

Texas Supreme Court Update: Developments Since Summer Recess

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Presented by

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ADMINISTRATIVE LAW—RULEMAKING CHALLENGE

El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n, No. 05-0372, 50 Tex. Sup. Ct. J. 1143, 2007 WL 2457848 (Tex. Aug. 31, 2007)

Dissatisfied with the process the Texas Health and Human Services Commission (HHSC) uses to determine reimbursement rates for inpatient Medicaid service, several hospitals sought administrative review of the reimbursement rates since 2000. The HHSC denied the hospitals' request, and it refused to refer the case to the State Office of Administrative Hearings (SOAH). The hospitals sued HHSC for declaratory and injunctive relief under section 2001.038 of the Administrative Procedure Act (APA) to enjoin the agency from applying a cutoff date to submit paid claims data to the agency. The trial court granted the temporary injunction, but at a subsequent trial on the merits, the trial court ruled against the hospitals on all claims. The Austin Court of Appeals affirmed.

Writing for the supreme court, Justice Medina held the challenged cutoff date was a rule under the APA, reversed the portion of the lower court's opinion which found otherwise, and remanded the rule to agency under the provisions of the APA. However, the court upheld the HHSC's refusal to refer the matter to SOAH.

AGENCY

Gaines v. Kelly, No. 05-1092, 50 Tex. Sup. Ct. J. 1054, 2007 WL 2404840 (Tex. Aug. 24, 2007)

Roger Kelly acted through an intermediary, Robert Thompson, to gain financing for a tract of real property from Russell Gaines, who was an officer of a mortgage corporation. When the financing fell through, Kelly sued Gaines and Thompson—among others—for breach of contract, fraud, and negligence. The trial court granted Thompson's motion for summary judgment, but the Waco Court of Appeals reversed on the fraud claim, finding there was some evidence that Thompson was Gaines' agent.

Writing for the supreme court, Justice Medina explained that Kelly's complaint was really that "Thompson, acting for Gaines, fraudulently misled [Kelly] into believing that the loan was a 'done deal.'" *Gaines*, 2007 WL 2404840, at *4. In reversing the judgment of the court of appeals, the court held the summary judgment proof in the case "failed to raise a fact issue as to whether Thompson's agency included the apparent authority to commit the funds or obligate Gaines to terms other than those agreed to in the parties' contract." *Id.*

ARBITRATION

***In re Kaplan Higher Educ. Corp.*, No. 06-0072, 50 Tex. Sup. Ct. J. 1058, 2007 WL 2404836 (Tex. Aug. 24, 2007) (per curiam) (orig. proceeding)**

A vocational college and forty-five students agreed to arbitrate any dispute arising from or relating to their enrollment agreement. However, the students later sued the college, Kaplan Higher Education Corporation (“Kaplan”) (which owned the college), and the college’s president and admissions director (“Ventura”). After the defendants moved for arbitration, the students dropped the college president and the college itself, leaving fraudulent inducement claims only against two nonsignatories to the arbitration agreement, Kaplan and Ventura. The trial court denied the motion to compel arbitration, and the Thirteenth Court of Appeals denied mandamus relief.

In conditionally granting the writ of mandamus, the supreme court reasoned that, “when an agreement between two parties clearly provides for the substance of a dispute to be arbitrated, one cannot avoid it by simply pleading that a nonsignatory agent or affiliate was pulling the strings.” See *In Re Kaplan*, 2007 WL 2404836, at *3.

***In re Merrill Lynch Trust Co. FSB*, No. 04-0865, 50 Tex. Sup. Ct. J. 1030, 2007 WL 2404845 (Tex. Aug. 24, 2007) (orig. proceeding)**

Personal injury plaintiffs retained Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) as financial advisors through its employee, Henry Medina. Sometime later, the plaintiffs sued Merrill Lynch Trust Co. (“ML Trust”), Merrill Lynch Life Insurance Co. (“ML Life”), and Medina in state court, and Merrill Lynch moved to stay the litigation and compel arbitration under the terms of the financial plan in which the plaintiffs enrolled. The parties agreed that the Federal Arbitration Act applied to the dispute, making mandamus relief appropriate. After the

trial court denied both motions, the Thirteenth Court of Appeals denied mandamus relief as well.

Justice Brister wrote for the majority, and the entire court joined the factual background portion of the opinion in Part I. In Part II,¹ the court held that, because the plaintiffs’ claims against Medina were, in substance, claims against Merrill Lynch, the plaintiffs were required to arbitrate their claims against Medina. In Part III-A,² the majority held that, because there were no allegations that ML Trust, ML Life, and Merrill Lynch operated as one corporate entity, ML Trust and ML Life were not covered by Merrill Lynch’s arbitration agreements. In Part III-B,³ the court rejected ML Life and ML Trust’s concerted-misconduct estoppel theory, because nothing in “Texas contract law” or “settled principles of federal law . . . would require the plaintiffs to arbitrate with Merrill Lynch affiliates.” *In re Merrill Lynch*, 2007 WL 2404845, at *5. In Part IV, which the entire court joined, the court reiterated that pending litigation must be stayed pending the completion of arbitration. Accordingly, the court conditionally granted the writ of mandamus and vacated the trial court’s order denying stay and arbitration.

Justices Hecht, joined by Justices O’Neill and Medina, dissented from the court’s conditional grant of mandamus relief. Justice Johnson, joined by Justice Wainwright, dissented from the court’s refusal to direct the trial court to order the plaintiffs’ claims against ML Trust and ML Life to arbitration to the extent the claims against the corporate affiliates are based on Medina’s alleged misconduct.

***In re Merrill Lynch Trust Co. FSB*, No. 03-1059, 50 Tex. Sup. Ct. J. 1139, 2007 WL 2458421 (Tex. Aug. 31, 2007) (per curiam) (orig. proceeding)**

¹ Therein, the majority was comprised of Chief Justice Jefferson and Justices Wainwright, Brister, Green, Johnson, and Willett.

² Therein, the majority was comprised of Chief Justice Jefferson and Justices Hecht, Brister, Medina, Green, and Willett.

³ Therein, the majority was comprised of Chief Justice Jefferson and Justices O’Neill, Brister, Green, and Willett.

In a case almost identical to cause number 04-0865, a personal injury plaintiff retained Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) through its employee, Henry Medina, to prepare a financial plan, which included an arbitration clause. Later, the plaintiff initiated both an arbitration proceeding and a suit in state court against Merrill Lynch. Merrill Lynch filed a motion to compel arbitration and stay litigation, which the trial court denied, and the Fourth Court of Appeals denied mandamus relief.

For the reasons stated in *In re Merrill Lynch Trust Co. FSB*, No. 04-0865, 50 Tex. Sup. Ct. J. 1030, 2007 WL 2404845 (Tex. Aug. 24, 2007)—but thankfully in a per curiam opinion—the supreme court held the trial court abused its discretion in refusing to compel arbitration and stay the pending litigation. Accordingly, the court conditionally granted the writ of mandamus and vacated the trial court’s denial order.

***In re H&R Block Fin. Advisors, Inc.*, No. 04-0061, 50 Tex. Sup. Ct. J. 1029, 2007 WL 2404818 (Tex. Aug. 24, 2007) (per curiam) (orig. proceeding).**

Robert and Gilda Bonds sued H&R Block Financial Advisors, Inc. (“H&R Block”) and their investment advisor for negligence, gross negligence, fraud, breach of fiduciary duty, and violations of both the Texas Securities Act and Texas Deceptive Trade Practices Act for recommending the Bonds invest in Enron Corp. H&R Block and the investment advisor moved to stay proceedings pursuant to the Federal Arbitration Act, but the trial court denied the motion. The Corpus Christi Court of Appeals denied mandamus relief.

In a per curiam opinion, the supreme court conditionally granted mandamus relief and directed the trial court to order the Bonds’ claims to proceed to arbitration under the Federal Arbitration Act.

ATTORNEY FEES IN SUITS AFFECTING PARENT-CHILD RELATIONSHIP

***In re Moore*, No. 06-0544, 50 Tex. Sup. Ct. J. 1193, 2007 WL 2457709 (Tex. Aug. 31, 2007) (per curiam) (orig. proceeding)**

While married to another man, Lisa Denise Santos gave birth to I.E.T., and moved in with the child’s alleged paternal grandmother, Michelle Moore. Moore filed a Suit Affecting Parent-Child Relationship (SAPCR), which resulted in Moore being granted temporary custody of I.E.T. Santos filed petition for writ of mandamus in the court of appeals, asserting that Moore lacked standing to bring a SAPCR, which the appellate court granted because Moore was not listed in the Texas Family Code as a party who could initiate a SAPCR. However, the Thirteenth Court of Appeals did not award attorney fees to Santos.

Thereafter, a series of suits between Moore and Santos, including a second SAPCR, which culminated in Santos being awarded custody of I.E.T. and attorney fees incurred in all the related suits. Moore brought a petition for writ of mandamus regarding the lower court’s award of attorney fees, arguing that neither the Texas Rules of Appellate Procedure nor any statute authorizes the imposition of sanctions by a court of appeals.

In conditionally granting the writ as to attorney fees, the supreme court held the award of attorney fees was issued as a penalty and that the underlying facts did not support such penurious action by the court of appeals.

CGL DUTY TO DEFEND

***Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 50 Tex. Sup. Ct. J. 1162, 2007 WL 2459193 (Tex. Aug. 31, 2007)**

The Fifth Circuit Court of Appeals certified three questions to the Texas Supreme Court for its consideration:

- (1) When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an “accident” or “occurrence” sufficient to trigger the duty to defend

or indemnify under a [commercial general liability (“]CGL[“)] policy?

- (2) When a homebuyer sues his general contractor for construction defects and alleges only damages to or loss of use of the home itself, do such allegation allege “property damage” sufficient to trigger the duty to defend or indemnify under a CGL policy?
- (3) If the answers to certified questions 1 and 2 are answered in the affirmative, does Article 21.55 of the Texas Insurance Code apply to a CGL insurer’s breach of the duty to defend?

Writing for the majority, Justice Medina answered the third certified question in the affirmative because the court held former article 21.55 applies to an insurer’s breach of the duty to defend. Because the court concluded that “allegations of unintended construction defects may constitute an ‘accident’ or ‘occurrence’ under the CGL policy and that allegations of damage to or loss of use of the home itself may also constitute ‘property damage’ sufficient to trigger the duty to defend under a CGL policy, the court answered certified question numbers 1 and 2 “yes,” with respect to the duty to defend. *Lamar Homes*, 2007 WL 2459193, at *1. However, the court did not reach the portion of question numbers 1 and 2 dealing with the duty to indemnify because such a “duty is not triggered by allegations but rather by proof at trial.” *Id.*

Justice Brister, joined by Justices Hecht and Willett, dissented, stating that “[s]elling damaged property is not the same as *damaging* property.” *Id.* at *14. Justice Brister reasoned that, because the injuries complained of “occurred when the sale took place . . . , [the plaintiffs] did not have a property damage claim under Texas law.” *Id.* at *17. Because property damage claims are all the CGL policy at issue covered, Justice Brister would have answered certified question number 2 in the negative and would have declined to answer the others.

CITY OF KELLER STANDARD OF REVIEW

***Goodyear Tire and Rubber Co. v. Mayes*, No. 04-0993, 50 Tex. Sup. Ct. J. 886, 2007 WL 1713400 (Tex. June 15, 2007) (per curiam)**

A Goodyear Tire & Rubber Co. (“Goodyear”) employee caused a head-on collision with Patrick Mayes. Mayes sued Adams for negligence, negligence per se, and gross negligence, and Goodyear for negligent entrustment and vicarious liability under respondeat superior. The trial court granted Goodyear’s motion for summary judgment, severed Mayes’ suit against Goodyear from his suit against Adams, and rendered a final take-nothing judgment in favor of Goodyear.

The First Court of Appeals reversed and remanded, and the supreme court reversed and reinstated the take-nothing judgment.

In explaining its holding, the supreme court recited its formulation of the standard of review from *City of Keller v. Wilson*, 168 S.W.3d 802, 822-24 (Tex. 2005), wherein the court held an “appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.” *Goodyear*, 2007 WL 1713400, at *1. The court ruled that no reasonable juror could have concluded there was sufficient evidence to raise a genuine issue of material fact. The supreme court also determined the court of appeals erred in considering only the evidence favorable to Mayes, ignoring undisputed evidence in the record that could not be disregarded.

CLASS CERTIFICATION—MONEY HAD AND RECEIVED

***Stonebridge Life Ins. Co. v. Pitts*, No. 06-0655, 50 Tex. Sup. Ct. J. 1195, 2007 WL 2457626 (Tex. Aug. 31, 2007) (per curiam)**

Stonebridge Life Insurance Co. (“Stonebridge”) provides accidental death and dismemberment insurance policies through a telemarketing program. Before calling potential customers, Stonebridge purchases credit card and bank account information about its target customers. This case arose after Gayle G. Pitts and Mary Vanderford brought suit on behalf of a class of

Stonebridge's insurance customers who enrolled through the telemarketing program on the sole equitable liability theory of "money had and received." The class alleged they were never informed that Stonebridge already possessed their credit and account information and that they were not told their accounts would be charged with no further contact from Stonebridge when the trial enrollment period ended.

Stonebridge sought appellate review of the trial court's certification order, contending that class certification was inappropriate because the "equitable claim the class members assert[ed] requires resolution of individual issues that w[ould] predominate at trial." *Stonebridge*, 2007 WL 2457626, at *2. The Thirteenth Court of Appeals affirmed the certification order.

In reversing and remanding the cause back to the court of appeals, the supreme court harkened back to its rejection of the "certify now and worry later" approach in *Southwest Refining Co. v. Bernal*, 22 S.W.3d 425, 435-36 (Tex. 2000), decided seven years earlier. *Id.* at *3. Particularly because of the equitable nature of the claim asserted by the class, the court reasoned the predominance requirement for class certification could not be met by the class members in the case.

CONSTRUCTIVE TRUST

***Wilz v. Flournoy*, 228 S.W.3d 674 (Tex. 2007) (per curiam) (No. 06-0913)**

After Patricia Wilz and Kenneth Flournoy divorced, their son was incapacitated in an automobile accident. Flournoy sued Ford Motor Company individually and on behalf of his son for the injuries his son sustained and received several hundred thousand dollars in settlement. Flournoy and his "new wife" subsequently purchased a farm, and they used at least of some or all of his son's settlement money to pay for the purchase.

Wilz later became her son's legal guardian, and she sued Flournoy on her son's behalf for conversion, breach of fiduciary duty, and constructive fraud. The jury found for the son, and the trial court imposed a constructive trust on

the entire farm. On appeal, the Waco Court of Appeals concluded the son was only entitled to a constructive trust on thirty-five percent of the farm because the only evidence in the case was from Flournoy and established that just a portion of the farm was impermissibly purchased with the son's trust funds.

In a per curiam opinion, the supreme court explained that Flournoy "bet the farm" when he failed to obtain a jury finding on his affirmative claim that part of the purchase money came from personal funds, and the jury was therefore free to disregard his testimony as not credible. 228 S.W.3d at 676-77. Accordingly, the court reversed the judgment of the Tenth Court of Appeals and rendered judgment that the entire farm was subject to a constructive trust.

DISCOVERY—LIMITATION

***In re Allied Chem. Corp.*, 227 S.W.3d 652 (Tex. 2007) (orig. proceeding) (No. 04-1023)**

Roughly 1,900 plaintiffs sued 30 defendants in Hidalgo County, alleging exposure to chemical fumes and leaks. After several procedural permutations, the trial court postponed responses to basic discovery until shortly before trial, and the Thirteenth Court of Appeals refused to grant mandamus relief.

The supreme court found this case to be strikingly similar to the court's earlier holding in *Able Supply Co. v. Moye*, 898 S.W.3d 766, 770 (Tex. 1995), in which the supreme court clarified that, in mass tort cases involving hundreds of parties and complicated causation questions, a trial judge could not postpone responses to basic discovery until shortly before trial. Justice Brister, writing for the majority, held that, if mandamus was proper in *Able Supply*, it must be here too. Therefore, the court conditionally granted mandamus relief and ordered the trial court to "vacate its order setting any of the plaintiffs' claims for trial until the defendants have a reasonable opportunity to prepare for trial after learning who will connect their products to plaintiffs' injuries." *Allied Chem.*, 227 S.W.3d at 659.

Chief Justice Jefferson dissented, joined by Justices O’Neill, Wainwright, and Johnson. Therein, he disagreed with the court that this case presented an opportunity for the court to create special rules for such cases, and he argued that the case was rendered moot by the trial court’s withdrawal of its consolidation order.

Justice Wainwright filed his own dissenting opinion as well, in which he took issue with the court’s grant of mandamus relief.

Justice Hecht filed a concurring opinion, in which he responded to Chief Justice Jefferson’s dissent, explaining that there was no reasonable expectation that the same action would not occur again if the issue was not considered.

DISCOVERY—SCOPE

***In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667 (Tex. 2007) (per curiam) (orig. proceeding)**

Following a car accident, two plaintiffs brought a single suit against the other driver, her carrier Allstate County Mutual Insurance Co. (“Allstate”), and Allstate’s adjuster. After the plaintiffs sent the insurer and its adjuster a total of eighty nine requests for production, fifty-nine interrogatories, and sixty-five requests for admission, Allstate and the adjuster objected to the discovery and moved for summary judgment. The trial court denied the summary judgment, rejected the objections, and ordered Allstate and the adjuster to respond to all the requests.

Conditionally granting Allstate and the adjuster’s petition for writ of mandamus, the supreme court directed the trial court to vacate its discovery order because it was error to compel “discovery of everything the plaintiffs could imagine asking.” *In re Allstate*, 227 S.W.3d at 670.

ESTABLISHMENT AND FREE EXERCISE CLAUSES

***HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, No. 03-0995, 50 Tex. Sup. Ct. J. 1094, 2007 WL 2458077 (Tex. Aug. 31, 2007)**

HEB Ministries, Inc. (“HEB”) operates a school, Tyndale Theological Seminary and Bible Institute

(“Tyndale”), which has never been accredited by an agency recognized by the Texas Higher Education Coordinating Board (the “Board”). After the Board sent notice of its decision that Tyndale must stop issuing academic certificates purporting to be academic degrees, Tyndale did not appeal the decision. Instead, he sued the Board, the Commissioner of the Board, and the Attorney General for a declaratory judgment that the pertinent sections of the Education Code violate the Establishment and Free Exercise clauses of both the United States and Texas Constitutions. The trial court found that section 61.313’s regulation of the word “seminary” was violative of the First Amendment and article I, sections 6 and 8 of the Texas Constitution, but it granted summary judgment for the Board in all other respects. The trial court ordered Tyndale pay the penalty assessed by the Board and the Board’s attorney fees, and it enjoined Tyndale from awarding any “degrees.” On appeal, the Third Court of Appeals held that neither section 61.313 nor 61.304 violated the Federal or Texas constitutions.

In an opinion in which Justice Willett did not participate, Justice Hecht wrote for the majority. In Part I, the entire participating court joined. In Part II,⁴ the Hecht plurality held that Education Code sections 61.304 and .313(a) “violate the Establishment Clause and article I, section 6 of the Texas Constitution as applied to a religious institution’s programs of religious instruction.” *HEB*, 2007 WL 2458077, at *14. In Part III-A,⁵ the court discussed the United States Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the U.S. Supreme Court clarified that only the Free Exercise Clause in conjunction with other constitutional protections may relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law mandates conduct contrary to that which one’s religion requires. In Part III-B,⁶ a majority of the Court

⁴ Therein, the plurality was comprised of Justices Hecht, O’Neill, Brister, and Medina.

⁵ *Id.*

⁶ Therein, the majority was comprised of Chief Justice Jefferson and Justices Hecht, O’Neill, Brister, Medina, and

concluded section 61.313's restriction on the use of the name 'seminary' by schools offering only religious programs of study violates the Free Exercise guarantees of the First Amendment and Texas Constitution. In Part III-C,⁷ the Hecht plurality concluded "section 61.304's restriction on the words that religious institution may use to refer to completion of religious programs of study is so broad that it violates the Free Exercise guarantees of the First Amendment and the Texas Constitution." Justices Wainwright and Johnson concurred in the judgment of the Hecht plurality (thereby making it the judgment of the court), which reversed the Austin Court's judgment, vacated the injunction and award of penalties, and remanded the cause to the trial court.

Justices Wainwright and Johnson differed in reasoning and the constitutional underpinning from Justice Hecht's plurality as to Parts III-B and -C, but agreed that "the State has no authority to prohibit Tyndale from using the term[, 'seminary,'] in its title, and may not constitutionally require private postsecondary institutions to submit to state regulation in order to do so. Moreover, Justices Wainwright and Johnson would have held that the State failed to carry "its burden of showing that its regulation of ... commercial speech directly advances its interest because the regulation is more extensive than necessary to serve the Legislature's legitimate purposes.

Chief Justice Jefferson, joined by Justice Green, agreed with Justices Wainwright and Johnson, that the statutes at issue were not violative of either the Free Speech or Establishment Clauses. However, Chief Jefferson and Justice Green agreed in the reversal of the appellate court's judgment relating to the use of the term, "seminary," but would render judgment on that issue.

***Westbrook v. Penley*, No. 04-0838, 50 Tex. Sup. Ct. J. 949, 2007 WL 1861168 (Tex. June 29, 2007)**

Green.

⁷ Therein, the plurality was comprised of Justices Hecht, O'Neill, Brister, and Medina.

After experiencing marital problems, Peggy Lee Penley turned to her fellow parishioner who was also a licensed professional counselor, C.L. Westbrook. The two later formed a new church with a group of other parishioners, and Westbrook was elected pastor of the new church. Sometime later, Westbrook disclosed details of Penley's marital difficulties to the congregation as required by the church's constitution, to which Penley had agreed to abide. Penley sued Westbrook, the church, and its elders for defamation, negligence, breach of fiduciary duty, and intentional infliction of emotional distress. In response, Westbrook filed a plea to the jurisdiction, contending the suit only involved an "ecclesiastical dispute" protected by the First and Fourteenth Amendments to the U.S. Constitution. The trial court granted the defendants motions to dismiss, which Penley appealed as to Westbrook. The Fort Worth Court of Appeals affirmed the dismissal of all Penley's claims against Westbrook except for those concerning Westbrook's role as Penley's secular professional counselor.

Writing for the supreme court, Justice O'Neill held that court interference in the inherently ecclesiastical agreement entered into by Penley through the imposition of tort liability would impinge upon matters of church governance in violation of the First Amendment. Accordingly, the court reversed the Waco court's judgment, and dismissed the case for want of subject-matter jurisdiction.

EXPERT EVIDENCE

***Guevara v. Ferrer*, No. 05-1100, 50 Tex. Sup. Ct. J. 1182, 2007 WL 2457760 (Tex. Aug. 31, 2007)**

After an accident involving a car driven by Noemi Guevara and a car driven by Pacifico Ferrer in which his father-in-law, Arturo Labao, was riding, Labao later died. Ferrer subsequently sued Guevara, but at trial he relied only upon lay testimony to establish causation of the medical expenses. After the jury returned found damages of over \$1.1 million for Labao's medical expenses and \$125,000 for his pain and anguish, Guevara moved for judgment notwithstanding the verdict

on the basis that there was no evidence the conditions treated and complained by Ferrer were caused by the accident. The trial court granted the j.n.o.v. and entered a take-nothing judgment against Labao. Ferrer appealed, and the El Paso Court of Appeals reversed, finding the lay testimony of causation legally sufficient.

Justice Johnson wrote the majority opinion for the supreme court, which held that the lay evidence of causation introduced at trial was legally insufficient to support part of the jury's damages award. While the court reversed the judgment of the court of appeals, because there was evidence to support some damages, the court remanded the cause to the Eighth Court of Appeals to consider a remittitur as to expenses for which expert evidence was required.

FORUM-SELECTION CLAUSES

In re AutoNation, Inc., 228 S.W.3d 663 (Tex. 2007) (orig. proceeding)

Garrick Hatfield, a former employee of AutoNation, Inc. ("AutoNation"), violated the non-compete clause of his employment contract, which contained a forum-selection clause mandating Florida as the proper venue. AutoNation first sued Hatfield in Florida, and Hatfield subsequently sued AutoNation in Harris County, Texas. Hatfield sought and was granted a temporary injunction preventing AutoNation from pursuing its Florida action during the pendency of the Texas suit. AutoNation then filed a notice of accelerated appeal of the injunction order at the Fourteenth Court of Appeals, and the following week AutoNation filed a petition for writ of mandamus as well. The court of appeals denied mandamus relief on grounds that an adequate remedy at law was available to AutoNation, via its earlier-filed interlocutory appeal, and the appellate court upheld the injunction order in resolving that appeal. AutoNation sought mandamus relief of the appellate court's decision in the supreme court.

Conditionally granting writ of mandamus for AutoNation, Justice Willett wrote for the majority and explained the appellate court improperly

conflated Texas jurisprudence dealing with choice-of-law analysis with the law governing forum-selection clauses. The court found particularly persuasive the factual setting of the case that the first-filed action was in Florida. In conditionally granting the writ of mandamus, the supreme court directed the trial court to dismiss this suit in favor of the first-filed Florida action in the parties' contracted-for forum

Justice O'Neill filed a concurring opinion, in which she alluded that if there had been a clear showing that enforcement of the forum-selection clause would have undermined Texas public policy, she might have agreed with the appellate court's analysis.

GENERAL CONTRACTORS UNDER THE LABOR CODE

Entergy Gulf States, Inc. v. Summers, No. 05-0272, 50 Tex. Sup. Ct. J. 1140, 2007 WL 2458027 (Tex. Aug. 31, 2007)

John Summers, who was an employee of an independent contractor, sued Entergy Gulf States, Inc. ("Entergy") for injuries he sustained while working at one of Entergy's plants. Entergy had agreed to provide workers' compensation ("workers' comp.") insurance to the independent contractor's employees. Summers applied for and received workers' compensation benefits, but he still sued Entergy for negligence. Entergy moved for summary judgment, arguing that it was a general contractor and thus, was "a deemed employer shielded from Summers's suit under the Texas Workers' Compensation Act (the "Act"). The trial court granted Entergy's motion for summary judgment, and the Ninth Court of Appeals reversed.

Writing for the supreme court, Justice Willett held Entergy was a general contractor under the Act, and it was therefore entitled to the Act's exclusive-remedy defense. The fact that Entergy also owned the premises upon which Summers was injured was "immaterial." *Entergy*, 2007 WL 2458027, at *3. Accordingly, the court reversed the judgment of the Beaumont Court, and rendered judgment in favor of Entergy.

IMMUNITY FROM SUIT

***Fort Worth Indep. Sch. Dist. v. Serv. Emp. Redev.*, No. 05-0427, 50 Tex. Sup. Ct. J. 1053, 2007 WL 2404848 (Tex. Aug. 24, 2007) (per curiam)**

Service Employment Redevelopment (SER) sued Fort Worth Independent School District (the “District”) for breach of contract, and the trial court dismissed the case for want of jurisdiction. A divided Fort Worth Court of Appeals reversed, holding the District’s immunity from suit was waived by section 11.151(a) of the Texas Education Code.

On review, the supreme court recounted how section 11.151(a) had been previously determined to not be a clear and unambiguous waiver of immunity. Further, the court elaborated that while the case had been pending on appeal, the Legislature had enacted several sections of the Texas Local Government Code, which waive immunity from suit for certain claims against local government entities. In order that SER may argue in the trial court that these newly-enacted provisions waive the District’s immunity from suit, the court reversed the judgment of the court of appeals and remanded the cause to the trial court.

INDEMNITY AGREEMENTS

***Energy Serv. Co. of Bowie, Inc. v. Super. Snubbing Servs., Inc.*, No. 05-0202, 50 Tex. Sup. Ct. J. 1045, 2007 WL 2404843 (Tex. Aug. 24, 2007)**

Energy Service Co. of Bowie, Inc. (“Energy”) and Superior Snubbing Services, Inc. (“Superior Snubbing”) entered into an industry-standard “Master Service Agreement,” which “provided that they would indemnify each other and each other’s contractors against their respective employees’ personal injury claims arising out of work performed under the [Master] Agreement or at the jobsite, even if the indemnitee was at fault.” *Superior Snubbing*, 2007 WL 2404843, at *1. Superior’s employee sued Energy for injuries he

sustained at a site where both Superior and Energy were performing services. Despite Superior’s claim that because it was a subscribing employer Energy’s claim was barred section 417.004 of the Labor Code, the trial court granted summary judgment for Energy. The Fort Worth Court of Appeals reversed and rendered judgment for Superior.

Writing for the majority, Justice Hecht framed the question before the supreme court as whether, “under section 417.004 of the Texas Labor Code, [] a subscribing employer’s written agreement to indemnify a person and that person’s contractors [may] be enforced by one of those contractors even though the agreement was not executed by that contractor?” *Id.* The court found that it could, reversed the judgment of the Second Court of Appeals, and remanded the cause to the trial court.

Justice Johnson dissented, joined by Justices Wainwright, Green, and Willett, contending that the court’s construction of section 417.004 was incorrect because that section invalidates the indemnity language in Superior’s contract.

INHERENTLY DANGEROUS ACTIVITY

***Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649 (Tex. 2007) (No. 05-0940)**

Luciano Islas was injured while cleaning out the inside of a concrete truck’s rotating drum. A jury found the cleaning job was “inherently dangerous,” but the jury’s apportionment of damages to Central Ready Mix Concrete Co. (“Central”) was overturned by the judge, notwithstanding the verdict. Islas appealed the take-nothing judgment against Central, and the Thirteenth Court of Appeals reversed.

Writing for the supreme court, Justice Brister reversed and rendered judgment for Central, explaining that adopting “Islas’s theory would impose a nondelegable duty on every person in Texas who hires someone to make repairs, thereby rendering them liable for every injury that might occur in the course thereof.” *Islas*, 228 S.W.3d at 653.

JURISDICTION—MINIMUM CONTACTS

***PHC-Minden, L.P. v. Kimberly-Clark Corp.*, No. 05-0823, 50 Tex. Sup. Ct. J. 1153, 2007 WL 2457843 (Tex. Aug. 31, 2007)**

While traveling in Louisiana, Jajah Eddington sought medical care at MHC-Minden Hospital (“MHC-Minden”), which treated her flu-like symptoms and advised her to consult her primary care physician if her symptoms did not improve. Four days later, Jajah was admitted to a hospital in Longview, Texas, where she was diagnosed with toxic shock syndrome and later succumbed to her condition. DeWayne Eddington brought suit, individually, and on behalf of Jajah’s estate against Kimberly-Clark Corp. (“Kimberly-Clark”), alleging Jajah’s use of tampons manufactured by Kimberly-Clark caused her death. Kimberly-Clark filed a third-party petition against PHC-Minden, L.P. (“PHC-Minden”), which owned MHC-Minden, asserting PHC-Minden’s negligence proximately caused Jajah’s death. PHC-Minden filed a special appearance, which the trial court denied after finding it had general jurisdiction. The Tyler Court of Appeals affirmed, and PHC-Minden petitioned the Texas Supreme Court for review.

In writing for the court, Chief Justice Jefferson conducted a minimum contacts analysis, after which it held that isolated Texas trips by PHC-Minden employees, payments to Texas vendors, and various contracts with Texas entities were insufficient to establish continuous and systematic general business contacts with Texas. The court also struck down the second basis the court of appeals used to establish jurisdiction: that PHC-Minden and MHC-Minden operated as a single business enterprise. The court noted that it had never endorsed that jurisdictional theory. Accordingly, the court reversed and rendered judgment, holding that PHC-Minden lacked both the continuous and systematic contacts with Texas or any basis for imputing Province Health Care’s Texas contacts to PHC-Minden.

JURISDICTION—EXCLUSIVE

***In re Sw. Bell Tel. Co.*, No. 05-0951, 50 Tex. Sup. Ct. J. 1178, 2007 WL 2457771 (Tex. Aug. 31, 2007) (orig. proceeding)**

Plaintiffs Debbie Clara Trevino, Arnaldo Benavides, and Annette Muniz, individually and as representatives of a putative class consisting of all SWBT residential customers in Texas, sued Southwestern Bell Telephone Co. (SWBT) for violation of the rate-cap provisions in chapter 58 of the Public Utility Regulatory Act (PURA), alleging that SWBT improperly collected the Texas Universal Service Fund (TUSF) surcharge from its customers. Plaintiffs sought a declaration that SWBT’s collection of the TUSF surcharge was a rate impermissibly charged for basic network services in violation of the PURA. SWBT filed a plea to the jurisdiction, asserting that the Public Utility Commission (PUC) had exclusive jurisdiction over the core claims in the suit. The trial court denied the plea, and the Thirteenth Court of Appeals denied mandamus relief.

Writing for the supreme court, Chief Justice Jefferson held that chapter 56 of the PURA bestowed exclusive jurisdiction upon the PUC to decide the case. Accordingly, the court conditionally granted SWBT’s petition for writ of mandamus and ordered the trial court to dismiss the core claims for lack of subject matter jurisdiction.

JURISDICTION—FEDERAL PREEMPTION

***Christus Health Gulf Coast v. Aetna, Inc.*, No. 05-0710, 50 Tex. Sup. Ct. J. 1148, 2007 WL 2457803 (Tex. Aug. 31, 2007)**

Several hospitals asserted state-law claims against Aetna, Inc. (“Aetna”)—a Medicare health maintenance organization—after the Texas Department of Insurance denied jurisdiction over their complaint. Aetna filed a plea to the jurisdiction, which the trial court granted. The hospitals appealed, but the court of appeals affirmed the trial court’s judgment, concluding that the hospitals’ “claims arose under the Medicare Act and . . . the [h]ospital[s] therefore had to exhaust administrative remedies before

suing in state court.” *Christus Health Gulf Coast*, 2007 WL 2457803, at *3. The hospitals filed a motion for rehearing for the appellate court to take into consideration an inconsistent opinion issued by the Fifth Circuit Court of Appeals, which was handed down two days after the state appellate court’s opinion, but the Fourteenth Court of Appeals denied the motion.

Writing for the supreme court, Chief Justice Jefferson followed the analysis of the Fifth Circuit Court of Appeals decision the Texas appellate court attempted to distinguish. The court agreed with the second holding from *Rencare, Ltd. v. Humana Health Plan of Tex., Inc.*, 395 F.3d 555, 558 (5th Cir. 2004), in which the circuit court concluded “it appears that the administrative review process attendant to Part C [of Medicare] does not extend to claims in which an enrollee has absolutely no interest.” *Rencare*, 395 F.3d at 559. As in *Rencare*, the supreme court explained, “enrollees are protected from liability for fees that the Medicare Advantage organization[, such as Aetna here,] must pay, and the only interest at issue here is the [h]ospitals’ interest in receiving payment from the Medicare Advantage organization. *Christus Health Gulf Coast*, 2007 WL 2457803, at *6. As such, “[w]hether those fees are in fact Aetna’s legal obligation is a matter within the trial court’s jurisdiction.” *Id.* Accordingly, the court reversed the judgment of the Fourteenth Court of Appeals and remanded the case to the trial court.

“MADE WHOLE” DOCTRINE

***Fortis Benefits v. Cantu*, No. 04-0838, 50 Tex. Sup. Ct. J. 965, 2007 WL 1861000 (Tex. June 29, 2007)**

Vanessa Cantu sued multiple parties for injuries she sustained in an automobile accident. Her medical insurer, Fortis Benefits (“Fortis”), intervened claiming a subrogation right. All the defendants settled with Cantu, and Fortis looked to Cantu for its recovery. A divided Waco Court of Appeals upheld the trial court’s finding that, “because Cantu’s medical expenses exceeded the settlement amount plus the benefits Fortis had paid, Fortis’s subrogation claim was barred by the

equitable ‘made whole’ doctrine.” *Fortis*, 2007 WL 1861000, at *1.

Writing for the supreme court, Justice Willett reversed the Waco court’s judgment, reasoning that the equitable “made whole” doctrine is inapplicable when the parties’ agreed contract provides a clear and specific right of subrogation.

OPEN COURTS PROVISION

***Kallam v. Boyd*, No. 05-0027, 50 Tex. Sup. Ct. J. 899, 2007 WL 1721947 (Tex. June 15, 2007) (per curiam)**

Sharon Boyd sued five health care providers for failing to diagnose her colorectal cancer, and the trial court granted partial summary judgment dismissing Boyd’s claims of negligence that occurred more than two years before she filed suit as being barred by limitations. The Fort Worth Court of Appeals reversed, holding “the Open Courts provision of the Texas Constitution precluded application of the statute of limitations to bar claims before Boyd reasonably could have discovered them,” and it remanded the case to the trial court. *Kallam*, 2007 WL 1721947, at *1.

Before oral argument at the supreme court could be had, Boyd succumbed to her cancer. In a per curiam opinion, the court declined to address such an “important constitutional issue,” because of the change in posture of the case. *Id.* The court did allow that, “[o]n remand, Boyd’s heirs or estate representative may, of course, continue the litigation.” *Id.* Therefore, the court withdrew its order granting the petition for review as improvidently granted, and it denied the petition.

PREMISES LIABILITY

***Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161 (Tex. 2007) (per curiam) (No. 05-0722)**

Connie Alger became the first person to have ever fallen from a pedestrian ramp at Brinson Ford, Inc. (“Brinson”) since its opening ten years before her injury. Alger sued Brinson alleging the ramp’s configuration was a premises condition posing an unreasonable risk of harm, to which Brinson filed both traditional and no-evidence

motions for summary judgment. In her response to the summary judgment motions, Alger's safety engineering expert attested that the ramp in question was "unreasonably dangerous." The trial court granted summary judgment in favor of Brinson, but the Waco Court of Appeals reversed.

In a per curiam opinion, the supreme court explained that "a condition is not unreasonably dangerous simply because it is not foolproof." *Brinson*, 228 S.W.3d at 163 (citing *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 410 (Tex. 2006)). As a matter of law, the court held the ramp at issue did not pose an unreasonable risk of harm because the portion of it that was in question met applicable safety standards and was outlined in yellow stripping. The court therefore reversed the judgment of the Tenth Court of Appeals and rendered judgment for Brinson.

SOVEREIGN IMMUNITY—PLEA TO THE JURISDICTION

***Tex. A&M Univ. Sys. v. Koseoglu*, No. 05-0321, 50 Tex. Sup. Ct. J. 1213, 2007 WL 2562359 (Tex. Sep. 7, 2007)**

Dr. Sefa Koseoglu was a contract employee at a division of the Texas A&M University System ("TAMU"). After Koseoglu was notified that he was to be terminated, he obtained a written agreement on December 19, 2002 from the TAMU general counsel's office that he be permitted to remain an employee under certain conditions. However, TAMU refused to execute a final agreement evidencing the same terms on January 14, 2003.

Koseoglu sued TAMU and his supervisor, Dr. Mark McClellan, for breach of contract arising out of the December 19 agreement, to which TAMU and McClellan filed pleas to the jurisdiction. After the trial court denied both pleas, TAMU and McClellan filed interlocutory appeals under Texas Civil Practice and Procedure ("CPRC") section 51.014(a)(8) to the Waco Court of Appeals. The appellate court reversed the trial court's denial of TAMU's plea to the jurisdiction and dismissed McClellan's interlocutory appeal for want of jurisdiction.

On review, the supreme court expressly declined to adopt a rule proposed by TAMU that a "plaintiff's opportunity to amend should come after the governmental entity files its plea to the jurisdiction, which puts the plaintiff on notice of alleged defects in his pleadings, but before the trial court takes any definitive action." *Koseoglu*, 2007 WL 2562359, at *3. However, while the supreme court "generally agree[d]" with the Waco Court that "a plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious," *Id.* (quoting *Tex. A&M Univ. Sys. v. Koseoglu*, 167 S.W.3d 374, 383 (Tex. App.—Waco 2005)), the court clarified that such an opportunity to amend exists "only if it is possible to cure the pleading defect." *Id.* at *4. Because it had consistently held the "State does not waive its immunity from a breach-of-contract action by accepting the benefits of a contract," and because there was no evidence that the Legislature had waived TAMU's sovereign immunity to Koseoglu's suit, the court reversed the Waco Court's remand order and dismissed Koseoglu's claims against TAMU with prejudice.

In determining whether CPRC section 51.014(a)(8) excludes state officials sued in their official capacity from the class of entities that may seek an interlocutory appeal a denial of plea to the jurisdiction, the court resolved a split amongst the courts of appeal. The court reasoned that, because a "suit against a state official in his official capacity 'is not a suit against the official personally, [because] the real party in interest is the entity,' . . . [s]uch a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and 'is, in all respects other than name, . . . a suit against the entity.'" *Id.* at *8 (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). Accordingly, the court held a state official may seek interlocutory appellate review from the denial of a jurisdictional plea, and the court therefore reversed "that portion of the court of appeals' judgment that it was without jurisdiction to decide McClellan's appeal of the trial court's denial of his jurisdictional plea" and rendered the judgment the court of appeals should have rendered. *Id.* at *10.

STATUTE OF LIMITATION—SERVICE OF PROCESS

***Proulx v. Wells*, No. 06-0258, 50 Tex. Sup. Ct. J. 1188, 2007 WL 2457758 (Tex. Aug. 31, 2007) (per curiam)**

Dennis Proulx filed a personal injury suit against Michael Wells before the expiration of the statute of limitations. In a protracted effort to serve Wells that lasted over eight months, Proulx utilized two process servers, two investigators, and attempted to effect service some thirty times at five different addresses before substituted service was finally effected.

Predictably, Wells moved for summary judgment of the suit because Proulx's allegedly failed to exercise due diligence in the issuance and service of the citation. Incredibly however, both the trial court and a divided Fort Worth Court of Appeals agreed.

In reversing and remanding the judgment of the appellate court, the supreme court reasoned that the periods of inactivity that had troubled the trial and appellate courts were explained by Wells deliberate avoidance of service by moving from one address to another.

The court also clarified an earlier apparent discrepancy in the burden-shifting attendant to this inquiry in a summary judgment context. Therein, the court explained that when the nonmovant pleads diligence in requesting issuance of citation, the limitation defense is not conclusively established until the movant meets his or her burden of negating the applicability of the limitation issue, and explaining every lapse in effort or period of delay.

STATUTE OF LIMITATIONS—SUIT TO QUIET TITLE

***Ford v. Exxon Mobil Chem. Co.*, No. 06-0293, 50 Tex. Sup. Ct. J. 1191, 2007 WL 2457755 (Tex. Aug. 31, 2007) (per curiam)**

Summarizing the complexity of this case disposed of with a per curiam opinion, the supreme court recounted that “[t]his suit involves one pipeline,

two litigants, three tracts, and four deeds.” *Ford*, 2007 WL 2457755, at *1.

Five years after signing the last amendment to an easement granted in favor of Exxon Mobil Chemical Co. (“Exxon Mobil”), Robert Ford sued for real estate fraud. The trial court granted summary judgment for Ford, awarding him \$36,167, and it ordering Exxon Mobil's pipeline removed from Ford's property. The Beaumont Court of Appeals reversed the damages claim because Ford's fraud claim was barred by the four-year statute of limitations, but it affirmed the removal order because equitable actions to quiet title have no statute of limitations.

In reversing the Ninth Court of Appeals' judgment granting Ford quiet title and requiring the removal of Exxon Mobil's pipeline, the supreme court distinguished that deeds obtained by fraud are merely voidable, as opposed to void, deeds sought to be resolved in equity by a suit to quiet title. Therefore, Ford could not simply recast his claim as one in equity to quiet title to avoid the running of the statute of limitations on his fraud claims. If, as the court reasoned, “the rule were otherwise, limitations would rarely apply in real estate cases, as virtually every case could be recast as an action to remove cloud on title.” *Id.* at *3.

STATUTE OF LIMITATIONS—UNJUST ENRICHMENT

***Elledge v. Friberg-Cooper Water Supply Corp.*, No. 06-0677, 50 Tex. Sup. Ct. J. 1060, 2007 WL 2404872 (Tex. Aug. 24, 2007) (per curiam)**

Wichita County contracted with Bobby Elledge for improvement to waterline services to the county's rural residents, including members of Friberg-Cooper Water Supply Corp. (“Friberg”). Although the contract with the county required Elledge to provide his own insurance and equipment, he nevertheless invoiced Friberg for these items, which Friberg voluntarily paid. More than two years but less than four years after the final invoice payment, Friberg sued Elledge under unjust enrichment. The trial court granted Elledge's summary judgment motion, ruling

Friberg's claim was barred by the "two-year statute of limitations applicable to suits for 'conversion of personal property' or 'taking or detaining the personal property of another.'" *Friberg*, 2007 WL 2404872, at *1. A divided Fort Worth Court of Appeals reversed, holding that unjust enrichment claims are instead governed by the four-year limitations period applicable to suits on debt. *Id.*

Because the supreme court reasoned the most logical reading of sections 16.003 and 16.004 of the Civil Practices and Remedies Code is to treat "debt" actions as breach-of-contract actions governed by a four-year statute of limitations, the court "declare[d] categorically" that unjust enrichment claims are governed by the two-year statute of limitations. Accordingly, in a per curiam opinion, the court reversed the judgment of the appellate court and rendered judgment that Friberg's claims were time-barred.

TIMELY-FILED NOTICES OF APPEAL

***Ramos v. Richardson*, 228 S.W.3d 671 (Tex. 2007) (per curiam)**

An incarcerated pro-se litigant brought a medical malpractice action against the respondents, which the trial court dismissed for noncompliance with the expert report requirements of the Texas Civil Practices and Remedies Code. The pro se litigant appealed to the Corpus Christi Court of Appeals, but his notice of appeal was file-stamped a day after the appellate deadline, even though the pro-se litigant placed his notice of appeal in the prison's outgoing mailbox some twenty-two days before the expiration of the appellate deadline. Accordingly, the Corpus Christi Court of Appeals dismissed the pro-se litigant's appeal.

In a per curiam opinion, the supreme court cited to its 2004 opinion in *Williams v. T.D.C.J.-I.D.*, 142 S.W.3d 308 (Tex. 2004), in which it held that, when "an inmate . . . does everything necessary to satisfy timeliness requirements," the inmate "must not be penalized if the document is ultimately filed tardily because of an error on the part of officials over whom the inmate has no control." *Ramos*, 228 S.W.3d at 673. Accordingly, the

court reversed the judgment of the Corpus Christi court and reinstated the pro-se litigant's appeal.

TORT CLAIMS ACT

***Stephen F. Austin St. Univ. v. Flynn*, 228 S.W.3d 653 (Tex. 2007)**

Diane Flynn was riding her bike on a trail on the Stephen F. Austin State University (SFA) campus when she was struck by a stream of water from an oscillating sprinkler, knocking her off her bike, and causing her injury. Flynn sued SFA under the Tort Claims Act, and SFA filed a plea to the jurisdiction. The trial court denied SFA's plea, and SFA filed an interlocutory appeal. The Twelfth Court of Appeals affirmed the trial court's order, "concluding that Flynn had sufficiently alleged a premises defect for which the Tort Claims Act waived sovereign immunity and that neither the discretionary powers exception to the Tort Claims Act nor the recreational use statute (RUS) barred Flynn's claim." *Flynn*, 228 S.W.3d at 656.

Writing for the supreme court, Justice Medina affirmed the Tyler Court of Appeals' conclusion that SFA's decisions regarding its sprinkler system were operational and maintenance-level decisions, rather than policy formulation. However, the court reversed the judgment of the appellate court regarding the RUS, holding no material factual dispute existed as to the application of the RUS to this case.

Justice Hecht, joined by Justices Wainwright and Willett, concurred in all but Part III of the opinion, distinguishing that, even if SFA had made watering its campus a policy issue, the policy would not be one protected by the discretionary function exception to the Tort Claims Act.

NEWER CASES

This Week's Supreme Court Orders & Opinions

September 28, 2007 | [Leave a Comment](#)

The Texas Supreme Court issued four opinions with [today's orders](#).

In [National Plan Administrators, Inc. v. National Health Insurance Co.](#) (No. 05-0006), the Court held that a third-party administrator did not owe a general fiduciary duty to an insurer in light of the parties' agreement and certain provisions in the Insurance Code. The Court therefore reversed the court of appeals' judgment affirming a monetary award and rendered judgment that the insurer take nothing.

In [Texas Parks & Wildlife Department v. E.E. Lowrey Realty, Ltd.](#) (No. 05-0157) (per curiam), the Court applied its recent decision in *Texas A&M University System v. Koseoglu*, ___ S.W.3d ___ (Tex. 2007) and held that Government Code § 51.014(a)(8) provided the court of appeals with jurisdiction to consider the appeal of Department employees named as codefendants in the suit. Reversing the court of appeals' judgment, the Court dismissed the plaintiff's claims against the employees and the Department after concluding that they were incurably defective and therefore should not be remanded.

In [A.G. Edwards & Sons Inc. v. Beyer](#) (No. 05-0580), the Court rejected the contention that Probate Code § 439(a) barred the plaintiff's breach of contract claim against A.G. Edwards and affirmed the court of appeals' judgment affirming a \$791,200 jury verdict. However, the Court reversed and remanded for a new trial on attorney's fees because the plaintiff failed to segregate fees between her breach of contract and tort causes of action.

In [Lamesa Independent School District v. Booe](#) (No. 05-0959) (per curiam), the Court reiterated its holding in *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 197 S.W.3d 390 (Tex. 2006) that Education Code § 11.151(a) is not a clear and ambiguous waiver of sovereign immunity. Because the court of appeals determined otherwise, the supreme court reversed and remanded the case to the court of appeals to consider issues it did not reach.

This Week's Supreme Court Orders & Opinions

October 12, 2007 | [Leave a Comment](#)



The Texas Supreme Court issued four opinions with [this week's orders](#).

In [In re U.S. Home Corp.](#) (No. 03-1080) (per curiam), a dispute between a homebuilder and purchasers, the Court conditionally granted mandamus relief from a trial court order refusing to compel arbitration, holding that no evidence supported any of the asserted defenses to enforcement of the arbitration clause. The Court declined the defendants' invitation to reverse the trial court's class certification order because the court of appeals had not yet ruled on that request.

Answering certified questions from the Fifth Circuit in [Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.](#) (No. 05-0261), the Court held under the facts of the case that one insurer owed a second insurer no duty (directly or by subrogation) to compensate the second insurer for paying more than its proportionate share of a settlement to which both contributed. Justice Willett delivered a [concurring opinion](#) providing his additional thoughts on why Texas law should not recognize such a claim.

In [In re SCI Texas Funeral Services, Inc.](#) (06-0385) (per curiam), the Court conditionally granted mandamus relief from discovery and sanctions orders in a putative class action because the court of appeals' reversal of class certification "render[ed] the class-wide discovery superfluous and the class-wide sanctions incongruous."

In [BFI Waste Systems of North America, Inc. v. North Alamo Water Supply Corp.](#) (No. 06-0602) (per curiam), the Court denied both petitions for review, but indicated that the court of appeals (in footnote 6 of its opinion) had improperly commented on the validity of a discharge permit, an issue not before that court. The supreme court agreed with petitioners' argument that the court of appeals' comments should not prejudice future litigation over the discharge permit.

This Week's Supreme Court Orders & Opinion

October 19, 2007 | [Leave a Comment](#)



The Texas Supreme Court issued one opinion with [today's orders](#). In [Yancy v. United Surgical](#)

[Partners Inc.](#) (05-0925), a summary judgment case, the Court held that the two-year statute of limitations in the former Medical Liability Act did not violate the Texas Constitution's open courts guarantee on the record presented. Although the Court concluded that the court of appeals erred because the record contained some evidence of continuous mental incapacity, it nevertheless affirmed after concluding that the petitioner failed to raise a "fact issue establishing that [petitioner] did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that she sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save [petitioner's] time-barred negligence claims."

Supreme Court Opinions, Part II

November 5, 2007 | [Leave a Comment](#)



[As promised](#), here are some very brief summaries of the latest Texas Supreme Court opinions.

In [In re Pirelli Tire, L.L.C.](#) (No. 04-1129) (orig. proceeding), a case brought by non-U.S. residents, the Court held that the trial court abused its discretion by denying a motion to dismiss based on forum non conveniens. The Court relied on the private and public interest factors set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and held that they "clearly and overwhelmingly favor a Mexican forum for resolution of this dispute." The Court further held that the "[e]rroneous denial of an forum-non-conveniens motion . . . cannot be adequately rectified on appeal." Justice Willett (joined by Justice Wainwright) issued a [concurring opinion](#), and Justice Johnson (joined by Chief Justice Jefferson) [dissented](#).

In both [Springer v. Springer](#) (No. 06-0382) (per curiam) and [Sprowl v. Payne](#) (No. 06-0533) (per curiam), the Court held that dismissal of an appeal was improper even though the appellant failed to either pay the filing fee or file an affidavit of indigence "with or before" the notice of appeal as TRAP 20.1(c)(1) requires. Relying on TRAP 44.3, the Court reversed the court of appeals' judgment of dismissal in both cases, concluding that "failure to file an affidavit of indigence 'with or before' a notice of appeal will not support

dismissal unless the appellant is given a reasonable time to correct the defect and fails to do so."

In [Knapp Medical Center v. De La Garza](#) (No. 06-0575) (per curiam), the Court held that TRCP 11 barred enforcement of a disputed oral settlement agreement reached during trial.

In [Bossier Chrysler-Dodge II, Inc. v. Rauschenberg](#) (No. 06-0874) (per curiam), the Court reversed and remanded the case to the court of appeals in light of *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006), which held that the issue of attorney's fees should ordinarily be retried when damages are significantly reduced on appeal.

In [In re J.A.J.](#), (No. 07-0511), the Court held that an appellant whose parental rights have been terminated must specifically assign error to the Department of Family and Protective Services' appointment as conservator. If the parent appeals only the termination decision, any error in the conservatorship appointment is waived.

OTHER INTERESTING DEVELOPMENTS

Supreme Court Webcasting Era Begins

March 20, 2007 | [Leave a Comment](#)

With [this morning's live webcast](#) of arguments before the [Texas Supreme Court](#), a new era in Texas appellate practice has begun. I was able to access the webcast and view the arguments without any problem. The video feed—which has a certain "Court TV" look—appears on the left side of the screen, flanked by a brief summary of the case being argued. A schedule of upcoming arguments, along with links to electronic briefs and summaries for each, appears on the [main webcast page](#). Bravo!

Appellate Court Filing Fee Alert

August 29, 2007 | [Leave a Comment](#)

Yesterday, the Texas Supreme Court issued an [order increasing filing fees](#) for proceedings in the supreme court and the courts of appeals. The increase takes effect September 1, 2007. Consult the order to avoid any glitches that might result from sending checks in the wrong amount. (Thanks to Pam Baron for the tip.)

Supreme Court Posts Calendar Online

September 9, 2007 | [1 Comment](#)

The Texas Supreme Court has added links to its calendar (in [Microsoft Word](#) and [PDF form](#)) as a new feature on [the Court's web site](#). Advocates and others now have ready access to the Court's schedule through August 2008, including dates for oral argument, conference, orders, and holidays. (Thanks to [Elana Einhorn](#) for the tip.)

Interesting Recusal Motion in Supreme Court

September 13, 2007 | [1 Comment](#)

Appellate geeks like me are already interested in [In re Columbia Medical Center, Subsidiary, L.P. \(No. 06-0416\)](#), a case in which the Texas Supreme Court will re-examine whether a trial court's decision to grant a new trial is reviewable by mandamus. (Oral argument is set for September 27.) But the real parties in interest have filed a recusal motion that will lift more than a few eyebrows. [Texas Lawyer](#) provides the details [here](#).

This Week's Supreme Court Orders

September 21, 2007 | [Leave a Comment](#)

The Texas Supreme Court issued no opinions with [today's orders](#). Interestingly, the Court denied the motion to recuse filed in in [In re Columbia Medical Center, Subsidiary, L.P. \(No. 06-0416\)](#) (previously discussed [here](#) and [here](#)), which reportedly had been set for oral argument with the mandamus petition next Thursday.

UPDATE: The Court's spokesman, Osler McCarthy, has confirmed that reports of a hearing on the *Columbia* motion were mere rumors. Accordingly, I have taken down today's earlier post on that subject. Ugh!