are both governed by state law, but the former turns on what state law *allows*, while the latter depends on what *ought to be allowed* under the circumstances. Likewise, the rules governing harmful error and jury argument turn on whether a judgment or jury argument was "improper," not whether it was "inappropriate." *See* TEX. R. APP. P. 44.1(a)(1), 61.1(a); TEX. R. CIV. P. 324(c).

By contrast, the Government Code often uses "inappropriate" in cases requiring discretion. For example, it recognizes that historical markers may be "inappropriate" in some cemeteries (TEX. GOV'T CODE § 442.0061(c)), art popular in a prior era may be "inappropriate" in the Governor's Mansion today (*id*. § 442.0071(b)(3)), and state funding may be withheld from films that contain "inappropriate" content (*id*. § 485.022(e)). In this usage, the law recognizes that some things may not always be *improper*, yet may be barred as *inappropriate*.

Assuming the Legislature and the Supreme Court drafted both the statute and the rule here advisedly, I thus agree that an appeal is not "*improperly* taken" to this Court when it falls within our general jurisdiction. Since we have concurrent general jurisdiction with our sister courts of this appeal, it was not "improperly taken," and Rule 27a does not seem to apply. *See* TEX. R. APP. P. 27a(b)(1)(A) ("The transfer process in this rule applies to appeals … *improperly* taken to the Fifteenth Court of Appeals.").

But I also think this appeal was "inappropriately filed" in this Court under the present circumstances. The Legislature specified two primary categories of appeals *included* in this Court's exclusive jurisdiction: cases challenging state laws or state agents, and complex business disputes. *See* TEX. GOV'T CODE § 22.220(d)(1). This appeal falls into neither category, nor do hundreds of others in the fifteen categories omitted from our exclusive jurisdiction that are nonetheless within our general jurisdiction. Even if it would be *proper* to file such cases here, it would be *inappropriate* for this Court to entertain hundreds of appeals in family law, employment discrimination, eminent domain, and personal injury cases as they would inevitably shift time and attention away from our primary tasks.

Furthermore, allowing litigants to routinely opt into one court of appeals instead of another could create a practice that, "if tolerated, breeds disrespect for and threatens the integrity of our judicial system." *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997). Appellants here do not argue that this appeal involves an issue of statewide importance or a complex business dispute, but only that they "were entitled to choose between the courts." My colleagues say that does not make this appeal "inappropriately filed" since appellants may choose between two

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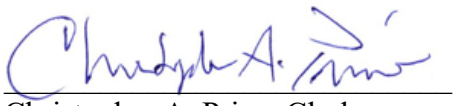
overlapping appellate courts in some cases. But the Legislature has restricted that choice when it involves large numbers of appeals. *See* TEX. GOV'T CODE § 22.202(h) (requiring random assignment of appeals between the First and Fourteenth Courts of Appeals). And choosing between two neighboring courts in appeals from a handful of smaller counties is different from choosing between one statewide court with specific jurisdiction and fourteen others handling every kind of appeal in the State. I doubt the Legislature intended appellant's choice on a large scale to be appropriate.

The Legislature authorized the Supreme Court to adopt rules for transferring an appeal "inappropriately filed" here. *See* TEX. GOV'T CODE § 73.001(c). Whether Rule 27a does so or not does not matter in this case; given the Thirteenth Court's agreement to receive this transfer, it will likely occur if we don't object to it under either Rule 27a or the previous practice governed by *Miles v. Ford Motor Co*., 914 S.W.2d 135, 137 n.2 (Tex. 1995). I would so inform the Supreme Court; as the Court does otherwise, I respectfully dissent.

* * *

Pursuant to the procedures for opposed transfers set forth in Rule 27a(d) of the Texas Rules of appellate Procedure, please present this transfer motion and responses, along with the recommendations of the Fifteenth, First and Fourteenth Courts of Appeal, to the Supreme Court for consideration.

Sincerely,



Christopher A. Prine, Clerk

cc: D. Davin McGinnis (DELIVERED VIA E-MAIL)
David W. Jones (DELIVERED VIA E-MAIL)
Gregg Laswell (DELIVERED VIA E-MAIL)
Jane M. Webre (DELIVERED VIA E-MAIL)
Juergen Koetter Jr. (DELIVERED VIA E-MAIL)
James Stephen Barrick (DELIVERED VIA E-MAIL)
Allen Rustay (DELIVERED VIA E-MAIL)
Michael Sheppard (DELIVERED VIA E-MAIL)
Amy Parker Beeson (DELIVERED VIA E-MAIL)
Marcus Schwartz (DELIVERED VIA E-MAIL)
The Honorable Kathy Mills (DELIVERED VIA E-MAIL)
Kelly J. Curnutt (DELIVERED VIA E-MAIL)
Russell S. Post (DELIVERED VIA E-MAIL)
Amy Lee Dashiell (DELIVERED VIA E-MAIL)

PERMISSIVE APPEALS: WHY DO APPELLATE COURTS DENY PERMISSION TO APPEAL AFTER THE TRIAL COURT GRANTS SUCH PERMISSION?

By Nicholas Bruno[1]

September 1, 2023 was a significant date for permissive interlocutory appeals in Texas. For the first time, intermediate appellate courts declining to accept a permissive interlocutory appeal were required to give a "specific reason for finding that the appeal is not warranted[.]" TEX. CIV. PRAC. & REM. CODE § 51.014(g). Where does Texas jurisprudence stand about fourteen months later?

The sample size is, predictably, small. While appellate practitioners should be mindful of the reasons that appellate courts have denied permissive appeals, any examination of these opinions necessarily must include the disclaimer that predicting any trends at this early stage is a fool's errand.

This article will start with the basic jurisprudential background. It will then discuss the reasons that appellate courts have denied permission for an interlocutory appeal after the trial court has granted permission. It will end with statistics on the number of permissive appeal decisions in each of the appellate courts in Texas.

I. The Basics.

Appellate practitioners are aware that the permissive appeal statute allows an interlocutory appeal otherwise unavailable when (1) the trial court "permit[s] an appeal," (2) the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and (3) an interlocutory appeal would "materially advance the ultimate termination of the litigation":

[1] Nicholas Bruno is a Partner at Beck Redden LLP and board certified in civil appellate law by the Texas Board of Legal Specialization.

> On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:
>
> **(1)** the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
>
> **(2)** an immediate appeal from the order may materially advance the ultimate termination of the litigation.

TEX. CIV. PRAC. & REM. CODE § 51.014(d).

A plurality opinion of the Supreme Court noted a perceived reluctance to grant permissive interlocutory appeals, which "could at least be read to indicate its disagreement with our exhortation" that "just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should." *Indus. Specialists, LLC v. Blanchard Refin. Co. LLC*, 652 S.W.3d 11, 18 (Tex. 2022) (plurality). Even the concurring justices, who largely advocated for more intermediate court discretion in the permissive interlocutory appeal process, "tend[ed] to think that earlier and quicker appellate review of dispositive legal issues would be a salutary thing." *Id.* at 22 (Blacklock, J., concurring).

Nonetheless, the intermediate courts had significant discretion in whether to give permission to appeal. A majority of the justices in *Blanchard* confirmed that, as long as the statutory requirements are satisfied, "the statute then grants courts vast—indeed, unfettered—discretion to accept or permit the appeal." *Id.* at 16 (plurality); *see also id.* at 21 (Blacklock, J., concurring) ("discretion is 'absolute'").

Justice Brett Busby suggested that intermediate appellate courts be required to give their reasons for declining permission to appeal. He wrote a dissenting opinion, discussing possible benefits of that proposal, *i.e.*, that a more-developed written opinion would help "develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future cases." *Id.* at 24 (Busby, J., dissenting). "Requiring courts of appeals to explain their permissive appeal rulings would also develop Texas jurisprudence regarding why such appeals should be accepted or denied, providing guidance for future courts and fostering comparable outcomes in similar cases." *Id.* at 34 (Busby, J. dissenting).

The Texas legislature took note. It enacted Section 51.014(g), requiring appellate courts to give a "specific reason" for declining permission for an appeal:

> If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

TEX. CIV. PRAC. & REM. CODE § 51.014(g).

The law took "effect September 1, 2023." Tex. S.B. 1603, § 3, 88th Leg., R.S. (2023). Fourteen months have passed. This article hopes to help chronicle the way those opinions "develop Texas jurisprudence regarding why such appeals should be accepted or denied" so that practitioners can "provid[e] guidance" to their clients and predict "outcomes in similar cases." *Indus. Specialists*, 652 S.W.3d at 34 (Busby, J., dissenting).

II. Reasons for Denial of Permission to Appeal.

The appellate courts have begun to give reasons for declining permission to appeal—despite the trial court (usually) giving permission for an interlocutory appeal. Some of the reasons are no surprise (*i.e.,* despite the petition for permissive appeal winding up in the appellate court, the trial court actually never granted permission to appeal). Others may be subject to a debate that is beyond the purview of this brief article.

It is noteworthy that the intermediate courts have (albeit rarely) denied permission to appeal even when the trial court has granted permission to appeal ***and*** both sides requested that permission to appeal because of some defect in the order granting permission to appeal. This practice highlights the importance of practitioners carefully drafting proposed orders granting permission to appeal—even when the order itself is unlikely to be a subject of controversy vis-à-vis the parties.

Others have written about some reasons that appellate courts have declined to give permission to appeal. *See, e.g.*, Michael J. Ritter & Ben Allen, *Beware the "Substantive Ruling" Requirement*, 36 REV. LITIG. 55 (2017), https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=37832. Rather than spotlighting a particular requirement, however, this article attempts to capture as many of the reasons given by the appellate courts for denying permission thus far:

- **The trial court's order is conclusory**: "[T]he trial court's order does not comply with the plain, mandatory language of section 51.014(d) and rule 168. The order states in broad, conclusory language that it 'involves a controlling question of law as to which there is a substantial ground for difference of opinion' and that 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Wholesale, Inc. v. Houston Specialty Ins. Co.*, No. 01-23-00867-CV, 2024 WL 234745, at *2 (Tex. App.—Houston [1st Dist.] Jan. 23, 2024, no pet.). "But the order fails to go further and '*identify* the controlling question of law as to which there is a substantial ground for difference of opinion.' The order also fails to '*state why*' an immediate permissive appeal 'may materially advance the ultimate termination of the litigation.'" *Id.* (quoting TEX. R. CIV. P. 168) (emphasis in

original); *see also Mack v. Pittard*, No. 04-24-00201-CV, 2024 WL 2836624, at *3 (Tex. App.—San Antonio June 5, 2024, no pet.) ("[T]he trial court's order stated that resolution of the controlling legal question identified in the order 'may materially advance the ultimate termination of this litigation proceeding.' However, the order did not explain *why* the trial court reached that conclusion."); *AccessDirect-A Preferred Provider Network, Inc. v. RCG E. Tex. LLP*, No. 12-24-00056-CV, 2024 WL 2337632, at *2 (Tex. App.—Tyler May 22, 2024, no pet.) ("offers no explanation as to how or why").

- **The parties present a "thorough" explanation of error but provide no explanation of why a substantial ground for disagreement exists: "**Although Singh thoroughly addresses why he believes the trial court erred in compelling him to arbitration, he does not explain why there is a substantial ground for disagreement about the law regarding this issue. Singh does not explain, and we do not see, how the question presented to this Court is novel or difficult, the controlling law is doubtful, or that there is little authority upon which the district court could rely." *Singh v. RateGain Travel Techs., Ltd.*, No. 05-23-01088-CV, 2023 WL 8642555, at *3 (Tex. App.—Dallas Dec. 14, 2023, no pet.); *see also Estate of Hansson*, No. 10-24-00361-CV, 2025 WL 635489, at *3 (Tex. App.—Waco Feb. 27, 2025, no pet.) ("does not present an issue with a substantial ground for disagreement"; no "ongoing dispute"); *Culberson Midstream Equity, LLC v. Energy Transfer LP*, 705 S.W.3d 817, 818 (Tex. App.—Dallas 2024, review granted, opinion vacated) ("Case law . . . is well settled."); *Spicer, Tr. for Celeritas Chems., LLC v. Euler Hermes N. Am. Ins. Co.*, No. 05-24-01156-CV, 2024 WL 5251995, at *1 (Tex. App.—Dallas Dec. 31, 2024, no pet.) ("these questions are governed by settled law").

- **Other issues remain for resolution regardless of the outcome of the permissive appeal**: "[R]egardless of the outcome of this permissive appeal, neither party would seek judgment without further litigation." *Singh*, 2023 WL 8642555, at *3; *see also Zurich Am. Ins. Co. v. MB2 Dental Sols., LLC*, 698 S.W.3d 355, 359 (Tex. App.—Dallas 2024, pet. dism'd by agr.) (same); *Boone v. Whittenburg*, No. 07-24-00258-CV, 2024 WL 4346412, at *2 (Tex. App.—Amarillo Sept. 18, 2024, no pet.) ("other material issues would remain for trial irrespective of our decision"). Nonetheless, "to satisfy the material advancement standard a complete resolution is not necessary—although, the possibility of a complete resolution could be sufficient." *Zurich Am. Ins.*, 698 S.W.3d at 360.

- **No substantive ruling on the legal issue**: "[T]he order did not specify the basis for the trial court's ruling. It is well-settled that to invoke this court's permissive-appeal jurisdiction, the trial court must make a substantive ruling on the controlling legal issue being appealed so that the legal issue presented to this court is the same legal issue determined by the trial court." *Estate of Ward*, No. 02-24-00330-CV, 2024 WL 3948018, at *2 (Tex. App.—Fort Worth

Aug. 27, 2024, no pet.) (cleaned up); *see also AccessDirect*, 2024 WL 2337632, at *2, 8 ("[T]he record demonstrates that the trial court could have denied the pleas based on one or more conclusions," but "[t]he orders set forth no substantive ruling on any of the issues identified therein.").

- **The question turns on procedural or factual issues**: "A controlling issue of law that will support a permissive appeal needs to be solely a question of law unconstrained by procedural or factual issues. Because the trial-court ruling that the Estate seeks to appeal turned on the trial court's resolution of procedural or factual issues, the Estate has not established that the order denying its motion to reconsider involves a controlling question of law as to which there is a substantial ground for difference of opinion, nor has it shown how an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Ward*, 2024 WL 3948018, at *3 (internal quotations omitted); *$17,060.00 U.S. Currency v. State*, No. 09-24-00273-CV, 2024 WL 4295275, at *1 (Tex. App.—Beaumont Sept. 26, 2024, no pet.) ("That question is dependent upon the underlying facts and not on a legal issue on which there is a substantial difference of opinion."); *Mack*, 2024 WL 2836624, at *4 ("This evidence arguably raises a fact issue[.]"); *Hartline Barger LLP v. Denson Walker Props., LLC*, No. 05-23-00126-CV, 2023 WL 8540006, at *1 (Tex. App.—Dallas Dec. 11, 2023, no pet.) ("The determination of these questions, however, is constrained by the facts.").

  - **Failure to attach documents relevant to permissive appeal:** "Although the parties' advised that no evidence was adduced and there are no transcripts, the parties' petition in this case still does not include any documents related to the denial of summary judgment. . . . Because the parties' joint petition fails to comply with Rule 28.3(e)(2)(B), we dismiss their petition seeking permission to file an interlocutory appeal." *Mem'l Women's Care, PLLC v. Hanover Cas. Co.*, No. 14-24-00566-CV, 2024 WL 4274127, at *1 (Tex. App.—Houston [14th Dist.] Sept. 24, 2024, no pet.).

- **An unexplained delay in filing the petition**: "We deny [the] petition because after the trial court signed the complained-of order, [the appellant] waited about five months to seek a permissive appeal. The prolonged delay defeats the purpose of a permissive interlocutory appeal." *Murphy v. Harris*, No. 02-24-00019-CV, 2024 WL 1670903, at *1 (Tex. App.—Fort Worth Apr. 18, 2024, no pet.); *Progressive Cnty. Mut. Ins. Co. v. Saldivar*, No. 14-23-00824-CV, 2023 WL 7145056, at *1 (Tex. App.—Houston [14th Dist.] Oct. 31, 2023, no pet.) (petition was "filed after the statutory deadlines").

- **No permission expressly stated in the order**: "[T]he trial court's order is silent on the subject of permission to appeal the interlocutory order." *Channelview MHP, LLC v. Hernandez*, No. 01-24-00923-CV, 2024 WL 5160635, at *1 (Tex. App.—Houston [1st Dist.] Dec. 19, 2024, no pet.); *see also*

Harris v. Loose Cannon Indus., LLC, No. 03-23-00744-CV, 2024 WL 628897, at *2 (Tex. App.—Austin Feb. 15, 2024, no pet.) ("there is no trial court order granting Harris permission to appeal"); *Harris v. Covey*, No. 05-23-01231-CV, 2023 WL 8595682, at *1 (Tex. App.—Dallas Dec. 12, 2023, no pet.) ("Harris has not alleged the trial court granted permission to appeal and she has not provided a signed order granting permission."); *Thomas v. Wells Fargo Bank, N.A.*, No. 05-23-01229-CV, 2024 WL 2126712, at *1 (Tex. App.—Dallas May 13, 2024, no pet.) ("the trial court here has not granted permission").

- **The trial court later withdrew permission to appeal**: "[T]he trial court's April 9, 2024 order was subsequently amended by the May 7, 2024 order insofar as the trial court vacated language granting permission for an appeal and expressly denied permission to appeal. . . . [Thus,] the record before the Court fails to reflect that the trial court granted permission to appeal, so § 51.014(d) does not provide us with jurisdiction over this appeal." *Sifuentes v. Maka Logistics, LLC*, No. 13-24-00179-CV, 2024 WL 3197477, at *2 (Tex. App.—Corpus Christi–Edinburg June 27, 2024, no pet.).

- **No explanation of the 51.014(d) requirements at all**: The trial court's order "neither identified the controlling question of law nor stated why an immediate appeal may materially advance the litigation." *Toro Co. v. Lira*, No. 08-24-00348-CV, 2024 WL 4635422, at *1 (Tex. App.—El Paso Oct. 31, 2024, no pet.) (discussing *Feagan v. Wilson*, No. 11-21-00032-CV, 2021 WL 1134804, at *1 (Tex. App.—Eastland Mar. 25, 2021, no pet.)).

III. Other Observations.

A few statistics stand out from a review of petitions for permissive appeal filed after September 1, 2023 and before December 31, 2024 that may be relevant to appellate practitioners advising their clients on permissive interlocutory appeals:

- ***Permissive appeals are rare***. Only seventeen permissive appeals have been granted in this period (out of 41 petitions). In other words, even if the trial court grants permission to appeal, there is only a 43.5% chance that the appellate court will accept the permissive appeal.

- ***Obtaining an agreement is important***. In eight of the seventeen appeals in which permission was granted, both sides agreed that a permissive appeal was appropriate. In seven of the other nine appeals in which permission was granted, the appellee did not respond to the petition for permissive appeal in the appellate court, so its position on the propriety of an interlocutory appeal could not be ascertained. Only one unopposed petition was ultimately denied.

In other words, an agreed motion to appeal has an 88% chance of acceptance once the trial court grants permission to appeal. On the other hand, without an agreement, there is only a 28% chance that the appellate court will grant permission for an interlocutory appeal.

- ***The time for decision is typically about 80 days***. The average time for decision from the filing of a petition for permissive appeal to a decision on whether to accept the petition is roughly 80 days. This date varies widely, however, probably due to the small sample size. It may also be helpful to give a client the median time for decision: 46 days.

APPENDIX

This appendix (1) lists each petition for permissive appeal filed after September 1, 2023 and before December 31, 2024,[2] (2) the disposition of each of those petitions, (3) whether a response was filed, and (4) the amount of time that elapsed from the filing of the petition to the date that an order was issued either granting or denying permission to appeal:

A. First Court of Appeals: 66% denial rate and an average of about 40 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
01-23-00867-CV	Denied Permission	Yes: Unopposed to Permissive Appeal	64 days
01-24-00088-CV	Granted Permission	No: Unopposed to Permissive Appeal	32 days
01-24-00599-CV	No decision by April 1 (The Court ultimately denied permission)	No	232 days from petition to April 1 *[The 259 days for this decision is not included in the average as a decision was not reached before this article's April 1 cutoff.]*
01-24-00923-CV	Denied Permission	No	23 days

[2] The First and Fourteenth Court of Appeals allow a search on the "event reports" part of TAMES that list all permissive appeals, so the data for those courts comes from that search. Otherwise, these results come from a "document search" on TAMES, searching for the phrase "51.014(d)" in all orders and opinions from each of the intermediate appellate courts from September 1, 2023, to December 31, 2024.

B. Second Court of Appeals: 66% denial rate and an average of about 36 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
02-24-00330-CV	Denied Permission	No	36 days
02-24-00019-CV	Denied Permission	No	41 days
02-24-00461-CV	Granted Permission	No	32 days

C. Third Court of Appeals: 33% denial rate and an average of about 140 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
03-23-00744-CV	Denied Permission	Yes: In the Form of a Motion to Dismiss	72 days
03-24-00162-CV	Granted Permission	Yes: Response is Unavailable	315 days
03-24-00834-CV	Granted Permission	No	34 days

D. Fourth Court of Appeals: 33% denial rate and an average of about 95 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
04-24-00201-CV	Denied Permission	Yes: Opposed to Permissive Appeal	76 days
04-24-00516-CV; 04-24-00521-CV (Consolidated)	Granted Permission	No	116 days
04-24-00383-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	158 days
04-24-00699-CV	No decision	Yes: Opposed to Permissive Appeal	169 days from petition to April 1 *[This decision is not included in the average.]*
04-24-00888-CV	Denied Permission	No	30 days

E. Fifth Court of Appeals: 77.7% denial rate and an average of about 150 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
05-24-00288-CV	Denied Permission	Yes: Opposed to Permissive Appeal	193 days
05-23-01126-CV	Denied Permission	Yes: Opposed to Permissive Appeal	231 days
05-23-01229-CV	Denied Permission	No	11 days

05-23-00126-CV	Denied Permission	Yes: Opposed to Permissive Appeal	304 days
05-23-01231-CV	Denied Permission	Yes: Opposed to Permissive Appeal	7 days
05-23-01088-CV	Denied Permission	Yes: Opposed to Permissive Appeal	43 days
05-23-00541-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	270 days
05-24-01156-CV	Denied Permission	No	91 days
05-24-00469-CV	Granted Permission	No	194 days

F. Sixth Court of Appeals: 100% denial rate and an average 58 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
06-24-00086-CV	Denied Permission	Yes: Opposed to Permissive Appeal	58 days

G. Seventh Court of Appeals: 100% denial rate and an average 43 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
07-24-00258-CV	Denied Permission	Yes: Opposed to Permissive Appeal	43 days

H. Eighth Court of Appeals: 25% denial rate and an average of about 41 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
08-24-00348-CV	Denied Permission	No	16 days
08-23-00283-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	69 days
08-24-00420-CV	Granted Permission	Yes: Response is Unavailable	46 days
08-24-00063-CV	Granted Permission	No	32 days

I. Ninth Court of Appeals: 100% denial rate and an average of about 46 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
09-24-00273-CV	Denied Permission	Yes: Opposed to Permissive Appeal	46 days

J. Tenth Court of Appeals: 100% denial rate and an average of about 108 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
10-24-00361-CV	Denied Permission	Yes: Opposed to Permissive Appeal	108 Days

K. Eleventh Court of Appeals: 0% denial rate and an average 22 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
11-23-00208-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	22 days
11-23-00207-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	22 days

L. Twelfth Court of Appeals: 100% denial rate and an average 62 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
12-24-00056-CV	Denied Permission	Yes: Opposed to Permissive Appeal	62 days

M. Thirteenth Court of Appeals: 50% denial rate and an average 41 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
13-24-00179-CV	Denied Permission	Yes: In the Form of a Motion to Dismiss	64 days
13-23-00124-CV	Granted Permission	Yes: Unopposed to Permissive Appeal	18 days

N. Fourteenth Court of Appeals: 25% denial rate and an average 73 days for decision on whether to grant permission to appeal.

Cause No.	Disposition	Response Filed	Days from Filing of Petition to Decision on Permission to Appeal
14-23-00824-CV	Denied Permission	No	1 day
14-23-00866-CV	Granted Permission	No: several motions for extension of deadline for response granted	91 days
14-24-00259-CV	Granted Permission	No: the court of appeals requested a response	189 days
14-24-00566-CV	Granted Permission on Rehearing	Yes: Joint Motion for Permissive Appeal	11 days from rehearing motion

JURISDICTION IN FEDERAL COURT: A TOPIC OF FREQUENT JUDICIAL CONVERSATIONS

By Lionel M. Schooler[1]

The centerpiece of federal court proceedings is jurisdiction. Courts of the United States at the district and appellate levels cannot consider any dispute as to which they lack such jurisdiction. Given this bedrock principle derived from Article III of the United States Constitution as well as Title 28 of the United States Code, one would expect that the contours and boundaries of such a long-standing doctrine would be well settled. However, as indicated in decisions issued by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit since the beginning of December 2024, the borderlines and delineations of federal court jurisdiction continue to ebb and flow.

I. Removal Jurisdiction: Part I

Filing of Lawsuit. The first stop on this jurisdictional sightseeing tour is the United States Supreme Court's unanimous decision in *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22 (2025), which focused upon removal jurisdiction. In that case, the underlying dispute was about dog food marketing. The Petitioner manufactured a brand of dog food available only with a veterinarian's prescription, which was accordingly sold at a premium price. The Respondent purchased this product, thinking it contained medication not found in off-the-shelf products. When she later learned it did not, she filed a lawsuit in a Missouri state court, contending that the Petitioner sold ordinary dog food at an inflated price, incorporating the prescription requirement solely to fool consumers. The original complaint asserted claims under both Missouri law and the Federal Food and Drug law.

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Removal of Lawsuit. On the basis of the complaint's reference to federal law, the Petitioner removed the lawsuit to federal court, asserting the presence of federal question jurisdiction. The removal transferred both the federal claim and all "factually intertwined" state law claims. This broad removal of claims was undertaken on the basis of the scope of the removal statute. *See* 28 U.S.C. §1441(a). That statute authorizes removal of any state court case that asserts federal claims, augmented by a federal court's authority to adjudicate companion state law claims by the exercise of supplemental jurisdiction via 28 U.S.C. §1367.

Request to Remand. In response to this maneuver, the Respondent amended her complaint to eliminate any federal law claim as well as any reference to the federal statute involved. Once that amended complaint was filed, the Respondent sought remand of the case to state court. The District Court denied this relief, but such ruling was reversed by the Eighth Circuit. That court's decision conflicted with rulings in other Circuit Courts, which had ruled that a post-removal complaint amendment had no jurisdictional impact.

Supreme Court Ruling. Granting certiorari to resolve this circuit split, the Supreme Court unanimously held that in a case involving a plaintiff's amendment to her complaint post-removal, the vitality of removal jurisdiction depended upon the wording of the amended complaint. Thus, if such an amendment had the effect of eliminating any federal law claims, leaving only state law claims behind, then the court's power to resolve the dispute dissolves. *See Royal Canin*, 604 U.S. at 39. In such a situation (involving invocation of federal question jurisdiction), the Court made clear that the federal court loses supplemental jurisdiction over the state law claims, premised upon the long-standing criterion that an amended complaint supersedes the former one. *Id*.

II. Removal Jurisdiction: Part II

Introduction. Another recent decision gauging removal jurisdiction was issued by the United States Court of Appeals for the Fifth Circuit in *Cantu v. Beck Redden L.L.P.*, No. 24-40275, 2024 WL 5199328 (5th Cir. Dec. 23, 2024). *Cantu* involved a claim of legal malpractice filed by a client in a Texas court against his former counsel. Both the client and the law firm resided in Texas, but the law firm nevertheless removed the case to federal court, asserting federal question jurisdiction. The District Court denied a motion to remand, considered the merits of the case, and entered judgment in favor of the law firm, dismissing the client's claims.

Jurisdictional Issue. The former client appealed, challenging the existence of subject matter jurisdiction, among other issues. The Fifth Circuit focused upon the jurisdictional issue from the outset. It considered the impact of the decision by the United States Supreme Court evaluating the status of federal question jurisdiction, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), a case that also arose out of a Texas state law legal malpractice claim.

The *Cantu* Court enunciated the four-part jurisdictional test set forth in *Grable*, that is, whether a state law claim arises under federal law if a federal issue is: (a) necessarily raised; (b) actually disputed; (c) substantial; and (d) capable of being resolved in federal court without disrupting a Congressional federal-state balance test. The *Cantu* Court noted that all four of these requirements had to be met to support subject matter jurisdiction.

Accordingly, evaluating the dispute against the backdrop of this four-part test, the Court immediately focused upon the "substantiality" criterion, and determined that this case by its nature presented no substantial federal question. It therefore concluded that removal jurisdiction did not exist, and accordingly reversed and vacated the judgment of the District Court, instructing it to remand the case to state court.

III. Subject Matter Jurisdiction

Introduction: The Badgerow Doctrine. A recent decision addressing the scope of subject matter jurisdiction was issued by the United States Court of Appeals for the Ninth Circuit, following in the wake of the recent decision by the United States Supreme Court in *Badgerow v. Walters*, 596 U.S. 1 (2022). The *Badgerow* Court established a bright line demarcation regarding assessing federal court jurisdiction in the context of a dispute over the validity of an arbitration award. Essentially, it held that a district court was precluded from conducting a judicial "look through" analysis of the dispute underlying the request for arbitration of that dispute. Rather, it held that a district court was required to evaluate the status of subject matter jurisdiction based upon the controversy before it, that is, whether a request to evaluate an arbitration award is premised upon an independent source of jurisdiction, given the absence of such a source in the Federal Arbitration Act itself. *See* 9 U.S.C. §§9, 10.

Background of Lawsuit Addressing Subject Matter Jurisdiction. The subject matter jurisdiction demarcation prescribed in *Badgerow* was on sharp display in the recent Ninth Circuit decision in *Tesla Motors, Inc. v. Balan*, 134 F.4th 558 (9th Cir. 2025). The *Balan* case commenced in the United States District Court for the Western District of Washington when the plaintiff sued Tesla Motors for defamation. In response to this lawsuit, Tesla Motors moved to compel arbitration, a motion the District Court granted.

When the matter went to arbitration, the Arbitrator determined that California law governed the dispute. In response to this ruling, Tesla Motors moved to dismiss the defamation claims on the basis of the time bar contained in the California statute's limitations clause. The Arbitrator granted this request and, as a result, issued an award in favor of Tesla Motors on all claims. Tesla Motors then filed an action in the United States District Court for the Northern District of California to confirm the award, which the District Court granted.

Appellate Review of Subject Matter Jurisdiction. However, on appeal, the Ninth Circuit reversed, concluding that the District Court lacked subject matter jurisdiction to confirm the arbitration award. The Ninth Circuit noted that there are two main sources of jurisdiction in federal court: diversity jurisdiction and federal question jurisdiction. It rejected the possible application of federal question jurisdiction, noting that the Federal Arbitration Act itself does not supply such jurisdiction, and that no other federal claim was asserted in arbitration.

Turning to a consideration of the applicability of diversity jurisdiction by which to invoke federal court authority to review the arbitration award, the Ninth Circuit focused upon the face of the application to confirm the arbitration award itself, rather than upon the original defamation claims asserted by the plaintiff. It determined that while the subsequent petition to confirm the award identified the parties as being citizens of different states, the petition was silent as to the $75,000 jurisdictional requirement, given that the arbitration award in question contained a "zero dollar" award. As a result, the Ninth Circuit held that the District Court lacked subject matter jurisdiction to confirm the award.

IV. Ancillary Jurisdiction

Settlement and Dismissal of Lawsuit. The next recent jurisdictional decision, issued by the Fifth Circuit in February 2025, *Whittier v. Ocwen Loan Servicing, L.L.C.*, 128 F. 4th 724 (5th Cir. 2025), addressed a knotty jurisdictional problem involving court authority to exercise ancillary jurisdiction in connection with a settlement or other disposition of a federal case. In *Whittier*, the Plaintiffs sued to enjoin a foreclosure of their home mortgage loan. The parties then settled their dispute and informed the District Court of this development. On this basis, the District Court entered an interim order of dismissal pending final documentation of the settlement.

The parties then completed the settlement process and returned to the District Court with a signed "Joint Stipulation to Dismiss Action," accompanied by a proposed order of dismissal with prejudice, seeking dismissal pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii).[2]

Wording of the Dismissal Stipulation. The Joint Stipulation stated as follows:

> The Court shall retain jurisdiction for the purposes of enforcing or interpreting the terms of the separate settlement agreement entered into between the Parties.

[2] That Rule generally provides that a plaintiff may dismiss an action without a court order by filing a stipulation of dismissal signed by all parties who have appeared.

Even so, as the Fifth Circuit pointed out, the accompanying Order of Dismissal did not expressly call for the court to retain jurisdiction over the settlement agreement, nor incorporate the agreement's terms. The District Court nevertheless signed the Joint Stipulation.

Aftermath of Settlement Stipulation. Three months later, the Plaintiffs filed a motion with the District Court to enforce the settlement, also seeking an award of attorney's fees. The Defendant responded by contending that the District Court lacked ancillary jurisdiction to enforce the agreement. Adopting a Magistrate Judge's recommendation, the District Court rejected the Defendant's position, enjoining any foreclosure proceedings until resolution of the matter "and further order of this court." The Fifth Circuit noted that the District Court did not characterize the injunction as preliminary or permanent. The injunction remained in place for over two years.

Request to Dissolve Injunction and Subsequent Dismissal. After the two years had elapsed, the Defendant moved to re-start the case and dissolve the injunction, contending that the Plaintiffs were in default under the terms of the agreement, which the Plaintiffs opposed. Acting again on a Magistrate Judge's recommendation, the District Court determined that it lacked ancillary jurisdiction to enforce the 2020 injunction, explicitly declining jurisdiction over the settlement agreement. It accordingly dissolved the injunction and dismissed the lawsuit with prejudice in May 2024.

Appeal to the Fifth Circuit. The Plaintiffs appealed, contending (a) the 2020 injunction could only be nullified by a timely appeal to the Fifth Circuit at the time; and (b) the District Court retrained ancillary jurisdiction over the settlement agreement based upon its retention of jurisdiction as indicated by the order that adopted the stipulation to that effect.

Fifth Circuit Determination. The Fifth Circuit rejected both arguments. First, the *Whittier* Court pointed out that the Plaintiffs' time limit argument failed, because the underlying issue in this case was one of subject matter jurisdiction, an issue resistant to any time bar. Second, the *Whittier* Court noted that a Rule 41 stipulation of dismissal of the kind involved in this case became effective immediately, thus nullifying any subsequent action by the District Court. The Court pointed out that a Rule 41 settlement must be preceded by an order expressly retaining jurisdiction or expressly incorporating the terms of such an agreement entered in advance of the stipulation or the dependence of the stipulation being contingent upon the District Court's entry of an appropriate order.

The *Whittier* Court went on to point out that while the parties did indeed jointly stipulate that the District Court was to retain ancillary jurisdiction, nothing in that stipulation made the order of dismissal contingent upon entry of such an order. As a result, according to the *Whittier* Court, the Plaintiffs' claims were dismissed with prejudice once the stipulation was entered by the District Court, a

determination reinforced by the companion failure of the proposed order of dismissal to expressly retain jurisdiction in the District Court. In making this determination, the *Whittier* Court cited the Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994).

V. Conclusion

These recent decisions highlight the importance of assessing from the outset the status of federal court jurisdiction, as well as conducting ongoing assessment of this fundamental requirement as a case progresses and the status of parties and claims evolves.

FIFTH CIRCUIT UPDATE

By Raffi Melkonian[1]

The public-facing role of the United States Court of Appeals for the Fifth Circuit has diminished somewhat with the arrival of the new Trump administration—the challenges to presidential power that used to be brought in Texas are now being pursued in different Circuits. But that change has not abated the constant flow of interesting cases through the New Orleans courthouse. This update covers a new episode in the Fifth Circuit's campaign to limit sealing of court records, how the First Amendment interacts with political donations, the prosaic question of whether a fax confirmation sheet counts as notice under the Federal Tort Claims Act, and, to round it all off, the application of the Second Amendment to younger adults.

Take sealing and confidentiality first. Over the past few years, the Fifth Circuit has repeatedly underscored its skepticism toward sealing judicial records and proceedings. This careful stance has emerged clearly through a series of pointed statements in cases—the Court has a strong presumption in favor of transparency and public access that differs from many district courts (which often allow parties to seal what they wish when they can articulate some kind of need for privacy). For instance, in *Binh Hoa Le v. Exeter Financial Corp.*, 990 F.3d 410, 418–19 (5th Cir. 2021), the Court explicitly instructed that courts should approach sealing judicial records with an "ungenerous" eye, emphasizing that judicial records must presumptively remain unsealed to ensure accountability and public scrutiny. The Court elaborated that this principle requires judges, not litigants, to undertake a detailed, "document-by-document," "line-by-line" analysis, carefully balancing public interests against privacy or proprietary concerns. *Id.* Courts that fail to conduct this

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rigorous balancing or neglect to articulate clear justifications for sealing judicial records risk reversal for abusing their discretion. And simply telling the Fifth Circuit that the document was sealed below, and therefore must be sealed in the Fifth Circuit, is not enough. *Id.*; *see also June Med. Servs., L.L.C. v. Phillips¸* 22 F. 4th 512, 519 (5th Cir. 2022) ("The public has an interest in transparent court proceedings that is independent of the parties' interests.").

Further emphasizing this principle, in *IFG Port Holdings v. Lake Charles Harbor & Terminal District*, 410–11 (5th Cir. 2023), the Court again criticized extensive sealing without adequate justification. In that case, the appellate panel overturned a district court's sealing orders that broadly and inexplicably concealed extensive portions of the judicial record. *Id.* at 410–11. Notably, the Fifth Circuit took issue with unreasoned, summary sealing orders, highlighting their inadequacy in protecting the public's right to transparency. *Id.* And, the Court held that the standard for sealing documents is different at the discovery stage (which has a more lenient standard) than at the adjudicative phase (in court). The Court reiterated that sealing judicial records demands a far more arduous standard at the adjudicative stage. *Id.* at 412–13.

The Court recently had an opportunity to apply these principles to oral arguments. Oral arguments epitomize the Court's commitment to transparency, typically accessible via livestream and audio recordings. Thus, it was remarkable when, in early 2025, a panel consisting of Judges Wiener, Stewart, and Southwick sealed the courtroom and excluded livestream access for oral arguments in two cases involving vaping products: *Shenzhen IVPS Technology v. FDA*, Case No. 24-60032, and *Shenzhen Youme Information Technology Co. v. FDA*, Case No. 24-60060. The unusual step signaled extraordinary confidentiality concerns that were inconsistent with the commercial nature of the case.

Following weeks without public release of argument recordings, the Court reiterated its disfavor toward sealing in an April 2025 order. Acknowledging the "public interest in open proceedings," the panel directed counsel to review the sealed oral argument recordings and submit recommended redactions, enabling eventual public dissemination. Notably, the Court warned counsel that failing to provide these redactions promptly would result in the unredacted posting of the argument audio, underscoring the Court's determination to maintain transparency. And the Court expressed its displeasure with the fact that the parties had *failed* to provide redactions when originally ordered. Clearly, the Court's patience had run out. A few days later, the parties provided a relatively narrow set of proposed redactions.

This episode reinforces the Fifth Circuit's consistent message: sealing judicial proceedings, whether written records or oral arguments, requires compelling, clearly articulated justifications. The default remains openness, transparency, and accountability. Litigants and counsel before the Fifth Circuit must be keenly aware that requests for sealing will face rigorous scrutiny. When a client asks whether they

will be able to maintain the same level of confidentiality in the Fifth Circuit as they might have enjoyed in the trial court, the answer must be "no." The public's interest in the proceedings is likely to overwhelm any claim your client might have towards privacy.

Moving from court secrecy to politics, the Fifth Circuit recently examined laws concerning political donations in *Virden v. City of Austin*, 127 F. 4th 950 (5th Cir. 2025). This case scrutinized the constitutionality of the City of Austin's ordinance that restricts campaign fundraising for city offices to a one-year period before a general election. Before the authorized period, "candidates can neither solicit nor receive contributions to their campaigns." *Id.* at 963. Jennifer Virden, a small business owner in Austin, ran for city council in 2020 and for mayor in 2022. Alongside donor William Clark, she challenged the city's fundraising blackout period, asserting it violated their First Amendment rights. In response, Austin "eliminated the blackout period altogether," mooting the plaintiffs' claims for prospective relief. *Id.* But they maintained their claims for nominal damages based on the unconstitutional limits on donations in the 2022 election cycle. *Id.*

The Fifth Circuit agreed, affirming that the ordinance was unconstitutional and affirming the award of nominal damages to both plaintiffs. *Id.* at 967. Judge James C. Ho authored the opinion, beginning with a reflection on American generosity, citing Alexis de Tocqueville's observation that "Americans make great and true sacrifices for public affairs." *Id.* at 960. The Court then noted that the First Amendment protects both donors and recipients in political campaigns, and any restrictions on contributions, including timing, must undergo rigorous scrutiny to ensure that there is a risk of "actual corruption or its appearance." *Id.* at 967. The court emphasized that the city failed to demonstrate how contributions made just outside the one-year window posed a greater threat of corruption than those within it. *Id.* In short, *Virden* emphasizes that limitations on campaign contributions continue to face an extremely high burden in the Fifth Circuit.

On more mundane matters, the Fifth Circuit addressed an interesting procedural issue in *Spriggs v. United States*, 132 F. 4th 376 (5th Cir. 2025). Despite focusing on the validity of fax confirmation sheets—no, this opinion wasn't mistakenly unearthed from the 1980s—the court tackled a contemporary Federal Tort Claims Act (FTCA) dispute over whether sending documents by fax sufficiently proves presentment of a claim. Plaintiff Perry Spriggs alleged that a U.S. Postal Service vehicle struck him while he was riding his bicycle. To comply with the FTCA's requirement to present a claim to the appropriate federal agency before filing suit, Spriggs faxed his medical records and a signed Standard Form 95 to the Postal Service. *Id.* at 378–79. He received a fax confirmation indicating successful transmission to the correct number and recipient. *Id.* However, the Postal Service maintained that it never actually received these faxed documents. Agreeing with the Postal Service, the district court dismissed Spriggs's lawsuit, finding no affirmative evidence of receipt beyond the fax confirmation. The district court sweepingly held

that fax confirmations are not "probative evidence of receipt." *Id.* at 380. But the Fifth Circuit reversed, holding that a fax confirmation sheet demonstrating successful transmission is indeed probative evidence of claim presentment under the FTCA. As the Fifth Circuit observed, unlike normal "untrackable" postal mailing, a fax confirmation sheet "confirms successful transmission." *Id.* at 380. So in one fell swoop, the Fifth Circuit provided clarity on fax cover sheets as well as on the broader topic of taking unreasonable positions in litigation!

Finally, the Court decided an important Second Amendment case. In *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 127 F. 4th 583 (5th Cir. 2025), the Fifth Circuit revisited the constitutionality of federal laws prohibiting federally licensed firearms dealers from selling handguns to adults aged 18–20. This case challenged the constitutionality of 18 U.S.C. §§ 922(b)(1) and (c)(1), laws previously upheld by the same court in the 2012 decision, *National Rifle Association, Inc. v. ATF*, 700 F.3d 185 (5th Cir. 2012). However, the panel—led by Judge Edith H. Jones—found the earlier decision incompatible with recent Supreme Court rulings, notably *New York Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024).

Under the *Bruen* framework, the Fifth Circuit first concluded that the plain text of the Second Amendment includes young adults within "the people" it protects. Historical evidence from the founding era demonstrated that individuals as young as 18 were expected—even required—to keep arms for militia service. Contrary evidence offered by the government, primarily from later 19th-century laws restricting gun access by younger adults, was insufficient to show a historical tradition justifying the federal restriction. *Id.* at 599. The court criticized the district court's decision for relying on outdated intermediate scrutiny standards invalidated by *Bruen*. *Id.* at 587. Instead, applying *Bruen's* historical analogy test, the Fifth Circuit emphasized that the modern prohibition on handgun purchases imposed greater burdens than any analogous historical regulation. *Id.* at 598–600 (discussing the lesser weight that should be given to analogues passed later than the founding era). Thus, the court held the challenged provisions unconstitutional. This decision marks a significant application of *Bruen*, reshaping Second Amendment jurisprudence in the Fifth Circuit by reaffirming the fundamental right to firearm access for young adults aged 18–20 and questioning broader federal regulatory authority based solely on age classifications.

TEXAS CRIMINAL LAW UPDATE

By John Messinger[1]

***Crawford v. State*, No. PD-0243-23, __ S.W.3d __, 2025 WL 907787 (Tex. Crim. App. Mar. 26, 2025).**

> **A defendant should be prepared to defend against whatever offenses the body of the charging instrument raises, including through factual averments.**

Crawford represents a shift, or perhaps a shift back, in the way charging instruments are viewed for notice. It is ultimately a tale of two cases—it, and *Delarosa v. State*, 677 S.W.3d 668 (Tex. Crim. App. 2023), which was decided just before *Crawford* was argued in late 2023.

Delarosa had sex with one of his daughter's friends when the girl was a minor. Although the caption of the charging instrument plainly described the three counts as "SEXUAL ASSAULT OF A CHILD," "22.011(a)(2) Penal Code," the body of the instrument read like a "regular" sexual assault under Section 22.011(a)(1): "did then and there intentionally or knowingly contact the sexual organ of [pseudonym], hereafter styled the complainant, by defendant's sexual organ, without the consent of the complainant . . . ." Lack of consent is not an element when a child is involved. Nearly every aspect of the trial, including the application paragraph of the jury charge, was framed in terms of sexual assault of a child. Delarosa never objected. He was convicted. On appeal, he claimed the evidence was insufficient to prove his contact was without consent. Indeed, the complainant testified that she thought she

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was in love with him and that she agreed to everything. The court of appeals found the evidence sufficient because, in its view, the complainant could not consent because she was a minor. *See Delarosa v. State*, No. 09-19-00408-CR, 2022 WL 710063, at *6 (Tex. App.—Beaumont Mar. 9, 2022), *rev'd*, 677 S.W.3d 668 (Tex. Crim. App. 2023) ("So in this case, the State proved lack of consent by proving [pseudonym]'s age and by proving Delarosa knew [she] was underage, as alleged in the indictment, evidence that established a statutory lack of consent [under Section 22.011(b)(4) because of 'mental disease or defect,'] sufficient to satisfy the requirements of subsection (a)(1).").

The CCA granted Delarosa's petition for review and reversed in a 5-4 decision. The State's primary argument to the court was that "[t]he entire indictment should be considered . . . because that is what the grand jury had before it and that is what the foreperson signed." The CCA looks to the caption of the indictment to determine whether a charge that appears to be a misdemeanor was meant as a felony, *see Kirkpatrick v. State*, 279 S.W.3d 324, 328–29 (Tex. Crim. App. 2009), and whether a charging instrument qualifies as an indictment because its body fails to name the defendant. *See Jenkins v. State*, 592 S.W.3d 894, 901–02 (Tex. Crim. App. 2018). "If the language used in the body of the indictment caused appellant any confusion [in light of the plain caption]," the State argued, "the time to ask for clarification was before trial." The CCA rejected this argument. "The body of this indictment . . . completely alleged non-consensual sexual assault, omitting no element. It was not defective. It was facially complete." *Delarosa*, 677 S.W.3d at 677. Without the question of subject-matter jurisdiction presented in *Kirkpatrick*, "the body of the indictment alleged non-consensual sexual assault, and the State had to prove it though that was not the felony it intended to charge." *Id*. Although the majority did not create a brightline rule regarding whether the caption is part of the indictment as a matter of constitutional or statutory law, it said the caption in that case "made no allegation" of sexual assault of a child; "There was no sentence in the caption. There was not even a sentence fragment." *Id*. at 678. In response to the State's argument that objection should have been required to clarify any confusion over the charged offense, the majority said, "It would be perverse to rescue the State from its inattention to that duty by requiring an arguably deficient performance by defense counsel." *Id*. It concluded, "The caption's reference to sexual assault of a child did not make the indictment defective. Its body alleged a facially complete offense of non-consensual sexual assault. Having alleged it, the State was obliged to prove it." *Id*. at 679.

It was against this backdrop that *Crawford* was decided early this year. In 2021, Crawford assaulted a deputy sheriff attempting to arrest him. Before 2017, that would have been charged as an assault on a public servant, making it a third-degree felony. In 2017, Texas Penal Code § 22.01(b-2) was added to make assaulting someone the defendant knows is a peace officer or judge a second-degree felony. Tex. Penal Code § 22.01(b-2). Deputy sheriffs are peace officers. Tex. Code Crim. Proc. art.

2.12(1). The caption of Crawford's charging instrument said, "ASSAULT PEACE OFFICER/JUDGE," "22.01(b-2) PENAL CODE," and "SECOND DEGREE FELONY" on separate lines. The body of the charging instrument, however, said "the defendant knew that the complainant was a public servant, to wit: Menard County Deputy Sheriff." In isolation, that line suggested the State might have intended to pursue a lesser, third-degree charge. The rest of the record makes it clear, however, that the State had no intention of obtaining a conviction for anything but second-degree assault on a peace officer. Moreover, pretrial orders from the trial court and filings by Crawford recognized that. It was not until after the State *voir dired* on the second-degree charge, the jury was sworn, and Crawford pleaded not guilty to the charge that he pointed out the body conflicted with the caption. The trial court carried the objection until the charge conference at which point it was overruled. The jury was charged on assault on a peace officer and convicted Crawford.

The court of appeals reversed. Although this predated the CCA's opinion in *Delarosa*, its reasoning was similar. It held that Crawford was indicted for a third-degree offense because the body of the indictment showed a facially complete allegation of assault on a public servant. "If the body of the charging instrument names all the elements of an offense, that is a facially complete indictment that an accused must be able to rely on." *Crawford v. State*, 683 S.W.3d 793, 799 (Tex. App.—San Antonio 2023), *rev'd*, No. PD-0243-23, __ S.W.3d __, 2025 WL 907787 (Tex. Crim. App. Mar. 26, 2025). It distinguished *Kirkpatrick* and *Jenkins*, which require pretrial objection and consideration of the caption in their respective analyses, by saying those cases apply only when a defendant alleges for the first time on appeal a constitutional defect like lack of jurisdiction.

The CCA reversed in a 5-4 decision written by Judge Parker. It distinguished *Delarosa* on the basis that the indictment in that case "alleged only non-consensual sexual assault and did not allege sexual assault of a child." *Crawford*, 2025 WL 907787, at *4. "But in the present case, the body of the indictment *does* allege a fact that establishes the 'peace officer' element of assault on a peace officer—the victim being a 'deputy sheriff.'" *Id*. at *5. "[A]ll one has to do is look at the applicable statutes." *Id*. "Although the body of the indictment facially alleges assault on a public servant, with that public servant being more specifically described as a 'deputy sheriff,' it is nevertheless true that the body of the indictment *also* includes every fact needed to convict of assault on a peace officer." *Id*. This is true if one views "deputy sheriff" as a definition in the absence of the term defined, *id*., or as a descriptive averment under the cognate pleadings approach. *Id*. at *6.

Judges Newell and Walker wrote dissenting opinions. They will be discussed in context below.

You may have noticed that I keep saying "charging instrument" rather than indictment. That is because the CCA has not definitely said how much of the instrument is part of the "indictment" as defined by Texas Constitution article V, § 12 and Texas Code of Criminal Procedure article 21.01, outside of narrow cases like *Kirkpatrick* and *Jenkins*. The Constitution says, "An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense." The Code defines an "indictment" as "the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense." In both *Delarosa* and *Crawford*, the State asked the CCA to decide whether the caption is to be considered for all purposes: what the State intended, what the grand jury decided, and for what the defendant had notice. Neither case did. To illustrate the confusion, neither *Delarosa* nor *Crawford* says that only the body of the charging instrument is the "indictment," and both cases refer to the caption as being part of the indictment. *See*, *e.g.*, *Delarosa*, 677 S.W.3d at 671 ("On the one hand, the body of Appellant's indictment charged him with . . . . On the other hand, the indictment's caption . . ."); *Crawford*, 2025 WL 907787, at *1 (setting forth "[t]he body of the indictment" and "[t]he caption of the indictment"), *8 ("After all, not only does the body of the indictment support a prosecution for assault on a peace officer, but the indictment's caption explicitly titles the offense as assault on a peace officer and cites the Penal Code subsection for assault on a peace officer."). Neither majority opinion mentions either the constitutional or statutory definition of "indictment." Treatment by the dissenters highlights the problem.

Judge Newell's dissent implies the caption is not legally part of the "indictment." He acknowledges "the caption at the top of the indictment" but points out that the statute governing what makes an indictment "deemed sufficient," Texas Code Crim. Proc. art. 21.02, does not mention "caption." 2025 WL 907787, at *10 (Newell, J., dissenting). That is true, but an item does not have to be on that list to be part of "the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense." *See* Tex. Code Crim. Proc. art. 21.01. In reality, the grand jury does no writing of its own other than to sign a true bill. That being the case, the adoption of everything on that instrument should make its entirety the "indictment" for all purposes. Judge Newell suggests that the captions routinely found on what everyone calls an indictment "may or may not have been included by an entity other than the grand jury." 2025 WL 907787, at *10. If the captions were printed on the instrument after the foreperson signed it, they would not qualify under the constitutional or statutory definitions of "indictment." But there is no reason to believe that is the case. My experience—and the experience of everyone I've asked—says the opposite: both the caption and body are typed when the indictment is drafted. In other words, it is complete when approved by the grand jury. That discrepancies between the caption and body sometimes happen does not belie that fact.

One unacknowledged consequence of Judge Newell's dissent is that it would result in the reversal of cases like *Kirkpatrick* and *Jenkins*. In *Jenkins*, the CCA held that "the proper test" for determining whether an instrument satisfies "the constitutional definition of indictment" "is whether *the face of the charging instrument* is clear enough to give an appellant adequate notice of the charge against him." 592 S.W.3d at 901 (cleaned up and emphasis added). In that case, the caption had to be used to satisfy the constitutional requirement that it "charg[e] a person with the commission of an offense" because the body omitted the defendant's name. If the caption is not part of the "indictment" because the grand jury did not have it before them, the charging instrument in that case failed to be an indictment. Judge Richardson wrote *Jenkins* and joined Judge Newell's dissent in *Crawford*.

Judge Walker would apparently treat the caption as part of the "indictment" but would hold that the body controls over the caption. In his view, *Delarosa* held that "when determining what offense is charged by a charging instrument, it is the accusatory language in the body of the charging instrument that must be considered." 2025 WL 907787, at *15. Judge Walker would limit that to "facially complete" bodies, however, as he suggested "the State may be correct that the entirety of the indictment, including the caption, should be considered to resolve any doubt as to which offense is being charged" in a given case. *Id*. at *18. What is curious is that both Judge Newell and Judge Walker joined each other's opinion. That is, they agree that there is no evidence the grand jury considered the caption but also that the caption may be considered if the offense is unclear from the body of the indictment. (Judge Walker also joined *Jenkins*.) On this latter point, they were in agreement with the majority. *See id*. at *8 ("Even if the caption cannot *add content*, it arguably might be able to clarify what the State intended by the content that is already present in the body of the charging instrument.") (emphasis in original).

However, both Judge Newell and Judge Walker are correct that *Crawford* conflicts with (at least) some of *Delarosa* without that conflict being addressed. The upshot of *Crawford* is that the State had the option of pursuing either a third- and second-degree offense because the body of the indictment, though facially complete, supported both. In practice, this would require defense counsel to object or at least ask the State which it intended to pursue, if only to properly advise his client as to potential exposure. *Delarosa* said it would be "perverse" and "arguably deficient" to bring a mistake to the State's attention. *Crawford* effectively holds that a body that points to two distinct offenses is not a mistake, but the result is the same: defense counsel has to "risk" alerting the State to (or finding out about) a greater charge than he wants for his client.

All of this could be avoided if the CCA addressed the constitutional and statutory definitions of "indictment." If the entire "written instrument" or "written statement" were considered in every case regardless of the facial completeness of the body (which *Kirkpatrick* already says is not the end all), the inconsistencies in this

area of law would evaporate. As it stands, the State is arguably better served providing fewer details in the body of its charging instruments because ambiguity gives it more leeway. At worst, that practice might prompt a motion to quash that would provide the opportunity to clarify. The better approach would be to foster an environment that encourages specific pleading by not fatally punishing drafting mistakes that are easily remedied by viewing the caption on the first page of the instrument.

***Zapata v. State*, 707 S.W.3d 440 (Tex. Crim. App. 2025).**

Sometimes the proper question is not whether the trial court has explicit authorization but whether it lacks general authority/discretion.

Zapata pleaded no contest to an assault charge as part of an agreement for deferred adjudication. The State asked for an affirmative finding of family violence. Zapata opposed it because such a finding attaches only to a judgment and there is no judgment when a defendant is placed on deferred. The judge made the finding but permitted Zapata to appeal. Zapata's sole argument on appeal was whether a family-violence finding could be made without a judgment. *Zapata v. State*, 678 S.W.3d 325, 327 (Tex. App.—San Antonio 2023), *aff'd*, 707 S.W.3d 440 (Tex. Crim. App. 2025). The court of appeals agreed that there was no judgment and that Texas Penal Code § 22.01(f)(1), which makes his plea a "previous conviction" for purposes of the assault statute, does not change that. *Id*. at 327–28. Therefore, no affirmative finding was required by Texas Code of Criminal Procedure article 42.013, which says, "if the court determines that the offense involved family violence, as defined by Section 71.004, Family Code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case." *Zapata*, 678 S.W.3d at 328–29. The court of appeals also noted that a family violence finding is not on the list of findings that must be made when a defendant is placed on deferred adjudication, *see* Tex. Code Crim. Proc. art. 42A.105, and is not properly characterized as a condition of deferred adjudication that the trial court had discretion to impose. *Zapata*, 678 S.W.3d at 329; *see* Tex. Code Crim. Proc. art. 42A.104(a).

Zapata did not win, however. The court of appeals concluded that none of this meant "the trial court wholly lacked discretion to enter the finding." *Zapata*, 678 S.W.3d at 329. Because Texas Code of Criminal Procedure article 42A.504(b) includes conditions for those placed on community supervision for offenses against persons involving family violence, the court held, there is good reason to include the finding at the time the defendant is placed on deferred. And because Zapata pleaded no contest to an information that alleged "assault bodily injury – married/cohab"—in the caption(!)—the trial court had discretion to make it.

Zapata's petition for discretionary review was granted. Its sole issue: "Does the trial court have the discretion to make an affirmative finding of family violence during sentencing prior to adjudication?" In a 6-3 decision, the CCA reversed on the ground that there was "no admissible evidence" to support the finding. *Zapata v. State*, No. PD-0800-23, 2024 WL 4547506, at *1 (Tex. Crim. App. Oct. 23, 2024); *see also id.* at *4 ("no evidence whatsoever"), *7 ("unsupported by any evidence"). Along the way, the majority held that Zapata did not admit to family violence by his plea because it refused to consider the caption, focusing exclusively on a body that alleged a facially complete assault without any indication it involved family violence. *Id.* at *5–6. The majority also held that an "inadmissible hearsay statement in the officer's probable cause affidavit, which stated that the Complainant told the officer that Appellant was her 'boyfriend,'" was not enough. *Id.* at *6.

Presiding Judge Keller dissented. She pointed out that the issue decided was not raised on appeal below, decided by the court of appeals, or granted review by the CCA. *Id.* at *7–8 (Keller, P.J., dissenting). Presumably in response, the majority said, "the issue on which we granted review in this case is intertwined with the underlying question of whether any evidence could support the trial court's finding" and that this was a "narrower basis" on which to resolve the case. *Id.* at *4. But this did not address Presiding Judge Keller's other point that the State had no opportunity to brief sufficiency. *Id.* at *8–9 (Keller, P.J., dissenting). This mattered, because there were colorable arguments that the plea colloquy adopted the caption and the trial court considered the hearsay statement, which has probative value in the absence of objection. *Id.* at *9–10.

Judge Yeary also took issue with "ambushing the State in this way." *Id.* at *10 (Yeary, J., dissenting). He addressed the issue granted review and agreed with the court of appeals. He rejected Zapata's argument that because statutes require some findings when a defendant is placed on deferred but not others, the others are forbidden. *Id.* at *12–13.

The State filed a motion for rehearing that was granted this year. In a 5-4 decision, the CCA affirmed the court of appeals in an opinion written by Judge Yeary that largely tracked his dissent on original submission and the analysis of the court of appeals. The CCA also reiterated that its role, as a discretionary review court, is to review "decisions" of the courts of appeals. *Zapata v. State*, 707 S.W.3d 440, 441 n.1 (Tex. Crim. App. 2025) (op. on reh'g). As discussed below, proper application of this rule is not as easy as it may sound.

***State v. Hatter*, 707 S.W.3d 429 (Tex. Crim. App. 2025).**

A defendant has no plea bargain agreement with the State until there is an agreement with the State and the trial court accepts it.

Hatter was charged with felony assault on a peace officer and driving while intoxicated (DWI) arising out of the same incident. She later picked up another DWI charge. Hatter was represented by different attorneys on the felony and DWIs, respectively. Her first attorney worked out an agreement by which the assault would be dismissed in exchange for a plea on the DWIs. The motion to dismiss was filed with the notation "State reserves right to refile." Separately, and without input from the felony prosecutor, the DWI charges were dismissed a few weeks later. The State then refiled the assault charge. Hatter moved for specific performance of the State's alleged promise not to prosecute her no matter what. The trial court granted her motion and ordered the charge dismissed.

The court of appeals affirmed. It treated the grant of Hatter's motion for specific performance as the approval of an immunity agreement. *State v. Hatter*, 634 S.W.3d 456, 461 (Tex. App.—Houston [14th Dist.] 2021), *rev'd*, 665 S.W.3d 584 (Tex. Crim. App. 2023). Justice Jewell dissented. In his view, there was neither an immunity agreement nor even a regular plea agreement to enforce, as there was no acceptance by appellant of an offer, no exchange of consideration, no performance or reliance by one of the parties, or acceptance of an agreement by the trial court. The only action taken by the trial court came after the motion for specific performance was filed, which was after the State withdrew any offer it had made.

The State argued to the CCA that a conditional dismissal subject to refile cannot be retroactively converted into an immunity agreement if the trial court was never aware of it and, as a result, never approved it. The CCA reversed but for different reasons. Although it spent many pages reiterating that a grant of immunity from prosecution requires the approval of the trial court, *State v. Hatter*, 665 S.W.3d 584, 590–93 (Tex. Crim. App. 2023), its holding was based on the more basic premise that what Hatter had "was plainly not an immunity agreement[; t]his was the *beginning* of a plea bargain agreement." *Id*. at 594 (emphasis added). A few short paragraphs later, the CCA remanded for the court of appeals to determine whether the trial court was correct for some other reason, "including but not limited to whether there was an enforceable plea bargain agreement." *Id*. at 595 ("Because we review decisions of the courts of appeals, because the issue before us today is specifically whether the court of appeals erred in determining that the immunity agreement was approved and made enforceable by the trial court's grant of [Hatter]'s motion for specific performance, and because the parties' briefing was tailored toward that issue, remand is necessary.").

The court of appeals did just that. Over two years after its original opinion, that court again held the State's case was properly ordered dismissed. Despite noting that "the parties did not cite—and our research did not find—any criminal cases with analogous facts, whereby the parties apparently reached an agreement but one party reneged on that agreement before the trial court's approval was secured[,]" it held the trial court approved the plea agreement when it granted Hatter's motion for specific performance. *State v. Hatter*, 681 S.W.3d 885, 891 (Tex. App.—Houston [14th Dist.] 2023), *rev'd*, 707 S.W.3d 429 (Tex. Crim. App. 2025). Justice Jewell again dissented. He reiterated that there is no evidence Hatter ever accepted the offer, consented to the terms, or made any mutual promise. He also noted that Hatter had never asserted the existence of a plea bargain until her supplemental brief on remand from the CCA, and that it was contrary to her previous characterizations of events.

In January of this year—just over two years since its last opinion—the CCA again reversed. As the opening line says, "This case is about a plea bargain offer that [Hatter] never accepted." *State v. Hatter*, 707 S.W.3d 429, 431 (Tex. Crim. App. 2025). "It is undisputed that the State made a plea offer, but that is as far as it went." *Id*. at 438. "[E]ven if we were to assume that [Hatter] and the State had reached an agreement, that agreement never became binding because it was never approved by the trial court." *Id*. "Before approval by the trial court, the State was free to withdraw its offer to dismiss the felony." *Id*. at 439. For that reason, any argument that Hatter intended to plead to the DWIs but was prevented to by their dismissal—something not supported by the record—does not matter.

The opinion, written by Judge Newell, is plainly correct and a good refresher on the law of plea agreements. It adds to it by explaining what concepts like "unilateral promise" look like in the plea context. *Id*. at 439–40. Arguably, however, this opinion was necessary only because the CCA's previous opinion suggested a "plea agreement" claim was viable. It was not, and the CCA should have known that. The law on plea agreements was clear for decades, including the need for party agreement and trial court approval. That the trial court's only involvement came after the State changed its mind on whatever promise it made has never been disputed. Moreover, as Justice Jewell pointed out, Hatter never claimed (prior to remand) that there was an agreement. The CCA's first opinion even hinted at what its second opinion held: the record showed "the beginning of a plea bargain agreement" rather than an agreement in fact or law. The State went so far as to seek rehearing of the original opinion solely to ask the CCA to remove the sentence about the possibility of a plea agreement because it was unsupported by the record. Having reviewed *Zapata*, *supra*, I hesitate to chide the CCA for its strict adherence on original submission to the specific issue granted review. However, the ease with which the CCA dispatched the "plea agreement" claim based on facts that were clear from its previous opinion forces the conclusion that the claim should not have been suggested by the CCA in the first place.

***Ex parte Zubiate*, No. WR-95,541-01, __ S.W.3d __, 2025 WL 907366 (Tex. Crim. App. Mar. 26, 2025).**

The due process right to confrontation is less extensive than the Sixth Amendment right and is not offended by Zoom parole hearings.

Zubiate was on parole. When the State moved to revoke his parole, the hearings were conducted via Zoom over his objection. Zubiate claimed that violated the Sixth Amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. He filed an application for writ of habeas corpus to that effect. The CCA ordered that the application be filed and set for submission "to determine whether allowing witnesses to testify remotely, such as via Zoom, violates the Confrontation Clause of the U.S. Constitution in the context of a parole revocation hearing." That Court, in an opinion by Judge Keel, held it did not. There were three related reasons.

First, Zubiate wasn't being prosecuted. "Prosecution," for Sixth Amendment confrontation purposes, is not limited to proceedings before a factfinder to decide guilt. *See generally Kentucky v. Stincer*, 482 U.S. 730, 740 (1987) ("Instead of attempting to characterize a competency hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination [at trial]."). But it doesn't extend to parole revocations. Unlike a conviction, "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). In other words, the right "goes out of play after trial." *Ex parte Zubiate*, No. WR-95,541-01, __ S.W.3d __, 2025 WL 907366, at *1 (Tex. Crim. App. Mar. 26, 2025).

Second, Zubiate was no longer an "accused." He was convicted, served part of his prison sentence, and was paroled. "Witnesses who testify 'after guilt is established are not accusers within the meaning of the confrontation clause.'" *Id*. (quoting *United States v. Fields*, 483 F.3d 313, 332 (5th Cir. 2007)).

Third, the witnesses who testified over Zoom were not "against" Zubiate because their testimony was not used to convict him. *Id*. Again, he was convicted long before that hearing. Nothing they said was used to determine his guilt.

The CCA also rejected the alternative argument that the Fourteenth Amendment's Due Process Clause required what the Sixth Amendment right provides. The Court reiterated that "[d]ue process is flexible and situational" not "ideal," and that States have "wide latitude" in designing parole revocation proceedings. *Id*. at *2. "As far as the record shows, [Zubiate] could see, hear, and

cross-examine the witnesses in real time, so his due process right to confront the witnesses was honored." *Id*. Zubiate thus "did confront and cross-examine the witnesses, just not in his preferred way—in person." *Id*.

Judge Newell concurred, joined by Judge Walker. "The United States Supreme Court has already held that the Sixth Amendment right to confront witnesses applies to 'criminal prosecutions' not parole revocations," citing *Morrissey*. *Id*. at *3 (Newell, J., concurring). He would have chosen not "trying to walk needlessly through wet cement" by incorporating cases dealing with other aspects of the Sixth Amendment, as the majority did, "try[ing] to inflate the value and reach of an otherwise routine case." *Id*.

Judge Walker also concurred, joined by Judge Newell. He would not have gone beyond the inapplicability of the Sixth Amendment to parole revocations to decide whether the parolee is an "accused" with witnesses "against" him, calling them "moot points." *Id*. at *3–4 (Walker, J., concurring). He also relied on Confrontation Clause cases to explain why, in his view, parole hearing officers should do more than satisfy the constitutional requirement of due process. *Id*. at *4–5.

***State v. Cuarenta*, 707 S.W.3d 424 (Tex. Crim. App. 2025).**

The State's statutory authority to appeal illegal sentences does not include illegal grants of deferred adjudication/disposition probation.

Cuarenta got caught speeding. Because speeding is a Class C misdemeanor, nearly all defendants may appeal de novo from the justice court to a county court, be found guilty after trial, and still receive a deferred disposition with a suspended sentence. *See* Tex. Code Crim. Proc. arts. 44.17 (appeals from justice courts), 42.111 (deferral of proceedings in appeals to county court), 45A.302(a) (deferred disposition for misdemeanors punishable by fine only). One of the exceptions is for holders of a commercial driver's license. By statute, deferred dispositions are unavailable for violations of law related to motor vehicle control committed by holders. Tex. Code Crim. Proc. art. 45A.301(2). Cuarenta had one. Whether this was known to the county court is unclear, but Cuarenta's disposition was deferred after he was found guilty. The State appealed, arguing that this amounted to an illegal sentence, which is one of the statutorily enumerated things the State may appeal. Tex. Code Crim. Proc. arts. 44.01(b) ("The state is entitled to appeal a sentence in a case on the ground that the sentence is illegal."). The court of appeals noted the split in authority but held it had jurisdiction over the appeal. It reversed and remanded for proper sentencing.

The CCA reversed in a unanimous opinion by Judge McClure. The State's right to appeal is governed by statute. As set out above, article 44.01(b) allows the appeal of illegal "sentences." Article 42.02 defines "sentence" as "that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law." By design, deferred dispositions avoid the execution of punishment and typically avoid the finding of guilt. It is a suspension and must itself be revoked by a later order. However illegal it was to defer Cuarenta's disposition, it was not a sentence and therefore could not be appealed by the State under 44.01(b). The CCA left open the possibility that the proper remedy in such cases is mandamus, the argument being a trial court has no discretion to do what the Legislature says it cannot. *See In re Medina*, 475 S.W.3d 291, 298 (Tex. Crim. App. 2015) ("If a trial judge lacks authority or jurisdiction to take particular action, the judge has a 'ministerial' duty to refrain from taking that action, to reject or overrule requests that he take such action, and to undo the action if he has already taken it.").

SUPREME COURT OF TEXAS UPDATE
March 2024 through April 2025

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Special thanks to all the Staff Attorneys and
Law Clerks at the Supreme Court of Texas
for their substantial contributions.

Table of Contents

I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from March 1, 2024, through April 30, 2025. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to kelly.canavan@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Administrative Procedure Act

a) *In re Carlson*, ___ S.W.3d ___, 2025 WL 1196720 (Tex. Apr. 25, 2025) [24-0081]

At issue in this case is whether a mandamus petition became moot after the Comptroller issued the final decision the relators had requested.

Tom and Becky Carlson filed an administrative contested case against the Comptroller, alleging a takings claim. The Comptroller referred the case to the State Office of Administrative Hearings. After referral, the administrative law judge granted the Comptroller's motion to dismiss for lack of jurisdiction, agreeing that the case was untimely filed. SOAH advised the Carlsons that the Comptroller needed to issue a final order before any further action could be taken in the case. The Comptroller informed the Carlsons that it would issue a final order, but later changed its mind, informing them that SOAH's order granting the motion to dismiss was a final order. By then, the deadline to file a motion for rehearing—a prerequisite to appeal—had passed.

The Carlsons filed a mandamus petition in the Supreme Court, asking the Court to compel the Comptroller to issue a final order. After briefing and oral argument before the Court, the Comptroller issued a final decision in the underlying case. The parties agreed that the issuance of the final decision rendered the mandamus proceeding moot. The Court agreed and dismissed the mandamus petition for lack of jurisdiction.

b) *Kensington Title-Nev., LLC v. Tex. Dep't of State Health Servs.*, ___ S.W.3.d ___, 2025 WL 937478 (Tex. Mar. 28, 2025) [23-0644]

This case addresses when a party can obtain a declaratory judgment regarding the applicability of an administrative rule under Section 2001.038(a) of the Administrative Procedure Act.

Kensington acquired real property in Denton, Texas, on which the prior owners had left behind radioactive personal property. Shortly thereafter, Kensington began implementing a plan approved by the Department of State Health Services to clean up the material, but Kensington ceased those activities when it was brought into an ongoing tax suit against the prior owners that subjected the radioactive personal property to a lien. The Department issued a notice that Kensington violated an administrative rule by possessing radioactive material without a license, and it sought a penalty. An

administrative law judge found a violation and recommended a $7,000 penalty, which the Department adopted.

In the pending tax dispute, Kensington amended its pleading to add a cause of action under Texas Government Code Section 2001.038(a) to declare the rule inapplicable, arguing that Kensington neither owned nor possessed the material. The Department filed a plea to the jurisdiction, arguing Kensington challenged the Department's application of the rule rather than the rule's applicability, and thus the Department's immunity from suit was not waived. The trial court denied the Department's plea but the court of appeals reversed, holding that Kensington's Section 2001.038(a) challenge failed to allege a proper rule-applicability challenge.

The Supreme Court reversed. The Court first held that Kensington had standing to bring a Section 2001.038(a) challenge because Kensington alleged that the Department rule, if enforced, would interfere with Kensington's rights and the requested declaration would redress its injury. The Court then held that Kensington alleged a proper rule-applicability challenge, explaining that Kensington's request for a declaration of whether the Department's rules could apply to nonlicensees like Kensington—who own real property on which radioactive material was abandoned—falls within the statute's scope. The Court remanded the case to the trial court to resolve the merits of the challenge.

c) *Save Our Springs All., Inc. v. Tex. Comm'n on Env't Quality*, ___ S.W.3d ___, 2025 WL 1085176 (Tex. Apr. 11, 2025) [23-0282]

This suit for judicial review involves claims that TCEQ (1) misapplied its "antidegradation" rules in granting a wastewater discharge permit and (2) failed to make "underlying fact" findings as required by section 2001.141 of the Administrative Procedure Act.

TCEQ rules prohibit permitted discharges into high-quality waterbodies that would either (1) disturb existing water uses or (2) degrade water quality. The City of Dripping Springs applied for a permit to discharge wastewater into Onion Creek. Predictive modeling estimated that dissolved oxygen levels at the mixing point would drop more than 20% but would remain at sufficient levels to protect existing uses and then quickly return to baseline levels. Taking into consideration other water-quality parameters, TCEQ's Executive Director concluded that overall water quality would not suffer and proposed to grant the City's application.

Contested-case and judicial-review proceedings ensued. A local environmental group, Save Our Springs Alliance, asserted that a significant reduction in dissolved oxygen level constitutes degradation of water quality as a matter of law. The administrative law judge rejected SOS's parameter-by-parameter antidegradation methodology as reflecting a misreading of the applicable rules. TCEQ agreed and granted the permit. The trial court vacated and enjoined the City's permit. A divided court of appeals reversed and upheld the permit.

The Supreme Court affirmed,

holding that TCEQ did not misread or misapply its rules. TCEQ's practice of assessing degradation of water quality on a whole water basis, rather than affording decisive weight to numeric changes in individual water-quality parameters, conforms to the antidegradation standards as written. SOS's additional complaint that TCEQ's final order was void for want of sufficient underlying fact findings was not preserved for judicial review. That complaint also failed on the merits because the language in TCEQ's antidegradation rules is not "statutory language" for which thee statute requires additional fact findings.

2. Medicaid Eligibility

a) *Tex. Health & Hum. Servs. Comm'n v. Est. of Burt*, 689 S.W.3d 274 (Tex. May 3, 2024) [22-0437]

The issue in this case is whether an interest in real property purchased after a Medicaid applicant enters a skilled-nursing facility qualifies as the applicant's "home," excluding it from the calculation that determines Medicaid eligibility.

The Burts lived in a house in Cleburne for many years and then sold it to their adult daughter and moved into a rental property. About seven years later, the Burts moved into a skilled-nursing facility. At that time, their cash and other resources exceeded the eligibility threshold for Medicaid assistance. Later that month, the Burts purchased a one-half interest in the Cleburne house from their daughter, reducing their cash assets below the eligibility threshold. They then applied for Medicaid. The Burts passed away, and the Health and Human Services Commission denied their application after determining that the Burts' partial ownership interest in the Cleburne house was not their home and therefore was not excluded from the calculation of the Burts' resources. After exhausting its administrative remedies, the Burts' estate sought judicial review. The trial court reversed, and the court of appeals affirmed the trial court's judgment. The court of appeals held that whether a property interest qualifies as an excludable "home" turns on the property owner's subjective intent and that the Burts considered the Cleburne house to be their home.

The Supreme Court reversed and rendered judgment for the Commission. In an opinion authored by Justice Bland, the Court held that under federal law, an applicant's "home" is the residence that the applicant principally occupies before the claim for Medicaid assistance arises, coupled with the intent to return there in the future. An ownership interest in property acquired after the claim for Medicaid assistance arises, using resources that are otherwise available to pay for skilled nursing care, is insufficient. The Court observed that federal and state regulations provide that the home is the applicant's "principal place of residence," which coheres with the federal statute and likewise requires residence and physical occupation before the claim for assistance arises.

Chief Justice Hecht dissented. He would have held that an applicant's home turns on the applicant's subjective intent to return to the house, even if the applicant had not owned or occupied it before admission to skilled-

nursing care, and that the Burts satisfied that standard.

3. Public Information Act

a) *Univ. of Tex. at Austin v. GateHouse Media Tex. Holdings, II, Inc.*, ___ S.W.3d ___, 2024 WL 5249449 (Tex. Dec. 31, 2024) [23-0023]

The issue in this case is whether the Texas Public Information Act gives the University of Texas discretion to withhold records of the results of disciplinary proceedings.

The Austin–American Statesman sent a PIA request to the University, seeking the results of disciplinary proceedings in which the University determined that a student was an alleged perpetrator of a violent crime or sexual offense and violated the University's rules or policies. The University declined to provide the information, asserting that the federal Family Educational Rights and Privacy Act does not require this information's disclosure.

The Statesman filed a statutory mandamus proceeding in the trial court, seeking to compel the disclosure. It then moved for summary judgment, arguing that the PIA revokes the discretion granted by FERPA. The trial court granted the Statesman's motion, ruling that the records are presumed subject to disclosure because the University failed to comply with the PIA's requirement that a decision of the Office of Attorney General be sought. The court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the University. The Court first held that the plain language of Section 552.026 of the PIA—which states that the act "does not require the release" of education records "except in conformity with" FERPA—grants an educational institution discretion whether to disclose an education record if the disclosure is authorized by FERPA. The Court then held that the University was not required to seek an OAG decision before withholding the records. The Court reasoned that the PIA provision imposing the requirement of an OAG decision does not apply to records withheld under Section 552.026, and it noted OAG's policy refusing to review education records to determine their compliance with FERPA.

4. Public Utility Commission

a) *Pub. Util. Comm'n of Tex. v. Luminant Energy Co.*, 691 S.W.3d 448 (Tex. June 14, 2024) [23-0231]

The main issue is whether orders issued by the Public Utility Commission during Winter Storm Uri exceed the Commission's authority under Chapter 39 of the Public Utility Regulatory Act.

The 2021 storm caused almost 50% of Texas' power-generation equipment to freeze and go offline, stressing the state's electrical grid. When mandatory blackouts failed to return the grid to equilibrium, the Commission determined that its pricing formula was sending inaccurate signals to market participants about the state's urgent need for additional power. In two orders, the Commission directed ERCOT to adjust the pricing formula so that electricity would trade at the regulatory cap.

Luminant Energy Co. challenged the orders in a statutory suit for

judicial review against the Commission in the court of appeals. The court of appeals agreed with Luminant that the orders violate Chapter 39 by directing ERCOT to set a single price for electricity.

The Supreme Court reversed and rendered judgment affirming the orders. Luminant's challenge rested on Chapter 39's express preference for competition over regulation. But the Court pointed to other language in Chapter 39 commanding the Commission and ERCOT to ensure the reliability and adequacy of the electrical grid and acknowledging that the energy market will not be completely unregulated. After applying the whole-text canon of statutory construction, the Court held that Luminant had not overcome the presumption that agency rules are valid. The Court went on to hold that the orders substantially comply with the Administrative Procedure Act's emergency rulemaking procedures.

b) *Pub. Util. Comm'n of Tex. v. RWE Renewables Ams., LLC*, 691 S.W.3d 484 (Tex. June 14, 2024) [23-0555]

The central issues in this case are: (1) whether the Public Utility Commission's order approving a protocol adopted by the Electric Reliability Council of Texas regarding electricity scarcity-pricing constitutes a "competition rule[] adopted by the commission" under Section 39.001(e) of the Public Utility Regulatory Act, which may be directly reviewed by the court of appeals; and (2) if so, whether the Commission exceeded its authority under PURA or violated the Administrative Procedure Act's mandatory rulemaking procedures in issuing the approval order.

In 2021, Winter Storm Uri strained Texas's electrical power grid to an unprecedented degree. Regulators resorted to mandating blackouts to prevent catastrophic damage to the state's power grid. Simultaneously, the Commission issued emergency orders administratively setting the wholesale price of electricity to the regulatory maximum in an effort to incentivize generators to rapidly resume production.

In the storm's aftermath, ERCOT adopted, and the Commission approved, a formal protocol setting electricity prices at the regulatory ceiling under certain extreme emergency conditions. RWE, a market participant, appealed the Commission's approval order directly to the Third Court of Appeals. The court held the order was invalid, determining that (1) the order constituted a competition rule under PURA and a rule under the APA; (2) by setting prices, the rule was anti-competitive and so exceeded the Commission's statutory authority under PURA; and (3) the Commission implemented the rule without complying with the APA's rulemaking procedures.

The Supreme Court reversed, holding that the Commission's approval order is not a "competition rule[] adopted by the commission" subject to the judicial-review process for such rules. The Court reasoned that PURA envisions a separate path for ERCOT-adopted protocols, which are subject to a lengthy and detailed process before being implemented. The statutory requirement that the Commission

approve those adopted protocols before they may take effect does not transform Commission *approval orders* into Commission *rules* eligible for direct review by a court of appeals. Hence, the court of appeals lacked jurisdiction over the proceeding. Accordingly, the Supreme Court vacated the court of appeals' judgment and dismissed the case for lack of jurisdiction.

5. Texas Clean Air Act

a) *Port Arthur Cmty. Action Network v. Tex. Comm'n on Env't Quality*, 707 S.W.3d 102 (Tex. Feb. 14, 2025) [24-0116]

In this certified question, the Court construed "best available control technology" as used in TCEQ's rules.

Port Arthur LNG sought a permit from the Texas Commission on Environmental Quality to expand its liquefied natural gas plant. To receive a permit, the applicant must show that emission sources at the facility satisfy Best Available Control Technology requirements. Port Arthur Community Action Network, an environmental group, challenged whether BACT was met, arguing that Port Arthur LNG had proposed emission limits for certain pollutants that exceeded the limits TCEQ had previously approved for another plant, the Rio Grande Plant. The Rio Grande Plant has a permit but has yet to be constructed. TCEQ rejected PACAN's challenge and granted a permit to Port Arthur LNG. PACAN appealed this decision to the Fifth Circuit under the federal Natural Gas Act.

The Fifth Circuit certified this question to the Texas Supreme Court: "Does the phrase 'has proven to be operational' in Texas's definition of 'best available control technology' codified at section 116.10(1) of the Texas Administrative Code require an air pollution control method to be currently operating under a permit issued by the Texas Commission on Environmental Quality, or does it refer to methods that TCEQ deems to be capable of operating in the future?"

The Court answered the question as follows. BACT is technology that has already proven, through experience and research, to be operational, obtainable, and capable of reducing emissions. BACT does not extend to methods that TCEQ deems to be capable of operating in the future. Further, BACT is not limited to a pollution control method that is currently operating under a previously granted permit. The earlier permit, such as one for a facility that has yet to be built, might exceed a level of pollution control that is currently available, technically practical, and economically reasonable. A previously permitted emissions level for one facility is neither necessary nor sufficient to establish BACT for other, similar facilities.

B. ARBITRATION

1. Admission Pro Hac Vice

a) *In re AutoZoners, LLC*, 694 S.W.3d 219 (Tex. Apr. 26, 2024) (per curiam) [22-0719]

In this case, the Court addressed motions by out-of-state attorneys seeking to appear pro hac vice. Velasquez sued his employer, AutoZoners, for age discrimination. A Texas attorney, Koehler, filed an answer for AutoZoners. The signature block included the electronic signature of Koehler.

Below this signature, the signature block included two out-of-state attorneys, Riley and Kern, with statements that an "application for pro hac vice admission will be forthcoming." Shortly thereafter, Riley and Kern filed motions to appear pro hac vice. Velasquez objected to their admission.

At a hearing, Riley and Kern testified that they had reviewed the answer and provided input but denied preparing and filing the answer. The trial court denied their motions to appear pro hac vice on the sole ground that Riley and Kern were "signing documents before being admitted." AutoZoners sought mandamus relief from the order denying the motions.

The court of appeals denied mandamus relief. The Supreme Court granted mandamus relief. The Court held that Riley and Kern had not signed any pleadings, and the trial court abused its discretion in denying the motions to appear pro hac vice on that ground. The Court concluded that Riley and Kern had not engaged in the unauthorized practice of law and had not appeared on a frequent basis in Texas courts and that Kern's conduct in a federal case was not grounds for denying her motion. The Court concluded that mandamus relief was available to remedy the trial court's abuse of discretion.

b) *Lennar Homes of Tex. Inc. v. Rafiei*, 687 S.W.3d 726 (Tex. Apr. 5, 2024) (per curiam) [22-0830]

The issue is whether the plaintiff established that the arbitration agreement in his home-purchase contract is unconscionable because the cost to arbitrate the issue of "arbitrability" would be excessive.

Rafiei bought a house from Lennar Homes. Several years later, Rafiei sued Lennar for personal injuries that he attributed to improper installation of a garbage disposal. Lennar moved to compel arbitration pursuant to an arbitration agreement in the home-purchase contract. Rafiei opposed the motion on the ground that the costs of arbitration are so excessive that the agreement is unconscionable and unenforceable. The trial court denied Lennar's motion and the court of appeals affirmed.

The Supreme Court reversed. First, it observed that because the arbitration agreement had a clause delegating the issue of arbitrability to the arbitrator, Rafiei had to show that the costs to arbitrate the delegation clause are unconscionable, not the costs to arbitrate the entire case. If an arbitrator decides that the costs to arbitrate the entire case are unconscionable, the case is returned to the courts. The Court then concluded that Rafiei presented legally insufficient evidence to demonstrate unconscionability for that proceeding, which requires an evaluation of: (1) the cost for an arbitrator to decide arbitrability, (2) the cost for a court to decide arbitrability, and (3) Rafiei's ability to afford one but not the other.

C. ATTORNEYS

1. Legal Malpractice

a) *Henry S. Miller Com. Co. v. Newsom, Terry & Newsom, LLP*, ___ S.W.3d ___, 2024 WL 5249801 (Tex. Dec. 31, 2024) [22-1143]

The lead issue in this case is whether a client can pursue a legal-malpractice claim against its former attorney where the client's judgment creditor from the underlying case has a financial interest in the malpractice recovery.

Henry S. Miller Commercial Company sued its former attorney, Steven Terry, for malpractice after losing a fraud case. HSM claims that Terry was negligent in failing to designate a responsible third party and by stipulating to HSM's responsibility for its agent's actions. HSM and its opponent in the fraud case, now a judgment creditor, made an agreement, memorialized in HSM's bankruptcy plan of reorganization, that the creditor would receive the first $5 million of any malpractice recovery and a percentage of additional amounts. The the jury found Terry 100% responsible for the fraud judgment against HSM and awarded actual and punitive damages. After Terry appealed, the court of appeals remanded for a new trial based on jury-charge error.

Both Terry and HSM petitioned for review. In an opinion by Chief Justice Hecht, the Supreme Court addressed Terry's argument that the bankruptcy-plan arrangement giving HSM's judgment creditor an interest in its malpractice recovery constitutes an illegal assignment of the malpractice claim. The Court disagreed, reasoning that HSM retained substantial control over litigation of the claim.

The Court concluded there is some evidence that Terry's negligence caused HSM's damages because the jury likely would have assigned at least partial responsibility to the undesignated third party. However, the only evidence supporting the amount of damages awarded—testimony that the jury would have assigned 85 to 100% fault to the third party based on the expert's "experience"—is conclusory. Since there is evidence of some damages, but no evidence supporting the full amount awarded, the Court agreed with the court of appeals' disposition remanding the case for another trial. Finally, the Court held that there is no evidence that Terry was grossly negligent and that the punitive damages award must therefore be reversed.

Justice Young filed a concurring opinion to further address how the judicial system should respond where a legal-malpractice case is not impermissibly assigned yet still implicates the concerns that led the Supreme Court to preclude such assignments.

Justice Bland dissented in part. She would have held that the expert testimony is legally insufficient to establish legal malpractice as a cause of damage to HSM and rendered judgment for Terry.

D. CLASS ACTIONS

1. Class Certification

a) *Frisco Med. Ctr., L.L.P. v. Chestnut*, 694 S.W.3d 226 (Tex. May 17, 2024) (per curiam) [23-0039]

The issue is whether emergency-room patients who were allegedly

charged an undisclosed evaluation-and-management fee after receiving treatment were appropriately certified as a class under Texas Rule of Civil Procedure 42.

Baylor Medical Center at Frisco and Texas Regional Medical Center at Sunnyvale charge ER patients a fee for evaluation and management services. Paula Chestnut and Wendy Bolen allege that they were charged the fee without receiving notice prior to treatment. They sued the hospitals on behalf of themselves and all others similarly situated, seeking class certification under Rule 42 to bring claims under the Texas Deceptive Trade Practices Consumer Protection Act and the Texas Uniform Declaratory Judgments Act. The trial court ordered class certification, concluding that the Rule 42(a) and (b) requirements were met. It further ordered certification of a Rule 42(d)(1) issue class with respect to four discrete issues.

The hospitals appealed, arguing that the class does not satisfy any of Rule 42(b)'s requirements. The court of appeals agreed that the Rule 42(b) requirements are not met by the class's claims as a whole, but it nonetheless preserved the "Rule 42(d)(1) certification of a Rule 42(b)(2) class action as to . . . three discrete issues" and decertified the class as to every other claim and issue. The hospitals filed a petition for review.

The Supreme Court reversed the part of the court of appeals' judgment that preserved a class certified on discrete issues under Rule 42(d)(1) and remanded the case to the trial court for further proceedings. The Court's precedent mandates that Rule 42(d) cannot be used to manufacture compliance with the certification prerequisites. Instead, Rule 42(d) is a housekeeping rule that functions as a case-management tool that allows a trial court to break down class actions that already meet the requirements of Rule 42(a) and (b) into discrete issue classes for ease of litigation. Once the court of appeals determined that Rule 42(b)'s criteria were not met by the claims as a whole, it should have decertified the class.

b) *USAA Cas. Ins. Co. v. Letot*, 690 S.W.3d 274 (Tex. May 24, 2024) [22-0238]

At issue in this case is whether the trial court erred by certifying a class of insurance claimants whose automobiles USAA had deemed a "total loss."

Sunny Letot's vehicle was rear-ended by a USAA-insured driver. USAA determined that the cost to repair Letot's vehicle exceeded its value. USAA therefore sent Letot checks for the car's value and eight days of lost use and, within days, filed a report with the Texas Department of Transportation identifying Letot's car as "a total loss" or "salvage." Letot later rejected USAA's valuation and checks. She sued USAA for conversion for sending TxDOT the report before she accepted payment. Letot then sought class certification.

The trial court certified a class for both injunctive relief and damages. The class consisted of all claimants for whom USAA filed a report within three days of attempting to pay a claim for a vehicle deemed a total loss. The court of appeals affirmed the certification

order.

The Supreme Court reversed. It first concluded that Letot lacked standing to pursue injunctive relief because she could not show that her past experience made it sufficiently likely that she would again be subject to the challenged claims-processing procedures. Without standing to pursue injunctive relief on her own, Letot could not represent a class, so the Supreme Court reversed the certification on that ground and dismissed the claim for injunctive relief.

The Court then held that Letot had standing to pursue damages pursuant to her conversion claim, but that class certification was improper under the predominance and typicality requirements of Texas Rule of Civil Procedure 42. As to predominance, the Court concluded that Letot could not show that individual issues (including whether the other class members have standing) would not overwhelm the common issue of whether USAA exercised dominion over class members' property when it filed reports concerning their vehicles. As to typicality, the Court held that the unique factual and legal characteristics of Letot's claim rendered that claim atypical of those of the other putative class members.

E. CONSTITUTIONAL LAW

1. Abortion

a) *State v. Zurawski*, 690 S.W.3d 644 (Tex. May 31, 2024) [23-0629]

The issue in this direct appeal is whether Texas's civil abortion law permitting an abortion when the woman has a life-threatening physical condition is unconstitutional when properly interpreted.

The Center for Reproductive Rights, representing obstetricians and women who experienced serious pregnancy complications but were delayed or unable to obtain an abortion in Texas, sought to enjoin enforcement of Texas's civil, criminal, and private-enforcement laws restricting abortion. The Center argued that the laws must be interpreted to allow physicians to decide in good faith to perform abortions for all unsafe pregnancies and pregnancies where the unborn child is unlikely to sustain life after birth. If not so interpreted, the Center charged that the laws violate the due-course and equal-protection provisions of the Texas Constitution. The State moved to dismiss the case on jurisdictional grounds, including standing and sovereign immunity. The trial court entered a temporary injunction, barring enforcement of the laws when a physician performs an abortion after determining in good faith that the pregnancy is unsafe or that the unborn child is unlikely to sustain life.

In a unanimous opinion, the Texas Supreme Court vacated the injunction, holding that it departed from Texas law. The Court held that jurisdiction existed for one physician's claims against the Attorney General to enjoin enforcement of the Human Life Protection Act because she had been threatened with enforcement and her claims were redressable by a favorable injunction. Next, the Court held it error to substitute a good-faith standard for the statutory standard of reasonable medical judgment. Reasonable medical judgment under the law does not require that all physicians agree with a

given diagnosis or course of treatment but merely that the diagnosis and course of treatment be made "by a reasonably prudent physician, knowledgeable about [the] case and the treatment possibilities for the medical conditions involved." Under the statute, a physician must diagnose that a woman has a life-threatening physical condition, but the risk of death or substantial bodily impairment from that condition need not be imminent. Under this interpretation, the Court concluded that the Center did not present a case falling outside the law permitting abortion to address a life-threatening physical condition, where the due-course clause would compel an abortion. Nor is the law, which regulates the provision of abortion on medical grounds, based on membership in a protected class subject to strict scrutiny under the equal-protection clauses.

Justice Lehrmann filed a concurring opinion, emphasizing that a more restrictive law—one requiring imminent death or physical impairment or unanimity among the medical profession as to diagnosis or treatment—would be unconstitutional and a departure from traditional constitutional protections.

Justice Busby filed a concurring opinion, explaining that the Court's opinion leaves open whether the statute is void for vagueness or violates the rule of strict construction of penal statutes and does not decide the extent to which an abortion must mitigate a risk of death or bodily impairment.

2. Due Course of Law

a) *State v. Loe*, 692 S.W.3d 215 (Tex. June 28, 2024) [23-0697]

The issue in this direct appeal is whether a law prohibiting certain medical treatments for children with gender dysphoria likely violates the Texas Constitution.

Parents of children who have been diagnosed with gender dysphoria, along with doctors who treat such children, sought to enjoin enforcement of a Texas statute that prohibits physicians from providing certain treatments for the purpose of transitioning a child's biological sex or affirming a perception of the child's sex that is inconsistent with their biological sex. The trial court entered a temporary injunction enjoining enforcement of the law, concluding that it likely violates the Texas Constitution in three ways: (1) it infringes on the parents' right to make medical decisions for their children; (2) it infringes on the physicians' right of occupational freedom; and (3) it discriminates against transgender children.

The Supreme Court reversed and vacated the injunction. In an opinion by Justice Huddle, the Court concluded that the plaintiffs failed to establish a probable right to relief on their claims that the law violates the Constitution. The Court first concluded that, although fit parents have a fundamental interest in making decisions regarding the care, custody, and control of their children, that interest is not absolute and it does not include a right to demand medical treatments that are not legally available. The Court observed that the Texas Legislature has express constitutional authority to

regulate the practice of medicine, and the novel treatments at issue in this case are not deeply rooted in the state's history or traditions such that parents have a constitutionally protected right to obtain those treatments for their children. The Court therefore concluded that the law is constitutional if it is rationally related to a legitimate state purpose, and the plaintiffs failed to establish that it is not.

The Court next concluded that physicians do not have a constitutionally protected interest to perform medical procedures that the Legislature has rationally determined to be illegal, and the law does not impose an unreasonable burden on their ability to practice medicine. Finally, the Court held that the statute does not deny or abridge equality under the law because of plaintiffs' membership in any protected class, so the plaintiffs failed to establish that the law unconstitutionally discriminates against them.

Justice Blacklock, Justice Busby, and Justice Young filed concurring opinions, although they also joined the Court's opinion. Justice Blacklock observed that the issues in this case are primarily moral and political, not scientific, and he would conclude that the Legislature has authority to prohibit the treatments in this case as outside the realm of what is traditionally considered to be medical care. Justice Busby wrote to clarify that the scope of traditional parental rights remains broad and is limited only by the nation's history and tradition, not by the nature of the state power being exercised. Justice Young noted that there is a considerable zone of parental authority or autonomy that is inviolate, but the parents' claim in this case falls outside it.

Justice Lehrmann filed a dissenting opinion. The dissent would have held that parents have a fundamental right to make medical decisions for their children by seeking and following medical advice, so a law preventing parents from obtaining potentially life-saving treatments for their children should be subjected to strict scrutiny, which this law does not survive.

3. Free Speech

a) *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd.*, 696 S.W.3d 646 (Tex. June 7, 2024) [22-0427]

The issues in this challenge to Texas's regulatory scheme for public insurance adjusters are whether professional licensing and conflict-of-interest constraints (1) restrict speech protected by the First Amendment and (2) are void for vagueness under the Fourteenth Amendment.

Stonewater offers professional roofing services but is not a licensed public insurance adjuster. A dissatisfied commercial customer claimed that Stonewater was illegally advertising and engaging in insurance-adjusting services. To avoid statutory penalties, Stonewater sued the Texas Department of Insurance, seeking a declaration that two Insurance Code provisions violate the U.S. Constitution. The first requires a license to act or hold oneself out as a public insurance adjuster. The second prohibits a contractor, whether licensed as an adjuster or not, from (1) serving as both a contractor and adjuster on the same insurance

claim and (2) advertising dual-capacity services. TDI filed a Rule 91a motion to dismiss, which the trial court granted but the court of appeals reversed.

The Supreme Court reversed and dismissed the suit, holding that Stonewater's pleadings fail to state cognizable First and Fourteenth Amendment claims. Properly construed, the challenged statutes are conventional licensing regulations triggered by the role a person plays in a nonexpressive commercial transaction, not what any person may or may not say. Neither the regulated relationship (acting "on behalf of" the insured customer) nor the defined profession's commercial objective ("settlement of an insurance claim") is speech. False advertising about prohibited activities is not protected speech, and any incidental speech constraints are insufficient to invite First Amendment scrutiny. Additionally, Stonewater's as-applied and facial vagueness claims are foreclosed because the company's alleged conduct clearly violates the statutes.

Justice Blacklock concurred, concluding that no speech is implicated because only representative, or agency, capacity is regulated.

Justice Young's concurrence emphasized two points. First, in his view, regulating agency capacity is nearly irrelevant to the First Amendment's applicability; what is determinative here is that the challenged statutes, at their core, regulate nonexpressive conduct. Second, extant First Amendment jurisprudence is poorly equipped to address legitimate public-licensing regulation that affects speech or expressive conduct more than incidentally.

4. Gift Clauses

a) *Borgelt v. Austin Firefighters Ass'n*, 692 S.W.3d 288 (Tex. June 28, 2024) [22-1149]

The issues in this case are (1) whether article 10 of a collective-bargaining agreement between the City of Austin and the Austin Firefighters Association violates the Texas Constitution's Gift Clauses; and (2) whether the trial court erred by imposing TCPA sanctions and attorneys' fees on the plaintiffs.

In 2017, the City and the Association entered into a collective-bargaining agreement. Article 10 of the agreement, titled "Association Business Leave," authorizes 5,600 hours of paid time off for firefighters to engage in "Association business activities," which was defined to include activities like addressing cadet classes and adjusting grievances. Article 10 permits the Association's president to use 2,080 of those hours, which is enough for him to work full time while on ABL.

The Gift Clauses in the Texas Constitution prohibit "gifts" of public resources to private parties. Taxpayers and the State sued the City, alleging that article 10 violates the Gift Clauses and seeking declaratory and injunctive relief. Specifically, plaintiffs allege that ABL time has been used for improper private purposes and that the City does not exercise meaningful control over the ABL scheme, but instead approves nearly all ABL requests without maintaining adequate records of how ABL time is used.

The trial court ruled on summary judgment that the text of article 10 is not unconstitutional and awarded the Association attorneys' fees and

sanctions under the TCPA. The case proceeded to a bench trial on the issue whether article 10 is being implemented in an unconstitutional manner. The trial court concluded it is not and rendered judgment for the City. The court of appeals affirmed.

In an opinion by Justice Young, the Supreme Court affirmed in part and reversed in part. The Court affirmed the court of appeals' holding that article 10 as written does not constitute an unlawful "gift" of funds. The agreement's text and context impose limits on the use of ABL time, including that all such uses must support the fire department. Allegations of misuse of ABL would constitute violations of the agreement rather than show that the agreement itself is unconstitutional. The Court reversed the TCPA award of sanctions and attorneys' fees, holding that the taxpayers' contentions are sufficiently weighty and supported by the evidence to avoid dismissal under the TCPA.

Justice Busby filed an opinion dissenting in part and concurring in the judgment in part. He would have held that article 10 violates the Gift Clauses because the City does not exercise control over the Association to ensure that firefighters used ABL time only for public purposes. For that reason, he agreed that the TCPA awards must be reversed.

5. Retroactivity

a) *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852 (Tex. Apr. 26, 2024) [23-0565]

The issue in this certified question is whether the Pandemic Liability Protection Act—a statute shielding universities from damages for cancellation of in-person education due to the pandemic—is unconstitutionally retroactive as applied to a breach-of-contract claim.

Southern Methodist University ended in-person classes and services during the spring 2020 semester due to the pandemic. Graduate student Luke Hogan completed his degree online and graduated. He then brought a breach-of-contract claim against SMU for allegedly violating the Student Agreement, seeking to recover part of the tuition and fees he paid expecting in-person education. While the suit was pending, the Texas Legislature passed the PLPA, which shields educational institutions from monetary damages for changes to their operations due to the pandemic.

A federal district court dismissed Hogan's breach-of-contract claim. On appeal, the U.S. Court of Appeals for the Fifth Circuit certified to the Supreme Court the question whether the PLPA violates the retroactivity clause in Article I, Section 16 of the Texas Constitution as applied to Hogan's breach-of-contract claim.

The Supreme Court answered No. It reasoned that "retroactive" in the constitution has never been construed literally and is not subject to a bright-line test. Rather, the core of Article I, Section 16's bar on retroactive laws is to protect "settled expectations." Hogan did not have a reasonable and settled expectation to recover from SMU, mainly because the common-law impossibility doctrine would have barred the heart of his claim, regardless of the PLPA. Whatever remains of his claim after the impossibility

doctrine did its work was novel, untested, and unsettled. The Student Agreement permitted SMU to modify its terms, and, at any rate, Hogan accepted SMU's modified performance by finishing his degree online. Thus, the Court reasoned, whatever portion of Hogan's claim the PLPA removed was too slight and tenuous to render the PLPA unconstitutionally retroactive.

6. Separation of Powers

a) *In re Dallas County*, 697 S.W.3d 142 (Tex. Aug. 23, 2024) [24-0426]

At issue in this case is the constitutionality of S.B. 1045, the statute that creates the Fifteenth Court of Appeals.

The fourteen existing courts of appeals districts are all geographically limited, but the Fifteenth district includes all counties, and its justices will be chosen in statewide elections beginning in the November 2026 general election. Until then, the justices will be appointed by the Governor, subject to confirmation by the Senate. By statute, the Fifteenth Court will have exclusive intermediate appellate jurisdiction over various classifications of cases. S.B. 1045 requires any such cases pending in other courts of appeals to be transferred to the Fifteenth Court.

This petition involves one of the pending appeals subject to transfer. Dallas County and its sheriff sued officials of the Texas Health and Human Services Commission regarding HHSC's alleged failure to transfer certain inmates from county jails to state hospitals. The trial court denied HHSC's plea to the jurisdiction, so HHSC appealed to the Third Court of Appeals, noting in its docketing statement that the case is one that must be transferred to the Fifteenth Court if still pending by September 1. Invoking this Court's original jurisdiction, the County then filed a Petition for Writ of Injunction. The County argues that, for several reasons, S.B. 1045's creation of the Fifteenth Court is unconstitutional. As relief, the County asks the Court to prevent the appeal from being transferred.

The Supreme Court denied relief. It first concluded that it had jurisdiction to consider the County's petition and construed it as seeking mandamus relief.

On the merits, the Court rejected each of the County's three core arguments. First, it held that neither the text nor history of Article V, § 6(a) of the Texas Constitution prohibits the legislature from adding an additional court of appeals with statewide reach. It next held that the same constitutional provision expressly granted the Legislature sufficient authority to give the Fifteenth Court exclusive intermediate appellate jurisdiction over certain matters, as well as to decline to vest that court with criminal jurisdiction. Finally, the Court held that the Governor's initial appointments to the Fifteenth Court do not violate Article V, § 28(a)'s requirement that vacancies on a court of appeals must be filled in the next general election. A vacancy must arise sufficiently before an election to be placed on the ballot; the Election Code determines that 74 days is needed, and the Court held that this rule, which allows ballots to be timely printed and distributed, adheres to the constitutional requirement. These

vacancies arise on September 1, which is fewer than 74 days before the election. Filling the vacancies by appointment until the November 2026 general election, therefore, is lawful, not unconstitutionally void.

b) *In re Tex. House of Representatives*, 702 S.W.3d 330 (Tex. Nov. 15, 2024) [24-0884]

The issue in this case is whether a subpoena issued by the Committee on Criminal Jurisprudence of the Texas House of Representatives required the Texas Department of Criminal Justice to cancel a scheduled execution because the date of the scheduled execution preceded the date on which the inmate was commanded to appear.

Robert Roberson was scheduled to be put to death on October 17, 2024. On October 16, the Committee issued a subpoena requiring Roberson to appear before it to testify about his case and its implications for article 11.073 of the Code of Criminal Procedure. The Committee then obtained a temporary restraining order from a district court preventing the Department from executing Roberson. The Department filed a mandamus petition in the Court of Criminal Appeals, which was granted. The Committee then invoked the Supreme Court's original jurisdiction, seeking a writ of injunction and emergency relief. The Court temporarily enjoined the Department from impairing Roberson's compliance with the subpoena and requested merits briefing.

The Court first confirmed its jurisdiction to resolve the dispute. It concluded that this case raised a justiciable and purely civil-law question concerning the separation of powers and the distribution of governmental authority. The Court explained that it may construe the Committee's petition as one for mandamus, which the Court has authority to issue against the department.

As for the merits, the Court held that the Committee's authority to compel testimony does not include the power to override the scheduled legal process leading to an execution. While the legislative-inquiry power is robust and essential to the functioning of our system of government, the Committee had the opportunity to obtain any testimony relevant to its legislative task long before Roberson's scheduled execution. The Committee's subpoena, moreover, intruded on authority vested in the other branches: the judiciary's authority to schedule a lawful execution, the executive's authority to determine whether clemency is proper, and the legislature's own authority, which created the legal framework for capital punishment. The Committee thus lacked a judicially enforceable right to prevent the other branches from proceeding with the scheduled execution. That result, the Court said, accommodated the interests of all three branches of government. Accordingly, the Court denied the committee's petition, thereby superseding its temporary order.

c) *Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478 (Tex. Dec. 31, 2024) [23-0694]

The issue in this case is whether the Texas Constitution's separation-of-powers doctrine renders the Commission for Lawyer Discipline's lawsuit against First Assistant Attorney General Brent Webster nonjusticiable.

After the 2020 presidential election, the State of Texas moved for leave to invoke the U.S. Supreme Court's original jurisdiction to sue four other states regarding those states' election-law changes. The first assistant

appeared as counsel on the initial pleadings. After the State's lawsuit was dismissed for lack of standing, an individual filed a grievance with the commission alleging that the first assistant committed professional misconduct. The commission eventually agreed and initiated disciplinary proceedings. Invoking the separation of powers, the district court dismissed for lack of subject-matter jurisdiction. The court of appeals reversed, holding that neither the separation-of-powers doctrine nor sovereign immunity bars the case.

The Supreme Court reversed. In an opinion by Justice Young, the Court observed that generally, scrutiny of statements made directly to a court within litigation is by the court to whom those statements are made. In contrast with such direct scrutiny, the commission's collateral scrutiny seeks to second-guess the contents of the initial pleadings filed at the attorney general's direction on behalf of the State, which intrudes into the attorney general's constitutional authority both to file petitions in court and to assess the propriety of the representations that form the basis of those petitions. The separation-of-powers balance is delicate. While courts retain inherent authority to compel all attorneys to adhere to standards of professional conduct within litigation (hence why direct review remains available), the other branches lack the authority to control the attorney general's litigation conduct (which is why collateral review outside the litigation process would push too far). This Court's ultimate authority to regulate the practice of law does not depend on allowing the commission to bring its unprecedented lawsuit. Because this lawsuit does not allege criminal or ultra vires conduct, the first assistant is not subject to collateral review of either the choice to file a lawsuit or the representations in the suit's initial pleadings. The Court therefore reinstated the district court's judgment of dismissal.

Justice Boyd filed a dissenting opinion that rejected the Court's newly minted distinction between the judicial branch's "direct" and "collateral" enforcement of the disciplinary rules. In his view, the constitutional separation of powers prohibits a branch of government from exercising a power that belongs to another branch but does not separate the powers that exist within a single branch or restrict the means by which a branch may exercise a power it properly possesses. He thus would have held that the separation-of-powers doctrine does not deprive the courts of subject-matter jurisdiction.

7. Takings

a) *Tex. Dep't of Transp. v. Self*, 690 S.W.3d 12 (Tex. May 17, 2024) [22-0585]

The issues in this case are whether a subcontractor's employees were TxDOT's "employees" under the Texas Tort Claims Act and whether TxDOT acted with the required intent to support an inverse condemnation claim when it destroyed the Selfs' property.

As part of a highway maintenance project, TxDOT contracted with a private company to remove brush and trees from its right-of-way easement on a tract of land owned by the Selfs. That company further subcontracted

Lyellco, which ultimately removed 28 trees that were wholly or partially outside the State's right of way. The Selfs sued TxDOT for negligence and inverse condemnation. TxDOT filed a plea to the jurisdiction, and the parties disputed whether (1) Lyellco's employees were TxDOT's "employees" under the Act; (2) TxDOT employees exercised such control that they "operated" or "used" the equipment to remove the trees under the Act; and (3) TxDOT intentionally removed the trees, given its mistaken belief that the trees were inside the right-of-way. The trial court denied TxDOT's plea to the jurisdiction. The court of appeals affirmed in part and reversed in part. Both parties filed petitions for review.

The Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing the negligence cause of action, and remanded the cause of action for inverse condemnation to the trial court for further proceedings. Regarding negligence, the Court held immunity was not waived because the Selfs had not shown either that the subcontractor's employees were in TxDOT's "paid service" or that TxDOT employees "operated" or "used" the motor-driven equipment that cut down the trees. Regarding inverse condemnation, the Court held the Selfs had alleged and offered evidence that TxDOT intentionally directed the destruction of the trees, which was sufficient to support the inverse condemnation claim. The Court rejected TxDOT's argument that its mistaken belief that the trees were in the right-of-way negated its intentional acts in directing the subcontractors to destroy the trees.

F. CONTRACTS

1. Interpretation

a) *Bd. of Regents of the Univ. of Tex. Sys. v. IDEXX Labs., Inc.*, 690 S.W.3d 12 (Tex. June 14, 2024) [22-0844]

The issue is whether royalty provisions in a licensing agreement are ambiguous.

IDEXX Labs develops and sells veterinary diagnostic tests to detect disease in dogs. To improve its products that detect heartworm, Labs obtained a license for a Lyme disease peptide patented by the University of Texas. Under the license agreement, the amount of the royalty owed to the University depends on how a test for Lyme disease is packaged with other tests. One provision grants the University a 1% royalty for products sold to detect Lyme and "one other veterinary diagnostic test." Another provision grants a 2.5% royalty on the sales of products that detect Lyme and "one or more" tests "to detect tickborne diseases."

Each of the Labs products at issue test for heartworm, Lyme disease, and at least one other tickborne disease. For years, Labs paid the University royalties of 1%. The University sued, claiming it is owed royalties of 2.5%. The trial court granted the University's motion for partial summary judgment on the applicable royalty rate. The court of appeals reversed, concluding that the royalty provisions are ambiguous. The court characterized the parties' competing interpretations as "equally reasonable" and reasoned that when the provisions are considered separately and in the abstract, each could logically be read to apply.

The Supreme Court reversed,

holding that the provisions are not ambiguous. The Court emphasized that contractual text is not ambiguous merely because it is unclear or the parties disagree about how to interpret it. A reviewing court must read the text in context and in light of the circumstances that produced it to ascertain whether it is genuinely uncertain or whether one reasonable meaning clearly emerges. After applying that analysis, the Court concluded that the provisions are most reasonably interpreted to require 2.5% royalties. The Court remanded the case to the court of appeals to address remaining issues, including defenses raised by Labs.

G. DAMAGES

1. Settlement Credits

a) *Bay, Ltd. v. Mulvey*, 686 S.W.3d 401 (Tex. Mar. 1, 2024) [22-0168]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Bay sued Mulvey and a former Bay employee, alleging that the employee stole Bay's resources to improve Mulvey's property. Bay also sued the employee in a separate lawsuit, alleging that he engaged in a pattern of similar acts for the benefit of himself, Mulvey, and others. Bay and the employee agreed to the entry of a $1.9 million judgment, which included Bay's injury for the improvements to Mulvey's property. The employee agreed to make monthly payments to Bay. Bay then went to trial against Mulvey alone, and the jury awarded Bay damages. Mulvey sought a settlement credit based on the agreement and agreed final judgment. The trial court refused and rendered judgment on the jury's verdict. The court of appeals reversed and rendered a take-nothing judgment, holding that Mulvey was entitled to a credit that exceeded the amount of Bay's verdict.

The Supreme Court affirmed. The Court first held that the agreement and agreed final judgment together constituted a settlement agreement that obligated the employee to pay Bay $1.9 million. The Court rejected Bay's argument that promised but not-yet-received settlement payments should not be included in determining the settlement amount. Following its settlement-credit precedents, the Court concluded that Mulvey was entitled to a credit for the full amount of the settlement unless Bay established that all or part of the settlement was allocated to an injury or damages other than that for which it sued Mulvey. Bay only presented evidence that $175,000 of the settlement was allocated to a separate injury. The Court therefore credited the remaining $1.725 million against the jury's verdict, resulting in a take-nothing judgment.

b) *Shumate v. Berry Contracting, L.P.*, 688 S.W.3d 872 (Tex. Apr. 26, 2024) (per curiam) [21-0955]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Berry Contracting d/b/a Bay, Ltd. obtained a jury verdict against Frank Thomas Shumate for conspiring with a Bay employee to use Bay's

materials and labor for their personal benefit. Shumate sought a settlement credit based on an agreement between Bay and its employee that incorporated an agreed judgment in a separate lawsuit. The trial court refused to apply a credit, and the court of appeals affirmed, concluding that the agreement was not a settlement.

In a per curiam opinion, the Supreme Court granted Shumate's petition and reversed in light of its opinion in *Bay, Ltd v. Mulvey*, ___ S.W.3d ___ (Tex. Mar. 1, 2024), which construed the same agreement and concluded that it was a settlement. The Court held that Shumate was entitled to a settlement credit based on that agreement. The Court remanded to the trial court to apply the credit and consider the parties' arguments regarding what effect, if any, the credit would have on the relief sought by Bay.

H. ELECTIONS

1. Ballots

a) *In re Dall. HERO*, 698 S.W.3d 242 (Tex. Sept. 11, 2024) [24-0678]

This case concerns the interplay between citizen- and council-initiated ballot propositions to amend the charter of the City of Dallas.

Nonprofit Dallas HERO spearheaded the collection of signatures for three petitions to amend the city charter. After confirming that the petitions met statutory requirements and negotiating with HERO on the specific ballot language for the three propositions, the City passed an ordinance setting a November 2024 special election. The citizen-initiated propositions, if passed, would amend the city charter to authorize, and waive the City's governmental immunity for, citizen suits to force compliance with the law; compel the City to conduct an annual community survey, the results of which would affect the city manager's compensation and job status; and require the City to appropriate a certain percentage of revenue for police hiring, compensation, and pension funding.

The City then approved three council-initiated propositions on the same topics for the same election. HERO filed a petition for writ of mandamus in the Supreme Court under the Elections Code.

The Court granted mandamus relief in part. Ballot language submit a question with such definiteness and certainty that the voters are not misled by omitting information that reflects the proposition's character and purpose. The Court concluded that the council-initiated propositions would confuse and mislead voters because they contradict and would supersede the citizen-initiated propositions without acknowledging those characteristics. The Court directed the City to remove the council-initiated propositions from the ballot but rejected HERO's request for additional revisions to the wording of the citizen-initiated propositions.

b) *In re Rogers*, 690 S.W.3d 296 (Tex. May 24, 2024) (per curiam) [23-0595]

This case concerns the statutory duty of an emergency services district's board of commissioners to call an election to modify the district's tax rate when presented with a petition containing the required number of

signatures.

In the fall of 2022, voters in Travis County Emergency Services District No. 2 circulated a petition to change the sales and use tax rates in their district. The petition gathered enough signatures to surpass the threshold required by law. However, the district's Board rejected the petition, claiming it was "legally insufficient." The Board has never contended any of the petition signatures are invalid for any reason. Relators, three of the petition signatories, sought a writ of mandamus directing the Board to hold an election on their petition.

The Supreme Court conditionally granted mandamus relief. The Court first concluded that it had jurisdiction to grant relief against the Board because the Legislature authorized the Court to issue writs of mandamus to compel performance of a duty in connection with an election, and the duty here was expressly imposed on the Board. Second, the Court held that the Board has a ministerial, nondiscretionary duty to call an election to modify or abolish the district's tax rate based on a petition with the statutorily required number of signatures. The Court thus directed the Board to determine whether the petition contains the required number of valid signatures and, if so, to call an election.

I. EMPLOYMENT LAW

1. Age Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Flores*, ___ S.W.3d ___, 2024 WL 5249446 (Tex. Dec. 31, 2024) [22-0940]

This case concerns Tech's jurisdictional plea in the plaintiff's age-discrimination case.

Tech employee Loretta Flores, age fifty-nine, applied to be chief of staff for Tech's president, Dr. Richard Lange. Flores had previously complained of age discrimination by Tech and Lange in connection with an earlier reassignment. While interviewing Flores, Lange asked her age. He later testified that the question was intended to address the "elephant in the room"—Flores's prior discrimination complaint. Amy Sanchez, the thirty-seven-year-old director of Tech's office of auditing services, also applied for the chief-of-staff position. Lange hired Sanchez.

Flores sued Tech for age discrimination and retaliation. Tech filed a jurisdictional plea based on sovereign immunity, which the trial court denied. The court of appeals reversed on retaliation but affirmed on age discrimination. Tech filed a petition for review.

The Supreme Court reversed. In an opinion by Justice Lehrmann, the Court held that Flores did not present sufficient evidence that the reason for not hiring her was untrue and a mere pretext for discrimination. The Court pointed to the undisputed evidence that both candidates have relevant experience and qualifications and declined to second-guess the manner in which Lange weighed those qualifications. The Court further reasoned that Lange's asking Flores's age is not evidence of pretext when viewed in the context of his knowledge of her prior discrimination claim. The Court thus held that Flores failed to raise a genuine issue of material fact that age was a motivating factor in Lange's hiring

decision.

Justice Blacklock concurred, opining that the *McDonnell Douglas* formula has no foundation in the statutory text governing discrimination claims. He emphasized that the chief of staff is a person in whom the president places significant trust and that there is no basis in the record for a reasonable factfinder to conclude that Lange subjectively believed Flores would be better suited to the position than Sanchez if not for her age.

Justice Young also concurred, echoing Justice Blacklock's call for reexamination of the Court's burden-shifting framework for analyzing discrimination claims.

2. Disability Discrimination

a) *Dall. Cnty. Hosp. v. Kowalski*, 704 S.W.3d 550 (Tex. Dec. 31, 2024) (per curiam) [23-0341]

This case concerns disability-based discrimination and retaliation.

Sheri Kowalski served as Director of Finance at Parkland Hospital. In late 2017, Kowalski asked Parkland management to make changes to her workstation to alleviate neck and upper back pain. Parkland had Kowalski and her medical provider complete several forms. Kowalski repeatedly disclaimed having any ADA-covered disability and complained that the tedious process was unnecessary. Around the same time, Kowalski's position at Parkland was eliminated. Kowalski sued, alleging disability discrimination and retaliation under Chapter 21 of the Labor Code.

The trial court denied Parkland's plea to the jurisdiction, concluding that Kowalski had created a fact issue on her discrimination and retaliation claims. The court of appeals affirmed.

The Supreme Court held that Kowalski failed to create a fact issue on any of her claims. Evidence of neck pain without a showing that the pain significantly limits any activity, the Court explained, is no evidence of a disability under Chapter 21. Further, Parkland's having directed Kowalski to its formal accommodation process is not evidence that Parkland regarded Kowalski as disabled. Finally, the Court noted that Kowalski's complaints that Parkland did not require another employee to complete the same process—absent a showing that either employee is disabled—is no evidence that Parkland was on notice of disability-based discrimination. Kowalski's repeated insistence—confirmed by her medical provider—that she does not have a disability further illustrated these points. Without a fact issue on any claim, Parkland's plea to the jurisdiction should have been granted.

Accordingly, the Court reversed the court of appeals' judgment, rendered judgment for Parkland, and dismissed the case for lack of jurisdiction.

3. Sexual Harassment

a) *Fossil Grp., Inc. v. Harris*, 691 S.W.3d 874 (Tex. June 14, 2024) [23-0376]

The issue in this workplace sexual-harassment case is whether the summary-judgment record bears any evidence that a company knew or should have known its employee was being harassed and failed to take prompt remedial action.

Shortly after Fossil Group hired Nicole Harris as a sales associate, the assistant store manager sent her sexually explicit content through social media. Harris told some colleagues about the conduct but did not tell anyone in management. After a brief term of employment, Harris voluntarily resigned. A week later, her store manager learned of the harassment from another source, met with her, and immediately reported it to human resources. Fossil then fired the assistant store manager.

Harris sued Fossil for a hostile work environment, alleging that she had reported the harassment by an email through Fossil's anonymous reporting system days before she resigned. Fossil moved for summary judgment, challenging the email's existence with a report from the system showing that it never received the complaint and asserting that its subsequent actions were prompt and remedial. The trial court granted summary judgment. But the court of appeals reversed, holding that Harris's testimony regarding her email is some evidence Fossil knew of the harassment without taking remedial action.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's take-nothing judgment. The Court held that (1) Fossil's actions following the date of the email, even if taken in response to learning of the harassment from another source, were sufficiently prompt and remedial as a matter of law to avoid liability, and (2) Harris did not adduce evidence that Fossil knew or should have known of the harassment before that date.

Justice Blacklock filed a concurring opinion, emphasizing that federal Title VII sexual-harassment authorities do not play any formal role beyond what the Court has already recognized in the interpretation and application of Texas statutory law on sexual harassment.

Justice Young filed a concurring opinion, concluding that Harris's testimony regarding her email at most raised a presumption that Fossil was notified of her harassment, which Fossil rebutted through its generated report that it did not receive her complaint through the anonymous reporting system.

4. Whistleblower Actions

a) *City of Denton v. Grim*, 694 S.W.3d 210 (Tex. May 3, 2024) [22-1023]

In this case, the Court addressed the scope of the Texas Whistleblower Act. Plaintiffs Grim and Maynard were employees of the City of Denton. They sued the city under the Whistleblower Act after they were terminated. They alleged they were fired for reporting that city council member Briggs had violated the Public Information Act and the Open Meetings Act by meeting at her home with a reporter and disclosing confidential vendor information. The trial court rendered judgment on the jury's verdict for plaintiffs. A divided court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the city. The Act only applies to reports of a violation of law "by the employing governmental entity or another public employee." Briggs was not "another public employee" because Denton's city

council members are not paid for their service. The case thus turned on whether Briggs' actions could be imputed to the city as the plaintiffs' "employing governmental entity." The Court answered that question no. The evidence showed that Briggs had acted alone and was not acting on behalf of the city or the city council. Under Texas law, a city council acts as a body through a duly called meeting. Under principles of agency law, a city might authorize a single city council member to act on the city's behalf, but there was no evidence here to support such a theory. It was undisputed that Briggs acted entirely on her own, without the knowledge of other council members or employees, and that she did not purport to be acting for the city. On the contrary, Briggs opposed the city council's support for a new power plant and this opposition motivated her communications with the reporter.

J. EVIDENCE

1. Privilege

a) *In re Richardson Motorsports, Ltd.*, 690 S.W.3d 42 (Tex. May 10, 2024) [22-1167]

The issue in this case is whether a minor's psychological treatment records are discoverable under the patient-litigant (*i.e.*, patient-condition) exceptions to the physician-patient and mental-health-information privileges.

Father purchased an ATV from Richardson. During a ride with his two children, E.B. and C.A.B, a recalled steering mechanism malfunctioned, causing the vehicle to roll over. E.B. suffered physical injuries and contemporaneously witnessed her brother's death. E.B. later sued Richardson for negligence, seeking damages for her physical injuries and for mental anguish. During discovery, Richardson requested E.B.'s psychological treatment records from E.B.'s treating psychologist and pediatrician, and E.B. moved to quash the requests, claiming privilege under Texas Rules of Evidence 509(c) and 510(b). The parties primarily disputed the extent to which E.B.'s mental condition was at issue and the applicability of the patient-condition exceptions.

Following the trial court's denial of the motions to quash, E.B. filed a petition for writ of mandamus. The court of appeals conditionally granted mandamus relief vacating the trial court's orders, holding that E.B.'s routine claim of mental anguish was insufficient to trigger the patient-condition exceptions.

Richardson filed a petition for writ of mandamus in the Supreme Court and the Court conditionally granted relief. After rejecting the argument that bystander recovery alone was sufficient to trigger the exceptions, the Court held that E.B.'s mental condition is part of both her claim and Richardson's causation defense. As such, the patient-condition exceptions to privilege apply and E.B.'s records are discoverable.

K. FAMILY LAW

1. Division of Community Property

a) *Landry v. Landry*, 687 S.W.3d 512 (Tex. Mar. 22, 2024) (per curiam) [22-0565]

The issue is whether legally sufficient evidence supports the trial court's finding that certain investment

accounts are Husband's separate property.

In a divorce case, the trial court found that two investment accounts in Husband's name that preexisted the marriage are his separate property. At trial, Husband's expert had testified that he traced the accounts through fifteen-years' worth of statements and that the accounts were not commingled with community assets. The expert also testified that there was a four-month gap in the statements he reviewed but that the missing statements did not affect his analysis.

The court of appeals reversed the part of the judgment dividing the community estate and remanded for a new division. The court held that the "missing" account statements created a gap in the record, with the result that no evidence supports the accounts' characterization as separate property.

The Supreme Court reversed. The Court explained that while the account statements at issue were not reviewed by the expert, they were admitted into evidence at trial, are included in the appellate record, and, thus, not "missing." Because the statements are in the record, the court of appeals erred in relying on their absence to hold that Husband failed to overcome the presumption that the accounts are community property. The Court remanded to the court of appeals to conduct a new sufficiency analysis that includes consideration of the account statements.

2. Division of Marital Estate

a) *In re J.Y.O.*, ___ S.W.3d ___, 2024 WL 5250363 (Tex. Dec. 31, 2024) [22-0787]

This divorce case concerns the characterization and division of a discretionary performance bonus, the marital residence, and a retirement account.

Lauren and Hakan Oksuzler were married in 2010. The trial court granted them a divorce in December 2019, but litigation continued relating to the division of the marital estate. One issue is a performance bonus of $140,000 that Hakan received from his employer, Bank of America, in early 2020. The evidence shows that Hakan has received a bonus annually as part of his compensation; that the bonus is discretionary and contingent on Hakan's and the Bank's performance during the previous calendar year; and that Hakan must still be employed by the Bank on the date of payment to receive it. The Supreme Court held that the characterization of a bonus—like any compensation—depends on when it was earned and that a discretionary bonus paid after divorce for work performed during marriage is community property. Because the bonus Hakan received in 2020 was for work performed during marriage, it is community property.

The second issue is the marital residence, which Hakan owned before marriage but refinanced during marriage. The deed executed in connection with the refinancing lists both Hakan and Lauren as grantees. The Supreme Court affirmed the court of appeals' judgment that Hakan and Lauren each own an undivided one-half interest in the home as tenants in common. Texas caselaw establishes a "gift presumption" in the context of real-property conveyances between spouses. When the marital home was purchased by one

spouse before marriage, and a new deed executed during marriage purports to convey an interest in the home to the other spouse, it raises a presumption that the owner spouse intended to give the other spouse an undivided one-half interest in the property as a gift. This presumption can be rebutted by clear-and-convincing evidence that a gift was not intended, but the Court held Hakan presented no evidence to rebut the presumption here.

As to Hakan's 401(k) account, the Court noted Hakan contributed to the both during the marriage. It was therefore presumptively community property, and any separate property within the account must be traced to contributions made before marriage. The Court held that Hakan failed to overcome the community-property presumption.

The Court thus affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

3. Divorce Decrees

a) *In re Marriage of Benavides*, ___ S.W.3d ___, 2025 WL 1197404 (Tex. Apr. 25, 2025) [23-0463]

This case concerns the effect of one spouse's death on the appeal from a divorce decree.

When Carlos and Leticia Benavides married, they signed pre- and post-marital agreements stating that each spouse's property would belong solely to that spouse. In 2011, Carlos's adult children filed for guardianship over Carlos's person and estate. Soon after, Carlos signed documents that named Leticia as his executor and left his estate to her. The guardianship court determined that Leticia lacked standing to contest the guardianship and appointed guardians for Carlos.

Carlos's daughter Linda moved Carlos from his marital home onto her property. She was later appointed as Carlos's permanent guardian. Linda then filed for divorce on Carlos's behalf on the ground that he and Leticia had lived apart for three years. The trial court granted the divorce. Leticia appealed, but Carlos died two weeks later. The court of appeals held that Carlos's death mooted the appeal.

The Supreme Court reversed. It held that Carlos's death did not moot the appeal because whether the marriage ended by divorce or by death substantially affects Leticia's property interests under the 2011 Will, which has not yet been determined to be invalid.

The Court also held that to whatever extent the law may allow a guardian to seek a divorce on her ward's behalf, it requires the court to grant the guardian the express authority to file for divorce and to find that the divorce would promote the ward's well-being and protect his best interests. The lower court did not make such a finding in this case and, because Carlos died, cannot do so. The Court therefore vacated the divorce decree and dismissed the case.

Chief Justice Blacklock concurred. While he agreed the Court did not need to reach the issue of whether a guardian can seek a divorce on her ward's behalf, he noted the long-held traditional view that a guardian cannot obtain a divorce on behalf of a ward who cannot express his desire to divorce.

4. Termination of Parental Rights

a) *In re A.V.*, 697 S.W.3d 657 (Tex. Aug. 30, 2024) (per curiam) [23-0420]

The issue in this case is whether evidence of a parent's drug use alone is sufficient to terminate parental rights for endangerment.

The trial court terminated both parents' rights to A.V. after hearing evidence that both parents used drugs during pregnancy, did not complete court-ordered services including drug testing and refraining from drug use, and only sporadically attended visitation. The court of appeals affirmed, citing its own precedent for the proposition that mere illegal drug use is sufficient to terminate. The Supreme Court subsequently clarified that illegal drug use accompanied by circumstances indicating related dangers to the child can establish a substantial risk of harm, in *In re R.R.A.*, 687 S.W.3d 269 (Tex. 2024).

The Supreme Court denied the parents' petition for review, reaffirming the endangerment review standards set forth in *R.R.A.* in a per curiam opinion. The evidence detailed by the court of appeals shows a pattern of behavior sufficient to support the court of appeals' decision under the *R.R.A.* standards.

b) *In re C.E.*, 687 S.W.3d 304 (Tex. Mar. 1, 2024) (per curiam) [23-0180]

The issue in this case is whether there was legally sufficient evidence to support termination of Mother's parental rights to her son.

DFPS began an investigation after Carlo, a seven-week-old infant, was hospitalized with a fractured skull, a brain bleed, and retinal hemorrhaging, and his parents could not provide an explanation for the injuries to hospital staff. Investigators ultimately concluded Mother likely injured Carlo. A jury made the findings necessary to terminate Mother's parental rights under Sections 161.001(b)(1)(D), (E), and (O) and Section 161.003 of the Texas Family Code, and the trial court rendered judgment on the verdict. The court of appeals reversed the judgment of termination because it concluded that the evidence was legally insufficient on each ground.

The Supreme Court held that there was sufficient evidence Mother engaged in conduct that endangered Carlo's well-being to support termination under (E). At trial, Mother and Father gave conflicting versions of the events taking place in the likely timeframe of Carlo's injuries. But there was other evidence—such as testimony that the injury likely occurred when Carlo was in Mother's care and concerns from caseworker regarding Mother's behavior and her inconsistent story throughout the investigation—that was legally sufficient to support the jury's finding that Mother engaged in endangering conduct. The Court thus reversed the court of appeals' judgment and remanded to that court to address Mother's remaining issues that the court of appeals had not addressed in its first opinion.

c) *In re R.R.A.*, 687 S.W.3d 269 (Tex. Mar. 22, 2024) [22-0978]

The issue in this case is whether the State must prove that a parent's drug use directly harmed the child to prove endangerment as a ground for termination of parental rights.

Father had a history of methamphetamine use, unemployment, and homelessness for two months while parenting his three children, who were between one- and three-years old. The Department removed the children from Father's care. During the Department's attempts to reunify the children with Father over the course of a year and a half, Father tested positive for drugs twice more, stopped taking court-mandated drug tests for nearly a year, and had no contact with the children for about six months before trial. Father did not secure housing or employment. The trial court ordered Father's parental rights terminated under grounds that require that a parent's conduct "endanger" the child, including one ground specific to drug use. A divided court of appeals reversed and held that individual pieces of evidence were insufficient to show that Father's drug use directly endangered the children.

The Supreme Court reversed. It reaffirmed that endangerment does not require that the parent's conduct directly harm the child. Instead, a pattern of parental behavior that presents a substantial risk of harm to the child permits a factfinder to reasonably find endangerment. This pattern can be shown when drug use affects the parent's ability to parent. The Court went on to hold that based on the totality of the evidence—Father's felony-level drug use, refusal to provide court-ordered drug tests, inability to secure housing and employment, and prolonged absence from the children—legally sufficient evidence supported the trial court's finding of endangerment. The Court remanded the case to the court of appeals to consider Father's challenge to the trial court's best-interest findings in the first instance.

Justice Blacklock filed a dissenting opinion. He would have held that the Department did not prove by clear and convincing evidence that the children were sufficiently endangered to warrant termination.

L. GOVERNMENTAL IMMUNITY

1. Contract Claims

a) *Campbellton Rd., Ltd. v. City of San Antonio ex rel. San Antonio Water Sys.*, 688 S.W.3d 105 (Tex. Apr. 12, 2024) [22-0481]

The issue in this case is whether a signed document providing for sewer services is a written contract for which the Local Government Contract Claims Act waives governmental immunity.

A private developer planned to develop land it owned into residential subdivisions. To ensure sewer service and guarantee sewer capacity, the developer signed a written instrument with a municipal water system, which included terms of an option for the developer to participate in and fund the construction of off-site oversized infrastructure, which the system would then own. The developer did not develop its land into residential subdivisions within the stated ten-year term. By the time it started developing the

land, the system had no remaining unused sewer capacity. The developer sued the system for breach of contract, alleging that it had acquired vested rights to sewer capacity.

The Act waives immunity when a local governmental entity enters into a written contract that states the essential terms of an agreement for providing services to that entity. Here, the municipal system asserted that it is entitled to governmental immunity, but the trial court denied the plea to the jurisdiction. The court of appeals reversed, holding that the Act does not apply because the system had no contractual right to receive any services and would not have legal recourse if the developer unilaterally decided not to proceed with its developments.

The Supreme Court reversed, holding that the Act waives the system's immunity from suit because the developer adduced evidence that (1) a contract formed when the developer decided to and did participate in the offsite oversizing project, (2) the written contract states the essential terms of an agreement for the developer to participate in the project, and (3) the agreement is for providing a service to the system that was neither indirect nor attenuated. The Court remanded the case to the trial court for further proceedings.

b) *Legacy Hutto v. City of Hutto*, 687 S.W.3d 67 (Tex. Mar. 15, 2024) (per curiam) [22-0973]

This case concerns statutory requirements for a contract between a governmental entity and a business entity.

Legacy Hutto sued the City for its failure to pay for work Legacy had performed under a contract. Section 2252.908(d) of the Government Code prohibits a governmental entity from entering into certain contracts with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity when the contract is signed. Legacy had never submitted the disclosure. The City argued that the lack of disclosure meant that the contract was not "properly executed," as required by Chapter 271 of the Local Government Code, which waives a governmental entity's immunity to suit for breach of contract. The City thus argued that its immunity to suit was not waived for Legacy's claim. The City filed a plea to the jurisdiction and a Rule 91a motion on that basis.

The trial court granted the City's plea and motion but also granted Legacy leave to replead. Both parties appealed. The court of appeals affirmed, holding among other things that Chapter 271's waiver of immunity requires compliance with Section 2252.908(d).

Both parties petitioned for review. After they had done so, the Legislature passed HB 1817, which amended Section 2252.908 to require that a governmental entity notify a business entity of its failure to submit a disclosure of interested parties. HB 1817 also provides that a contract is deemed to be "properly executed" until the governmental entity provides notice to the business entity. Lastly, it permits a court to apply the new statutory requirements to already-pending cases if the court finds that failure to enforce the new requirements would lead to an inequitable or unjust result.

Due to this change in the law, the Supreme Court granted the petitions for review, vacated the court of appeals' judgment, and remanded for the trial court to conduct further proceedings in accordance with the new statutory requirements.

c) *San Jacinto River Auth. v. City of Conroe*, 688 S.W.3d 124 (Tex. Apr. 12, 2024) [22-0649]

The issue in this case is whether an alternative-dispute-resolution procedure in a government contract limits an otherwise applicable waiver of immunity under the Local Government Contract Claims Act.

The cities of Conroe and Magnolia entered into municipal-water contracts with the San Jacinto River Authority. The contracts contained provisions that required pre-suit mediation in the event of certain types of default. The cities, along with other municipalities and utilities, began to dispute the rates set by SJRA under the water contracts. Substantial litigation ensued, including suits by several private utilities against SJRA. SJRA then brought third-party claims against the cities for failure to pay amounts due under the contracts. The cities filed pleas to the jurisdiction, arguing that their immunity had not been waived because SJRA failed to submit its claims to pre-suit mediation and because the contracts failed to state their essential terms. The trial court granted both pleas and dismissed SJRA's claims against the cities. SJRA filed an interlocutory appeal, and the court of appeals affirmed, holding that the cities' immunity was not waived.

The Supreme Court reversed, holding that contractual alternative dispute resolution procedures do not limit the waiver of immunity in the Local Government Contract Claims Act. Instead, the Act provides that such procedures are enforceable so that courts may exercise jurisdiction to order compliance with those provisions. The Supreme Court also held that the parties' dispute did not trigger the mandatory mediation procedure in SJRA's contracts with the cities. Finally, the Supreme Court rejected the cities' argument that their immunity was not waived because the contracts failed to state their essential terms. The contracts complied with the common law and the Act's requirements, and so stated their essential terms.

2. Official Immunity

a) *City of Houston v. Sauls*, 690 S.W.3d 60 (Tex. May 10, 2024) [22-1074]

The issue in this interlocutory appeal is whether a city established that official immunity would protect its police officer from liability in a wrongful-death suit for the purpose of retaining its governmental immunity under the Tort Claims Act.

Officer Hewitt was responding to a priority two suicide call when his vehicle struck a bicyclist crossing the road, tragically ending the bicyclist's life. At the time of the accident, Hewitt was traveling 22 miles per hour over the speed limit and without lights or sirens to avoid agitating the patient on arrival. The bicyclist's family sued the City of Houston for wrongful death based on Hewitt's alleged negligence.

Relying on Hewitt's official

immunity, the City moved for summary judgment, asserting that its governmental immunity was not waived. The trial court denied the motion, and the court of appeals affirmed, holding that the City did not establish Hewitt's good faith through the required need–risk balancing factors.

The Supreme Court reversed the court of appeals' judgment. Emphasizing that the good-faith test is an objective inquiry, the Court held that the City established Hewitt was (1) performing a discretionary duty while acting within the scope of his authority in responding to the priority-two suicide call and (2) acting in good faith, given that a reasonably prudent officer in the same or similar position could have believed his actions were justified in light of the need–risk factors. Because the plaintiffs failed to controvert the City's proof of Hewitt's good faith, the Court dismissed the case.

3. Texas Labor Code

a) *Tex. Tech Univ. Sys. v. Martinez*, 691 S.W.3d 415 (Tex. June 14, 2024) [22-0843]

The issue in this case is whether the plaintiff's petition alleged sufficient facts to demonstrate a valid employment-discrimination claim against university entities and thus establish a waiver of immunity.

Pureza "Didit" Martinez was terminated at age 72 from her position at the Texas Tech University Health Sciences Center. She sued the Center for age discrimination. Her petition also named as defendants Texas Tech University, the TTU System, and the TTU System's Board of Regents.

The University, the System, and the Board jointly filed a plea to the jurisdiction. They argued that only the Center, Martinez's direct employer, could be liable for her employment-discrimination claim. Martinez responded that she alleged sufficient facts to impose liability under the Labor Code against the other defendants. The trial court denied the plea. The court of appeals reversed the trial court's order as to the University, though it allowed Martinez to replead. The court affirmed as to the System and the Board, concluding that Martinez's allegations were sufficient. The System and the Board petitioned the Supreme Court for review.

The Court reversed. In an opinion by Justice Huddle, the Court first noted that to affirmatively demonstrate a valid employment-discrimination claim against defendants other than her direct employer, Martinez needed to allege sufficient facts showing that those defendants controlled access to her employment opportunities and that they denied or interfered with that access based on unlawful criteria. The Court held that Martinez's factual allegations and the exhibits attached to and incorporated in her petition fail to demonstrate she has a valid claim against the System or the Board. Because Martinez's petition does not affirmatively demonstrate that she cannot cure the jurisdictional defect, the Court remanded to the trial court to allow her to replead.

Justice Young filed a dissenting opinion. He would have held that Martinez's allegations are sufficient at this stage of the litigation, particularly under the Court's duty to liberally construe her pleading in a way that

reflects her intent.

4. Texas Tort Claims Act

a) *City of Austin v. Powell*, 704 S.W.3d 437 (Tex. Dec. 31, 2024) [22-0662]

The issue in this case is whether the Texas Tort Claims Act waives the City of Austin's governmental immunity.

Officers Brandon Bender and Michael Bullock were involved in a police chase. Officer Bullock was closely following Officer Bender's vehicle. Officer Bender decided to make a sudden right turn. Unable to slow in time, Officer Bullock struck the side of Officer Bender's car. The two cars lost control, and Officer Bullock's car hit Noel Powell's minivan, which was stopped at the intersection.

Powell sued the City. The City filed a plea to the jurisdiction under the Act's emergency-response exception. To establish the emergency exception, it was Powell's burden to create a fact issue on either Officer Bullock's compliance with an applicable statute or his recklessness during the chase. The trial court denied the City's motion, and the City filed an interlocutory appeal. The court of appeals affirmed, holding that there is a fact issue about whether Officer Bullock's actions were reckless.

The Supreme Court reversed. The Court held that the City's immunity to suit is not waived. First, no statute specifically applies to Officer Bullock's actions during the chase, and thus no fact issue could arise as to compliance with one. Second, no evidence supports characterizing Officer Bullock's actions as reckless. Reckless requires more than a momentary lapse in judgment. There must be evidence that the officer consciously disregarded a high degree of risk. Here, the accident report listed Officer Bullock's inattentiveness and failure to keep a safe following distance as reasons for the accident. At most, this evidence shows that Officer Bullock was negligent. Powell offered no other evidence to create a fact issue as to recklessness. Because the plaintiff must establish a waiver of sovereign immunity, Powell's inability to provide evidence essential to the emergency exception means that the City should have prevailed on its plea to the jurisdiction. Accordingly, the Court reversed the court of appeals' judgment and rendered judgment dismissing the case for lack of jurisdiction.

b) *City of Houston v. Rodriguez*, 704 S.W.3d 462 (Tex. Dec. 31, 2024) [23-0094]

The issue in this interlocutory appeal is whether the City of Houston established that official immunity protects its police officer from liability in a high-speed pursuit case.

Assisting in a prostitution sting, Officer Corral pursued a suspect fleeing in a stolen car at a high rate of speed. The suspect suddenly turned on a side street, and Corral followed. While making the turn, Corral hit the curb and struck a vehicle waiting at a stop sign. Corral later testified that he hit the curb due to his brakes not working. The driver and passenger of the vehicle sued the City.

The Texas Tort Claims Act waives a city's immunity from suit for injuries caused by its employee's negligence in operating a vehicle if the

employee would be personally liable. But when government officials perform discretionary duties in good faith and within their authority, the law shields them from personal liability. The City moved for summary judgment based on Corral's official immunity. The trial court denied the motion, and the court of appeals affirmed. Relying on Corral's testimony that the brakes were not working, the intermediate court inferred that the brakes were deficient. Because Corral did not explain when he became aware that he was driving with deficient brakes, the court held that a fact issue on good faith precludes summary judgment.

The Supreme Court reversed and rendered judgment dismissing the case. The Court held that (1) a governmental employer bears the burden to assert and prove its employee's official immunity in a manner analogous to an affirmative defense; (2) when viewed in context, Corral's statement communicated that the brakes were functional, but their use did not accomplish his intended result of stopping the car before it hit the curb; and (3) the City established as a matter of law Corral's good faith in making the turn.

Justice Busby concurred to make two observations: evidence of an officer's recklessness may inferentially rebut the good-faith prong of official immunity, and the Court's opinion should not be construed as sanctioning the decision to initiate a high-speed chase to apprehend a suspected nonviolent misdemeanant.

c) *City of Killeen–Killeen Police Dep't v. Terry*, ___ S.W.3d ___, 2025 WL 1196743 (Tex. Apr. 25, 2025) (per curiam) [22-0186]

The issue in this case is whether the Texas Tort Claims Act waived the City of Killeen's governmental immunity in a suit involving a collision with a police cruiser.

Terry sued the City's police department after a police cruiser responding to a 9-1-1 call struck his vehicle. The City filed a plea to the jurisdiction asserting governmental immunity. The trial court denied the plea, and the court of appeals affirmed.

The Supreme Court held that the court of appeals' analysis was inconsistent with its recent decision in *City of Austin v. Powell*, 704 S.W.3d 437 (Tex. 2024). Under *Powell*, which addressed the Tort Claims Act's "emergency exception," a court must first assess compliance with any applicable laws or ordinances and only then, and if necessary, turn to assessing the officer's alleged recklessness. Moreover, this suit also implicates the Tort Claims Act's distinct 9-1-1 exception, which may independently remove the plaintiff's claims from the Act's immunity waiver and should be addressed on remand.

Accordingly, the Supreme Court granted the City's petition for review, vacated the court of appeals' judgment, and remanded the case to the court of appeals for further proceedings.

5. Ultra Vires Claims

a) *City of Buffalo v. Moliere*, 703 S.W.3d 350 (Tex. Dec. 13, 2024) (per curiam) [23-0933]

The issue in this case is whether a city's governing body had authority to terminate a police officer and therefore

is immune from suit.

The City of Buffalo's City Council fired police officer Gregory Moliere after he violated department policy by engaging in a high-speed chase while a civilian was riding along, resulting in an accident. Moliere sued the City, its mayor, and the City Council members, alleging that the City Council has no authority to fire him. The trial court dismissed Moliere's claims based on governmental immunity.

The court of appeals reversed. It held that there is a fact issue whether the City Council had authority to fire Moliere, so he properly alleged an ultra vires claim that should not have been summarily dismissed. The appellate court concluded that the Local Government Code requires the City Council to pass an ordinance specifically authorizing termination of police officers and that the City's policy manuals are ambiguous and therefore created a fact issue regarding the City Council's authority to terminate Moliere.

In a per curiam opinion, the Supreme Court reversed and held that, to the extent Moliere alleged an ultra vires claim based on the City Council's lack of authority to fire him, the trial court properly dismissed that claim. The Court noted that the Local Government Code authorizes the City Council to "establish and regulate" the City's police force and that the City Council passed an ordinance requiring its approval of all police officers' hiring or appointment. The Court concluded that the statute and ordinance, considered together, authorize the City Council as a matter of law to terminate Moliere. The Court remanded to the court of appeals to consider a previously unaddressed argument regarding Moliere's separate claim that the City Council members violated Moliere's due process when he was terminated.

b) *Image API, LLC v. Young*, 691 S.W.3d 831 (Tex. June 21, 2024) [22-0308]

At issue is the interpretation of a statute requiring the Health and Human Services Commission to conduct annual external audits of its Medicaid contractors and providing that an audit "must be completed" by the end of the next fiscal year.

HHSC hired Image API to manage a processing center for incoming mail related to Medicaid and other benefits programs. In 2016, HHSC notified Image that an independent firm would audit Image's performance and billing for years 2010 and 2011. Image cooperated fully. The audit, completed in 2017, found that HHSC had overpaid Image approximately $440,000.

Image sued HHSC's executive commissioner for ultra vires conduct, alleging that she has no legal authority to audit Medicaid contractors outside the statutory timeframe. Image sought a declaration that the 2016 audit for years 2010 and 2011 violated the Human Resources Code and an injunction preventing HHSC from conducting or relying on any noncompliant audit. The parties filed cross-motions for summary judgment, and HHSC also filed a plea to the jurisdiction. The lower courts ruled for HHSC. The court reasoned that the lack of any textual penalty for noncompliance, coupled with HHSC's heavy workload, supported "forgo[ing] the common man's interpretation of 'must'" and construing the

deadline as directory rather than mandatory.

The Supreme Court affirmed the part of the court of appeals' judgment dismissing Image's claims arising from the 2016 audit, while clarifying the mandatory–directory distinction in Supreme Court caselaw. After agreeing with the court of appeals that Image is a Medicaid contractor, the Court emphasized that a statute requiring an act be performed within a certain time, using words like shall or must, is mandatory. The deadline is therefore mandatory because it states that a statutorily required audit "must be completed" within the time prescribed. What consequences follow a failure to comply is a separate question, which turns on whether a particular consequence is explicit in the text or logically necessary to give effect to the statute. Because there is no textual clue that the relief Image seeks is what the Legislature intended, the Court held that an injunction prohibiting HHSC from collecting overpayments found by the 2016 audit would be error. The Court remanded the case to the trial court for further proceedings on remaining claims.

M. INSURANCE

1. Policies/Coverage

a) *Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc.*, 703 S.W.3d 790 (Tex. Dec. 20, 2024) [23-0006]

The issue in this case is whether an excess-insurance policy covers the insured's legal-defense expenses.

Patterson provides oil-and-gas equipment and services. To cover its risk, Patterson purchased a primary policy and multiple levels of excess policies from its broker, Marsh USA, Inc. A drilling-rig incident led to lawsuits against Patterson. The settlements and defense expenses triggered an excess policy from Ohio Casualty after exhausting the coverage limits of the lower-level policies. Ohio Casualty funded portions of the settlements but refused to indemnify Patterson for defense expenses.

The trial court granted Patterson's motion for summary judgment, concluding that the policy covers defense expenses. The court of appeals affirmed.

The Supreme Court reversed, holding that the policy does not cover Patterson's defense expenses. According to the Court, a "follow-form" excess policy like the one at issue in this case can incorporate an underlying policy to varying degrees. At all times, however, courts interpreting the agreement must start with the text of the excess policy, not that of the underlying policy. Here, the underlying policy undisputedly covers defense expenses. The court of appeals began with the underlying policy and thus erroneously concluded that the excess policy also covers defense expenses because it does not expressly exclude them. The court should instead have looked first to the excess policy, which provides its own statement of coverage that does not include defense expenses.

Accordingly, the Court reversed the court of appeals' judgment, rendered judgment for Ohio Casualty, and remanded the case to the trial court for further proceedings between Patterson and Marsh.

2. Pre-Suit Notice

a) *In re Lubbock Indep. Sch. Dist.*, 700 S.W.3d 426 (Tex. Oct. 25, 2024) (per curiam) [23-0782]

This case concerns the interpretation of an Insurance Code provision requiring pre-suit notice.

The Lubbock Independent School District sent a pre-suit notice to numerous insurance companies that provided the District with layers of coverage during two separate storms. Each notice stated that the "specific amount alleged to be owed" was $20 million. After filing suit, the District estimated in its initial disclosures that the covered damages would range from $100 to $250 million.

The insurers sought an abatement, asserting that the notice failed to comply with the Insurance Code's requirement that pre-suit notice include "the specific amount alleged to be owed by the insurer on the claim." The trial court denied the abatement, but the court of appeals granted the insurers' petition for writ of mandamus and directed the trial court to grant the abatement. The court of appeals held that the statute does not permit a claimant "to equivocate, or suggest an estimate, or offer a placeholder sum that might be changed after further investigation takes place"; instead, the statute requires the notice to "clearly articulate" the "precise sum alleged to be owed."

The Supreme Court disagreed with that holding. The Court observed that federal courts have consistently held that the "specific amount" language requires only that the notice assert a specific dollar amount; it does not require that the notice provide a "fixed and final total dollar sum" that is free from estimate and can never change. The Court commented that the federal courts' construction appears to be the one most consistent with the statute as a whole, especially in light of statutory provisions suggesting that the amount awarded may vary from the amount stated in the notice. But because the District's notice was inadequate for other reasons, the Court denied the District's mandamus petition in a per curiam opinion.

N. INTENTIONAL TORTS

1. Defamation

a) *Roe v. Patterson*, 707 S.W.3d 94 (Tex. Feb. 14, 2025) [24-0368]

In two certified questions, the United States Court of Appeals for the Fifth Circuit asks, "Can a person who supplies defamatory material to another for publication be liable for defamation?" and "If so, can a defamation plaintiff survive summary judgment by presenting evidence that a defendant was involved in preparing a defamatory publication, without identifying any specific statements made by the defendant?"

Jane Roe alleges she was sexually assaulted while attending Southwest Baptist Theological Seminary. Southwest later removed President Leighton Patterson, citing in part Patterson's mishandling of Roe's allegations. Seeking Patterson's reinstatement, a group of donors published a letter stating that Roe had lied to the police and falsely characterized a consensual relationship as assault. Roe sued Southwest and Patterson for

defamation, claiming that Patterson's agent was the source of defamatory statements in the letter. The district court granted summary judgment for Southwest and Patterson, and the Fifth Circuit certified questions regarding liability for defamation.

The Supreme Court answered "yes" to both questions. It held that a person who supplies defamatory material to another for publication may be liable if the person intends or knows that the defamatory material will be published. A plaintiff may survive summary judgment without identifying the specific statements the defendant made if the evidence is legally sufficient to support a finding that the defendant was the source of the defamatory content.

2. Fraud

a) *Keyes v. Weller*, 692 S.W.3d 274 (Tex. June 28, 2024) [22-1085]

At issue is whether Section 21.223 of the Business Organizations Code limits a corporate owner's personal liability for torts committed as a corporate officer or agent.

David Weller spent several months in employment negotiations with MonoCoque Diversified Interests LLC, which is wholly owned by Mary Keyes and Sean Nadeau. The parties exchanged emails detailing compensation terms, Weller's salary, a training supplement, and payments based on quarterly revenues. Weller declined other employment opportunities and accepted MonoCoque's employment offer. MonoCoque and Weller subsequently disagreed on the terms of the required compensation, and Weller resigned. MonoCoque denied owing Weller any additional compensation.

Weller sued MonoCoque for breach of contract and asserted fraud claims against Keyes and Nadeau individually, alleging that they are personally liable for their own tortious conduct. Keyes and Nadeau moved for summary judgment on the ground that Section 21.223 bars the claims against them individually because they were acting as authorized agents of MonoCoque. The trial court granted the motion, but the court of appeals reversed and remanded for further proceedings.

The Supreme Court affirmed. In a unanimous opinion by Justice Lehrmann, the Court explained that Section 21.223 does not shield a corporate agent who commits tortious conduct from direct liability merely because the agent also possesses an ownership interest in the company. Because Weller's claims against Keyes and Nadeau stemmed from their allegedly fraudulent conduct as MonoCoque's agents, not as its owners, they were not entitled to summary judgment on the ground that Section 21.223 shields them from liability.

Justice Busby concurred, opining that the statutory text and the Court's opinion provide guidance on future analysis of Section 21.223's effect on a shareholder's liability for tortious acts not committed as a corporate agent.

Justice Bland concurred, emphasizing the distinction between a shareholder's conduct in his role as an owner and conduct in his role as a corporate agent acting on the company's behalf.

3. Tortious Interference

a) *Inwood Nat'l Bank v. Fagin*, 706 S.W.3d 342 (Tex. Jan. 31, 2025) (per curiam) [24-0055]

The issue in this case is whether a party can be liable for tortious interference with a trust agreement where the grantor's obligation to transfer property into the trust was conditioned on a third party's approval and the condition was not satisfied.

Kyle Fagin and his then-wife, Christy, signed a trust agreement for an inter vivos trust naming Kyle as the sole beneficiary. It provided that Christy intended to transfer her shares of Inwood Bank stock—her separate property—to the trust "upon approval" by Inwood. But Christy changed her mind and informed Inwood she no longer wished to complete the transfer, so Inwood never approved it. Kyle, individually and as trustee and beneficiary of the trust, sued Inwood. Among other claims, he alleged that Inwood tortiously interfered with the trust agreement by convincing Christy to revoke her intended transfer of the shares.

The trial court granted Inwood's motion for summary judgment on all claims, and the court of appeals reversed as to the tortious interference claim.

The Supreme Court held that summary judgment in Inwood's favor on the tortious interference claim was proper. The trust agreement did not vest Kyle with any contractual right to the shares absent Inwood's approval. The transfer of the shares was expressly conditioned on Inwood's approval, and that condition was never satisfied. Because the trust agreement's plain language contemplated only a future intent to transfer the shares, not a present transfer or gift, the trust agreement did not vest Kyle with any legal right to the shares with which Inwood could have interfered. Accordingly, the Court reversed the court of appeals' judgment in part and reinstated the trial court's take-nothing judgment.

O. INTEREST

1. Simple or Compound

a) *Samson Expl., LLC v. Bordages*, 662 S.W.3d 501 (Tex. June 7, 2024) [22-0215]

The issues in this case are collateral estoppel and whether a late-charge provision in a mineral lease calls for simple or compound interest.

Samson Exploration holds oil-and-gas leases on properties owned by the Bordages. Each lease has an identical late-charge provision that provides for interest on unpaid royalties at a rate of 18%. A late charge is "due and payable on the last day of each month" in which a royalty payment was not made. After the Bordages sued to recover unpaid royalties and interest, Samson paid the unpaid royalties and the amount of interest it believed to be due, which Samson calculated by applying 18% simple interest to the unpaid royalties.

The parties continued to dispute whether the late-charge provision provides for simple or compound interest. On cross-motions for summary judgment, the trial court determined that the provision calls for compound interest and ordered Samson to pay another $13 million in compounded late charges. The court of appeals affirmed.

The Supreme Court reversed

and remanded for further proceedings. The Court addressed first the Bordages' argument that Samson is collaterally estopped from relitigating the interpretation of the late-charge provision. In another case involving a different landowner, the court of appeals concluded that an identical late-charge provision called for compound interest, and the Supreme Court denied Samson's petition for review. The Court held that nonmutual collateral estoppel will not prevent a party from relitigating an issue of law in the Supreme Court when the Court has not previously addressed the issue, and the Court deems the issue to be important to the jurisprudence of the State.

The Court turned next to interpreting the late-charge provision. The Court held that because Texas law disfavors compound interest, an agreement for interest on unpaid amounts is an agreement for simple interest absent an express, clear, and specific provision for compound interest. Temporal references such as "per annum," "annually," or "monthly," standing alone, are insufficient to sustain the assessment of compound interest. The court of appeals thus erred by construing the language making a late charge "due and payable on the last day of each month" as providing for compound interest.

P. JURISDICTION

1. Ripeness

a) *The Commons of Lake Hous., Ltd. v. City of Houston*, ___ S.W.3d ___, 2025 WL 876710 (Tex. March 21, 2025) [23-0474]

This case concerns when an inverse-condemnation or takings claim becomes ripe.

The Commons is the developer of a master-planned community, parts of which are located within the City's 100-year or 500-year floodplains. In 2018, the City passed a Floodplain Ordinance, which raised the required elevation for new residential structures within the floodplains. The Commons sued the City for inverse condemnation and takings. The City filed a plea to the jurisdiction arguing that the claims were unripe because the City had not made a final decision on a permit or application. The Commons argued that the City unreasonably withheld a decision, so its claims were ripe under the futility doctrine.

The trial court denied the City's plea, and the court of appeals reversed. The court of appeals held that The Commons's claims were barred by governmental immunity because the Floodplain Ordinance was a valid exercise of the City's police power and made pursuant to the National Flood Insurance Program and could not, therefore, constitute a taking.

The Supreme Court reversed. It rejected the notion that the City's exercise of police power excuses it from paying for taking property, stating that whether a regulation constitutes a valid exercise of the police power is irrelevant to whether the regulation causes a compensable taking. It then rejected the argument that a takings claim must fail as a matter of law if it is based on a local ordinance adopted to comply with the National Flood Insurance Program. The cases relied upon by the court of appeals were inapposite because they concerned facial challenges to the NFIP, whereas this case

concerned an as-applied challenge. The Court did not address whether The Commons can prevail on its as-applied challenge on remand.

Finally, the Court held that The Commons's claims were ripe and it had standing to pursue them. The City's assertions that The Commons could never obtain a permit indicate the finality of the City's decision. The Commons had standing because it possessed a vested interest in the property at issue and its claim is redressable. The Court remanded the case to the trial court.

2. Service of Process

a) *Tex. State Univ. v. Tanner*, 689 S.W.3d 292 (Tex. May 3, 2024) [22-0291]

The main issue in this case is whether diligence in effecting service of process is a "statutory prerequisite to suit" under Section 311.034 of the Government Code and, thus, a jurisdictional requirement in a suit brought against a governmental entity.

In 2014, Hannah Tanner was injured after being thrown from a golf cart driven by her friend, Dakota Scott, a Texas State University employee. Shortly before the two-year statute of limitations ran in 2016, Tanner filed a lawsuit under the Texas Tort Claims Act against the University, Scott, and another defendant. Tanner did not serve the University until 2020, three-and-a-half years after limitations had run. The University filed a plea to the jurisdiction, alleging that Tanner failed to use diligence in effecting service on the University and arguing that Tanner's untimely service meant that she had failed to satisfy a statutory prerequisite to suit under Section 311.034. The trial court granted the plea, but the court of appeals reversed.

The Supreme Court reversed and remanded. The Court held that the statute of limitations, including the requirement of timely service, is jurisdictional in suits against governmental entities and that the University's plea to the jurisdiction was the proper vehicle to address Tanner's alleged failure to exercise diligence. The Court reasoned that diligence is a component of timely service and pointed to its precedent holding that if service is diligently effected after limitations has expired, the date of service will relate back to the date of filing. The Court also noted that the statute of limitations for personal injuries requires a person to "bring suit" within two years of the date the cause of action accrues, and it cited precedent establishing that "bringing suit" includes both filing the petition and achieving service of process.

The Court went on to hold that Tanner could not establish diligence in service on the University. But rather than render a judgment of dismissal, the court remanded to the court of appeals to address in the first instance Tanner's alternative legal theory under the Tort Claims Act that her service on Scott satisfied her obligation to serve the University.

3. Standing

a) *Tex. Right to Life v. Van Stean*, 702 S.W.3d 348 (Tex. Nov. 22, 2024) (per curiam) [23-0468]

This case concerns a motion to dismiss under the Texas Citizens

Participation Act in a suit challenging the constitutionality of the Texas Heartbeat Act.

The plaintiffs allege that the defendants organized efforts to sue those who may be or may be perceived to be violating the Texas Heartbeat Act. The defendants filed a motion to dismiss under the TCPA, which the trial court denied. The defendants filed an interlocutory appeal, and the court of appeals held that the TCPA does not apply to the plaintiffs' claims. It therefore affirmed the trial court's order. The defendants petitioned for review.

The Supreme Court held that the court of appeals erred by determining the TCPA's applicability before addressing the disputed jurisdictional question of the plaintiffs' standing. The Court explained that the standing inquiry is not influenced by the TCPA's multi-step framework, the second step of which requires a plaintiff to show clear and specific evidence of each element of every claim. That heightened standard is relevant only if the TCPA applies. But *whether* it applies (or, if it does, whether a plaintiff can satisfy the clear-and-specific-evidence requirement), are merits questions that a court may not resolve without first assuring itself that it has subject-matter jurisdiction.

The Court further held that under its precedents, a pending TCPA motion cannot create jurisdiction when a court lacks jurisdiction to entertain the underlying case. A claim for fees and sanctions under the TCPA can prevent an appeal from becoming moot, but only if a court with subject-matter jurisdiction had already determined that the TCPA movant prevails. If the plaintiffs here lack standing, then no court ever had jurisdiction to declare the defendants to be prevailing parties. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to that court for further proceedings.

4. Subject Matter Jurisdiction

a) *Hensley v. State Comm'n on Jud. Conduct*, 692 S.W.3d 184 (June 28, 2024) [22-1145]

This case raises jurisdictional issues arising from a suit under the Texas Religious Freedom Restoration Act.

Justice of the Peace Dianne Hensley declined to officiate marriages for same-sex couples due to her religious beliefs but referred those couples to another officiant. The Commission issued a public warning against Hensley for violating the Canon proscribing extra-judicial conduct that casts doubt on a judge's capacity to act impartially as a judge. Rather than appeal the warning to a Special Court of Review, Hensley sued the Commission and its members under TRFRA, alleging that the warning substantially burdens her free exercise of religion. The trial court granted the defendants' plea to the jurisdiction, which was based on exhaustion of remedies and sovereign immunity. The court of appeals affirmed.

In an opinion by Chief Justice Hecht, the Supreme Court reversed most of the court of appeals' judgment. The Court first held that Hensley was not required to appeal the warning before bringing her TRFRA claim. Even if the Special Court were to reverse the warning, that disposition would not

moot Hensley's claims because it would not extinguish the burden on her rights while the warning was in effect. Hensley also seeks injunctive relief against future sanctions, and the Special Court is not authorized to grant that relief.

The Court then concluded that most of Hensley's suit survives the defendants' sovereign-immunity challenges. The Court held that the written letter Hensley's attorney sent the Commission was sufficient presuit notice under TRFRA. The Court clarified that the immunity from liability accorded the defendants under Government Code Chapter 33 does not affect a court's jurisdiction, and it held that Hensley's allegations are sufficient to state an ultra vires claim against the commissioners. The Court affirmed the court of appeals' judgment dismissing one request for a declaratory judgment against the Commission, reversed the remainder of the judgment, and remanded to the court of appeals.

Justice Blacklock and Justice Young filed concurrences. Justice Blacklock opined that the Court should reach the merits of Hensley's TRFRA claim and rule in her favor. Justice Young expressed his view that the Court should only address legal questions in the first instance when doing so is truly urgent, and that test is not met here.

Justice Lehrmann dissented. She would have held that Hensley's suit is barred by her failure to appeal the public warning to the Special Court of Review.

b) *Tex. Windstorm Ins. Ass'n v. Pruski*, 689 S.W.3d 887 (Tex. May 10, 2024) [23-0447]

The issue in this case is whether Section 2210.575(e) of the Insurance Code, which provides that a suit against the Texas Windstorm Insurance Association "shall be presided over by a judge appointed by the judicial panel on multidistrict litigation," deprives a district court of subject-matter jurisdiction over such a suit when the judge is not appointed by the panel.

Stephen Pruski filed two claims with his insurer, TWIA, which partially accepted and partially denied coverage for both claims. Pruski sued TWIA in Nueces County district court under Chapter 2210 of the Insurance Code, seeking damages for improper denial of coverage. The case was assigned to a court without an appointment by the MDL panel. Pruski argued that the judge was not qualified to render judgment because she was not appointed by the panel, as required by statute. The court denied Pruski's motion for summary judgment, granted TWIA's motion for summary judgment, and rendered a final, take-nothing judgment for TWIA.

The court of appeals reversed, holding that a trial judge who is not appointed by the MDL panel is without authority to render judgment in a suit under Chapter 2210. The court thus held that the trial court's judgment was void and remanded with instructions to vacate the judgment.

The Supreme Court reversed, holding that although the panel-appointment requirement is mandatory, it is not jurisdictional. The Court first explained that a statute can be, and often is, mandatory without being jurisdictional and that classifying a statutory provision as jurisdictional requires

clear legislative intent to that effect. The Court then reasoned that nothing in Section 2210.575(e) or Chapter 2210, generally, demonstrates a clear legislative intent to deprive a district court of jurisdiction over a suit against TWIA unless the judge is appointed by the MDL panel. Thus, the trial court did not lack subject matter jurisdiction over the suit simply because the judge was not appointed by the MDL panel. The Court remanded the case to the court of appeals to address additional issues raised by the parties.

5. Territorial Jurisdiction

a) *Goldstein v. Sabatino*, 690 S.W.3d 287 (Tex. May 24, 2024) [22-0678]

The question presented is whether territorial jurisdiction, a criminal concept, is a necessary jurisdictional requirement for a Texas court to enter a civil protective order under Texas Code of Criminal Procedure Chapter 7B.

Goldstein and Sabatino were involved in a romantic relationship in Massachusetts. After a period of no contact, Sabatino found sexually explicit photos on a phone Goldstein had previous lent him. Sabatino began contacting Goldstein about them and refused to return the phone, leading her to fear that he would use the photos to control her and ruin her career. Goldstein was granted a protective order in Massachusetts. Goldstein then moved to Harris County. After receiving notice of several small-claims lawsuits filed by Sabatino against her in Massachusetts, Goldstein filed for a protective order in Harris County under Chapter 7B's predecessor.

The trial court held a hearing on the protective order. Sabatino did not file a special appearance and appeared at the hearing pro se. The trial court found reasonable grounds to believe Goldstein had been the victim of stalking, as defined by the Texas Penal Code, and issued a protective order preventing Sabatino from contacting Goldstein.

On appeal, Sabatino challenged the trial court's subject matter jurisdiction and personal jurisdiction because he was a Massachusetts resident, and the order was predicated on conduct that took place entirely in Massachusetts. The court of appeals vacated the protective order, holding that the trial court lacked territorial jurisdiction, which the court concluded is a requirement in "quasi-criminal" proceedings.

The Supreme Court disagreed with the court of appeals' territorial jurisdiction analysis but affirmed its judgment because the trial court lacked personal jurisdiction over Sabatino. The Court first held that Chapter 7B protective orders are civil proceedings and, as such, there is no additional requirement of territorial jurisdiction. The Court explained that the historical understanding of territorial jurisdiction in civil cases was subsumed into the minimum contacts personal jurisdiction analysis. Thus, the court of appeals erred by imposing a separate requirement of territorial jurisdiction in a civil case. Nevertheless, Court held that Sabatino did not waive his personal jurisdiction challenge. Because all relevant conduct occurred in Massachusetts, and Sabatino had no contacts with Texas, the trial court lacked personal jurisdiction to enter the order.

Accordingly, the Court affirmed the court of appeals' judgment vacating the protective order and dismissing the case.

Q. JUVENILE JUSTICE

1. Discretionary Transfer

a) *In re J.J.T.*, ___ S.W.3d ___, 2025 WL 937479 (Tex. Mar. 28, 2025) [23-1028]

Under Family Code Section 54.02(j), a juvenile court may transfer an adult respondent to the criminal justice system if it finds that it was "impracticable" for the State to bring the case before the respondent's eighteenth birthday "for a reason beyond the control of the state." The issue in this case is whether the development of probable cause before a respondent turns eighteen necessarily prevents application of the transfer statute.

The State charged J.J.T. with capital murder, alleged to have been committed when he was sixteen years and eight months old. The State did not charge J.J.T. until eleven months after he turned eighteen. The State moved to transfer J.J.T. to the criminal justice system on the alternative grounds that it was not practicable for the State to proceed with the prosecution before J.J.T.'s birthday (1) "for a reason beyond the control of the state" or (2) because, despite the State's diligence, probable cause did not develop until after his eighteenth birthday, and new evidence had been discovered. The juvenile court ordered the transfer, but it blended the two grounds for transfer, relying on the development of probable cause and omitting a diligence finding. The court of appeals reversed and dismissed the case for lack of jurisdiction, holding that, because probable cause had developed before J.J.T.'s eighteenth birthday, it was practicable for the State to proceed as a matter of law.

The Supreme Court reversed, holding that the timing of the development of probable cause is not conclusive as to whether proceeding in juvenile court is "impracticable." Both the juvenile court and the court of appeals erred in merging the two statutory standards in examining whether the State established good cause. Because the State adduced some evidence of impracticability that a juvenile court could have credited even if probable cause had developed before J.J.T.'s eighteenth birthday, the Court remanded the case for a new transfer hearing.

R. MEDICAL LIABILITY

1. Damages

a) *Noe v. Velasco*, 690 S.W.3d 1 (Tex. May 10, 2024) [22-0410]

The issue in this case is what damages, if any, are recoverable in an action for medical negligence that results in the birth of a healthy child.

Grissel Velasco allegedly requested and paid for a sterilization procedure to occur during the C-section delivery of her third child. Her doctor, Dr. Michiel Noe, did not perform the procedure and allegedly did not inform her of that fact. Velasco became pregnant again and gave birth to a healthy fourth child. Velasco brought multiple claims against Dr. Noe, including for medical negligence. The trial court granted Dr. Noe summary judgment on all claims. A divided court of appeals reversed as to the medical-negligence claim, concluding that Velasco raised a

genuine issue of material fact regarding her mental-anguish damages, as well as the elements of duty and breach.

The Supreme Court reversed and reinstated the trial court's judgment. The Court first held that Velasco's allegations stated a valid claim for medical negligence. But the Court explained that Texas law does not regard a healthy child as an injury requiring compensation. Thus, when medical negligence causes the birth of a healthy child, the types of recoverable damages are limited. The Court rejected recovery of noneconomic damages arising from pregnancy and childbirth, such as mental anguish and pain and suffering, reasoning that those types of damages are inherent in every birth and therefore are inseparable from the child's very existence. The Court also held that the economic costs of raising the child are not recoverable as a matter of law. But the Court held that a parent may recover economic damages, such as medical expenses, proximately caused by the negligence and incurred during the pregnancy, delivery, and postpartum period. The Court emphasized that these types of damages do not treat the pregnancy itself or the child's life as a compensable injury. In this case, because Velasco failed to present evidence of recoverable damages, the trial court correctly granted summary judgment.

2. Expert Reports

a) *Walker v. Baptist St. Anthony's Hosp.*, 703 S.W.3d 339 (Tex. Dec. 13, 2024) (per curiam) [23-0010]

This case concerns the sufficiency of expert reports under the Texas Medical Liability Act.

Kristen and Daniel Walker's son was born at Baptist St. Anthony's Hospital under Dr. Castillo's care. Immediately after birth, the baby suffered a medical emergency, thought to be a stroke, that required resuscitation. The Walkers sued the Hospital and Dr. Castillo for medical negligence and submitted expert reports by an obstetrician, a neonatologist, and a nurse in support of their claim.

The reports seek to show that certain actions and omissions by the Hospital and Dr. Castillo during the delivery fell below the standard of care and that had the Hospital and Dr. Castillo met the standard of care, the baby's injuries could have been avoided. The Hospital and Dr. Castillo objected to the reports and filed a motion to dismiss the Walkers' claims under the Act. The trial court denied the motion, finding that the reports provide a fair summary of the experts' views regarding the standard of care, breach, and causation. The court of appeals reversed reasoning that the reports include conclusory language and that they fail to sufficiently explain the cause of the baby's brain injury.

The Supreme Court reversed and remanded to the trial court for further proceedings. The Court held that the trial court did not abuse its discretion by finding that the reports reflect a good-faith effort to provide a fair summary of the experts' conclusions. Considered together, the first two reports explain how the Hospital's and Dr. Castillo's actions fell below the standard of care and how those breaches caused the baby's neurologic injury. Because

the first two expert reports adequately address causation, the Court did not address the third report.

Justice Bland filed a concurring opinion that addresses the defendants' challenges to the experts' qualifications and to the proper standard of care.

S. MUNICIPAL LAW

1. Authority

a) *City of Dallas v. Emps.' Ret. Fund of the City of Dall.*, 687 S.W.3d 55 (Tex. Mar. 15, 2024) [22-0102]

At issue is whether the City of Dallas could properly give veto power over amending its city code to a third party.

By ordinance, the City of Dallas established the Employees' Retirement Fund of the City of Dallas, which provides benefits for Dallas employees, and codified that ordinance in Chapter 40A of its city code. A board of trustees administers the Fund. The City later adopted another ordinance that purports to prevent any further amendments to Chapter 40A unless the board approves them. In 2017, the City amended Chapter 8 of its code—by ordinance, without the board's approval—to impose term limits on the Fund's board members.

The Fund resisted the term-limits amendment because it was passed without the board's approval. The Fund and the City each sought declaratory relief about the amendment's validity. The trial court rendered judgment for the City. The court of appeals reversed. According to that court, Chapter 40A was a codified trust document, and trust law barred amendment to it except as the document provided. The amendment, it held, was invalid because imposing term limits on the board changed the trust document's terms without board approval.

The Supreme Court reversed. Although it agreed with the court of appeals that the ordinance imposing term limits amended Chapter 40A, the Court held that the board's veto power was unenforceable and could not prevent the otherwise valid term-limits amendment from taking effect. That amendment impliedly repealed the board's veto power. Chapter 40A's status as a codified ordinance meant that the term-limits amendment was just one ordinance amending another, not an ordinance purporting to amend something protected by a separate or higher source of law. Even if trust law applies to the Fund, trust law does not authorize much less require the City to bestow the core power of legislating on any third party, such as the board. To hold otherwise would improperly prevent the City from amending its own code, authority that is constitutionally given only to the City.

The Court declined to analyze a separate issue about whether the amendment remained valid despite being passed without the City voters' approval. The Court remanded the case to the court of appeals to consider this separate issue in the first instance.

T. NEGLIGENCE

1. Anti-Fracturing Rule

a) *Pitts v. Rivas*, ___ S.W.3d ___, 2025 WL 568114 (Tex. Feb. 21, 2025) [23-0427]

In this case the Court adopts the anti-fracturing rule for professional malpractice.

Accountants Brandon and Linda Pitts provided accounting services to Rudolph Rivas, a home builder. Rivas sued the Accountants, claiming they negligently prepared financial statements, resulting in overpayment of taxes and a loss of credit that damaged Rivas's business. Rivas's claims included negligence, fraud, and breach of fiduciary duty. The Accountants sought summary judgment, relying on the statute of limitations, the anti-fracturing rule, and other arguments. The district court granted summary judgment on all claims. The court of appeals reversed on the fraud and breach of fiduciary duty claims. The Supreme Court reversed the court of appeals' in part and rendered a take-nothing judgment for the Accountants on all claims.

The Court noted the anti-fracturing rule's development in the courts of appeals. Under this rule, if the crux or gravamen of the claim concerns the quality of the defendant's professional services, the claim is treated as one for professional negligence even if the petition attempts to assert additional claims. The Court found merit to the rule and concluded that it barred Rivas's fraud claim. The gravamen of that claim was that defendants made accounting errors that harmed Rivas's business—a straightforward accounting malpractice claim.

The Court further held that the breach of fiduciary claim failed because no fiduciary duty existed. Rivas claimed an informal fiduciary duty arose because Rivas and Pitts sometimes had dinner together, their sons had been roommates, Rivas had built Pitts a house at a discount, and Rivas had developed a high degree of trust in Pitts. These allegations did not give rise to a fiduciary duty, which rarely arises in a business relationship. Subjective belief that a business associate is a fiduciary is never sufficient. The parties' engagement letters further suggested the lack of a special relationship of trust and confidence, instead contemplating an arms-length relationship.

Justice Huddle filed a concurring opinion that would bar fiduciary duty claims premised only on informal relationships, and instead limit such claims to those where the defendant assumed a role that Texas law recognizes as fiduciary in nature.

2. Premises Liability

a) *Albertsons, LLC v. Mohammadi*, 689 S.W.3d 313 (Tex. Apr. 5, 2024) (per curiam) [23-0041]

At issue in this slip-and-fall case is whether the premises owner's knowledge of a leaking bag placed in a wire shopping cart is evidence of the owner's actual knowledge of the dangerous condition that caused the fall.

Maryam Mohammadi slipped and fell at a Randalls grocery store next to a shopping cart used by Randalls to store returned or damaged goods. She alleged that a leaking bag placed in the cart caused her to slip. Randalls disputed that the floor was wet. The jury charge contained separate questions about Randalls' constructive knowledge of the danger and its actual knowledge of the danger, and the jury was instructed to answer the actual-knowledge question only if it answered "yes" to the constructive-knowledge question. The jury

answered "no" to the constructive-knowledge question and therefore did not answer the actual-knowledge question. The trial court rendered a take-nothing judgment for Randalls.

The court of appeals reversed, holding that the jury should have been given the opportunity to answer the question on Randalls' actual knowledge. Though there is no evidence that Randalls knew of the wet floor before the fall, the court reasoned that Randalls had knowledge of the dangerous condition because there is some evidence that an employee knowingly placed a leaking grocery bag in the shopping cart.

The Supreme Court reversed and reinstated the trial court's judgment, holding that any charge error is harmless because there is legally insufficient evidence of Randalls' actual knowledge. The Court reiterated that the relevant dangerous condition is the condition at the time and place injury occurs, not the antecedent situation that created the condition. Here, the dangerous condition for which Randalls could be liable was the wet floor, not the leaking bag placed into the shopping cart.

b) *Pay & Save, Inc. v. Canales*, 691 S.W.3d 499 (Tex. June 14, 2024) (per curiam) [22-0953]

The issue is whether a wooden pallet used to transport and display watermelons is an unreasonably dangerous condition.

Grocery stores use wooden pallets to transport and display whole watermelons. While shopping at a Pay and Save store, Roel Canales' steel-toed boot became stuck in a pallet's open side. When Canales tried to walk away, he tripped, fell, and broke his elbow. Canales sued the store for premises liability and gross negligence. After a jury trial, the trial court awarded Canales over $6 million.

The court of appeals reversed. The court concluded that the evidence is legally, but not factually, sufficient to support a finding of premises liability, and it remanded for a new trial on that claim. The court rendered judgment for Pay and Save on gross negligence because Canales had not presented clear and convincing evidence that the pallet created an extreme degree of risk. Both parties filed petitions for review.

Without hearing oral argument, the Court reversed and rendered judgment for Pay and Save on premises liability. The Court held that the wooden pallet was not unreasonably dangerous as a matter of law. To raise a fact issue on whether a common condition is unreasonably dangerous, a plaintiff must show more than a mere possibility of harm; there must be sufficient evidence of prior accidents, injuries, complaints, reports, regulatory noncompliance, or other circumstances that transformed the condition into one measurably more likely to cause injury. There was a complete absence of such evidence here.

The Court also affirmed the court of appeals' judgment on gross negligence because the absence of legally sufficient evidence for premises liability also disposed of the gross-negligence claim.

c) *Weekley Homes, LLC v. Paniagua*, 691 S.W.3d 911 (Tex. June 21, 2024) (per curiam) [23-0032]

The issue in this case is whether Chapter 95 of the Civil Practice and Remedies Code applies to claims by contractors who were injured on a driveway of the townhome on which they were hired to work.

Weekley Homes, LLC hired independent contractors to work on a townhome construction project. While the workers were moving scaffolding across the townhome's wet driveway, electricity from a temporary electrical pole or lightning killed one worker and injured another. Weekley filed a combined traditional and no-evidence summary-judgment motion arguing that Chapter 95 applies and precludes liability. The trial court granted Weekley's motion, but the court of appeals reversed, holding that Chapter 95 does not apply because the summary-judgment evidence does not conclusively establish that the driveway is a dangerous condition of the townhome on which the contractors were hired to work.

The Supreme Court reversed in a per curiam opinion and held that Chapter 95 applies to the workers' claims. The Court held that Weekley conclusively established that the electrified driveway is a condition of the townhome because the workers alleged that the electrified driveway was a dangerous condition that they were required to traverse to perform their work, and the summary-judgment evidence established that the driveway, by reason of its proximity to the townhome, created a probability of harm to those working on the townhome.

U. OIL AND GAS

1. Assignments

a) *Occidental Permian, Ltd. v. Citation 2002 Inv. LLC*, 689 S.W.3d 899 (Tex. May 17, 2024) [23-0037]

The issue in this case is whether an assignment of mineral interests that conveys leasehold estates is limited by depth notations in an exhibit describing property found within the leases.

In 1987, Shell Western E&P, Inc. assigned to Citation "all" of its oil-and-gas property interests described in an incorporated exhibit. The exhibit contains columns listing (1) an overarching leasehold mineral estate, (2) tracts within that lease (some with depth specifications), and (3) third-party interests that encumber those leases. In 1997, Shell purported to transfer to Occidental's predecessor some of the same oil-and-gas interests contained in the 1987 Assignment. Litigation ensued.

Occidental contends that Shell in 1987 had reserved to itself portions of the described leases beyond the depth notations and that the reserved interests were conveyed to Occidental in 1997. As a result, Occidental and Citation dispute ownership of the "deep rights" to the property. The trial court granted summary judgment for Occidental, concluding that the 1987 assignment was a limited-depth grant that did not convey Shell's deep rights to Citation. The court of appeals reversed, holding that the assignment of "all right and title" to the leases is not limited by the exhibit's information

about those leases, leaving Citation and its transferee as the owners of the interests in their entirety.

The Supreme Court affirmed the court of appeals' judgment. The Court first observed that the exhibit presents ambiguities because the property interests listed in it overlap, and the exhibit contains no language directing the proper method for reading its tables. The Court then turned to the assignment's three granting clauses. The first and third clauses grant all of Shell's rights and interests in the "leasehold estates" or "leases" described in the exhibit. The second clause, which grants Shell's rights in "contracts or agreements," contains language acknowledging that those contracts may be depth limited. This differentiation between the grant of leases and the grant of contract rights and burdens solidifies a reading that the exhibit column listing Shell's leases is not narrowed by the columns referring to contracts or agreements that contain depth limitations. The Court thus held that the 1987 assignment unambiguously transferred Shell's entire leasehold interests without reservation.

2. Lease Termination

a) *Scout Energy Mgmt., LLC v. Taylor Props.*, 704 S.W.3d 544 (Tex. Dec. 31, 2024) (per curiam) [23-1014]

This case concerns whether the due date for payment under an oil-and-gas lease's savings clause is affected by a notation on an earlier check receipt.

Scout was the lessee for two oil-and-gas leases on land owned by Taylor Properties. To maintain the leases during nonproduction, a "shut-in royalty" savings clause provided that the lessee could pay "$50.00 per well per year, and upon such payment it will be considered that gas is being produced." Scout's predecessor made a payment in September 2017, then made another payment one month later. When Scout made a payment in December 2018, Taylor claimed it was too late and sought a declaration that the leases had terminated. Specifically, Taylor argued that the leases terminated in October 2018, one year after the second payment, while Scout argued that the second payment secured a full additional year.

The trial court concluded that the savings clause is ambiguous, but it agreed that Scout's interpretation reflects the parties' intent that each payment secure a full year of constructive production, and it therefore rendered judgment for Scout. The court of appeals concluded that the savings clause unambiguously supports Scout's interpretation, but it nonetheless reversed, holding that a notation on the check receipt in October 2017 established a new starting date for the one-year period of constructive production.

The Supreme Court reversed and reinstated the trial court's judgment. The Court agreed with the court of appeals that the savings clause is unambiguous, and that the only reasonable interpretation is that each payment provides a full year of constructive production. The Court then held that the check-receipt notation is too vague to be considered a contract expressing the parties' intent to deviate from the savings clause.

3. Pooling

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.*, 698 S.W.3d 198 (June 28, 2024) [21-1035]

This case arises from the Railroad Commission's rejection of forced-pooling applications under the Mineral Interest Pooling Act.

Ammonite leases the State-owned minerals under a tract of the Frio River. EOG leases the minerals on the land next to the river on both sides. The leases lie in a field in which minerals can only be extracted through horizontal drilling. Because the river is narrow and winding, a horizontal well cannot be drilled entirely within the boundaries of Ammonite's riverbed lease.

While EOG was drilling its wells, Ammonite proposed that the parties pool their minerals together. EOG rejected the offers because its wells would not reach the riverbed; thus, Ammonite was proposing to share in EOG's production without contributing to it.

Ammonite filed MIPA applications in the Commission. By then, EOG's wells were completed, and it was undisputed they were not draining the riverbed. The Commission "dismissed" the applications because it concluded that Ammonite's voluntary-pooling offers were not "fair and reasonable." The Commission alternatively "denied" the applications because Ammonite failed to prove that forced pooling is necessary to "prevent waste." The lower courts affirmed the Commission's final order.

The Supreme Court also affirmed but for different reasons. In an opinion by Chief Justice Hecht, the Court repudiated the intermediate court's reasoning that the Commission's dismissal is justified by Ammonite's offering a "risk penalty" of only 10%. The Court pointed out that Ammonite had agreed to a higher penalty if prescribed by the Commission, and there is no statutory requirement that a voluntary-pooling offer include a risk-penalty term.

The Court held that both of the Commission's dispositions are reasonable on the record. The Court reasoned that Ammonite's offers were based solely on EOG's wells as permitted and did not suggest extending them, EOG's wells do not drain the riverbed, and Ammonite did not present any evidence to the Commission on the feasibility of reworking them. The Court explained that even if Ammonite's minerals are stranded, forced pooling could not, at the time of the hearing, have *prevented* waste because the wells were already completed.

Justice Young dissented. He opined that Ammonite's offers were fair and reasonable as a matter of law and, because Ammonite's minerals are stranded, that forced pooling might be necessary to prevent waste. He would have reversed and remanded either to the court of appeals or to the Commission for further proceedings.

b) *ConocoPhillips Co. v. Hahn*, 704 S.W.3d 515 (Tex. Dec. 31, 2024) [23-0024]

At issue in this case is the proper calculation of Kenneth Hahn's royalty interest in a tract of land in DeWitt County.

In 2002, Hahn conveyed the

tract to William and Lucille Gips but reserved a 1/8 non-participating royalty interest. The Gipses later leased their executive interest to a subsidiary of ConocoPhillips in exchange for a 1/4 royalty. The lease also allowed ConocoPhillips to pool the acreage. At ConocoPhillips's request, Hahn signed a document ratifying the lease in all its terms. Hahn also signed a separate stipulation of interest with the Gipses, in which they agreed that Hahn had intended to reserve a 1/8 "of royalty" in his 2002 conveyance to the Gipses. ConocoPhillips then pooled the tract into one of its existing production units.

In 2015, Hahn sued ConocoPhillips and the Gipses, alleging he had reserved a fixed rather than floating royalty interest. The trial court disagreed and granted summary judgment for the Gipses. The court of appeals reversed, holding that Hahn had reserved a 1/8 fixed royalty in the 2002 conveyance.

On remand, Hahn added a claim for statutory payment of royalties, and the parties filed cross-motions for summary judgment regarding whether Hahn's ratification of the lease made his non-participating royalty interest subject to the landowner's royalty. The trial court granted summary judgment for the defendants, but the court of appeals reversed, holding that Hahn was only bound to the lease's pooling provisions and that this Court's intervening decision in *Concho Resources v. Ellison* was inapplicable.

The Supreme Court affirmed in part and reversed in part. The Court upheld the court of appeals' determination that Hahn's ratification of the lease did not transform his royalty interest from fixed to floating. But the Court rejected Hahn's argument that the stipulation of interest failed as a conveyance because it lacked a sufficient property description, and it held that the court of appeals' failure to give effect to the stipulation was contrary to *Concho Resources*. The Court therefore reversed in part and rendered judgment that ConocoPhillips correctly calculated Hahn's share of proceeds from the production on the pooled unit.

4. Royalty Payments

a) *Carl v. Hilcorp Energy Co.*, 689 S.W.3d 894 (Tex. May 17, 2024) [24-0036]

In this case, the Court addressed certified questions from the Fifth Circuit.

The plaintiffs Carl and White filed a class action on behalf of holders of royalty interests in leases operated by defendant Hilcorp. The leases state that Hilcorp must pay as royalties "on gas . . . produced from said land and sold or used off the premises . . . the market value at the well of one-eighth of the gas so sold or used." Hilcorp also "shall have free use of . . . gas . . . for all operations hereunder." The parties dispute whether Hilcorp owes royalties on gas used off-lease for post-production activities. The district court ruled in favor of Hilcorp on a motion to dismiss.

On appeal, the Fifth Circuit sought guidance from the Texas Supreme Court as to the effect of *BlueStone Natural Resources, II, LLC v. Randle*, 620 S.W.3d 380, 386 (Tex. 2021), on the issues presented. *Randle* discussed a free-use clause, but the Fifth Circuit noted a lack of Texas authority analyzing *Randle* when construing value-at-the-well leases. It

certified two questions to the Texas Supreme Court:

(1) After *Randle*, can a market-value-at-the well lease containing an off-lease-use-of-gas clause and free-on-lease-use clause be interpreted to allow for the deduction of gas used off lease in the post-production process?

(2) If such gas can be deducted, does the deduction influence the value per unit of gas, the units of gas on which royalties must be paid, or both?

The Court answered the first question yes. It reasoned that under longstanding caselaw, gas used for post-production activities should be treated like other post-production costs where the royalty is based on the market value at the well. *Randle* involved a gross-proceeds royalty and its discussion of a free-use clause had no bearing on the outcome of this dispute.

As to the second question, the Court noted that the parties did not fully engage on this issue, but the Court's rough mathematical calculations indicated that either of the accounting methods referenced in the second question would yield the same royalty payment. The Court did not state a preference for any particular method of royalty accounting.

V. PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

1. Transfer of Trust Property

a) *In re Tr. A & Tr. C*, 690 S.W.3d 80 (Tex. May 10, 2024) [22-0674]

This case raises issues of subject-matter jurisdiction and remedies arising from a co-trustee's transfer of stock from the family trust to herself and then to others.

Glenna Gaddy, a co-trustee of a family trust, transferred stock from the family trust to her personal trust without the participation or consent of the other co-trustee, her brother Mark Fenenbock. Glenna then sold the stock to her two sons. Mark sued Glenna.

The probate court declared the stock transfer void and ordered that the stock "be restored" to the family trust. Glenna appealed. The court of appeals vacated and remanded, holding sua sponte that the probate court lacked jurisdiction to declare the stock transfer void because Glenna's sons, the owners of the stock, were "jurisdictionally indispensable" parties.

The Supreme Court reversed both the court of appeals' judgment and the probate court's order. The court of appeals relied on Texas Rule of Civil Procedure 39 to support its jurisdictional holding, but the Supreme Court pointed to its caselaw teaching that parties' failure to join a person will rarely deprive the court of jurisdiction. The Court concluded that this is not such a rare case, and while the absence of Glenna's sons may have limited the relief the probate court could grant, it did not deprive the court of jurisdiction to resolve the case before it.

The Court then rejected Glenna's contention that she did not commit a breach of trust as a matter of law. But it agreed the probate court had erred by imposing a constructive trust requiring Glenna to restore the stock shares to the family trust when she no longer owns or controls the shares. The Court remanded to the probate court for further proceedings with the instruction that if Glenna's sons

are not made parties on remand, then any relief must come from Glenna or her trust or through the ultimate distribution of the family trust's remaining assets.

2. Will Contests

a) *In re Estate of Brown*, 697 S.W.3d 647 (Tex. Aug. 30, 2024) (per curiam) [23-0258]

The issue is whether unsworn testimony from an officer of the court is competent evidence to establish the cause of nonproduction of an original will under Section 256.156 of the Estates Code.

Beverly June Eriks and the Humane Society of the United States each filed an uncontested application to probate a copy of decedent Brown's will, which named the Society her sole beneficiary. Although the trial court found that a reasonably diligent search for the original will had occurred, it nonetheless concluded that the Society failed to establish the cause of nonproduction and that Brown died intestate. The court of appeals affirmed, holding that unsworn testimony from Catherine Wylie—an attorney and the guardian of Brown's personal and financial estate—could not be considered evidence of the cause of nonproduction.

The Supreme Court reversed. The Court held that, as an officer of the court, Wylie's testimony is properly considered evidence because her statements were made on the record, without objection from opposing counsel, and where there was no doubt her statements were based on her personal knowledge. The Court further held that, in addition to other testimony, Wylie's testimony regarding her thorough search of Brown's home and safe deposit box established the cause of nonproduction as a matter of law. The Court remanded to the court of appeals to address other issues.

W. PROCEDURE—APPELLATE

1. Finality of Judgments

a) *In re C.K.M.*, ___ S.W.3d ___, 2025 WL 807353 (Tex. Mar. 14, 2025) (per curiam) [24-0267]

This case concerns whether a trial court's order dismissing a parental-termination suit was a "final" order.

In 2022, the Department of Family and Protective Services filed a petition for temporary orders requiring Mother and Father to participate in state-provided services and later filed a separate petition to terminate their parental rights and obtain conservatorship of the Child. Mother filed a motion to consolidate the suits. Mother and Father separately filed original answers, counter-petitions, and motions for sanctions in both suits. In response to the filings, the Department filed a motion to nonsuit all of its claims.

The trial court orally granted the motion to consolidate and signed the Department's proposed dismissal order, entitled "Order on Motion to Terminate Temporary Order for Required Participation in Services Pursuant to Texas Family Code § 264.203(t)." The order included language directing the court clerk to "remove this cause from the Court's docket and send notice to all parties that this cause is hereby dismissed." The court signed an order granting sanctions over a month later.

The Department appealed the Sanctions Order; the court of appeals

dismissed the appeal and vacated the order as void, reasoning that the Dismissal Order was a final order triggering the running of the trial court's plenary power, which expired prior to the trial court's Sanctions Order.

The Supreme Court reversed the court of appeals and remanded the case to the trial court for further proceedings. The Court held that the Dismissal Order failed to state with unmistakable clarity that it was a final judgment. Because the Sanctions Order also did not include the necessary requirements for finality, the trial court had not entered a final judgment in the case.

b) *In re Lakeside Resort JV, LLC*, 689 S.W.3d 916 (Tex. May 10, 2024) (per curiam) [22-1100]

The issue in this mandamus proceeding is whether a purportedly "Final Default Judgment" is final for purposes of appeal despite expressly describing itself as "not appealable."

Mendez was a guest at Margaritaville Resort Lake Conroe, which Lakeside Resort JV owns but does not manage. Mendez alleged that she sustained severe bodily injuries after stepping in a hole. She sued Lakeside, seeking monetary relief of up to $1 million. Lakeside failed to timely answer; it alleged that its registered agent for service failed to send it a physical copy of service and misdirected an electronic copy. Mendez subsequently moved for a default judgment. The draft judgment prepared by Mendez's counsel was labeled "Final Default Judgment" and contained the following language: "This Judgment finally disposes of all claims and all parties, and *is not appealable.* The Court orders execution to issue for this Judgment." (Emphasis added.) The trial court signed the order. After the trial court's plenary jurisdiction had expired and the time for a restricted appeal had run, Mendez sent Lakeside a letter demanding payment.

Lakeside quickly filed a motion to rescind the abstract of judgment and a combined motion to set aside the default judgment and for a new trial, arguing that the "Final Default Judgment" was not truly final. The trial court denied Lakeside's motions, thinking that the judgment was final and that its plenary power had expired. The court of appeals denied mandamus relief, describing the judgment as erroneously stating that it was "not appealable" but holding that the judgment was clearly and unequivocally final on its face.

In a per curiam opinion, the Supreme Court conditionally granted Lakeside's petition for writ of mandamus. The Court held that the judgment's assertion of non-appealability does not unequivocally express an intent to finally dispose of the case, but in fact affirmatively undermines or contradicts any such intent. The Court then held that default judgments that affirmatively undermine finality are not final regardless of whether the trial court's order or judgment resolves all claims by all parties, so finality may not be established by turning to the record to make that showing. Accordingly, the Court ordered the trial court to vacate its orders denying Lakeside's motions and allowing execution.

c) *In re Urban 8 LLC*, 689 S.W.3d 926 (Tex. May 10, 2024) (per curiam) [22-1175]

This case concerns the effect of a trial court order declaring a default judgment issued months prior to be a final judgment.

Susan Barclay sued Urban 8 for negligence. After Urban 8 failed to answer, the trial court issued an order titled "Final Order of Default" in November 2021. The order awarded Barclay all the damages she requested except for exemplary damages. Months later, Urban 8 filed a "Motion to Set Aside Interlocutory Judgment and Motion for New Trial," which the trial court denied in August 2022. That order expressly stated that the November 2021 order was the court's final judgment and that it fully and finally disposed of all parties and claims and was appealable.

Urban 8 filed both a petition for writ of mandamus challenging the November 2021 order and a notice of appeal as to the August 2022 order. The court of appeals abated Urban 8's appeal pending resolution of its petition for writ of mandamus, which it then denied.

The Supreme Court also denied mandamus relief, holding that Urban 8 had an adequate remedy by appeal. The Court cautioned that a judgment cannot be backdated or retroactively made final, as doing so could deprive a party of an adequate remedy by appeal. But the Court did not read the August 2022 order to have that effect. The August 2022 order modified the November 2021 order by providing that it fully and finally disposed of all parties and claims and was appealable. The modification caused the timeline for appeal to run from the date of the August 2022 order. As a result, the court of appeals has jurisdiction over Urban 8's pending appeal.

2. Interlocutory Appeal Jurisdiction

a) *Bienati v. Cloister Holdings, LLC*, 691 S.W.3d 493 (Tex. June 7, 2024) (per curiam) [23-0223]

The issue in this case is whether delay of a trial pending the appellate review of a temporary injunction deprives the court of appeals of jurisdiction to hear the appeal.

Cloister Holdings is part-owner of Holy Kombucha, Inc., a beverage company. Following a dispute about the company's management and finances, Cloister sued several members of Holy Kombucha's board of directors. The trial court granted Cloister's request for a temporary injunction, enjoining the board members from making certain amendments to the company's shareholders' agreement, and the board members appealed. While the appeal was pending, the trial court abated the underlying case, postponing trial to await the court of appeals' ruling on the temporary injunction.

The court of appeals then dismissed the appeal. It held that the trial court's delay of trial was an effort to obtain an advisory opinion from the court of appeals. It also held that such a delay violated Texas Rule of Civil Procedure 683, which provides that the appeal of a temporary injunction "shall constitute no cause for delay of the trial." The enjoined board members petitioned for review.

The Supreme Court reversed. In a per curiam opinion, it held that although parties ordinarily should proceed to trial pending an appeal from a temporary injunction, failure to do so does not deprive the court of appeals of jurisdiction. The Court explained that an interim appellate decision resolves a current controversy and governs the parties until final judgment; therefore, any decision is not advisory, even if it decides a question of law that is also presented on the merits of the dispute. The Court also held that Rule 683 is not a basis for dismissing the appeal. Parties have a statutory right to an interlocutory appeal from a temporary injunction, and the rule does not provide that the remedy for the failure to proceed to trial is dismissal.

b) *Harley Channelview Props., LLC v. Harley Marine Gulf, LLC*, 690 S.W.3d 32 (Tex. May 10, 2024) [23-0078]

The issue in this case is whether an interlocutory order requiring a party to convey real property within thirty days as part of a partial summary judgment ruling is an appealable temporary injunction.

Harley Marine Gulf leases a maritime facility from Harley Channelview Properties. When Harley Marine attempted to exercise a contractual option to purchase the facility, Channelview refused on grounds that any option right had terminated. Harley Marine sued for breach of the option contract and sought specific performance.

The trial court granted Harley Marine's partial summary judgment motion, and it ordered Channelview to convey the property to Harley Marine within thirty days. Channelview appealed, but the court of appeals dismissed the appeal for want of jurisdiction, holding that the trial court's order granted permanent relief on the merits and thus was not an appealable temporary injunction.

The Supreme Court reversed. It held that an order to immediately convey real property based on an interim ruling is a temporary injunction from which an interlocutory appeal may be taken. An order functions as a temporary injunction when it operates during the pendency of the suit and requires a party to perform according to the relief demanded. The absence of the protective hallmarks of a temporary injunction, like a trial date or a bond, may invalidate the injunction, but it does not change the character and function of the order.

3. Jurisdiction

a) *In re S.V.*, 697 S.W.3d 659 (Tex. Aug. 30, 2024) (per curiam) [23-0686]

The issue in this case is whether the petitioner timely filed his notice of appeal.

Venkatraman, a pro se litigant, missed the deadline to file a notice of appeal but timely sought an extension under Texas Rule of Appellate Procedure 26.3. His explanation for missing the deadline was that he mistakenly believed a notice of appeal was not required until after the trial court ruled on his post-judgment motions. The court of appeals denied the Rule 26.3 motion and dismissed the case.

The Supreme Court reversed and remanded the case to the court of

appeals for further proceedings. The Court pointed out that a movant must offer a reasonable explanation for needing an extension. Then the appellate court's focus should be on a lack of deliberate or intentional failure to comply with the deadline. Here, Venkatraman operated under a genuine misunderstanding of the deadlines. There was no argument or evidence that he intentionally disregarded the rules or sought an advantage by waiting for the trial court to decide his post-judgment motions. In these circumstances, the court of appeals erred in denying his Rule 26.3 motion and dismissing the case for want of jurisdiction.

4. Mootness

a) *Paxton v. Comm'n for Law. Discipline*, 707 S.W.3d 115 (Tex. Feb. 14, 2025) [24-0452]

After the Supreme Court held that the Attorney General's first assistant could not be subjected to collateral professional discipline based on alleged misstatements in initial pleadings filed on behalf of the State of Texas, *see Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478 (Tex. 2024), the Commission for Lawyer Discipline nonsuited its nearly identical lawsuit against Attorney General Ken Paxton. The commission then moved to dismiss the petition as moot. The Attorney General conceded that the case was moot but argued that the Supreme Court should vacate both the court of appeals' judgment and its opinion.

The Supreme Court, in a per curiam opinion, agreed. In addition to vacating the court of appeals' judgment, the Court exercised its discretion and concluded that the public interest would be served by vacating the court of appeals' opinion.

5. Preservation of Error

a) *In re Est. of Phillips*, 700 S.W.3d 428 (Tex. Nov. 1, 2024) (per curiam) [24-0366]

The issue in this case is whether a plaintiff waives a claim by omitting it from an amended petition when the omission is required to comply with the trial court's prior order.

Billy Phillips devised his estate, including a fourteen-acre tract of land, to his daughters Sheila Smith and Billie Hudson. After Smith, as independent executor, sought to sell the tract, Hudson intervened in the probate proceeding, asserting claims to partition the property in kind and other claims for relief. The trial court granted Smith's special exceptions, struck Hudson's partition claims, and ordered her to file an amended petition omitting those claims. Hudson complied, though her amended pleading expressly reserved the right to replead the stricken claims if the trial court's order was reversed on appeal. The trial court later signed an order authorizing Smith to sell the property. A divided court of appeals affirmed, holding that Hudson abandoned the partition claims by omitting them from her amended petition, which superseded her prior petitions.

The Supreme Court reversed. The Court acknowledged the general rule that any claim not carried forward in an amended petition is deemed dismissed but pointed to caselaw recognizing possible exceptions to this rule. One is that when a plaintiff files an amended petition omitting a claim that

the trial court previously ruled against, but the plaintiff indicates an intent not to abandon the claim, the plaintiff does not waive her ability to complain of that ruling on appeal. This exception applies to Hudson's amended petition and the court of appeals erred by viewing Hudson's adherence to the trial court's order as manifestation of an intent to abandon the stricken claims. Because Hudson opposed Smith's special exceptions and obtained an adverse ruling from the trial court, no further step was required to preserve her complaint for appellate review. The Court remanded to the court of appeals for it to address the merits of Hudson's complaint.

6. Temporary Orders

a) *In re State*, ___ S.W.3d ___, 2024 WL 2983176 (Tex. June 14, 2024) [24-0325]

In this mandamus proceeding arising from a guaranteed-income program, the Court addressed the standard for deciding a motion for temporary relief.

Under Harris County's Uplift Harris program, residents who meet eligibility requirements can apply to receive monthly payments of $500 for 18 months. The State sued to block the program, claiming that it violates Article III, Section 52(a) of the Texas Constitution—one of the Gift Clauses. The trial court denied the State's request for a temporary injunction. On interlocutory appeal, the court of appeals denied the State's request for an order staying Uplift Harris payments under Texas Rule of Appellate Procedure 29.3. The State filed a mandamus petition in the Supreme Court challenging the court of appeals' Rule 29.3 ruling and separately filed a motion for temporary relief under Texas Rule of Appellate Procedure 52.10.

The Court addressed the request for temporary relief under 52.10. It first observed that while "preserving the status quo" remains a valid consideration in a request for temporary relief, identifying the status quo is not always a straightforward undertaking. Rule 29.3's analogous standard of an order "necessary to preserve the parties' rights" pending appeal is more helpful. The Court identified two factors important to deciding the Rule 52.10 motion pending before it. The first is the merits; an appellate court asked to issue temporary relief should make a preliminary inquiry into the likely merits of the parties' legal positions. The second is the injury that either party or the public would suffer if relief is granted or denied.

Applying those factors here, the Court concluded that the State's motion for temporary relief should be granted. The State has raised serious doubt about the constitutionality of Uplift Harris. The Court's Gift Clause precedents require that the governmental entity issuing the funds retain public control over them. The record here indicates that Uplift Harris advertised a "no strings attached" stipend, and so it appears there will be no public control of the funds after they are disbursed. Turning to the balance of harms, the Court pointed to precedent recognizing that ultra vires conduct by local officials automatically results in harm to the State, and it observed that once the funds are disbursed to individuals, they cannot feasibly be recouped.

The Court ordered Harris County to refrain from distributing funds under the program until further order of the Court and directed the court of appeals to proceed to decide the temporary-injunction appeal pending before it. The State's mandamus petition remains pending before the Court.

7. Vexatious Litigants

a) *Serafine v. Crump*, 691 S.W.3d 917 (Tex. June 21, 2024) (per curiam) [23-0272]

In this case, pro se petitioner Serafine challenges the determination that she is a vexatious litigant.

The court of appeals affirmed the trial court's order deeming Serafine a vexatious litigant by counting each of the following as separate "litigations": (1) Serafine's partially unsuccessful appeal to a Texas court of appeals of a final trial court judgment in a civil action; (2) her unsuccessful petition for review of that court of appeals judgment and motion for rehearing in the Supreme Court of Texas; (3) her unsuccessful petition for writ of mandamus in the court of appeals; (4) a civil action she filed in federal district court that was dismissed for lack of jurisdiction; (5) her unsuccessful appeal of that dismissal to the Fifth Circuit; and (6) her unsuccessful petition for writ of mandamus in the Fifth Circuit. Serafine now challenges the court of appeals' method of counting "litigations" under Section 11.054(1)(A) of the Civil Practice and Remedies Code, which requires a showing that the plaintiff has in the past seven years "maintained at least five litigations as a pro se litigant other than in a small claims court that have been . . . finally determined adversely to the plaintiff."

The Supreme Court reversed and remanded the case to the trial court for further proceedings. It held Serafine is not a vexatious litigant because an appeal and a petition for review from a judgment or order in a civil action are part of the same civil action and therefore count as a single "litigation." Accordingly, Serafine maintained at most only four litigations as a pro se litigant that were determined adversely to her.

8. Waiver

a) *Bertucci v. Watkins*, ___ S.W.3d ___, 2025 WL 807355 (Tex. March 14, 2025) [23-0329]

This case concerns issues of briefing waiver, fiduciary duties between partners, and defenses to summary judgment.

Bertucci and Watkins developed low-income-housing projects. They created a series of limited partnerships with themselves as limited partners. In 2014, Bertucci claimed to discover that Watkins misappropriated funds. Bertucci sued individually and derivatively on behalf of the companies. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment for Watkins on all claims.

The court of appeals held that Bertucci failed to adequately brief issues regarding the derivative claims and thus affirmed the judgment in Watkins's favor on those claims. It reversed the judgment on Bertucci's individual breach-of-fiduciary-duty claims, concluding that fact issues existed as to those claims and on Watkins's defenses

of limitations, waiver, and ratification. Both parties petitioned for review.

The Supreme Court affirmed in part and reversed in part. It held that Bertucci sufficiently asserted arguments in his appellate briefing on behalf of the companies so as to avoid waiver. It next held that summary judgment was proper on Bertucci's claim that Watkins owed fiduciary duties to Bertucci, individually. The court of appeals reversed on this issue on a ground that Bertucci raised for the first time in that court. Because the ground was not raised in the trial court, it could not form the basis for summary judgment. Finally, the Court held that fact issues precluded summary judgment in Watkins's favor based on limitations and that the court of appeals did not err by declining to address an expert's report or by holding that the Dead Man's Rule barred certain testimony.

The Court reinstated summary judgment on the breach-of-fiduciary-duty claims Bertucci asserted in his individual capacity and remanded the case to the court of appeals to address the derivative claims.

X. PROCEDURE—PRETRIAL

1. Discovery

a) *In re Elhindi*, 704 S.W.3d 827 (Tex. Dec. 31, 2024) (per curiam) [23-1040]

At issue in this case is whether the trial court should have delayed production of a video allegedly containing child sexual abuse material to permit law enforcement review.

Magdoline Elhindi sued Hamilton Rucker for invasion of privacy, alleging the filming and distribution of an illicit video made without her consent. The trial court entered a temporary injunction prohibiting the parties from disclosing intimate material of one another. During discovery, Rucker requested videos in Elhindi's possession that depicted him. Elhindi objected to the production of one video, which she alleged contained child sexual abuse material. She sought leave from the trial court's injunction to provide the video to the FBI for its review before producing the video to Rucker. The trial court issued an order allowing Elhindi to send the video to the FBI only after producing it to Rucker. The court of appeals denied Elhindi's request for mandamus relief.

The Supreme Court conditionally granted relief. The Court reasoned that the risk of harm to the alleged minor by further transmission before law enforcement review outweighed any delay in the discovery timeline. The Court directed the trial court to modify its order to permit Elhindi to provide the video to the FBI and receive a determination that it does not contain child sexual abuse material before compelling its production in discovery.

b) *In re Euless Pizza*, 702 S.W.3d 543 (Tex. Dec. 6, 2024) (per curiam) [23-0830]

At issue is the trial court's denial of relators' request to withdraw and amend responses to requests for admission.

Two delivery drivers for i Fratelli Pizza began racing each other in a low-speed zone. One crashed into plaintiffs' vehicle, injuring them. The driver was arrested and indicted for felony racing causing serious bodily injury.

Plaintiffs sued the driver and three corporate defendants, including Euless Pizza, LP.

In discovery, plaintiffs asked each corporate defendant to admit that at the time of the crash, the driver was acting within the scope of his employment "with i Fratelli Pizza" and "with You." Each defendant admitted to the first request, while only Euless Pizza admitted to the second. Defendants later sought leave to withdraw and amend their admissions to reflect that each denied both requests. The trial court denied the motion, and the court of appeals denied defendants' request for mandamus relief.

The Supreme Court granted defendants' request for mandamus relief in a per curium opinion. The Court reiterated the established test for withdrawing admissions—good cause and lack of undue prejudice to the opposing party—and held that the test is met here. Defendants represented that their initial responses were based on a misunderstanding about the pizzeria's corporate structure and confusion arising from the wording of the RFAs. Defendants further contended that new information revealed in the police investigation supported a defense that the driver's criminal conduct was outside the scope of his employment. Defendants' explanation established good cause, the Court said, because their initial responses were based on inaccurate or incomplete information, and there is no evidence defendants acted in bad faith. The Court reasoned that the no-undue-prejudice prong was also met because granting defendants' motion would not have delayed trial or hampered plaintiffs' preparation, while denial of the motion compromised the merits by eliminating defendants' scope-of-employment defense. The Court emphasized that RFAs must not be used to trick a party into admitting that it has no claim or defense. Additionally, the Court clarified that the test for changing an admission is not a high bar and that a trial court's "broad discretion" when faced with such a request is not unlimited.

c) *In re Off. of Att'y Gen.*, 702 S.W.3d 360 (Tex. Nov. 22, 2024) (per curiam) [24-0073]

The issue in this mandamus proceeding is whether the trial court abused its discretion by compelling depositions of fact witnesses in a case where the defendant amended its answer and no longer contests liability.

Four former employees sued the Office of the Attorney General under the Whistleblower Act. They sought to depose the Attorney General and three senior OAG employees. OAG amended its answer, stating that it no longer disputes the lawsuit as to any issue and consents to the entry of judgment against it. The trial court issued an order compelling the depositions. OAG sought mandamus relief.

In a per curiam opinion, the Supreme Court conditionally granted relief. It concluded that OAG's unambiguous statements in its amended answer unquestionably alter the analysis to determine whether the deposition requests show a reasonable expectation of obtaining information that would aid in the dispute's resolution and whether the burden or expense of the depositions outweigh their likely benefit. The Court held that the trial court abused

its discretion by failing to consider how the narrowing of the disputed fact issues to include only damages affect the need, likely benefit, and burden or expense of the requested depositions. The Court rejected the plaintiffs' additional arguments that the depositions are needed to advance the purposes of the Whistleblower Act and to obtain effective relief through legislative approval of the judgment. The Court concluded that neither argument justifies altering the rules' limits on discovery obligations in a lawsuit.

d) *In re Peters*, 699 S.W.3d 307 (Tex. Oct. 4, 2024) (per curiam) [23-0611]

This case involves the application of the Fifth Amendment privilege against self-incrimination to discovery requests.

After drinking, Taylor Peters caused a multi-car crash that injured the plaintiffs. Peters was admitted to a hospital, where he told the responding police officer that he had visited two bars whose names he had forgotten, drank three beers, and remembered feeling "buzzed." The officer noted that Peters appeared confused and disoriented. A breathalyzer test revealed that Peters had a blood-alcohol concentration above the legal limit. He was arrested and charged with intoxication assault with a motor vehicle.

After suing Peters for negligence, the plaintiffs served interrogatories inquiring where Peters had been before the crash. They sought the names of the bars that served Peters alcohol in order to initiate a timely dram shop action. Peters invoked the Fifth Amendment and refused to provide the information. The trial court granted the plaintiffs' motion to compel. The court of appeals denied Peters' mandamus petition.

The Supreme Court conditionally granted mandamus relief. The constitutional privilege against self-incrimination applies in civil litigation and can bar discovery, no matter how critical the need for that discovery is. Here, Peters' discovery responses could be used against him in the criminal case by leading to evidence that Peters drank more than the three beers that he claimed. The Court rejected the plaintiffs' argument that Peters waived the privilege by disclosing to the police that he had visited two bars, drank three beers, and felt buzzed. The plaintiffs did not show a voluntary, knowing, and intelligent waiver of the privilege in the record; indeed, the officer's notes about Peters' condition cut against a voluntary waiver.

e) *In re State Farm Mut. Auto. Ins. Co.*, ___ S.W.3d ___, 2025 WL 1196740 (Tex. Apr. 25, 2025) [23-0755]

At issue in this original proceeding is whether, in the first part of a bifurcated proceeding to recover underinsured motorist benefits, an insured is entitled to conduct discovery on extracontractual claims and to depose the insurer's corporate representative.

After an automobile accident, Mara Lindsey sought to recover UIM policy benefits and alleged that her insurer State Farm failed to attempt a good-faith settlement of her UIM claim in violation of the Insurance Code. The trial court bifurcated the proceedings and ordered Lindsey's

declaratory-judgment claims on her entitlement to UIM benefits to be tried before her extracontractual claims. State Farm moved to abate the extracontractual claims during the first part of the proceeding and to quash Lindsey's deposition notice of its corporate representative on proportionality grounds. The trial court denied the motions and the court of appeals denied mandamus relief.

The Supreme Court conditionally granted mandamus relief. The Court held that (1) in this distinctive context, an insurer is entitled to have extracontractual claims abated while the insured establishes her entitlement to UIM benefits, and (2) the deposition notice of a corporate representative must be quashed when a UIM insurer with no personal knowledge about the underlying car-crash issues has produced all nonprivileged claim documents and substantiated its proportionality complaints with evidence.

Justice Sullivan concurred, raising concerns about the Court's precedent on what it means for an insured to be "legally entitled to recover" UIM benefits.

2. Forum Non Conveniens

a) *In re Weatherford Int'l, LLC*, 688 S.W.3d 874 (Tex. Apr. 26, 2024) (per curiam) [22-1014]

The issue is whether the trial court abused its discretion by denying a motion to dismiss for forum non conveniens.

Kevin Milne was working for a Houston-based affiliate of the Weatherford company when he accepted an international assignment to work for a Weatherford affiliate in Egypt. Pursuant to Weatherford Houston's policy, Milne was required to undergo medical exams before commencing the assignment and then every two years for its duration. Milne's first exam was facilitated by Weatherford Egypt, and it cleared him to visit offshore rigs in Egypt and Tunisia. A second exam conducted by a different organization in South Africa provided the clearance required by Weatherford Houston. Unbeknownst to Milne, the first exam revealed a renal mass around his left kidney, and the report recommended further assessment. Milne first learned of the mass and follow-up recommendation a year later when he requested his medical records from Weatherford Egypt. By that point, the mass had already metastasized, and Milne passed away shortly after.

Milne's widow and children, all non-U.S. citizens, filed wrongful-death claims against Weatherford Houston in Texas. Weatherford Houston moved to dismiss them for forum non conveniens and identified Egypt as an appropriate forum. The trial court denied Weatherford Houston's motion, and the court of appeals denied mandamus relief.

Weatherford Houston filed a petition for writ of mandamus in the Supreme Court. The Court granted mandamus relief, concluding that all six statutory forum non conveniens factors favor dismissal and that Egypt is a more appropriate forum for the family's claims because, among other reasons, Weatherford Egypt's policies and practices governed the handling of Milne's medical information.

3. Multidistrict Litigation

a) *In re Jane Doe Cases*, 704 S.W.3d 538 (Tex. Dec. 31, 2024) [23-0202]

The issue in this case is whether the MDL panel erred by refusing to remand a "tag along" case.

In the underlying case, Jane Doe alleges that she was a victim of sex trafficking as a minor, and the perpetrator befriended her on Facebook to convince her to meet in person. Thereafter, she was sexually assaulted at a hotel owned by Texas Pearl. In 2018, Doe sued Facebook and Texas Pearl, alleging they both facilitated her trafficking. In 2019, the MDL panel formed an MDL with seven other cases involving sex-trafficking allegations, and it assigned an MDL pretrial court. None of the other cases involve the same parties or events alleged in the Facebook case. In 2022, Texas Pearl filed a Notice of Transfer of Tag-Along Case to move the underlying case into the MDL, asserting that Doe's claims relate to the MDL cases because all involve sex-trafficking allegations against hotels.

The MDL pretrial court denied Facebook's motion to remand, and the MDL panel denied Facebook's motion for rehearing. Facebook sought mandamus relief in the Supreme Court, arguing that its case shares no common fact question with the MDL, and further that the inclusion of the case in the MDL will not improve convenience or efficiency.

The Supreme Court granted relief, holding that that the Facebook case lacks a fact question in common with the MDL cases, as required to form an MDL. Without a common connection through the same plaintiffs, defendants, or events, general allegations of criminal activity by different perpetrators do not create the required common fact question to include a case within an MDL for pretrial docket management. The Court directed the MDL panel to remand the tag along case to its original trial court.

4. Responsible Third-Party Designation

a) *In re E. Tex. Med. Ctr. Athens*, ___ S.W.3d ___, 2025 WL 1197292 (Tex. Apr. 25, 2025) [23-1039]

This case concerns whether an employer that opted not to subscribe to the Texas workers' compensation program may designate responsible third parties when its employee sues it for negligence.

East Texas Medical Center Athens employed Sharon Dunn as an emergency-room nurse. Dunn alleges she was injured by an EMT who was not employed by ETMC Athens during one of her shifts. She originally sued the EMT and his employer, but they were dismissed from the case. Dunn then added claims against ETMC Athens, which moved to designate the EMT and his employer as responsible third parties. After the trial court granted the motion, Dunn moved to strike the designations, arguing that the proportionate-responsibility statute, which prohibits third-party designations in "action[s] to collect workers' compensation benefits under" the Workers' Compensation Act, does not apply because her suit is an action to collect "benefits."

The trial court granted the motion. The court of appeals denied

ETMC Athens's petition for mandamus relief, and ETMC Athens petitioned for mandamus relief in the Supreme Court.

The Court conditionally granted mandamus relief and held that an employee's negligence suit against her nonsubscribing employer is not one to "collect workers' compensation benefits" under the Act. Thus, the proportionate responsibility statute applies to such an action. The Court further held that the Act itself does not prohibit responsible third-party designations and that there was sufficient evidence in the record to create a fact issue regarding the third parties' responsibility in this case. Therefore, the trial court's striking of ETMC Athens's designations was an abuse of discretion with no adequate appellate remedy, warranting mandamus relief.

5. Sufficient Pleadings

a) *Herrera v. Mata*, 702 S.W.3d 538 (Tex. Dec. 6, 2024) (per curiam) [23-0457]

At issue in this case is whether the plaintiffs pleaded sufficient facts to allege an ultra vires claim against irrigation district officials under the Tax Code.

In 2019, Hidalgo County Irrigation District No. 1 sought to collect charges accrued in the 1980s and 1990s from a group of homeowners. The homeowners sued the district, claiming that the charges are taxes and that the district's refusal to remove them from the tax rolls violates the Tax Code's limitations period. In the alternative, the homeowners claim that the charges are Water Code assessments that the district has no authority to levy. The district filed a plea to the jurisdiction, arguing that the charges are assessments with no applicable limitations period; thus, governmental immunity bars suits seeking to stop their collection. The trial court granted the plea.

The court of appeals affirmed in part. It held that the Tax Code does not apply as a matter of law, so district officials did not act ultra vires by refusing to remove the charges from the tax rolls.

The Supreme Court reversed. It held that the homeowners pleaded sufficient facts to demonstrate the trial court's jurisdiction for their Tax Code claim by alleging that the charges are taxes assessed well after the limitations period. It also held that the homeowners' alternative pleading treating the charges as assessments does not affirmatively negate their pleadings that the charges are taxes. The Court remanded the case to the trial court for further proceedings.

6. Summary Judgment

a) *Gill v. Hill*, 688 S.W.3d 863 (Tex. Apr. 26, 2024) [22-0913]

This case concerns the burden of proof at the summary-judgment stage when a plaintiff asserts that a void judgment prohibits limitations from barring its suit.

In 1999, several taxing entities obtained a judgment foreclosing on the properties of more than 250 defendants, including James Gill. The following month, David Hill purchased Gill's former mineral interests, and Hill recorded the sheriff's deed with the county. Twenty years later, Gill's successors sued Hill to declare the foreclosure judgment and resulting deed void

for lack of due process and to quiet title to the mineral interests in their names. They argued that the 1999 judgment was void because Gill was never properly served. Hill moved for summary judgment under a statute that requires suits against purchasers of property at a tax sale to be brought within one year after the deed is filed of record, and he attached a copy of the sheriff's deed to his motion. The trial court granted summary judgment for Hill, and a divided court of appeals affirmed.

The Supreme Court held that the trial court correctly granted summary judgment. The Court concluded that Hill satisfied his summary-judgment burden by conclusively showing that the statute of limitations expired before the suit was filed. Gill's successors conceded that limitations had expired but asserted that their suit was not barred because the foreclosure judgment and deed were void for lack of due process. Gill's successors therefore had the burden to raise a genuine issue of material fact that the foreclosure judgment was void, and they failed to present any such evidence.

The Court concluded, however, that the case should be remanded to the trial court because the summary-judgment proceedings took place without the benefit of two recent decisions from the Court: *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. 2021), which addressed the burdens of proof for summary judgments based on limitations, and *Mitchell v. MAP Resources, Inc.*, 649 S.W.3d 180 (Tex. 2022), which clarified the types of evidence that can be used to support a collateral attack on a judgment such as that asserted by Gill's successors. The Court thus vacated the lower courts' judgments and remanded to the trial court for further proceedings.

b) *Keenan v. Robin*, ___ S.W.3d ___, 2024 WL 5249568 (Tex. Dec. 31, 2024) (per curiam) [23-0833]

This dispute between adjacent landowners involves claims of trespass and malicious prosecution.

A plat for a subdivision was approved by Randall County and filed in 2006. The plat shows forty-five lots separated by several named streets that, according to the Owner's Acknowledgment, are "dedicated to the public forever." Although the rest of the subdivision was never fully developed, the Keenans bought one of the lots in 2009. The Ranch Respondents eventually purchased all remaining lots at a bankruptcy auction, began using the land to run cattle, and erected a gate across one of the streets that the Keenans had been using to access their lot. Michael Keenan broke or removed the Ranch's gate and portions of its fence on two occasions, which resulted in his arrest and indictment on two counts of criminal mischief of a livestock fence.

The Keenans filed the underlying lawsuit against the Ranch Respondents, alleging claims for trespass and malicious prosecution and requesting declaratory and injunctive relief in addition to damages. At summary judgment, the parties disputed whether (1) the plat had dedicated the streets to the public or created a private easement, (2) the Ranch had "procured" Michael Keenan's prosecution, and (3) the Ranch Respondents were the owners of the cattle that had been crossing the Keenans' lot without their permission.

The trial court granted summary judgment for the Ranch Respondents and entered a take-nothing judgment on all the Keenans' claims. The court of appeals reversed the entry of a take-nothing judgment on the claims for declaratory and injunctive relief but otherwise affirmed the trial court's judgment.

The Supreme Court reversed in part and affirmed in part. The Court disagreed with the court of appeals' conclusion that the Keenans offered no evidence of trespass, pointing to Michael Keenan's declaration stating that he saw cattle and manure on his lot and that one of the respondents admitted ownership of the cattle. The Court further held that the Ranch does not own the dedicated public streets within the subdivision as a matter of law and that, therefore, the court of appeals erred by remanding the claim for declaratory relief to resolve factual disputes. Finally, the Court affirmed the court of appeals' judgment upholding the trial court's take-nothing judgment on the malicious prosecution claim. The Court remanded to the trial court for further proceedings.

c) *Verhalen v. Akhtar*, 699 S.W.3d 303 (Tex. Oct. 4, 2024) (per curiam) [23-0885]

The issue is whether the trial court abused its discretion by denying a motion to file a summary judgment response tendered one day late.

Georgia Verhalen and her mother sued Evan Johnston and Adriana Akhtar for negligence. The defendants filed motions for summary judgment, resulting in an October 5, 2022, deadline for the Verhalens' responses. The Verhalens did not file their responses until 11:48 p.m. on October 6. They also filed a verified motion for leave to file the responses late. The motion and affidavit explained that the deadline was improperly entered in the calendaring software used by the plaintiffs' counsel and that counsel filed the responses immediately upon discovering the oversight. The trial court denied the motion for leave, insisting on strict compliance with the response deadline prescribed by the rules of civil procedure. The trial court then granted the defendants' motions for summary judgment and awarded take-nothing judgments to both. The Verhalens appealed the denial of their motion for leave, but the court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court for further proceedings. The Court held that the trial court abused its discretion by denying the motion for leave because the Verhalens established good cause for the delay in filing. The Court emphasized counsel's uncontroverted factual assertions about her discovery of the calendaring error and her prompt action in response.

Y. PROCEDURE—TRIAL AND POST-TRIAL

1. Defective Trial Notice

a) *Wade v. Valdetaro*, 696 S.W.3d 673 (Tex. Aug. 30, 2024) (per curiam) [23-0443]

The Supreme Court reversed a $21.6 million judgment rendered after a one-hour bench trial at which the pro se defendant appeared but presented no evidence.

The defendant was unprepared to mount a defense because notice of the trial setting was sent to an

incorrect address. The Court held that a party who has appeared in a civil case has a constitutional right to notice of a trial, which by rule must ordinarily be at least 45 days before a first setting. Having sufficiently informed the trial court about the service defect, the defendant was entitled to a new trial. The defendant's failure to request a continuance did not constitute a voluntary, knowing, and intelligent waiver of the due process right to reasonable notice.

2. Incurable Jury Argument

a) *Alonzo v. John*, 689 S.W.3d 911 (Tex. May 10, 2024) (per curiam) [22-0521]

The issue in this personal-injury suit is whether an accusation of race and gender prejudice directed at opposing counsel was incurably harmful.

Roberto Alonzo was driving a tractor-trailer when he rear-ended Christine John and Christopher Lewis. John and Lewis sued Alonzo and his employer, New Prime, Inc. John requested $10–12 million in non-economic damages, but the defense asked the jury to award her $250,000. In closing, plaintiffs' counsel argued that "we certainly don't want this $250,000" and then remarked: "Because it's a woman, she should get less money? Because she's African American, she should get less money?" The defense moved for a mistrial, but the motion was overruled. The jury awarded John $12 million for physical pain and mental anguish, and the trial court rendered judgment on the verdict. The court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court, holding that defense counsel was entitled to suggest a smaller damages amount than John sought without an uninvited accusation of race and gender bias. The resulting harm was incurable by withdrawal or instruction because the argument struck at the heart of the jury trial system and was designed to turn the jury against opposing counsel and their clients.

3. Jury Instructions and Questions

a) *Horton v. Kan. City S. Ry. Co.*, 692 S.W.3d 112 (Tex. June 28, 2024) [21-0769]

This case raises questions of federal preemption, evidentiary sufficiency, and charge error.

Ladonna Sue Rigsby was killed by a Kansas City Southern Railroad Company train while she was driving across a railroad crossing. Her children (Horton) sued the Railroad, alleging two theories of liability: (1) the Railroad failed to correct a raised hump at the crossing; and (2) it failed to maintain a yield sign at the crossing. Both theories were submitted to the jury in one liability question. The jury found both the Railroad and Rigsby negligent, and the trial court awarded Horton damages for the Railroad's negligence.

The court of appeals reversed, holding that the federal Interstate Commerce Commission Termination Act preempted Horton's humped-crossing theory and that the submission of both theories in a single liability question was harmful error. The court remanded for a new trial on the yield-sign theory alone.

The Supreme Court granted both sides' petitions for review. In a

June 2023 opinion, the Court affirmed the court of appeals' judgment, but on different grounds. It held that federal law does not preempt the humped-crossing claim, but no evidence supports the jury's finding that the absence of a yield sign proximately caused the accident. The Court then concluded that the trial court's use of a broad-form question to submit the negligence claim was harmful error.

Both parties filed motions for rehearing. The Court denied the Railroad's motion and granted Horton's, which challenged the holding that the submission of the broad-form question was harmful error. The Court withdrew its original opinion. In a new opinion by Justice Boyd, the Court maintained its holdings that the humped-crossing claim is not preempted and that no evidence supports the yield-sign theory. But in the new opinion, the Court concluded that the submission of the broad-form question was not harmful error.

The Court held that *Casteel*'s presumed-harm rule does not apply when a theory or allegation is "invalid" because it lacks legally sufficient evidentiary support, as was the case here. The Court then reviewed the entire record and concluded that the broad-form question did not probably cause the rendition of an improper judgment. It therefore reversed the court of appeals' judgment and reinstated the trial court's judgment in Horton's favor.

Justice Busby filed a concurring opinion, urging the Supreme Court of the United States to reconsider its holding in *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), on the basis that implied-obstacle preemption is inconsistent with the federal Constitution.

Justice Young, joined by Justice Blacklock, dissented to the Court's judgment. He would apply *Casteel* whenever there is the risk that the jury relied on any theory that turns out be legally invalid.

b) *Oscar Renda Contracting v. Bruce*, 689 S.W.3d 305 (Tex. May 3, 2024) [22-0889]

This case raises procedural questions arising from an award of exemplary damages in a verdict signed by only ten jurors.

As part of a flood-mitigation project undertaken by the City of El Paso, Renda Contracting installed a pipeline from Interstate 10 to the Rio Grande river. Nearby homeowners sued Renda Contracting, alleging that vibration and soil shifting from the construction caused damage to their homes. The jury found gross negligence and awarded $825,000 in exemplary damages, but the verdict certificate and subsequent jury poll indicated that only ten of twelve jurors agreed with the verdict. The jury charge, which was not objected to, failed to instruct the jury that it must be unanimous in awarding exemplary damages, as required by Section 41.003(e) of the Civil Practice and Remedies Code.

When the homeowners moved for entry of a judgment that included exemplary damages, Renda Contracting objected on the basis that the verdict was not unanimous. The trial court sustained the objection and entered judgment on the jury's verdict without an exemplary damages award.

A split court of appeals reversed.

The majority held that unanimity as to exemplary damages could be implied despite the verdict certificate's demonstrating a divided verdict because the disagreement could be on an answer to a different question. The majority further held that Renda Contracting had the burden to prove that the verdict was not unanimous and that it had waived any error in awarding exemplary damages by failing to object to the jury charge. The dissenting justice would have held that the homeowners had the burden to secure a unanimous verdict.

The Supreme Court reinstated the trial court's judgment. The Court explained that Section 41.003 places the burden of proof on a claimant seeking exemplary damages to secure a unanimous verdict and states that this burden may not be shifted. Thus, it was the homeowners' burden to secure a unanimous verdict and to seek confirmation as to unanimity for the amount of exemplary damages after the jury returned a divided verdict. The Court also held that Renda Contracting's objection to the judgment, which the trial court had sustained, was sufficient to preserve the issue for appeal.

4. Rendition of Judgment

a) *Baker v. Bizzl*e, 687 S.W.3d 285 (Tex. Mar. 1, 2024) [22-0242]

The issue in this case is whether the trial court rendered judgment fully resolving the divorce action in an email sent only to the parties' counsel.

At the conclusion of a bench trial on cross-petitions for divorce, the judge orally declared "the parties are divorced" "as of today" but neither divided the marital estate nor ruled on the grounds pleaded for divorce. The judge later emailed the parties' counsel with brief rulings on the outstanding issues and instructed Wife's attorney to prepare the divorce decree. Two months later, Wife died, and her counsel subsequently tendered a final divorce decree to the court.

Husband moved for dismissal, arguing that (1) an unresolved divorce action does not survive the death of a party and (2) the court's prior email was not a rendition of judgment on the open issues. Over Husband's objection, the trial court signed the divorce decree, but on appeal, the court of appeals agreed with Husband that the decree was void. The court held that the oral pronouncement was clearly interlocutory, the email lacked language indicating a present intent to render judgment, and dismissal was required when Wife died before a full and final rendition of judgment.

The Supreme Court affirmed. Without deciding whether the email stated a present intent to render judgment, the Court held that the writing was ineffective as a rendition because the decision was not "announced publicly." Generally, judgment is rendered when the court's decision is "officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly." A ruling shared only with the parties or their counsel in a nonpublic forum is not a public announcement of the court's decision.

Justice Lehrmann concurred to note her view on an unpresented issue. If presented, she would hold that a trial court's interlocutory marital-status

adjudication continues to have legal significance after a party dies even though the trial court would lack jurisdiction to subsequently divide the marital estate.

Justice Young's concurrence proposed modernizing the law to eliminate distinctions between "rendering," "signing," and "entering" judgment by adopting an all-purpose effectiveness date based on the date of electronic filing.

Z. PRODUCTS LIABILITY

1. Design Defects

a) *Am. Honda Motor Co. v. Milburn*, 696 S.W.3d 612 (Tex. June 28, 2024) [21-1097]

The main issue presented is whether Texas Civil Practice and Remedies Code Section 82.008's rebuttable presumption of nonliability shields Honda from liability on a design-defect claim.

Honda designed a ceiling-mounted, detachable-anchor seatbelt system for the third-row middle seat of the 2011 Honda Odyssey. The detachable system allowed the seat to fold flat for additional cargo space. The Federal Motor Vehicle Safety Standards promulgated by the National Highway Traffic Safety Administration authorize the detachable system used in the Odyssey.

In November 2015, an Uber driver picked up Milburn and her friends in a 2011 Odyssey. Milburn sat in the third-row middle seat and buckled her seatbelt, but because the anchor was detached at the time, her lap remained unbelted. An accident caused the van to overturn, and Milburn suffered severe cervical injuries. Milburn sued several defendants and settled with all except Honda. Milburn alleged that the seatbelt system was defectively designed and confusing, creating an unreasonable risk of misuse. The jury found that Honda negligently designed the system, Honda was entitled to the Section 82.008 presumption of nonliability, and Milburn rebutted the presumption. The trial court rendered judgment for Milburn, and the court of appeals affirmed.

The Supreme Court reversed and rendered judgment for Honda. In an opinion by Justice Lehrmann, the Court first held that the statutory presumption applies because the system's design complied with mandatory federal safety standards governing the product risk that allegedly caused the harm. Next, the Court addressed the basis for rebutting the presumption, which requires a showing that the applicable standards are inadequate to protect the public from unreasonable risks of injury. The Court concluded that absent a comprehensive review of the various factors and tradeoffs the federal agency considered in adopting the standard, which was not provided here, the standard generally may not be deemed "inadequate" to prevent an unreasonable risk of harm to the public as a whole.

Justice Blacklock concurred, emphasizing that a factfinder cannot validly judge a safety standard's adequacy absent testimony about how the regulatory process works and the many competing considerations it entails.

Justice Devine dissented, opining that legally sufficient evidence supports the jury's findings of defective design and safety-standard inadequacy.

2. Statute of Repose

a) *Ford Motor Co. v. Parks*, 691 S.W.3d 475 (June 7, 2024) [23-0048]

This case addresses a defendant's burden of proof to obtain summary judgment under the statute of repose for a products-liability action. The statute requires a claimant to sue the manufacturer or seller "before the end of 15 years after the date of the sale of the product by the defendant."

Samuel Gama was injured when his 2001 Ford Explorer Sport rolled over on a highway. On May 17, 2016, Gama's wife, Jennifer Parks, brought products-liability claims against Ford. The trial court granted Ford's motion for summary judgment based on the statute of repose, but the court of appeals reversed. Ford's uncontroverted evidence established that Ford released and shipped the Explorer to a dealer in May 2000, more than 15 years before Parks' May 2016 suit. But the court of appeals accepted Parks' argument that Ford was required to conclusively prove the exact date that the dealer paid for the Explorer in full, and the court held Ford had not done so.

The Supreme Court reversed and rendered judgment for Ford. The Court explained that the premise underlying the court of appeals' analysis—that money must change hands before a sale is completed—is contrary to law. Chapter 2 of the Uniform Commercial Code sets a default rule that a sale is complete when the seller performs by physically delivering the goods, even if the buyer has not made full payment. This timing rule is consistent with blackletter contract law and the Court's caselaw, both of which recognize that a promise to pay is sufficient consideration for a sale. The court of appeals therefore erred by imposing on Ford the burden of proving the date that the dealership paid Ford for the Explorer. The Court emphasized that the way a buyer finances a purchase is irrelevant to whether a sale occurred.

The Court also clarified that a defendant need not prove an exact sales date to be entitled to judgment under the statute of repose. One purpose of a statute of repose is to relieve defendants of the burden of defending claims where evidence may be lost or destroyed due to the passage of time. It is enough for a defendant to prove that the sale, whatever the date, must have occurred outside the statutory period.

AA. REAL PROPERTY

1. Bona Fide Purchaser

a) *425 Soledad v. CRVI Riverwalk*, ___ S.W.3d ___, 2024 WL 5249787 (Tex. Dec. 31, 2024) [23-0344]

At issue in this case is whether an easement is enforceable against a property purchaser who claims bona fide purchaser protections.

425 Soledad executed a parking agreement that secured parking availability to its office building occupants in a garage connected by tunnel access. The parties agreed that the parking covenant would run with the land but did not record the interest. The garage later was sold, with the new owner's debt secured by mortgage liens. CRVI Crowne acquired part of this debt. When the new garage owner neared default, CRVI Crowne placed the property into a receivership, and its affiliate, CRVI Riverwalk, purchased the

garage from the receiver. CRVI Riverwalk later rejected an office building occupant's request for parking under the agreement, arguing that it is a bona fide purchaser who took without notice.

The trial court held that the parking agreement is an enforceable easement appurtenant that transferred with the property. The court of appeals agreed that the agreement is an easement but held it unenforceable because CRVI Crowne purchased its note without notice of the easement, and it "sheltered" CRVI Riverwalk as a subsequent purchaser under its bona fide mortgagee status.

The Supreme Court reversed. The Court agreed with both courts that the parking agreement is an easement. However, the Court concluded that the trial court correctly enforced the easement against CRVI Riverwalk because both it and CRVI Crowne had inquiry notice sufficient to remove any bona fide purchaser protection. Because the Court resolved the case on the notice element, it did not address whether a property purchaser can rely on an earlier lender's bona fide status to claim shelter.

2. Condemnation

a) *REME, L.L.C., v. State*, ___ S.W.3d ___, 2025 WL 567970 (Tex. Feb. 21, 2025) (per curiam) [23-0707]

At issue in this case is whether the deadline to object to a condemnation award begins to run from the filing of the award with the court clerk or not until presentment to the trial court judge.

The State brought a condemnation action to acquire about one-tenth of an acre from REME, L.L.C. The trial court appointed commissioners, who awarded damages for the taking. The State filed the award with the court clerk as part of an order requesting that costs be assessed. Three days later, the judge signed the order. The State objected to the findings outside the statutory time for raising an objection to the award, if calculated from the date it filed the award with the clerk. The State argued that its objections were filed within the deadline, if calculated from the date of judicial signature. The trial court held the State's objection untimely and rendered judgment. The State appealed, and agreeing with the State, the court of appeals held that Property Code Section 21.018(a), which requires that the award be filed "with the court," means receipt by the judge.

The Supreme Court reversed the court of appeals' judgment and reinstated the judgment of the trial court. The Court held that the State's objection was untimely because the requirement that an award be filed "with the court" includes receipt by the trial court clerk.

3. Implied Reciprocal Negative Easements

a) *River Plantation Cmty. Improvement Ass'n v. River Plantation Props. LLC*, 698 S.W.3d 226 (Tex. June 14, 2024) [22-0733]

The issue in this case is whether real property in a residential subdivision is burdened by an implied reciprocal negative easement requiring it to be maintained as a golf course.

River Plantation subdivision

contains hundreds of homes and a golf course. The subdivision's restrictive covenants provide that certain "golf course lots" are burdened by restrictions that, among other things, require structures to be set back from the golf course. The developer included graphic depictions of the golf course in some of the plat maps that it filed for the subdivision, which was often marketed as a golf course community. Forty years later, the subsequent owner of the golf course, RP Properties, sought to sell the property to a new owner who intended to stop maintaining it as a golf course.

The subdivision's HOA sued RP Properties to establish the existence of an implied reciprocal negative easement burdening the golf course, requiring that it be used as a golf course in perpetuity. RP Properties sold a portion of the property to Preisler, who was added as a defendant. The trial court granted the defendants' motions for summary judgment, declaring that the golf course property is not burdened by the claimed easement. The court of appeals affirmed.

The Supreme Court affirmed, holding that the implied reciprocal negative easement doctrine does not apply. This kind of easement is an exception to the general requirement that restraints on an owner's use of its land must be express. It applies when an owner subdivides its property into lots and sells a substantial number of those lots with restrictive covenants designed to further a common development scheme, such as a residential-use restriction. In that instance, the lots retained by the owner or sold without the express restriction to a grantee with notice of the restrictions in the other deeds will be subject to the same restrictions. Here, the HOA did not claim that the golf course property should be impliedly burdened by similar restrictions to the other lots in the subdivision; rather, it claimed that the property should be burdened by an entirely different restriction. The Court declined to consider whether a broader, unpleaded servitude-by-estoppel theory could be applied or would entitle the HOA to relief.

4. Landlord Tenant

a) *Westwood Motorcars, LLC v. Virtuolotry, LLC*, 689 S.W.3d 879 (Tex. May 17, 2024) [22-0846]

The issue in this case is what effect, if any, an agreed judgment awarding possession to a landlord in an eviction suit has on a related suit in district court by a tenant for damages.

Virtuolotry leased property to Westwood, an automobile dealer. When Westwood sought an extension under the lease, Virtuolotry rejected the attempt and asserted that Westwood had defaulted. Westwood sued in district court for a declaration of its right to extend the lease. When the current lease term expired, Virtuolotry initiated and prevailed in an eviction suit in justice court. Westwood appealed the eviction-suit judgment to county court, but the parties ultimately entered an agreed judgment awarding Virtuolotry possession of the premises. Westwood then added claims for breach of contract and constructive eviction to its district-court suit. After a jury trial, the district court awarded Westwood over $1 million in damages. But the court of

appeals reversed and rendered a take-nothing judgment because Westwood had agreed to the eviction-suit judgment awarding possession to Virtuolotry.

The Supreme Court reversed. The Court first explained that eviction suits provide summary proceedings for which the sole issue adjudicated is immediate possession. Accordingly, agreeing to an eviction-suit judgment does not concede an ultimate right to possession or abandon separate claims for damages, even if those claims also implicate the right to possession. The Court also rejected Virtuolotry's argument that Westwood's agreement to the judgment conclusively established that it voluntarily abandoned the premises, extinguishing any claims for damages. The Court explained that a key dispute at trial was whether Westwood left voluntarily, and it concluded that legally sufficient evidence supported a finding that neither Westwood's departure nor its agreement to entry of the eviction-suit judgment was voluntary. The Court remanded the case to the court of appeals to consider several unaddressed issues.

5. Nuisance

a) *Huynh v. Blanchard*, 694 S.W.3d 648 (Tex. June 7, 2024) [21-0676]

The issue in this case is the availability and appropriate scope of permanent injunctive relief to redress a temporary nuisance.

The Huynhs set up and operated two farms for raising chickens on the same property, upwind of residential properties. Because the Huynhs' submissions to state regulators misrepresented the scale and geographic isolation of their proposed operations, the Huynhs avoided triggering more stringent regulatory requirements. The farms routinely housed twice the number of chickens that the TCEQ has deemed likely to create a persistent nuisance. Shortly after the farms began receiving chickens, the TCEQ started to receive complaints about offensive odors from nearby residents. The TCEQ investigated, issued multiple notices of violation to the farms, and required the farms to implement odor-control plans. Nonetheless, the farms continued to operate in largely the same manner and generate a similar volume of complaints.

Some of the farms' neighbors sued for nuisance. A jury found that the farms caused nuisance-level odors of such a character that any anticipated future injury could not be estimated with reasonable certainty. The trial court rendered an agreed take-nothing judgment on damages and granted the neighbors a permanent injunction that required a complete shutdown of the two farms. The court of appeals affirmed the trial court's judgment.

The Supreme Court reversed in part and remanded for the trial court to modify the scope of injunctive relief. In an opinion by Justice Busby, the Court held that the jury's finding did not preclude the trial court from concluding the farms posed an imminent harm. The Court also held that monetary damages would not afford complete relief for the nuisance, the recurring nature of which would necessitate multiple suits, and was therefore an inadequate remedy. Finally, the Court held that the trial court abused its

discretion in determining the scope of injunctive relief because the shutdown of the two farms imposed broader relief than was necessary to abate nuisance-level odors.

Justice Huddle filed an opinion concurring in the judgment. While the concurrence also would have held that the record supported the trial court's finding of imminent harm and inadequate remedy at law, it asserted that the Court did not give proper deference to the jury's factual finding of a temporary nuisance and gave insufficient consideration to the Legislature's and TCEQ's regulatory authority in instructing the trial court to craft an injunction as narrowly as possible.

BB. RES JUDICATA

1. Claim Preclusion

a) *Steelhead Midstream Partners, LLC v. CL III Funding Holding Co.*, ___ S.W.3d ___, 2024 WL 5249688 (Tex. Dec. 31, 2024) (per curiam) [22-1026]

In this case, the Court held that a judgment in a lien-foreclosure suit does not bar a later suit on a related contract claim.

Predecessors to Steelhead and CL III had a joint-operating agreement to develop leases. The JOA obliged Steelhead and CL III to share the costs of constructing a pipeline. Orr placed a lien on the pipeline for unpaid construction costs. CL III settled with Orr and was assigned the lien in a bankruptcy proceeding. CL III then sued Steelhead in Montague County to foreclose on Steelhead's pipeline interest. Steelhead counterclaimed, alleging as a contract claim that under the JOA it had paid its share of construction costs. CL III filed a plea to the jurisdiction arguing the contract claim was barred because it was subject to the jurisdiction of the bankruptcy court. The trial court granted the plea and rendered judgment granting CL III the right to foreclose on the pipeline. Steelhead paid CL III over $400,000 to avoid foreclosure.

Steelhead brought a separate suit in Travis County, alleging CL III breached the JOA by failing to pay its share of the pipeline costs. The trial court rendered judgment for Steelhead. The court of appeals reversed, reasoning that the Travis County suit is an impermissible collateral attack on the Montague County judgment.

The Supreme Court reversed. It held that the Travis County suit is not barred because the contract claim was not decided in the Montague County foreclosure suit. The foreclosure suit decided the status of a lien originating from a construction debt owed to a third party. That suit did not decide whether one party to the JOA owed a contractual debt to the other. Steelhead in fact persuaded the Montague County court that it lacked jurisdiction to decide the contract claim. In these circumstances, neither res judicata nor judicial estoppel bars the Travis County suit.

2. Judicial Estoppel

a) *Fleming v. Wilson*, 694 S.W.3d 186 (Tex. May 17, 2024) [22-0166]

The issue in this case is whether judicial estoppel bars a defendant from invoking defensive collateral estoppel because of inconsistent representations

made in prior litigation.

George Fleming and his law firm represented thousands of plaintiffs in securing a products-liability settlement. Many of Fleming's clients then sued him for improperly deducting costs from their settlements. Some of those former clients sought to bring a class action in federal court, but Fleming persuaded the district court to deny class certification by arguing that issues of fact and law among class members meant that aggregate litigation was improper.

Later, in state court, Fleming prevailed in a bellwether trial involving ten plaintiffs. He then moved for summary judgment, contending that his trial win collaterally estopped the remaining plaintiffs from litigating the same issues. The trial court agreed and dismissed the remaining plaintiffs' claims with prejudice. The court of appeals reversed, holding that Fleming failed to establish that the remaining plaintiffs were in privity with the bellwether plaintiffs such that they were bound by the verdict.

The Supreme Court affirmed. It held that judicial estoppel bars Fleming from arguing that the plaintiffs' claims are identical. When a party successfully convinces a court of a position in one proceeding and wins relief on the basis of that representation, judicial estoppel bars that party from asserting a contradictory position in a later proceeding. Because Fleming secured denial of class certification on the ground that the plaintiffs' claims are not identical, he is estopped from arguing that their claims *are* identical, which is essential to his effort to bind all plaintiffs to the bellwether trial's result.

CC. STATUTE OF LIMITATIONS

1. Tolling

a) *Hampton v. Thome*, 687 S.W.3d 496 (Tex. Mar. 8, 2024) [22-0435]

At issue is whether an incomplete or defective medical authorization form can toll the statute of limitations under Section 74.051(c) of the Civil Practice and Remedies Code.

A health care liability claimant is required to provide notice to the defendant at least sixty days prior to filing suit. This notice must be accompanied by a medical authorization form that permits the defendant to obtain information from relevant health care providers. After being released from the hospital after a surgery, Dorothy Hampton fell at her house and was found confused and disoriented. Hampton notified Dr. Leonard Thome of her intent to bring a health care liability claim, alleging he had prematurely released her from the hospital. This notice was accompanied by an incomplete medical authorization form, which was missing several health care providers that had treated Hampton. Hampton's form also left out a sentence, found in the statutory form provided in Section 74.052(c), that extends authorization to future providers.

Hampton eventually filed her suit past the two-year statute of limitations, but within the 75-day tolling period specified in Section 74.051(c). Dr. Thome moved for summary judgment on limitations grounds, claiming that Hampton's deficient form could not trigger the 75-day tolling period. The district court denied Dr. Thome's motion for summary judgment. On appeal, the court of appeals reversed,

concluding that tolling was unavailable due to defects in Hampton's form.

The Supreme Court reversed. In an opinion by Justice Blacklock, the Court held that an incomplete or erroneous medical authorization form is still an authorization form for tolling purposes. The appropriate remedy for an incomplete or defective form is a 60-day abatement as provided by Section 74.052(a)-(b).

Justice Boyd filed a dissenting opinion. He would have held that only a fully compliant authorization form tolls the statute of limitations.

DD. TAXES

1. Property Tax

a) *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844 (Tex. June 7, 2024) [22-0485]

The primary issue in this case is whether a residence homestead tax exemption for disabled veterans can be claimed by two disabled veterans who are married but live separately.

Yvondia and Gregory Johnson are both 100% disabled U.S. military veterans. Mr. Johnson applied for and received a residence homestead exemption under the Tax Code for the couple's jointly owned home in San Antonio. After the couple bought another home in Converse, they separated. Yvondia moved into the Converse home, and she applied for the same exemption for that home. Bexar Appraisal District refused her application. After her protest was denied, Yvondia sued. The trial court granted summary judgment for the appraisal district. The court of appeals reversed, holding that the Tax Code did not preclude Yvondia from receiving the exemption even though her husband received the same exemption on a different home.

The Supreme Court affirmed. In an opinion by Justice Huddle, the Court held that the statute's plain text entitles Yvondia to the claimed exemption. The Court rejected the appraisal district's argument that the word "homestead" has a historical meaning imposing a one-per-family limit on the residence homestead exemption. It concluded that the disabled-veteran exemption does not incorporate the one-per-family limit found elsewhere; the Legislature deliberately placed the disabled-veteran exemption outside the reach of statutory limitations on other residence homestead exemptions.

Justice Young filed a dissenting opinion. He would have held that a one-per-couple limit inheres in the historical meaning of "homestead" and that nothing in the Constitution or the Tax Code displaces that meaning. He also would have held that allowing Yvondia to receive the exemption is contrary to the rule that tax exemptions can only be sustained if authorized with unmistakable clarity and that any doubt about the scope of the text requires rejecting a claimed exemption.

2. Sales Tax

a) *GEO Grp. v. Hegar*, ___ S.W.3d ___, 2025 WL 852414 (Tex. Mar. 14, 2025) [23-0149]

The primary issue in this case is whether private, for-profit business entities that detain federal and state inmates qualify as tax-exempt "agents" or "instrumentalities" of the government under the Tax Code and the Comptroller's rules.

GEO owned and operated detention facilities in Texas, housing federal and state inmates pursuant to contracts with federal, state, and county governments. When GEO failed to pay tax on purchases necessary to operate those facilities, the Comptroller assessed a sales-and-use tax deficiency against GEO. Following administrative proceedings challenging the deficiency, GEO paid the stipulated $3,937,103.71 tax due and filed suit for a taxpayer refund.

The trial court concluded that GEO failed to demonstrate "by clear and convincing evidence" that it qualified as a government "agent" or "instrumentality" entitled to a tax exemption as required. GEO appealed, arguing that the court erred by applying a heightened standard of review. The court of appeals affirmed.

The Supreme Court affirmed. Although the Court noted that the Tax Code's mandated trial de novo requires a preponderance of the evidence standard of proof instead of the heightened clear and convincing standard, application of the lesser standard did not alter the outcome of the case. The Court held that entities entitled to tax exemption as government "agents" or "instrumentalities" are of a specific, narrow character: only entities that the government has unequivocally declared an "agent" or "instrumentality" or those that could reasonably be viewed as an arm of the government are included. The Court held that GEO's mere performance of a governmental function like inmate detention was not sufficient.

3. Tax Protests

a) *J-W Power Co. v. Sterling Cnty. Appraisal Dist.* and *J-W Power Co. v. Irion Cnty. Appraisal Dist.*, 691 S.W.3d 466 (Tex. June 7, 2024) [22-0974, 22-0975]

The issue is whether an unsuccessful ad valorem tax protest under Section 41.41 of the Tax Code precludes a subsequent motion to correct the appraisal role under Section 25.25(c) with respect to the same property.

J-W Power Company leases natural gas compressors to neighboring counties. The compressors at issue here were maintained in Ector County and leased to customers in Sterling and Irion Counties. Between 2013 and 2016, the Sterling and Irion County Appraisal Districts appraised J-W Power's leased compressors as conventional business-personal property. This was despite the fact that the Legislature amended the Tax Code in 2011 so that leased heavy equipment like J-W Power's compressors would be taxed in the county where it is stored by the dealer when not in use.

J-W Power filed protests in Sterling and Irion Counties under Section 41.41 of the Tax Code, arguing that its compressors should be taxed elsewhere. The protests were denied. J-W Power did not seek judicial review. After the Supreme Court clarified in 2018 that leased heavy equipment should be taxed in the county of origin, J-W Power filed motions under Section 25.25 to correct the appraisal rolls for the relevant years. After the appraisal review boards again denied J-W Power's motions, J-W Power sought

judicial review.

The trial court granted summary judgment for the districts. The court of appeals affirmed, holding that the denial of J-W Power's Section 41.41 protests precluded subsequent motions to correct because of the doctrine of res judicata.

The Supreme Court reversed, holding that Section 25.25(l), which allows a Section 25.25(c) motion to be filed "regardless of whether" the property owner protested under Chapter 41, eliminates any preclusive effect a prior protest may have had. The Court remanded the case to the court of appeals for further proceedings.

b) *Oncor Elec. Delivery Co. NTU, LLC v. Wilbarger Cnty. Appraisal Dist.* and *Mills Cent. Appraisal Dist. v. Oncor Elec. Delivery Co.*, 691 S.W.3d 890 (Tex. June 21, 2024) [23-0138, 23-0145]

The issue in these cases is whether questions regarding the validity and scope of a statutory agreement under Section 1.111(e) of the Tax Code implicate the trial court's subject-matter jurisdiction over a suit for judicial review under Section 42.01 of the Code.

In 2019, Oncor's predecessor-in-interest, Sharyland, protested the value of its transmission lines in various appraisal districts, including in Wilbarger and Mills counties. Sharyland ultimately settled its protests by executing agreements with the chief appraiser of each district. The agreements with the appraisal districts for Wilbarger and Mills counties each stated a total value for Sharyland's transmission lines within that district. After acquiring the transmission lines, Oncor sought to correct the two districts' appraisal rolls, filing motions to correct under Section 25.25 of the Tax Code with the appraisal review board for each district. Oncor's motions asserted that the valuations listed on each district's appraisal rolls were based on a "clerical error" that occurred when Sharyland's agent sent incorrect mileage data to the districts' agent. The Wilbarger appraisal review board denied Oncor's motions and the Mills appraisal review board dismissed the motions for lack of jurisdiction.

Oncor sought review of those decisions in district court in each county, suing both the relevant appraisal district and review board, asserting the same claims, and seeking substantially identical relief in both cases. The relevant taxing authorities filed pleas to the jurisdiction, which were granted in the Mills case and denied in the Wilbarger case. The Wilbarger appraisal district and Oncor each filed an interlocutory appeal of the decision against them.

The courts of appeals reached conflicting decisions. In the Mills case, the court of appeals reversed in part and remanded for further proceedings, holding that the doctrine of mutual mistake, if applicable, would prevent the settlement agreement from becoming final. In the Wilbarger case, the court of appeals reversed the trial court's order and rendered judgment granting the Wilbarger taxing authorities' plea. Oncor and the Mills taxing authorities petitioned the Supreme Court for review. The Supreme Court granted both petitions and consolidated the cases for oral argument.

The Supreme Court held that a Section 1.111(e) agreement poses non-jurisdictional limits on the scope of appellate review under Chapter 42 of the Tax Code. Accordingly, the Court affirmed the court of appeals' judgment in the Mills case, reversed the court of appeals' judgment in the Wilbarger case, and remanded both causes to their respective trial courts for further proceedings.

c) *Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752 (Tex. June 21, 2024) [22-0620]

The issue in this case is whether statutory limits on an appraisal district's ability to challenge an appraisal review board's decision confine the trial court's subject matter jurisdiction.

Texas Disposal Systems Landfill operates a landfill in Travis County. In 2019, Travis County Central Appraisal District appraised the market value of the landfill, and the Landfill protested the amount under a Tax Code provision requiring equal and uniform taxation. The Landfill won its challenge, and the appraisal review board significantly reduced the appraised value of the landfill. The District appealed to the trial court and claimed that the appraisal review board's appraised value was unequal and below market value. The Landfill filed a plea to the jurisdiction, arguing that it raised only an equal-and-uniform challenge, not one based on market value. The trial court granted the Landfill's plea. The court of appeals reversed, holding that review of an appraisal review board's decision is not confined to the grounds the taxpayer asserted before the board.

In an opinion by Justice Bland, the Supreme Court affirmed. The Tax Code limits the trial court's review to the challenge the appraisal review board heard. That limitation, however, is procedural, not jurisdictional. The Court observed that the Tax Code allows the parties to agree to proceed before the trial court despite a failure to exhaust administrative remedies. This signals that the parameters of an appeal are not jurisdictional because parties cannot confer jurisdiction by agreement. Additionally, the Tax Code employs limits like those in other statutes the Court has held to be procedural, not jurisdictional. The Court also noted that the fair market value of the property is relevant to an equal and uniform challenge, but if the fair market value deviates from the equal and uniform appraised value, a taxpayer is entitled to the lower of the two amounts.

Justice Boyd filed a dissenting opinion. The dissent would have held that any limitation the Tax Code imposes on the scope of the District's appeal is jurisdictional, and the statute does not limit the trial court's jurisdiction to the specific protest grounds relied on by the taxpayer.

EE. TEXAS ALCOHOLIC BEVERAGE CODE

1. Dram Shop Act

a) *Raoger Corp. v. Myers*, ___ S.W.3d ___, 2025 WL 1085173 (Tex. Apr. 11, 2025) [23-0662]

At issue is the sufficiency of a Dram Shop Act claimant's summary judgment evidence.

Barrie Myers sued Cadot Restaurant under the Dram Shop Act for

injuries he sustained in a 2018 automobile accident. The driver who hit him, Nasar Khan, had consumed alcohol at Cadot with a friend approximately two hours prior to the accident. The Act provides for dram shop liability if it was "apparent" that an individual to whom the dram shop provided alcohol "was obviously intoxicated to the extent that he presented a clear danger," and the individual proximately caused injury to a claimant. Although there was no evidence that Khan appeared intoxicated at Cadot, Myers relied on other evidence such as Khan's appearance just after the accident and his blood alcohol level, which was well above the legal limit when it was taken three hours later.

The trial court granted summary judgment for Cadot, and the court of appeals reversed. The Supreme Court granted the petition for review and reinstated the trial court's summary judgment, holding that the record lacked competent evidence to establish Khan's "apparent" and "obvious" intoxication at Cadot. While the evidence may have indicated that Khan consumed a large amount of alcohol and became intoxicated at some point before the accident, it merely permitted speculation as to how Khan *appeared* at Cadot. The Court also held that the trial court did not abuse its discretion in denying Myers's motion to continue the summary-judgment hearing, because Khan did not establish the materiality and purpose of the additional discovery sought.

FF. TEXAS CITIZENS PARTICIPATION ACT

1. Timeliness of Trial Court's Ruling

a) *First Sabrepoint Cap. Mgmt., L.P. v. Farmland Partners Inc.*, ___ S.W.3d ___, 2025 WL 1197255 (Tex. Apr. 25, 2025) [23-0634]

This case concerns (1) a trial court's authority to grant a motion to dismiss under the Texas Citizens Participation Act after the motion has been denied by operation of law, and (2) whether the defendants conclusively established that collateral estoppel bars the claims.

Farmland Partners sued Sabrepoint for damages allegedly caused by the publication of an article critical of Farmland. Farmland originally sued in Colorado, but that court dismissed for lack of personal jurisdiction. Farmland then sued in Texas. Sabrepoint moved to dismiss the suit under the TCPA. It also moved for summary judgment, arguing that Farmland's claims were precluded because the Colorado court determined that Sabrepoint was not involved with the article's publication. The trial court granted both motions.

The court of appeals held that the TCPA order was void because the trial court did not rule within thirty days of the hearing as required by statute. The court also reversed the summary judgment, concluding that Sabrepoint did not conclusively establish its collateral estoppel defense. Sabrepoint petitioned for review.

The Supreme Court reversed as to the TCPA order but affirmed as to the summary judgment. First, the

Court held that the trial court retained plenary power to reconsider the merits of the TCPA motion after it was denied by operation of law. Because the court ruled within the time Sabrepoint could have appealed that denial, any error in granting the TCPA motion after the statutory deadline was harmless. Second, the Court held that Sabrepoint did not conclusively establish that the Colorado court's findings were identical to facts that would preclude Farmland from prevailing on its claims in Texas, so summary judgment based on collateral estoppel was improper. The Court remanded to the court of appeals to address Sabrepoint's TCPA motion on its merits.

GG. TEXAS MEDICAID FRAUD PREVENTION ACT

1. Unlawful Acts

a) *Malouf v. State*, 694 S.W.3d 712 (Tex. June 21, 2024) [22-1046]

The issue in this case is whether Section 36.002(8) of the Texas Medicaid Fraud Prevention Act imposes civil penalties when a provider indicates their license type but fails to indicate their identification number on a claim form.

Richard Malouf owned All Smiles Dental Center. Two of Malouf's former employees filed *qui tam* actions against him alleging that he and All Smiles committed violations of the Texas Medicaid Fraud Prevention Act. The State intervened in both actions, consolidating them and asserting a claim under Section 36.002(8) of the Human Resources Code.

The State filed a motion for partial summary judgment, alleging that All Smiles submitted 1,842 claims under Malouf's identification number even though a different dentist actually provided the billed-for services. Malouf filed a no-evidence summary judgment motion, arguing that a provider violates Section 36.002(8) only when he fails to indicate both the license type *and* the identification number of the provider who provided the service. Because the forms all correctly indicated the correct license type, Malouf argued he did not violate the Act. The trial court denied Malouf's motion and granted the State's, entering a final judgment that fined Malouf over $16,500,000 in civil penalties. The court of appeals affirmed the trial court's judgment apart from the amount awarded in attorney's fees.

The Supreme Court reversed and rendered judgment in Malouf's favor. In an opinion by Justice Boyd, the Court held that based on the statute's grammatical structure, context, and purpose, Section 36.002(8) only makes unlawful the failure to indicate both the license type and the identification number of the provider who provided the service. The Court concluded that the State failed to demonstrate that Malouf committed unlawful acts under Section 36.002(8).

Justice Young filed a dissenting opinion. He would have held that Section 36.002(8) makes unlawful the failure to indicate either the type of license or the identification number.

III. GRANTED CASES

A. ADMINISTRATIVE LAW

1. Judicial Review

a) *Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, 665 S.W.3d 135 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0192]

This case concerns the validity of an administrative rule governing immigration detention centers and the mootness and reviewability of the rule challenge.

In 2014, U.S. Immigration and Customs Enforcement began to detain undocumented families with children at two immigration-detention centers in Texas. But a federal court ruled that ICE violated a consent decree requiring detained minors to be placed in facilities with appropriate state childcare licenses. After the ruling, the Texas Department of Family and Protective Services promulgated Rule 748.7, establishing licensing requirements for family residential centers.

The advocacy group Grassroots Leadership, several detained mothers, and a daycare operator sued the Department to challenge Rule 748.7. The private operators of the two detention centers intervened. After the trial court declared the rule invalid, the court of appeals dismissed the case for lack of standing. The Supreme Court reversed and remanded, holding that the detained mothers (and their children) sufficiently alleged concrete personal injuries traceable to the rule's adoption.

On remand, the Department and private operators argued that the dispute is now moot because the plaintiff–detainees are no longer detained and are not reasonably likely to be detained at the centers again. The court of appeals agreed but applied a public-interest exception to the mootness doctrine and affirmed the trial court's judgment that Rule 748.7 is invalid because the Department lacked statutory authority to promulgate it.

The Department and the private operators petitioned for review, arguing that the rule challenge is moot, there is no public-interest exception in Texas, and Rule 748.7 is valid. The Supreme Court granted the Department's and the private operators' petitions for review.

2. Jurisdiction

a) *Tex. Dep't of State Health Servs. v. Sky Mktg. Corp.*, ___ S.W.3d ___, 2023 WL 6299115 (Tex. App.—Austin 2023), *pet. granted* (Apr. 4, 2025) [23-0887]

At issue in this case is whether the agency responsible for maintaining Texas's schedules of controlled substances properly modified certain definitions within those schedules and whether the plaintiffs have standing to enjoin the effect of those modifications.

Federal and Texas law recently allowed commercial production and sale of hemp. The federal Drug Enforcement Administration issued an interim final rule to implement certain regulations consistent with the change in federal law. The Commissioner of the Texas Department of State Health Services refused to adopt language in the DEA's rule on the basis that doing so would legalize certain psychoactive isomers of THC. The Commissioner

also modified certain definitions in Texas's schedule of controlled substances relating to marihuana and THC, and DSHS later posted a statement on its website that any form of THC in consumable hemp products, save certain low concentrations of one isomer, constitutes a controlled substance.

Hemp sellers and consumers sued DSHS and the Commissioner, seeking declaratory and injunctive relief. They contend that DSHS and the Commissioner lacked authority to modify and publish the relevant definitions, which purport to prohibit the sale and consumption of legal products. DSHS and the Commissioner filed a plea to the jurisdiction, asserting that the plaintiffs lacked standing and that sovereign immunity barred their claims. The trial court denied the plea and granted a temporary injunction prohibiting both the changes to the Texas schedules and the website posting. The court of appeals affirmed.

DSHS and the Commissioner petitioned for review, arguing that the plaintiffs lack standing because they suffered no injury and because DSHS cannot enforce criminal penalties. They also contend that the Commissioner's actions were statutorily authorized and that the trial court abused its discretion in granting the temporary injunction. The Supreme Court granted the petition.

3. Public Information Act

a) *Paxton v. Am. Oversight*, 683 S.W.3d 873 (Tex. App.—Austin 2024), *pet. granted* (Dec. 21, 2024) [24-0162]

At issue is whether trial courts have jurisdiction to issue writs of mandamus against the Governor and Attorney General to compel information under the Public Information Act.

In 2021 and 2022, American Oversight submitted various PIA requests to the Office of the Governor and the Office of the Attorney General. These requests largely pertained to official governmental communications surrounding the events of January 6, 2021, and the 2022 shooting in Uvalde. Both offices provided some documents but also reported that they did not find documents responsive to the requests for communications between government officials and external entities, including the National Rifle Association. Both offices also sought to withhold information they view as excepted from disclosure. Both offices received open records letter rulings from OAG's Open Records Decision opining that the documents are excepted from disclosure and can be withheld.

American Oversight sued the Governor and Attorney General in their official capacities in Travis County district court, seeking a writ of mandamus to compel disclosure of the requested information. The Governor and Attorney General filed pleas to the jurisdiction asserting sovereign immunity and mootness. They argued, among other things, that American Oversight failed to plead a viable claim that they had "refuse[d]" to supply public information. The trial court denied the pleas. The court of appeals affirmed.

The Governor and Attorney General petitioned the Supreme Court for review, arguing that the trial court lacked mandamus jurisdiction over

American Oversight's suit because only the Supreme Court has jurisdiction to issue a writ of mandamus against executive officers. They also argue that American Oversight has not demonstrated a waiver of sovereign immunity by showing that the government refused to supply public information. The Court granted the petition.

b) *Tex. Comm'n on Env't Quality v. Sierra Club*, ___ S.W.3d ___, 2022 WL 17096693 (Tex. App.—Austin 2022), *pet. granted* (Apr. 4, 2025) [23-0244]

This case is about whether the Texas Commission on Environmental Quality met a deadline to request an Attorney General decision under the Public Information Act and whether the Commission must disclose the requested information regardless.

On July 1, 2019, Sierra Club requested information from the Commission pursuant to the Act. On July 2, the Commission emailed Sierra Club, asking whether it intended to seek confidential information. The same day, Sierra Club responded that it did. The Commission was closed on July 4 and 5 in observance of Independence Day. It ultimately provided some documents but withheld others, claiming they were confidential under the deliberative-process privilege. The Commission sought an Attorney General decision on that issue, as required by the Act. The Commission deposited its decision request in interagency mail on July 17, and the Attorney General received the request on July 18.

The Attorney General required the Commission to disclose the information because (1) the Commission requested an Attorney General decision after its ten "business day" deadline to do so had expired, and (2) there was no "compelling reason to withhold the information." The Commission sued for declaratory relief, and Sierra Club intervened. The trial court granted summary judgment requiring disclosure. The court of appeals affirmed.

The Commission petitioned the Supreme Court for review, arguing it met its deadline for either of two reasons: first, July 5 was not a "business day" because the Commission was closed; second, the Commission's July 2 email was a clarification or narrowing request and thus reset the ten-business-day clock. The Commission also argued that, even if it missed the deadline, the deliberative-process privilege is a "compelling reason" for nondisclosure. The Supreme Court granted the petition.

4. Texas Water Code

a) *Cockrell Inv. Partners, L.P. v. Middle Pecos Groundwater Conservation Dist.*, 676 S.W.3d 677 (Tex. App.—El Paso 2023), *pet. granted* (Apr. 4, 2025) [23-0593], *consolidated for oral argument with Cockrell Inv. Partners, L.P. v. Middle Pecos Groundwater Conservation Dist.*, 677 S.W.3d 727 (Tex. App.—El Paso 2023), *pet. granted* (Apr. 4, 2025) [23-0742]

These petitions concern the statutory requirements for waiving a groundwater district's immunity under the Texas Water Code.

Petitioner Cockrell sought party status to challenge a neighboring landowner's administrative application for a groundwater-production permit. The District rejected Cockrell's request, and Cockrell requested a rehearing. Believing that the rehearing request was denied by operation of law under the District's Local Rules after forty-five days, Cockrell sought judicial review under the Water Code. The District (and other defendants) filed pleas to the jurisdiction, arguing Cockrell failed to exhaust its administrative remedies because it sought judicial review before its rehearing request expired by operation of law under the Water Code's ninety-day deadline. The trial court granted the pleas and dismissed Cockrell's case.

As the disputed permit's renewal date drew near, Cockrell again sought party status, this time to protest the renewal. Without addressing Cockrell's latest party-status request, the District renewed the neighbor's permit. Cockrell requested a rehearing, but as before, Cockrell believed the rehearing request was denied by operation of law when the District failed to issue a decision before the Local Rule's forty-five-day deadline. Cockrell sought judicial review, and the District (and other defendants) jointly filed a motion for summary judgment. The trial court granted the motion and dismissed Cockrell's case.

In both cases, Cockrell appealed, and the court of appeals affirmed, holding that Cockrell failed to satisfy the Water Code's administrative-exhaustion requirement, instead seeking judicial review before its rehearing request expired by operation of law under the Code's ninety-day deadline, and that Cockrell's claims for declaratory relief could not proceed without a valid waiver of immunity.

Cockrell petitioned for review in each case, arguing that the Water Code's statutory requirements for waiving the District's immunity do not apply to Cockrell because it is not "an applicant or a party to a contested hearing" under the Water Code and that Cockrell's claims for declaratory relief can proceed because the District and its officials acted ultra vires. The Supreme Court granted the petitions.

B. ARBITRATION

1. Enforcement of Arbitration Agreement

a) *Pearland Urb. Air, LLC v. Cerna*, 693 S.W.3d 711 (Tex. App.—Houston [14th Dist.] 2024), *pet. granted* (Jan. 31, 2025) [24-0273]

The issue in this case is whether an arbitrator or a court should determine whether an arbitration agreement signed during an earlier visit to a trampoline park governs an incident that occurred during a later visit.

Abigail Cerna and her minor son, R.W., visited an Urban Air trampoline park in August 2020. At that visit, Cerna—on R.W.'s behalf—signed a release containing an arbitration clause that delegated questions of arbitrability to the arbitrator. Cerna and R.W. visited the same park again in November without signing a new agreement. During the later visit, R.W. cut his foot while jumping on a trampoline.

Cerna sued Urban Air for negligence. Urban Air moved to compel

arbitration, arguing that the agreement signed by Cerna in August applied to the November visit and that, in any case, the arbitrator must resolve the arbitrability dispute. The trial court denied Urban Air's motion to compel arbitration, and Urban Air filed an interlocutory appeal. The court of appeals reversed, holding first that the August agreement was a valid arbitration agreement and second that the question of whether the August agreement applied to the November visit is one of scope, not existence, which must be decided by the arbitrator given the delegation in the August agreement.

Cerna petitioned the Supreme Court for review, arguing that the threshold question is one of existence—whether any valid arbitration clause exists that applies to the November visit—and that this threshold question must therefore be determined by a court. The Supreme Court granted the petition for review.

C. ATTORNEYS

1. Barratry

a) *Cheatham v. Pohl*, 690 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (May 31, 2024) [23-0045]

This case raises questions about the extraterritorial reach of Texas's civil barratry statute and whether barratry claims are subject to a two- or four-year statute of limitations.

Mark Cheatham, a Louisiana plaintiff, hired Texas attorneys, Michael Pohl and Robert Ammons, to represent him in a wrongful-death suit. Cheatham later asserted civil barratry claims against Pohl and Ammons in Texas, alleging that the attorneys paid a sham financing company run by Pohl's wife, Donalda, to offer him money for funeral expenses as an incentive to hire Pohl and Ammons.

Pohl and Ammons filed motions for partial summary judgment, asserting that Cheatham's claims were barred by a two-year statute of limitations. The trial court denied the motions, concluding that a four-year statute of limitations applied. Pohl, Ammons, and Donalda filed subsequent motions for summary judgment, asserting that the barratry statute has no extraterritorial reach to conduct that occurred out of state. The trial court granted the motions. The court of appeals reversed and remanded, reasoning that the attorneys' conduct occurred in Texas, but even if it had not, the statute can permissibly be extended to out-of-state conduct.

Pohl, Donalda, and Ammons petitioned for review, arguing that the court of appeals impermissibly extended the reach of the barratry statute and maintaining that such claims are subject to a two-year statute of limitations. The Supreme Court granted their petitions for review.

2. Disciplinary Proceedings

a) *In re Lane*, Cause No. 67623 (BODA Nov. 16, 2023), *argument granted on disciplinary appeal* (Aug. 30, 2024) [23-0956]

The main issue in this disciplinary appeal is whether the four-year limitations period in Texas Rule of Disciplinary Procedure 17.06 applies to a judgment imposing reciprocal discipline under Part IX of the rules.

In early 2023, the Illinois Supreme Court issued a final judgment suspending Lane for inappropriate emails she sent to a federal magistrate judge in 2017. After Lane sent a copy of that judgment to Texas's Chief Disciplinary Counsel, the Commission for Lawyer Discipline filed a petition for reciprocal discipline with the Board of Disciplinary Appeals. In November 2023, after a hearing, BODA issued its judgment of identical discipline with two members dissenting.

The BODA majority and dissent disagree whether Rule 17.06 applies to reciprocal-discipline proceedings and, if it does, whether Lane waived the defense by failing to raise it in her response to the Commission's petition or at the hearing. Rule 17.06 states a general rule prohibiting discipline "for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging Professional Misconduct is received by the Chief Disciplinary Counsel." The rule contains express exceptions for compulsory discipline under Part VIII and for prosecutorial misconduct.

The arguments presented by Lane and the Commission in this appeal address whether reciprocal discipline is initiated by a Grievance, whether the limitations rule is compatible with the procedure for reciprocal discipline in Part IX, whether the lack of an express exception for reciprocal discipline in Rule 17.06 is meaningful, and whether the limitations rule is an affirmative defense that is waived if not timely raised.

The Supreme Court set the appeal for oral argument.

3. Disqualification

a) *In re Zaidi*, ___ S.W.3d ___, 2024 WL 194353 (Tex. App.—Houston [14th Dist.] 2024) (per curiam), *argument granted on pet. for writ of mandamus* (Apr. 4, 2025) [24-0245]

At issue in this case is whether the trial court clearly abused its discretion in granting Shah's motion to disqualify Zaidi's counsel.

Shah sued Zaidi after a real-estate deal turned sour. Felicia O'Loughlin provided legal asstannce to Fred Wahrlich of the law firm Munsch Hardt. O'Loughlin then took a job at the law firm Hicks Thomas. Robin Harrison later joined Hicks Thomas and brought Zaidi with him as a client. For a few years, O'Loughlin assisted Harrison with the *Shah v. Zaidi* matter. In February 2023, Shah's counsel notified Harrison that they believed O'Loughlin had worked with Wahrlich on this case while at Munsch Hardt. Shah then moved to disqualify Harrison and Hicks Thomas due to the firm's employment of O'Loughlin.

The trial court granted the motion, and the court of appeals denied mandamus relief. Zaidi petitioned the Supreme Court, arguing that the trial court clearly abused its discretion in granting the motion to disqualify despite *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994), and its progeny. The Supreme Court set the case for argument.

D. CONSTITUTIONAL LAW

1. Administrative Subpoenas

a) *Paxton v. Annunciation House, Inc., argument granted on notation of probable jurisdiction over direct appeal* (Aug. 23, 2024) [24-0573]

This direct appeal case concerns a constitutional challenge to the Attorney General's administrative subpoena powers. Pursuant to its authority to examine books and records of businesses registered in Texas, the Attorney General served an administrative subpoena on Annunciation House, a Catholic volunteer organization, seeking a variety of documents pertaining to individuals that received certain services from Annunciation House.

Annunciation House sought a declaratory judgment against the Attorney General, challenging the administrative subpoena on constitutional grounds, and later filed a no-evidence and traditional motion for summary judgment. The Attorney General cross-filed an application for temporary injunction, leave to file a quo warranto counterclaim, and a plea to the jurisdiction, which, among other things, sought to revoke Annunciation House's business registration.

The trial court granted Annunciation House's summary judgment motion, concluding that the administrative subpoena statute was facially unconstitutional and entering injunctive relief against the Attorney General as to future administrative subpoenas served on Annunciation House. In a separate order, the trial court also denied the State's application for temporary injunction and leave to file an amended petition asserting the quo warranto counterclaim, concluding that two provisions of the Texas penal code that served as the basis for the quo warranto counterclaim were preempted by federal law and that the penal code provisions and the quo warranto statute were unconstitutionally vague in violation of due course of law and therefore unenforceable. The Attorney General filed a direct appeal with the Court.

2. Due Process

a) *Stary v. Ethridge*, 695 S.W.3d 417 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Aug. 30, 2024) [23-0067]

This case concerns the proper burden of proof to support a permanent protective order that prohibits contact between a parent and minor child.

Christine Stary and Brady Ethridge divorced in May 2018. In March 2020, Ethridge filed an application for a protective order, alleging that Stary had committed acts of family violence and abuse against their children, including an arrest for third-degree felony offense of injury to a child. The trial court granted the protective order, prohibiting Stary from having any contact with the children, stating that the order would remain in effect "in permanent duration for [Stary's] lifetime" subject to the children filing a motion to modify the order.

Stary appealed, and the court of appeals affirmed. It held that the "permanent" protective order did not effectively terminate Stary's parental rights, and, thus, due process did not require application of the "clear and convincing evidence" standard of proof;

that the evidence is legally and factually sufficient to support the order; and that the trial court's exclusion of Ethridge's history of domestic violence was not reversible error.

Stary petitioned for review, arguing that due process requires a heightened standard of proof and that the evidence adduced does not rise to that level. The Supreme Court granted the petition.

b) *Thompson v. Landry*, 704 S.W.3d 21 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0875]

The issue in this case is whether a tax sale of real property can be challenged on due process grounds if the original owner had notice of the tax sale before the Tax Code's limitations period ended.

Mae Landry inherited her grandmother's interest in a twelve-acre property. Tax authorities obtained a 2015 default judgment, foreclosing liens on the property to collect delinquent property taxes. They served all defendants by posting notice on the courthouse door. Cindy Thompson later purchased the property at a tax sale. Landry lived on the property before and after the sale, and her husband paid rent to Thompson until Thompson asked the Landrys to vacate. Ten years after the sale of the property, Landry sued to void the default judgment and to quiet title, alleging that citation by posting violated her constitutional right to procedural due process.

The trial court granted Landry's summary judgment motion and declared the default judgment void, denying Thompson's summary judgment motions based on limitations and laches. The court of appeals reversed, holding that a fact issue existed as to whether Landry's due process rights were violated.

Thompson petitioned for review, arguing that the court of appeals incorrectly applied Texas Supreme Court precedent. Thompson argues that Landry had actual notice of the default judgment, and this notice prevents her due process claim. She also argues that Landry's claim is barred by the Tax Code, which imposes a two-year limitations period on claims disputing title against purchasers if the original owner lived in the property as her homestead when a delinquent tax suit was first filed. The Supreme Court granted the petition.

3. Religion Clauses

a) *Perez v. City of San Antonio*, 2024 WL 3963878 (5th Cir. Aug. 28, 2024), *certified question accepted* (Sep. 6, 2024) [24-0714]

This certified question concerns Article I, Section 6-a of the Texas Constitution, which prohibits the state of Texas and its political subdivisions from prohibiting or limiting religious services.

The City of San Antonio's plans to improve Brackenridge Park require the City to temporarily close the Lambert Beach area of the park. Plaintiffs Gary Perez and Matilde Torres—who are members of the Native American Church and consider the Lambert Beach area a sacred place—sued the City, alleging that the City's planned changes to and temporary closure of

Lambert Beach violate Section 6-a. The district court denied plaintiffs' request for access to the Lambert Beach area for individual worship and their request to minimize tree removal.

The Fifth Circuit seeks guidance from the Supreme Court regarding the scope of Section 6-a. The City argues that the changes aim to promote safety and public health, while plaintiffs contend that Section 6-a does not even allow the City to try to satisfy strict scrutiny. The Fifth Circuit certified the following question to the Texas Supreme Court:

> Does the "Religious Service Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—impose a categorical bar on any limitation of any religious service, regardless of the sort of limitation and the government's interest in that limitation?

The Court accepted the certified question.

E. CONTRACTS

1. Damages

a) *Simmons v. White Knight Dev., LLC*, 703 S.W.3d 136 (Tex. App.—Waco 2023), *pet. granted* (Dec. 20, 2024) [23-0868]

This case concerns whether a seller awarded specific performance of a real estate contract is also entitled to monetary compensation for expenses incurred because of the purchaser's late performance.

In 2016, Dick and Julie Simmons sold real estate to White Knight Development with a "buy back" agreement requiring the Simmonses to repurchase the property if subdivision residents extended certain deed restrictions by 2018. Residents extended the restrictions in October 2016, and White Knight demanded the Simmonses perform the buy back agreement. They refused, and White Knight sued for specific performance, breach of contract, and fraud in the inducement of a real estate contract. After a bench trial, the trial court found the Simmonses liable for breach of contract and ordered specific performance. It also awarded White Knight "actual damages/consequential damages" for expenses incurred between the time the Simmonses should have performed and the trial.

The court of appeals affirmed the order of specific performance but modified the judgment to delete the monetary award to White Knight. It recognized that courts may award compensation incidental to specific performance to account for the delay in performance and adjust the equities between the parties. But here, the court reasoned, nothing indicates that the trial court made the monetary award to adjust the equities, as it spoke only of damages from the breach. The court of appeals thus deleted the award on the ground that White Knight cannot receive both specific performance and damages for the breach.

White Knight petitioned for review. It argues that the trial court's findings of fact and conclusions of law demonstrate that it made the monetary award to adjust the equities between the parties. Additionally, White Knight argues that the court of appeals improperly invoked a magic-words requirement that prevents warranted

incidental compensation because it is labeled as damages. The Supreme Court granted the petition.

2. Interpretation

a) *Am. Midstream (Ala. Intrastate), LLC v. Rainbow Energy Mktg. Corp.*, 667 S.W.3d 837 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Oct. 18, 2024) [23-0384]

This case involves contract interpretation and repudiation, lost-profits damages, and the election-of-remedies doctrine.

American Midstream owns the Magnolia natural gas pipeline. Rainbow, a natural gas trading company, contracted with American Midstream to transport natural gas on the Magnolia. The parties' contract required American Midstream to provide "firm" transportation and balancing services absent certain contractual exemptions. American Midstream limited its balancing services on various occasions and claims that it was excused from performing under the contract. The parties' representatives spoke on a conference call in which Rainbow claims American Midstream repudiated the contract. A month later, after continuing to ship gas under the contract, Rainbow terminated the contract, citing American Midstream's breach and repudiation.

Rainbow sued American Midstream for breach of contract and related claims. After a bench trial, the trial court found for Rainbow on all its claims, and Rainbow elected to recover on its breach-of-contract claim. The trial court awarded Rainbow more than $6 million in lost-profit damages. In a divided opinion, the court of appeals affirmed. It held that the trial court properly interpreted the contract and sufficient evidence supports the trial court's findings of breach and its award of lost profits.

American Midstream petitioned the Supreme Court for review. It argues that (1) the contract excused American Midstream's performance; (2) the trial court erred by awarding Rainbow speculative lost profits; and (3) the court of appeals erred by creating an exception to the election-of-remedies doctrine for contracts "performed as discrete transactions conducted on an on-going basis." The Court granted the petition.

b) *Am. Pearl Group, L.L.C. et al. v. Nat'l Payment Systems, L.L.C.*, 2024 WL 4132409 (5th Cir. Sept. 10, 2024), *certified question accepted* (Sept. 20, 2024) [24-0759]

This certified question asks the Supreme Court to construe statutory language governing the computation of interest to determine whether a loan agreement is usurious. American Pearl Group, L.L.C., John Sarkissian, and Andrei Wirth entered into a debt financing agreement with National Payment Systems, L.L.C, which included a specified total amount to be repaid over forty-two months of payments and a payment schedule listing each individual payment's allocation towards principal and interest. However, the agreement did not list an exact percentage interest rate.

American Pearl sued NPS, seeking a declaration that the debt financing agreement and a related option

agreement violated Texas's usurious interest statute because the total amount of interest under the agreement was more than the maximum allowable amount under Texas law. The trial court granted NPS's motion to dismiss, utilizing the "spreading" method for calculating interest and determining that, based on that calculation, the total amount of interest was less than the statutorily maximum allowable amount.

The Fifth Circuit reversed the dismissal of American Pearl's usury claim relating to the option agreement but, as to the debt financing agreement, recognized that the "spreading" method was derived from Texas Supreme Court decisions involving distinguishable interest-only loans and that there was a lack of clear guidance for computing the maximum allowable interest for the loan entered into by the parties. The Fifth Circuit therefore certified the following question to the Texas Supreme Court:

> Section 306.004(a) of the Texas Finance Code provides: "To determine whether a commercial loan is usurious, the interest rate is computed by amortizing or spreading, using the actuarial method during the stated term of the loan, all interest at any time contracted for, charged, or received in connection with the loan." If the loan in question provides for periodic principal payments during the loan term, does computing the maximum allowable interest rate "by amortizing or spreading, using the actuarial method" require the court to base its interest calculations on the declining principal balance for each payment period, rather than the total principal amount of the loan proceeds?

The Court accepted the certified question.

F. CORPORATIONS

1. Nonprofit Corporations

a) *S. Cent. Jurisdictional Conf. of the United Methodist Church v. S. Methodist Univ.*, 674 S.W.3d 334 (Tex. App.—Dallas 2023), *pet. granted* (Oct. 18, 2024) [23-0703]

At issue in this case is whether a nonmember nonprofit corporation may amend its articles of incorporation when those articles provided that no amendments shall be made without the prior approval of a religious conference.

Southern Methodist University is a nonprofit corporation founded by a predecessor-in-interest to the South Central Jurisdictional Conference of the United Methodist Church. Since its founding, the University's articles of incorporation stated that it was to be owned, maintained, and controlled by the Conference and that the Conference possessed the right to approve all amendments. In 2019, without the Conference's approval, the University's board of trustees amended its articles to remove these provisions and filed a sworn certificate of amendment with the secretary of state. The Conference sued the University, seeking declaratory relief and asserting breach of contract, promissory estoppel, breach of fiduciary duty, and a statutory claim alleging that the University filed a materially false amendment certificate.

The trial court dismissed some of the Conference's claims before granting summary judgment for the University on the remaining claims. The court of appeals affirmed in part and reversed in part, holding that the Conference was authorized to challenge the University's amendments under the Business Organizations Code, that both statements of opinion and fact could be actionable as materially false filings, and that plaintiffs can recover damages for nonpecuniary losses caused by those filings.

The University petitioned for review. It argues that the Conference is barred from bringing its breach-of-contract claim, that the University's articles cannot constitute a contract with the Conference, that the complained-of statements in the University's amendment certificate were good-faith legal opinions that cannot be materially false, and that the Conference could not have suffered the damages requisite for its statutory claim. The Supreme Court granted the petition.

G. EMPLOYMENT LAW

1. Employment Discrimination

a) *Butler v. Collins*, 2024 WL 3633698 (5th Cir. Aug. 2, 2024), *certified question accepted* (Aug. 9, 2024) [24-0616]

This certified question case concerns whether the Texas Commission on Human Rights Act preempts common law tort claims brought against the plaintiff's former coworkers.

After Southern Methodist University denied Professor Cheryl Butler's application for tenure and promotion, Butler filed suit against SMU and various SMU employees, asserting various statutory and common law claims, including common law claims of fraud, defamation, and conspiracy to defame against the defendant-employees. The district court granted a motion to dismiss against Butler on some of her claims, finding that the common law claims brought against the defendant-employees were preempted by the TCHRA.

The Fifth Circuit noted that the Texas Supreme Court has held that the TCHRA preempts common-law tort claims asserted against the plaintiff-employee's employer but has not addressed whether the TCHRA preempts such claims brought against other employees. The Fifth Circuit therefore certified the following question regarding Butler's claims against the defendant–employees:

> Does the Texas Commission on Human Rights Act ("TCHRA"), TEXAS LABOR CODE § 21.001, *et seq.*, preempt a plaintiff-employee's common-law defamation and/or fraud claims against another employee to the extent that the claims are based on the same course of conduct as discrimination and/or retaliation claims asserted against the plaintiff's employer?

The Court accepted the certified question.

H. EVIDENCE

1. Medical Expense Affidavits

a) *Ortiz v. Nelapatla*, ___ S.W.3d ___, 2023 WL 4571916 (Tex. App.—Dallas

2023), *pet. granted* (Apr. 4, 2025) [23-0953]

This personal injury case concerns the admissibility of partially controverted affidavits offered to prove the reasonableness and necessity of medical expenses.

Ortiz and Nelapatla were involved in a car crash, and Ortiz sued Nelapatla for negligence. Prior to trial, Ortiz served medical-provider affidavits pursuant to Texas Civil Practice and Remedies Code Section 18.001. In response, Nelapatla timely served counteraffidavits challenging the reasonableness and necessity of a portion, but not all, of Ortiz's medical expenses. Nelapatla objected that the affidavits were inadmissible because he contravened them with counteraffidavits and because they were hearsay. The trial court sustained Nelapatla's objections. Ortiz moved to offer the counteraffidavits into evidence because she had designated the authors as experts. Nelapatla objected, and the court sustained the objection. Ortiz offered the affidavits twice more at trial, with Nelapatla objecting both times on the same grounds as before. The trial court sustained both objections.

The trial court granted Ortiz a money judgment for her past medical expenses. A divided court of appeals affirmed.

Ortiz filed a petition for review. Ortiz argues that the plain text of Section 18.001 supports the admission of the undisputed portions of the affidavits. Ortiz also argues that Section 18.001 does not restrict the use of counteraffidavits as evidence of the claimant's uncontested expenses because the affidavits are a party-opponent statement that can be used against the party who made them—namely, Nelapatla. The Supreme Court granted the petition.

I. FAMILY LAW

1. Divorce Decrees

a) *Morrison v. Morrison*, ___ S.W.3d ___, 2023 WL 8288316 (Tex. App.—Tyler 2023), *pet. granted* (Apr. 4, 2025) [24-0053]

The central issue in this case is whether a post-divorce enforcement order that applied an agreed divorce decree's damages provision impermissibly changed the substantive division of property after the trial court's plenary power had expired.

Debbie and Rodney Morrison finalized their divorce in an agreed divorce decree. The decree memorialized terms of their mediated settlement agreement, which included a negotiated damages provision. The provision provides that if a party violates the decree by failing to timely deliver property, it "shall result in the award of damages (including a redistribution of cash or other assets) and attorney's fees to the other party." When Rodney violated the divorce decree, Debbie sought enforcement. After finding that Rodney committed numerous violations of the decree, the trial court assessed damages and ordered a redistribution of property that resulted in Rodney's divestment of certain assets.

Rodney appealed, arguing that the enforcement order impermissibly altered the decree's property division after the trial court's plenary power expired. The court of appeals agreed,

vacating the trial court's order and dismissing the case.

The Supreme Court granted Debbie's petition for review. She argues that the damages provision is enforceable because it was contractually agreed to by the parties in an agreed divorce decree.

2. Spousal Support

a) *Mehta v. Mehta*, 703 S.W.3d 100 (Tex. App.—Fort Worth 2023), *pet. granted* (Oct. 25, 2024) [23-0507]

The principal issue in this case is whether child-support payments should be considered when determining a spouse's eligibility for spousal maintenance.

Manish Mehta filed for divorce from his spouse, Hannah Mehta. In the final divorce decree, the trial court ordered Manish to pay child support and spousal maintenance to Hannah. Manish appealed, arguing that the evidence is legally insufficient to support the spousal maintenance award under Chapter 8 of the Texas Family Code.

The Family Code allows the trial court to award spousal maintenance when the spouse seeking maintenance will lack sufficient property upon divorce to provide for their minimum reasonable needs. In its review, the court of appeals included Manish's child support payments as part of the property available to provide for Hannah's minimum reasonable needs. It then reviewed evidence of Hannah's minimum reasonable needs. After comparing the two, the court reversed the award of spousal maintenance, holding that Hannah is ineligible for spousal maintenance because she has sufficient property to provide for her needs.

Hannah filed a petition for review. She argues that the court of appeals erred because spousal maintenance is intended to provide only for the spouse's needs, while the purpose of child support is to financially support the children. Accordingly, Hannah argues that receipt of child support should not be considered when determining a spouse's eligibility for spousal maintenance. The Supreme Court granted the petition.

3. Termination of Parental Rights

b) *In re H.S.*, ___ S.W.3d ___, 2024 WL 1207304 (Tex. App.—Fort Worth 2024), *pet. granted* (Apr. 4, 2025) [24-0307]

The issues in this case are whether there was legally sufficient evidence to support a parental termination order and whether the trial court abused its discretion by denying a motion to extend the mandatory dismissal date.

Mother and Father separately challenge an order terminating their parental rights to their three children. The Department of Family and Protective Services removed the children after discovering Father, who had previously assaulted Mother, returned home in violation of a safety plan Mother had signed. The jury heard evidence that Father had threatened suicide while the children were home and that both parents made some progress in completing their service plans, but neither plan was completed before the trial. Mother moved to extend the statutory dismissal date to allow her more time

to complete her plan, but the trial court denied the motion.

After a jury trial, the trial court rendered judgment terminating both parents' rights to all three children. The court of appeals affirmed, concluding the evidence was legally and factually sufficient to support both endangerment grounds for termination and that termination was in the children's best interest.

Both parents petitioned for review. Mother challenges the trial court's denial of her motion to extend the dismissal date and argues that the evidence is legally insufficient to terminate her rights. Father argues the evidence is legally insufficient to support termination of his rights. The Supreme Court granted both petitions.

J. FEDERAL PREEMPTION

1. Railway Labor Act

a) *Sw. Airlines Pilots Ass'n v. Boeing Co.*, 704 S.W.3d 832 (Tex. App.—Dallas 2022), *pet. granted* (Jan. 10, 2025) [22-0631]

This case raises questions of federal preemption and the assignability of causes of action.

In 2016, the Southwest Airlines Pilots Association entered a collective bargaining agreement with the airline on behalf of its member pilots and agreed that the pilots would fly the new Boeing 737 MAX aircraft. The FAA grounded the aircraft in 2019, and SWAPA sued Boeing in state court on behalf of itself and its pilots for the resulting damages. Boeing removed the case to federal court, but that court determined it lacked jurisdiction and remanded. While the remand motion was pending, over 8,000 pilots assigned all grounding-related claims against Boeing to SWAPA. Boeing filed a plea to the jurisdiction following the remand, arguing that SWAPA lacked standing to bring claims on behalf of the pilots and that the Railway Labor Act preempted SWAPA's own state law claims. The trial court granted the plea and dismissed both sets of claims with prejudice.

The court of appeals reversed in part and modified the trial court's judgment in part. It held that SWAPA did not meet the associational standing requirements to bring claims on behalf of its pilots. But the court recognized that the pilots' assignment of their claims could confer standing on SWAPA in a future suit and modified the trial court's dismissal as to those claims to be without prejudice. It then held that SWAPA possessed standing to bring claims on its own behalf and reversed the trial court's dismissal of those claims. Finally, the court held that SWAPA's own claims were not preempted by the Act because it only preempts claims between airline carriers and employees.

Boeing petitioned for review. It argues that the Act preempts all claims requiring the interpretation of a collective bargaining agreement and not just those involving airline carriers and employees. Boeing also argues that the pilots' assignments could not confer future standing on SWAPA because they circumvent associational standing limitations and should be invalidated on public policy grounds. On rehearing, the Supreme Court granted Boeing's petition for review.

K. GOVERNMENTAL IMMUNITY

1. Independent Contractors

a) *Third Coast Servs., LLC v. Castaneda*, 679 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2023), *pet. granted* (Apr. 4, 2025) [23-0848]

At issue in this case is whether the statutory immunity afforded to a contractor who constructs a highway "for the Texas Department of Transportation" requires contractual privity between that contractor and the Department.

Pedro Castaneda was fatally struck by two large trucks when he attempted to drive across the intersection of State Highway 249 and Woodtrace Boulevard. At the time of the accident, the intersection was under construction pursuant to a contract between the Department of Transportation and Montgomery County. The Castaneda family sued the general contractor, SpawGlass, and the subcontractor hired to install traffic signals, Third Coast, alleging negligence and gross negligence.

SpawGlass and Third Coast each moved for traditional summary judgment, arguing they were entitled to statutory immunity because they were highway contractors for the Department. When the trial court denied the motions, SpawGlass and Third Coast each filed an interlocutory appeal. The court of appeals affirmed, holding that because the Government Code requires privity between the Department and the contractor invoking immunity. SpawGlass and Third Coast were hired by the County and thus ineligible for statutory immunity.

SpawGlass and Third Coast each petitioned for review, arguing that the court of appeals impermissibly read a privity requirement into the statute that was not reflected by its plain language. The Supreme Court granted both petitions.

L. INSURANCE

1. Policies/Coverage

a) *Mankoff v. Privilege Underwriters Reciprocal Exch.*, ___ S.W.3d ___, 2024 WL 322297 (Tex. App.—Dallas 2024), *pet. granted* (Apr. 4, 2025) [24-0132]

The issue in this case is whether the term "windstorm," when undefined in a homeowner's insurance policy, includes a tornado.

After the Mankoffs' home was damaged by a tornado, they submitted a claim under their homeowner's policy. The insurer, PURE, paid most of the claim but withheld a portion under the policy's "Windstorm or Hail Deductible." The Mankoffs sued PURE for breach of contract and sought a declaration that a tornado is not a "windstorm" under the policy, so the deductible did not apply. On cross-motions for summary judgment, the trial court granted PURE's motion and rendered a take-nothing judgment against the Mankoffs.

A divided court of appeals reversed. The majority held that "windstorm" is ambiguous because it is susceptible to two reasonable meanings—one that includes a tornado, and one that does not. Concluding that the Mankoffs' interpretation was reasonable, it held that the trial court was required to construe the policy in their

favor. The dissenting justice would have held that a tornado is unambiguously a "subtype" of windstorm.

PURE petitioned for review, arguing that the court of appeals erred in concluding the term "windstorm" was ambiguous because the only reasonable construction of "windstorm" includes a tornado. PURE also contends the court of appeals erred by relying on improper sources to determine a term's plain meaning. The Supreme Court granted the petition.

M. JURISDICTION

1. Personal Jurisdiction

a) *BRP-Rotax GmbH & Co. KG v. Shaik*, 698 S.W.3d 305 (Tex. App.—Dallas 2023), *pet. granted* (June 14, 2024) [23-0756]

The issue in this case is whether the trial court had specific jurisdiction over a foreign manufacturer for claims based on an allegedly defective product.

Sheema Shaik suffered serious injuries when a plane she was flying crashed at an airport in Texas. She and her husband sued BRP-Rotax, the plane's engine manufacturer, asserting claims for strict products liability, negligence, and gross negligence. Rotax is based in Austria and sells its engines to international distributors who then sell the engines worldwide. The engine in this case was sold by Rotax under a distribution agreement to a distributor in the Bahamas whose designated territory included the United States.

The trial court denied Rotax's special appearance contesting personal jurisdiction. The court of appeals affirmed. Applying the stream-of-commerce-plus test, the court held that Rotax purposefully availed itself of the Texas market and that Shaik's claims arose from or related to those contacts with Texas.

Rotax petitioned this Court for review. It argues that all relevant contacts with Texas were initiated by Rotax's distributor, which Rotax had no control over or ownership interest in. In response, Shaik argues that Rotax's distribution agreement indicated an intent to serve the U.S. market, including Texas, and that Rotax maintained a website that allowed Texas customers to register their engines and identified a Texas-based repair center. The Court granted the petition for review.

2. Political Questions

a) *Elliott v. City of College Station*, 674 S.W.3d 653 (Tex. App.—Texarkana 2023), *pet. granted* (October 18, 2024) [23-0767]

At issue is whether claims under the Texas Constitution's "republican form of government" clause present a nonjusticiable political question.

Shana Elliott and Lawrence Kalke live in the City of College Station's extraterritorial jurisdiction. They cannot vote in City elections, but City codes regulate their property. Elliott and Kalke seek to place portable signs on their property and build a driveway for a mother-in-law suite. City ordinances prohibit portable signs and require a permit to build a driveway.

Elliott and Kalke sued the City and its officials, alleging that the ordinances facially violate the Texas Bill of Rights' "republican form of

government" clause by regulating them despite their inability to vote in City elections. The City argued that the claims are not ripe because the ordinances have not been enforced against the plaintiffs. The City also argued that claims under the "republican form of government" clause present a nonjusticiable political question. The trial court agreed and granted the City's plea to the jurisdiction. The court of appeals affirmed.

The plaintiffs filed a petition for review. They argue that they have standing and that their claims are ripe and justiciable. The Supreme Court granted the petition.

N. MEDICAL LIABILITY

1. Expert Reports

a) *Columbia Med. Ctr. of Arlington Subsidiary, L.P. v. Bush*, 692 S.W.3d 606 (Tex. App.—Fort Worth 2023), *pet. granted* (June 21, 2024) [23-0460]

The issue in this case is the sufficiency of an expert report supporting a health care liability claim against a hospital directly under Chapter 74 of the Civil Practice and Remedies Code.

Ireille Williams-Bush died from pulmonary embolism soon after she was discharged from Columbia Medical Center's emergency department. She had presented to the ER with chest pain, shortness of breath, and severe fainting. The ER physicians diagnosed Ireille with cardiac-related conditions, never screened her for pulmonary embolism, and discharged her in stable condition with instructions to follow up with a cardiologist.

Ireille's husband, Jared Bush, sued the hospital for medical negligence. Bush served the hospital with an expert report prepared by a cardiologist, who opined that the hospital should have had a testing protocol to rule out pulmonary embolism and other emergency conditions prior to discharge. The expert also opined that having this protocol would have resulted in a proper diagnosis and precluded Ireille's discharge and eventual death.

The hospital objected to the expert report and moved to dismiss Bush's claim. The trial court denied the motion, but the court of appeals reversed and directed the trial court to dismiss the claim with prejudice. The court of appeals held that the report is conclusory, and therefore insufficient, on the element of causation. The court of appeals reasoned that the report fails to explain how a hospital policy—which can only be implemented by medical staff—could have changed the decisions, diagnoses, and orders of Ireille's treating physicians.

Bush petitioned the Supreme Court for review, arguing that the court of appeals misinterpreted the Court's caselaw to impose too high a burden for causation in a direct-liability claim and that the report is sufficient because it provides a fair summary of the causal link between the hospital's failure and Ireille's death. The Supreme Court granted the petition.

2. Health Care Liability Claims

a) *Leibman v. Waldroup*, 699 S.W.3d 20 (Tex. App.—Houston [1st Dist.] 2023), *pet.*

granted (Sept. 27, 2024) [23-0317]

The main issue in this appeal is whether the plaintiffs' negligence suit against Leibman to recover damages for injuries sustained in a dog attack triggered the Texas Medical Liability Act's expert-report requirement.

Dr. Leibman, a gynecologist, wrote a series of letters to the landlord of his patient, stating that the patient has generalized anxiety disorder, she has four certified service animals, and she appears to need these service animals to control her anxiety. The purpose of the letters was to help the patient avoid eviction. At some point after the first note was written, the patient registered her dog Kingston as a service animal through a private company, which gave her a card identifying Kingston as a service dog under the Americans with Disabilities Act. One day the patient dressed Kingston in a "service dog" vest and brought him to a restaurant, where he attacked a toddler.

The toddler's parents sued the restaurant, the patient, and Leibman. The plaintiffs allege that Leibman was negligent in providing the letters without ascertaining whether Kingston is actually a service animal trained to perform specific tasks and that his conduct proximately caused the toddler's injuries by enabling the patient to misrepresent Kingston to the public. Leibman filed a motion to dismiss, arguing that the plaintiffs' suit alleges a health care liability claim under the TMLA and that the claim must be dismissed because the plaintiffs failed to timely serve an expert report. The trial court denied the motion, and the court of appeals affirmed. The court held that the plaintiffs' suit against Leibman does not allege a health care liability claim, as defined in the Act, because it complains about Leibman's representation that Kingston is a certified service animal, rather than his diagnosing the patient with generalized anxiety disorder or his statement that service animals may help her control that disorder.

Leibman filed a petition for review, which the Supreme Court granted.

O. MUNICIPAL LAW

1. Zoning

a) *City of Dallas v. PDT Holdings, Inc.*, 703 S.W.3d 409 (Tex. App.—Dallas 2023), *pet. granted* (Dec. 20, 2024) [23-0842]

The petitioner challenges the court of appeals' reversal of a judgment in its favor that the City of Dallas is estopped from enforcing a zoning ordinance.

PDT submitted plans for the construction of a thirty-six-foot-high townhome to the City of Dallas. The City approved the plans and issued a building permit. The City did not identify that its Residential Proximity Slope ordinance, which requires structures to have a maximum height of twenty-six feet, applies to the townhome. PDT began construction. A few months later, the City issued a stop-work order for PDT's failure to comply with a different regulation. The order did not mention the slope ordinance. A few months after that, when the townhome was 90% complete, the City issued another stop-work order, this time

for violation of the slope ordinance. PDT sought a variance from the Board of Adjustment, which was denied.

In the trial court, PDT alleged that it is entitled to relief under several theories, including equitable estoppel, laches, and waiver. After a bench trial, the trial court rendered judgment for PDT. The judgment, drafted by PDT, states only that the City is estopped from enforcing the slope ordinance against the townhome. The City did not request findings of fact and conclusions of law. The court of appeals reversed and rendered judgment that PDT is not entitled to relief on its claim for equitable estoppel.

PDT filed a petition for review. It argues that the court of appeals applied the wrong standard of review in its analysis, that the court should have considered its alternative theories before reversing the judgment, and that policy considerations support the application of equitable estoppel here. The Supreme Court granted the petition.

P. NEGLIGENCE

1. Causation

a) *Tenaris Bay City Inc. v. Ellisor*, 704 S.W.3d 37 (Tex. App.—Houston [14th Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0808]

This flooding case presents issues related to the legal sufficiency of causation evidence to support negligence claims.

For decades, homeowners in Matagorda County lived near a grass farm. In 2013, Tenaris bought the farm and built a manufacturing facility on the land. In 2017, Hurricane Harvey hit. The homeowners allege their properties flooded for the first time. They sued Tenaris for negligence, alleging that the facility's presence and storm-drainage deficiencies caused the flooding. During the trial, both sides presented weather and civil-engineering experts. The trial court granted a directed verdict on gross negligence in Tenaris's favor and rendered judgment for the homeowners on favorable jury findings for negligence, negligent nuisance, and negligence per se. The parties stipulated to damages. Tenaris appealed, and the court of appeals affirmed the trial court's judgment.

The Supreme Court granted Tenaris's petition for review, which argues that (1) the court of appeals applied the wrong causation standard; (2) expert causation evidence was required but legally insufficient to prove Tenaris caused the flooding; and (3) the trial court erred by striking the grass farm as a responsible third party.

b) *Werner Enters., Inc. v. Blake*, 672 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2023) (en banc), *pet. granted* (Aug. 30, 2024) [23-0493]

This car-crash case involves arguments about the sufficiency of the evidence, charge error, and damages.

Shiraz Ali, a novice driver employed by Werner Enterprises, was driving an 18-wheeler on I-20 westbound in Odessa in December 2014. He was accompanied by his supervisor, who was sleeping. In the eastbound lanes, Trey Salinas drove Jennifer Blake and her three children. Salinas hit black ice, lost control of his vehicle, and spun across the 42-foot-wide grassy median into Ali's westbound

lane. Ali promptly braked, but the vehicles collided, resulting in the death of one child and serious injuries to the rest of the Blakes.

The Blakes sued Ali and Werner for wrongful death and personal injuries. The trial court rendered judgment on the jury's verdict, which found Ali and Werner liable and awarded the Blakes more than $100 million in damages. Sitting en banc, the court of appeals affirmed over two dissents.

Ali and Werner filed a petition for review. They argue that Ali did not owe a duty to reasonably foresee that the Blakes' vehicle would cross the median into his path, that no evidence supports a finding that Ali's conduct proximately caused the crash, that Werner cannot be held liable for derivative theories of negligent hiring, training, and supervision when it accepted vicarious liability for Ali's conduct, that the court of appeals erred by rejecting petitioners' claims of charge error on grounds of waiver, and that the jury's comparative-responsibility findings are not supported by legally sufficient evidence.

The Supreme Court granted the petition.

2. Duty

a) *Santander v. Seward*, 700 S.W.3d 126 (Tex. App.—Dallas 2023), *pet. granted* (Sept. 27, 2024) [23-0704]

The issues include (1) when an off-duty officer working for a private employer is considered to be on duty, (2) whether negligence claims by police officers responding to a request for assistance should have been pleaded as premises-liability claims, and (3) whether the common law "firefighter rule" applies.

Chad Seward was an off-duty police officer employed by Point 2 Point and assigned to work at a Home Depot store. He was asked by a Home Depot employee to issue a criminal trespass warning to a suspected shoplifter. Following police department procedures, Seward checked the suspect for outstanding warrants and then called for assistance. Two officers responded and guarded the suspect while Seward confirmed the warrant. The suspect pulled a gun and shot the officers, killing one and injuring the other.

The officers sued Seward, Home Depot, and Point 2 Point under various negligence theories. The trial court dismissed the claims against Seward based on the Tort Claims Act's election of remedies, concluding that he was on duty. The trial court later granted Home Depot's and Point 2 Point's motions for summary judgment.

The court of appeals largely reversed. Among other things, it concluded a genuine fact issue exists as to whether Seward was on duty before he confirmed the suspect's warrant. The court of appeals also rejected Home Depot's other arguments for summary judgment, including that the officers' claims sound only in premises liability and that the firefighter rule applies.

Seward, Home Depot, and Point 2 Point petitioned for review. Seward and Point 2 Point argue that Seward was on duty during his entire encounter with the suspect. Home Depot challenges the various grounds on which the court of appeals reversed the trial court's summary judgment.

The Supreme Court granted the

petition.

3. Public Utilities

a) *In re Oncor Elec. Delivery Co.*, 694 S.W.3d 789 (Tex. App.—Houston [14th Dist.] 2024), *argument granted on pet. for writ of mandamus* (Dec. 20, 2024) [24-0424]

At issue is whether the multidistrict litigation court should have dismissed plaintiffs' gross negligence and intentional nuisance claims against transmission and distribution utility companies.

In February 2021, Winter Storm Uri created record-setting demand for electricity. ERCOT ordered transmission and distribution utilities to "load shed" (interrupt power) to protect the electric grid from collapse. The TDUs' load shedding reduced electric service on ERCOT's grid, causing blackouts for four days.

Thousands of customers filed hundreds of lawsuits against electricity companies, including TDUs, seeking damages related to the power outages. The cases were consolidated into an MDL court. Plaintiffs alleged various claims, including negligence, gross negligence, and nuisance. The TDUs moved to dismiss under Texas Rule of Civil Procedure 91a, arguing that the claims are barred by the tariff governing their operations. The trial court dismissed some claims but refused to dismiss the negligence, gross negligence, and nuisance claims. The court of appeals granted mandamus relief in part, ordering dismissal of the negligence and strict-liability nuisance claims, while allowing the gross negligence and intentional nuisance claims to proceed.

The TDUs petitioned the Supreme Court for mandamus relief. They argue that the common law does not impose tort duties on TDUs in emergency load-shedding. Additionally, they contend that their tariff's force majeure provision bars gross negligence and intentional nuisance claims arising from good-faith compliance with ERCOT's emergency orders. The Court granted argument on the petition for writ of mandamus.

4. Vicarious Liability

a) *Renaissance Med. Found. v. Lugo*, 672 S.W.3d 901 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (June 21, 2024) [23-0607]

The issue is whether a nonprofit health organization certified under Section 162.001(b) of the Occupations Code can be held vicariously liable for the negligence of a physician employed by the organization.

Renaissance Medical Foundation is a nonprofit health organization certified by the Texas Medical Board. Dr. Michael Burke, who works for Renaissance, performed brain surgery on Rebecca Lugo's daughter. Lugo sued Renaissance, in addition to suing Dr. Burke, alleging that it is vicariously liable for Dr. Burke's negligence in performing the surgery that caused permanent physical and mental injuries to her daughter.

Renaissance moved for summary judgment, arguing that it cannot be held vicariously liable because it is statutorily and contractually barred from controlling Dr. Burke's practice of medicine. The trial court denied the

motion after concluding that Dr. Burke's employment agreement gives Renaissance the right to exercise the requisite degree of control over Dr. Burke to trigger vicarious liability. Renaissance filed an interlocutory appeal. The court of appeals affirmed.

Renaissance petitioned for review, arguing that the Section 162.001(b) framework, which prohibits Renaissance from interfering with the employed physician's independent medical judgment, precludes vicarious liability. The Supreme Court granted the petition for review.

Q. OIL AND GAS

1. Leases

a) *Cactus Water Servs., LLC v. COG Operating, LLC*, 676 S.W.3d 733 (Tex. App.—El Paso 2023), *pet. granted* (Jan. 31, 2025) [23-0676]

This dispute concerns whether the mineral lessee or the surface estate holder owns the "produced water" from oil and gas operations.

COG is the mineral lessee under four leases with two surface owners in Reeves County. COG's operations focus on hydraulic fracking. The fluid that returns to the surface contains a mixture of various minerals. Once the oil and gas are removed, the remaining fluid is known as produced water.

Years after executing the mineral leases with COG, the surface owners executed Produced Water Lease Agreements with Cactus. These leases conveyed to Cactus the produced water from oil and gas operations on the land. Cactus informed COG of its leases. COG sued Cactus, seeking a declaratory judgment that under the mineral leases, COG owned the produced water from its operations. Cactus counterclaimed, asserting its right of ownership under the PWLAs. The trial court granted summary judgment in COG's favor and declared that COG owned the produced water that was part of COG's product stream. The court of appeals affirmed. It concluded that produced water is waste as a matter of law, and COG has the exclusive right to the produced water.

Cactus filed a petition for review. It argues that the court of appeals erred because the surface estate owns all subsurface water absent an express conveyance. Here, Cactus argues, the only express conveyances of the produced water were to Cactus in the PWLAs. The Supreme Court granted the petition.

2. Lease Termination

a) *Cromwell v. Anadarko E&P Onshore, LLC*, 676 S.W.3d 860 (Tex. App.—El Paso 2023), *pet. granted* (Nov. 15, 2024) [23-0927]

This case requires the interpretation of an oil-and-gas lease habendum clause.

David Cromwell and Anadarko are oil-and-gas co-tenants, both owning fractional shares of the working interest on the same acreage in Loving County. The habendum clauses of Cromwell's leases maintained his interest for "as long thereafter as oil, gas or other minerals are produced from said land." Cromwell submitted his leases to Anadarko, the operating tenant, and requested to participate in its production, but Anadarko never responded. After one well reached payout, Anadarko sent Cromwell monthly "Joint Interest Invoices"

that allocated production revenues and expenses to Cromwell. Years after the expiration of the leases' primary terms, Anadarko informed Cromwell that it believed his leases terminated at the end of their primary terms because he failed to enter a joint-operating agreement.

Cromwell sued Anadarko for declaratory relief, trespass to try title, and other claims. Both sides moved for summary judgment. After concluding that the leases had terminated, the trial court granted Anadarko's motion and denied Cromwell's. The court of appeals affirmed. Relying on its own precedent, the court held that Cromwell's leases terminated because he did not cause the production of oil or gas on the land.

Cromwell petitioned the Supreme Court for review. He argues that the plain language of the habendum clauses is satisfied because, at all relevant times, production in paying quantities has occurred on the acreage; thus, the leases have not terminated. The Court granted the petition.

3. Royalty Payments

a) *Myers-Woodward, LLC v. Underground Servs. Markham, LLC*, 699 S.W.3d 1 (Tex. App.—Corpus Christi–Edinburgh 2022), *pet. granted* (Aug. 30, 2024) [22-0878]

This case raises questions of who owns the right to use underground salt caverns created through the salt-extraction process and how a salt royalty interest is calculated.

USM owns the mineral estate of the property at issue, together with rights of ingress and egress for the purpose of mining salt. Myers owns the surface estate and a 1/8 nonparticipating royalty in the minerals. USM sued Myers, seeking declaratory relief regarding the royalty's calculation and the right to use the underground salt caverns, in which it stored hydrocarbons. Myers countersued, seeking, among other things, a declaration that USM cannot use the subsurface to store hydrocarbons. The parties filed competing summary-judgment motions.

The trial court granted USM's motion in part, declaring USM the owner of the subsurface caverns, and granted Myers's motion in part, holding USM may only use the caverns for the purposes specified in the deed, effectively denying USM the right to use the salt caverns for storing hydrocarbons. The trial court then held that Myers's royalty is based on the market value of the salt at the point of production, and it entered a take-nothing judgment on Myers's remaining claims. Both parties appealed.

The court of appeals reversed the judgment declaring that USM owns the subsurface caverns and rendered judgment that they belong to Myers. The court expressly declined to follow *Mapco, Inc. v. Carter*, 808 S.W.2d 262, 278 (Tex. App.—Beaumont 1991*), rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991) (per curiam) (holding that the salt owner owns and is entitled to compensation for the use of an underground storage cavern), holding instead that most authority in Texas requires a conclusion that the surface estate owner owns the subsurface. It affirmed the remainder of the judgment, including the holding that the Myers's royalty interest is 1/8 of the market value of USM's salt production at the

wellhead.

Both Myers and USM petitioned for review, raising issues regarding the calculation of Myers's royalty interest and the ownership of the caverns. The Supreme Court granted both petitions.

R. PROCEDURE—APPELLATE

1. Supersedeas Bonds

a) *In re Greystar Dev. & Constr., LP*, ___ S.W.3d ___, 2024 WL 1549466 (Tex. App.—Dallas 2024), *argument granted on pet. for writ of mandamus* (Apr. 4, 2025) [24-0293]

The issue in this mandamus proceeding is whether the $25 million cap on supersedeas bonds applies per judgment debtor or per judgment.

A crane at Greystar's construction site collapsed on an apartment building in Dallas during severe weather in 2019, killing Kiersten Smith and injuring several others. Smith's relatives brought a wrongful-death suit against Greystar and related entities. The trial court rendered a judgment awarding Smith's relatives more than $400 million in actual damages and prejudgment interest. Greystar and related entities perfected an appeal and filed a joint supersedeas bond of $25 million. Smith's relatives filed an emergency motion asking the trial court to declare the joint bond void because the $25 million statutory cap applies per judgment debtor.

The trial court found that the bond was invalid as to two of the three defendants. The court of appeals affirmed, holding that the trial court correctly concluded that the statute's $25 million cap applied per individual judgment debtor and that the trial court acted within its broad discretion in providing instructions as to how the defendants could supersede the judgment.

Greystar sought mandamus relief in the Supreme Court, arguing that the $25 million cap applies per judgment, not per judgment debtor. The Supreme Court set the mandamus petition for oral argument.

S. PROCEDURE—PRETRIAL

1. Certificates of Merit

a) *Studio E. Architecture & Interiors, Inc. v. Lehmberg*, 690 S.W.3d 725 (Tex. App.—San Antonio 2024) *pet. granted* (Apr. 4, 2025) [24-0286]

At issue in this case is whether a plaintiff may cure a defective petition under Chapter 150 of the Civil Practice and Remedies Code through amendment or whether the defect may only be cured by filing a new action.

Lehmberg sued Studio E. for claims related to Studio E.'s work on Lehmberg's home renovation project. Nearly two years later, Studio E. filed a motion to dismiss. It argued that it was entitled to dismissal under Chapter 150 because Lehmberg failed to file a "certificate of merit" with her original petition, which is statutorily required in lawsuits against certain licensed or registered professionals. Lehmberg argued in response that her claims fell outside the scope of the statute. The trial court denied the motion to dismiss.

Studio E. filed an interlocutory appeal, and the court of appeals reversed, concluding that the statute applied. However, it remanded to the trial court to determine whether the

dismissal should be with or without prejudice. On remand, the trial court dismissed without prejudice. Lehmberg then filed an amended petition with the certificate of merit attached. By this point, the statute of limitations on Lehmberg's claims had expired. Studio E. filed another motion to dismiss, arguing that Lehmberg could not cure the original, deficient petition through amendment. The trial court denied the motion to dismiss, and Studio E. brought a second appeal.

The court of appeals affirmed. It concluded that because the trial court dismissed the original petition without prejudice, Lehmberg could either amend or file a new action.

Studio E. filed a petition for review, arguing that Lehmberg could not cure her defective, dismissed petition through amendment. Rather, it argues, dismissed claims—even those dismissed without prejudice—may only be revived by filing a new action. The Supreme Court granted the petition.

2. Forum Non Conveniens

a) *In re Pinnergy Ltd.*, 693 S.W.3d 485 (Tex. App.—Houston [1st Dist.] 2023), *argument granted on pet. for writ of mandamus* (May 31, 2024) [23-0777]

The issue in this case is whether the trial court erred by denying the defendants' motion to dismiss for forum non conveniens.

A Union Pacific train collided with Pinnergy's 18-wheeler truck (driven by Ladonta Sweatt) in northwest Louisiana. Thomas Richards and Hunter Sinyard were conductors on Union Pacific's train. Pinnergy filed suit in Red River Parish, Louisiana, seeking damages from the Louisiana Department of Transportation and Union Pacific. Three months later, Richards filed suit in Harris County, Texas against Pinnergy, Union Pacific, and Sweatt. Sinyard intervened in the Harris County suit as a plaintiff.

The Harris County defendants filed a motion to dismiss that suit for forum non conveniens. They pointed out that the accident occurred 240 miles from the Harris County courthouse, but only 18 miles from the Louisiana courthouse, that the plaintiffs live closer to Red River Parish than to Harris County, and the existence of litigation in Louisiana arising from the same collision. The trial court denied the motion without explanation. The court of appeals denied the defendants' mandamus petition without substantive opinion.

The defendants filed a petition for writ of mandamus in the Supreme Court, arguing that all six statutory forum non conveniens factors have been met. The Court set the petition for oral argument.

3. Standing and Capacity

a) *In re UMTH Gen. Servs., L.P.*, ___ S.W.3d ___, 2023 WL 8291829 (Tex. App.—Dallas 2023), *argument granted on pet. for writ of mandamus* (Apr. 4, 2025) [24-0024]

This case concerns whether a trust's shareholder can assert claims directly against an advisor who contracted with the trust or whether such claims must be brought derivatively.

A real estate investment trust

entered into an advisory agreement with UMTH that gave UMTH authority to manage corporate assets. Alleging corporate funds were improperly used to cover legal fees, NexPoint, one of the trust's shareholders, sued UMTH and its affiliates, asserting various claims under the advisory agreement itself. UMTH filed a verified plea in abatement, a plea to the jurisdiction, and special exceptions, arguing that NexPoint's claims alleged collective harm to the trust and thus NexPoint lacked capacity and standing to bring a direct claim. The trial court denied the motions. UMTH filed a petition for writ of mandamus in the court of appeals, which was denied.

UMTH then petitioned the Supreme Court for mandamus relief. UMTH argues that the trial court abused its discretion in allowing NexPoint to bring its claims directly rather than derivatively, as it lacked a personal cause of action and a personal injury, and that NexPoint lacked derivative standing because it did not maintain continuous or contemporaneous ownership of trust shares. The Supreme Court set the case for oral argument.

4. Summary Judgment

a) *State of Texas v. $3,774.28*, 692 S.W.3d 759 (Tex. App.—Amarillo 2024) *pet. granted* (Dec. 20, 2024) [24-0258]

At issue in this case is whether, in deciding a no-evidence motion for summary judgment, the trial court should have considered an affidavit that was on file with the court but not attached to the nonmovant's response.

The State initiated civil-forfeiture proceedings for bank accounts related to an opioid trafficking operation. The claimants filed a no-evidence motion for summary judgment on the State's claim that the accounts were used or intended to be used in the commission of a felony, making the accounts contraband. The State's response to the motion summarized an affidavit from the investigating law enforcement officer. The affidavit was attached to the State's original notice of forfeiture proceedings but was not attached to its response to the no-evidence motion.

The trial court granted summary judgment for the claimants. At a hearing on a related motion for leave in which the State sought to have the affidavit considered, the trial court said that it understood the Texas Rules of Civil Procedure to require all evidence considered in a no-evidence summary judgment to be attached to the summary judgment response. The court of appeals affirmed, concluding that the rules require attachment.

The State filed a petition for review. It argues that the court of appeals erred by concluding that there is an attachment requirement in the no-evidence rule. The State also argues that its references to and discussion of the affidavit in its response were sufficient to direct the trial court to the affidavit, which was indisputably on file with the court. Accordingly, the State argues that because the affidavit raises a genuine issue of material fact, the trial court erred in granting summary judgment for the claimants.

The Supreme Court granted the petition.

5. Venue

a) *Rush Truck Ctrs. of Tex., L.P. v. Sayre*, 704 S.W.3d 857 (Tex. App.—Dallas 2023), *pet. granted* (Jan. 31, 2025) [24-0040]

This case raises venue and jurisdiction issues in an interlocutory appeal from a venue ruling.

Six-year-old Emory Sayre died after a school bus accident. Her parents sued the manufacturer, Rush Truck, in Dallas County for product liability. Rush Truck moved to transfer venue to either Parker County, where the accident occurred, or Comal County, Rush Truck's headquarters. The trial court denied the motion. The court of appeals affirmed, holding that a substantial part of the events or omissions giving rise to the Sayres' product liability claim arose in Dallas County. The court of appeals noted evidence that the bus was ordered, delivered, inspected, titled, billed, and paid for out of Rush Truck's Dallas County office.

Rush Truck petitioned for review, arguing that interlocutory appeals of venue determinations are available in all cases with multiple plaintiffs, that the court of appeals erred in considering allegations outside the venue section of pleadings, and that no substantial events or omissions giving rise to the Sayres' claim occurred in Dallas County. The Supreme Court granted review.

T. PROCEDURE—TRIAL AND POST-TRIAL

1. Default Judgment

a) *Shamrock Enters., LLC v. Top Notch Movers, LLC*, ___ S.W.3d ___, 2024 WL 2857011 (Tex. App.—Corpus Christi–Edinburg 2024), *pet. granted* (Apr. 4, 2025) [24-0581]

This restricted appeal raises personal jurisdiction and substituted service-of-process issues in a dispute about payment under a contract for moving services.

In the aftermath of Hurricane Laura, Top Notch Movers, a Texas-based LLC, provided moving services in Louisiana and Alabama to Alabama-based Shamrock Enterprises. Top Notch sued Shamrock in Texas for nonpayment of services. Alleging Shamrock was required, but failed, to have a registered agent for service of process in Texas, Top Notch employed substituted service on the Texas Secretary of State. The Secretary of State forwarded service to Shamrock at the address Top Notch provided, but it was returned with the notation "Return to Sender, Vacant, Unable to Forward." Shamrock did not appear. The trial court rendered a default judgment against Shamrock.

Shamrock filed a restricted appeal. The court of appeals affirmed the default judgment finding no error apparent on the face of the record.

The Supreme Court granted Shamrock's petition for review, which argues that (1) personal jurisdiction is lacking; (2) the court of appeals erroneously concluded that Shamrock was amenable to substituted service because the pleadings and record are facially insufficient to show Shamrock was transacting business in the state; and (3) return of the forwarded service is prima facie proof that service was defective.

U. REAL PROPERTY

1. Deed Restrictions

a) *EIS Dev. II, LLC v. Buena Vista Area Ass'n*, 690 S.W.3d 369 (Tex. App.—El Paso 2023), *pet. granted* (May 31, 2024) [23-0365]

The central issue in this case is the interpretation of a deed restriction.

EIS Development II acquired land in Ellis County to develop as a residential subdivision. The land came with a deed restriction stating: "No more than two residences may be built on any five acre tract. A guest house or servants' quarters may be built behind a main residence location . . . ." The subdivision was platted with 73 homes on 100 acres, with all but one lot being smaller than two acres. Nearby landowners formed the Buena Vista Area Association and sued to enforce the deed restriction.

The trial court denied EIS's plea in abatement, which sought to join adjoining landowners who were not already parties. The court concluded that the deed restriction unambiguously limits building on the property to two main residences per five-acre tract, and it granted partial summary judgment for the Association on that issue. The parties then proceeded to a jury trial on EIS's affirmative defense of "changed conditions." The jury failed to find that EIS had established that defense. The trial court entered a final judgment for the Association that permanently enjoined EIS from building more than two main residences per five-acre tract. The court of appeals affirmed.

In its petition for review, EIS challenges the trial court's denial of its plea in abatement, the court's interpretation of the deed and other legal rulings, and the jury instructions. The Supreme Court granted the petition.

2. Nuisance

a) *K&K Inez Props., LLC v. Kolle*, ___ S.W.3d ___, 2023 WL 8941487 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (Apr. 4, 2025) [24-0045]

This nuisance case concerns an exemplary-damages cap calculation and whether intentional and grossly negligent nuisance are mutually exclusive causes of action when based on the same property damage.

The Kolles own approximately 126 acres of land. David Kucera, Valerie Kucera, and K&K Inez Properties own a parcel adjacent to the Kolles' land and developed a portion of that property into a residential neighborhood. The Kolles then sued K&K and the Kuceras, alleging their development of the land caused the Kolles' property to flood. The Kuceras moved to add Victoria County, where the property was located, as a responsible third party.

The trial court granted leave to designate Victoria County, but subsequently struck the designation. The trial court rendered judgment on the jury's verdict in favor of the Kolles, holding that David, Valerie, and K&K negligently and intentionally caused nuisance, Valerie engaged in a conspiracy, and David and K&K committed gross negligence. The trial court awarded damages for diminution in market value and loss of use, as well as exemplary damages. The court of

appeals reversed the trial court's award of loss-of-use damages but otherwise affirmed the trial court.

The Kuceras petitioned for review, arguing that Victoria County was improperly struck, that the lower courts improperly calculated the exemplary-damages award cap, and that the Kolles should not be allowed to recover exemplary damages for grossly negligent nuisance while also recovering compensatory damages for intentional nuisance. The Supreme Court granted the petition.

V. TEXAS CITIZENS PARTICIPATION ACT

1. Applicability

a) *Whataburger Rests. LLC v. Ferchichi*, 698 S.W.3d 297 (Tex. App.—San Antonio 2022), *pet. granted* (Aug. 30, 2024) [23-0568], *consolidated for oral argument with Pate v. Haven at Thorpe Lane, LLC*, 681 S.W.3d 476 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0993]

The issue in these cases is the applicability of the Texas Citizens Participation Act to a motion to compel discovery that includes a request for attorney's fees.

In *Whataburger*, Sadok Ferchichi sued Crystal Krueger after she rear ended Ferchichi while driving a Whataburger-owned vehicle. Ferchichi learned during mediation that Whataburger had evidence that it did not produce in discovery. Ferchichi moved to compel production of the evidence and to award reasonable attorney's fees as sanctions. Whataburger and Krueger filed a TCPA motion to dismiss the motion to compel.

Pate involves a suit for common-law fraud and DTPA violations by fifty plaintiffs who signed leases to live in Haven's student-housing apartment complex. Before the lawsuit, Jeretta Pate and April Burke, the mothers of two plaintiffs, created a Facebook group, conveyed information to media outlets who ran stories about the Haven complex, and asserted grievances with governmental authorities. Haven served subpoenas duces tecum on the nonparty mothers, seeking documents and communications about Haven and the lawsuit. The mothers objected to many requests for production and included a privilege log. Haven filed a motion to compel and for attorney's fees, and the mothers responded by filing a TCPA motion to dismiss that motion.

In both cases, the trial court denied the motion to dismiss. And in both cases, the court of appeals reversed. Both courts of appeals held that the discovery motion before it is a "legal action" under the TCPA that was made in response to the exercise of the right to petition (*Whataburger*) or to "communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses" (*Pate*). Additionally, both courts held that the movant did not establish a prima facie case for sanctions so as to avoid dismissal.

Ferchici and Haven each petitioned for review. They argue that a motion to compel discovery that includes a request for attorney's fees is not a legal action under the TCPA, that

their motions were not made in response to the exercise of a protected right, and that they established their prima facie cases for sanctions. The Supreme Court granted both petitions.

2. Initial Burden

a) *Walgreens v. McKenzie*, 676 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2023), *pet. granted* (Dec. 20, 2024) [23-0955]

The main issue in this case is whether a party moving to dismiss a negligent-hiring claim under the Texas Citizens Participation Act meets its initial burden to demonstrate that the TCPA applies when the claim implicates an employee's exercise of a First Amendment right.

While shopping at Walgreens, Pamela McKenzie was detained and questioned by a police officer, who received an employee's report that McKenzie had shoplifted from the store earlier that day and on prior occasions. After reviewing surveillance video, the officer determined that McKenzie was not the thief, and she was released. McKenzie sued Walgreens, alleging that the employee knew that she was not the person in the video before reporting to the police and that she was targeted because of her race. She asserted several tort claims, including a claim that Walgreens was negligent in hiring, training, and supervising the employee who called the police. Walgreens moved to dismiss all her claims under the TCPA, arguing that its employee's report to law enforcement was a protected exercise of a First Amendment right. The trial court denied the motion, and Walgreens filed an interlocutory appeal.

A divided court of appeals panel affirmed with respect to the negligent-hiring claim but reversed otherwise and dismissed the remainder of McKenzie's claims. The majority reasoned that the negligent-hiring claim does not implicate the TCPA because it is based in part on conduct by Walgreens occurring before the incident and not based entirely on the employee's constitutionally protected police report. Thus, the majority held, Walgreens did not meet its initial burden to demonstrate that the TCPA applies to this claim. One justice dissented in part, opining that the majority had erroneously treated the negligent-hiring claim as an independent tort claim that may be viable even if there is no liability for an underlying tort.

The Supreme Court granted Walgreen's petition for review.

W. WORKERS' COMPENSATION

1. Exclusive Jurisdiction

a) *Univ. of Tex. Rio Grande Valley v. Oteka*, 704 S.W.3d 1 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (Dec. 20, 2024) [23-0167]

In this personal-injury case, the issue on appeal is whether an employee must obtain a predicate finding from the Division of Workers' Compensation that her injuries did not occur in the course and scope of her employment for the trial court to have subject-matter jurisdiction over her negligence claim against the employer.

A university professor was walking through the parking lot after

attending a commencement ceremony when a vehicle driven by a university police officer struck and injured her. The professor sued the university for negligence. As an affirmative defense, the university asserted that workers' compensation benefits are the exclusive remedy because the injuries occurred during the course and scope of her employment. Disputing that her injury was work related, the professor moved for partial summary judgment on the affirmative defense. The university then filed a plea to the jurisdiction, arguing that the Division has exclusive jurisdiction to determine the course-and-scope issue and that the professor therefore failed to exhaust her administrative remedies.

The trial court denied the plea, and the university appealed. The court of appeals affirmed, holding that exhaustion is not required because the professor's suit is not based on the ultimate question whether she is eligible for workers' compensation benefits.

The Supreme Court granted the university's petition for review.

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