

D. Todd Smith

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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED FEBRUARY 13, 2009

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

[FEBRUARY 13 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from February 5 through Wednesday](#) (PDF)

OPINIONS

06-0867

Pine Oak Builders Inc. v. Great American Lloyds Insurance Co.
from Harris County and the 14th District Court of Appeals, Houston
For petitioner: Joseph H. Pedigo, Houston, and Joe S. Yardas, Conroe
For respondent: Jennifer Bruch Hogan, Houston
AFFIRMED IN PART, REVERSED IN PART AND REMANDED.
opinion by Justice Willett:

The principal issues are (1) whether the “exposure rule” or “manifestation rule” should determine when the duty to defend is triggered under an occurrence-based commercial general liability insurance policy and (2) whether evidence outside the pleadings and policy provisions may be introduced to determine a duty to defend. In this case Pine Oak sued two insurers with which it had policies (each insurer for a different policy period) after the insurers refused to defend the homebuilder from home buyers’ lawsuits. Both insurers argue Pine Oak’s policies did not cover the home buyers’ claims. Great American contends its policy with Pine Oak did not cover Pine Oak’s own work but would cover subcontractors’ work – and one home buyer’s suit only cited Pine Oak’s work in its allegations. In that case, Pine Oak argues that it should be allowed to prove by evidence beyond the lawsuit pleadings that a subcontractor’s work was at issue. Great American argues that its duty to defend Pine Oak also should depend on when the construction defects were manifest rather than when the exposure to harmful conditions began. The trial court granted summary judgment for the insurers. The court of appeals affirmed the trial court’s ruling that extrinsic evidence should not be allowed to show coverage, but reversed on when coverage was triggered.

The Supreme Court HOLDS that the actual-injury rule will control in this occurrence-based policy and that Pine Oak failed to plead facts that would invoke the subcontractor exception to the no-coverage provision of the policy.

- The Court rejected both exposure and manifestation rules in [Don's Building Supply v. OneBeacon Insurance Co.](#), another case involving insurance coverage for claims about the homes' exterior finish and adopted instead the actual-injury rule, under which property damage occurs during the policy period if "actual physical damage to the property occurred" during the policy period. The key date is when injury happens, not when "someone happens upon it." The policy language construed in *Don's Building Supply* is identical to the relevant language in Great American's policies.

- The extrinsic fact Pine Oak seeks to introduce in this coverage action contradicts the facts alleged in the one suit. Faulty workmanship by a subcontractor that might fall under the subcontractor exception to the "your work" exclusion is not mentioned in the petition. Unlike the petitions in the other four suits, the petition in the Glass case does not accuse any subcontractor—a separate legal entity—of defective work or other legally actionable conduct, nor does it allege that Pine Oak is liable under any theory for the conduct or work of a subcontractor. The policy imposes no duty to defend a claim that might have been alleged but was not, or a claim that more closely tracks the true factual circumstances surrounding the third-party claimant's injuries but which, for whatever reason, has not been asserted.

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07-0419

In re Labatt Food Service L.P.

from Bexar County and the Fourth District Court of Appeals, San Antonio

For relator: Nissa Dunn, San Antonio

For real party in interest: Leo D. Figueroa, San Antonio

MANDAMUS RELIEF CONDITIONALLY GRANTED, opinion by Justice Johnson:

The principal issues are (1) whether an agreement to arbitrate occupational injury or death claims binds a person's wrongful-death beneficiaries and (2) whether the agreement as a whole is invalid because of the statutory prohibition of personal-injury or death-claim waivers under Texas Labor Code section 406.033(e). In this case the trial court refused to compel arbitration of wrongful death and survivors' claims after a Labatt employee died in a work accident. The court of appeals denied the company's mandamus petition.

The Supreme Court HOLDS that beneficiaries are bound because of the derivative nature of the wrongful-death action and that the arbitrator should decide whether the invalidity issue.

- The Court notes that Texas procedural rules apply in determining whether nonsignatories are bound by an arbitration agreement, but the question whether state or federal substantive law governs whether nonsignatories are bound to arbitrate under an agreement subject to the Federal Arbitration Act. Under the FAA, state law generally governs whether a litigant agreed to arbitrate, and federal law governs the scope of the arbitration clause. But whether nonsignatories are bound by an arbitration agreement is a distinct issue that may involve either or both of these matters. The FAA does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue. Pending an answer from the U.S. Supreme Court, the Court notes its determination to apply state substantive law and its endeavor to keep it consistent with federal law. By well-established law, statutory wrongful death beneficiaries' claims place them in the exact "legal shoes" of the decedent, subject to the same defenses to which the decedent's claims would have been subject. Long established precedent determined that a decedent's pre-death contract may limit or totally bar a subsequent action by his wrongful death beneficiaries. The beneficiaries in this case urge us to circumvent the derivative claim rule by holding that wrongful-death actions are analogous to and should be treated similarly to loss of consortium claims. But a tort action seeking damages for loss of consortium is fundamentally different from a statutory wrongful-death action: The beneficiaries would have been entitled to bring a claim in a case involving sever but nonfatal injury to recover for the loss of care, guidance, love and protection ordinarily provided by their father. Their lost consortium claims would be derivative in the sense that the beneficiaries would be required to establish Labatt was liable for their father's underlying injury in order to recover damages. But loss of consortium claims are not entirely derivative as are wrongful death claims. Instead, they are separate and independent claims distinct from the underlying action.

● As to the validity of the whole agreement, the U.S. Supreme Court has held that “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” the beneficiaries in this case challenge the contract on the ground that an illegal clause renders the whole contract void. The beneficiaries challenge the arbitration clause only in the sense that they also challenge all parts of the agreement because the parts comprise the whole. But, unless a challenge is to the arbitration clause or arbitration agreement itself, as it was in *In re Poly-America*, the question of a contract’s validity is for the arbitrator and not the courts.

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07-0924

Old Farms Owners Association Inc. v. Houston Independent School District, et al.

from Harris County and the First District Court of Appeals, Houston

REVERSED, TRIAL COURT JUDGMENT REINSTATED, per curiam opinion:

The issue is whether the 2001 amendment to section 33.04 of the Tax Code apply to a case originally filed in 1999, nonsuited, then refiled in 2002. That amendment removed a five-year notice requirement that, in its absence, waived penalty and interest on a tax-delinquency case. The amendment excluded from its effect tax-delinquency suits pending at the time the Tax Code was amended – “subject of a collection suit filed before the effective date of this Act.” The Supreme Court HOLDS that the amendments do not apply in this instance. The school district and other taxing entities argue that the exclusion may have been meant to apply to cases such as those that reach judgment, those pending appeal or those disposed of for want of prosecution, not nonsuits. But this clause could not have been intended to apply to a case disposed of due to judgment or one pending appeal because those cases would have already applied the statute in effect at the time of trial. And as to those cases dismissed for want of prosecution, this clause would apply to them, as long as they were dismissed without prejudice, in which case they are treated the same as a nonsuit. No indication shows the Legislature intended to include a dismissal for want of prosecution under this clause, but not a nonsuit.

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08-0093

In re Gayle E. Coppock

from Denton County and the Second District Court of Appeals, Fort Worth

For relator: William E. Trantham, Denton

For real party in interest: Amie S. Peace, Dan C. Coffey, Denton

HABEAS CORPUS RELIEF GRANTED, opinion by Justice O’Neill:

The issues in this habeas corpus proceeding involving an ex-spouse found in contempt for “coarse or offensive” communications are (1) whether the divorce decree ordered or commanded no coarse or offensive communication and, if so, (2) whether that would be an unconstitutional prior restraint on the ex-spouse’s free speech or void for vagueness.

The Supreme Court HOLDS that the order does not contain sufficient language to advise the parties that refraining from or engaging in the described conduct is mandatory. The injunctive provision at the heart of the dispute is less than clear, as what constitutes “coarse or offensive” communication, especially between warring spouses, is largely in the eye of the beholder. Because the judgment lacks a critical component necessary to invoke the court’s contempt power, the Court does not reach the constitutional challenges.

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ISSUES SUMMARIES FOR PETITIONS GRANTED

ORAL ARGUMENT IN TODAY'S ORDERS WILL BE SENT LATER

07-0205

Waffle House Inc. v. Cathie Williams
from Tarrant County and the Second District Court of Appeals, Fort Worth
Oral argument set March 12

[Briefs](#)

[Court of appeals opinion](#)

07-0815

Intercontinental Group Partnership v. KB Home Lone Star L.P.
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument set March 12

[Briefs](#)

[Court of appeals opinion](#)

08-0043

Timpte Industries Inc. v. Robert Gish and Pinnacol Assurance
from Hale County and the Seventh District Court of Appeals, Amarillo
Oral argument set March 11

[Briefs](#)

[Court of appeals opinion](#)

08-0175

Whirlpool Corp. v. Margarita Camacho, et al.
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument set March 10 at South Texas College of Law

[Briefs](#)

[Court of appeals opinion](#)

08-0262

Roy Kenji Yamada, M.D. v. Laura Friend, et al.
from Tarrant County and the Second District Court of Appeals, Fort Worth
Oral argument set March 10 at South Texas College of Law

[Briefs](#)

[Court of appeals opinion](#)

08-0363

State Office of Risk Management v, Mary Lawton
from Brazos County and the 10th District Court of Appeals, Waco
Oral argument set March 11

Briefs not available online

[Court of appeals opinion](#)

08-0390

MBM Financial Corp. and Marimom Business Systems Inc. v. The Woodlands Operating Co., L.P.

from Montgomery County and the Ninth District Court of Appeals, Beaumont
Oral argument set March 12

[Briefs](#)

[Court of appeals opinion](#)

08-0836

In re Weekley Homes L.P.

from Dallas County and the Fifth District Court of Appeals, Dallas

Oral argument set March 31

[Briefs](#)

[Court of appeals opinion](#)