

D. Todd Smith

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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED FEBRUARY 27, 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 27 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from February 19 through Wednesday](#) (PDF)

OPINIONS

05-0030

TXI Operations, L.P. v. David Perry

from Liberty County and the Ninth District Court of Appeals, Beaumont

For petitioner: Zeb D. Zbranek, Liberty

For respondent: Brent S. Thomas, Beaumont

AFFIRMED, opinion by Justice Green:

The issue is whether as a matter of law a 15-mph speed-limit sign adequately warned a business invitee of a large hole in the defendant's private road. In this case Perry sued for negligence and premises liability after suffering injuries when he hit the roof of his truck as it struck the hole on a dirt road TXI owned. The accident occurred on the fourth trip Perry drove on the road that day. He had driven the same road on previous days. A jury found for Perry, but assessed him and TXI equal fault. The court of appeals affirmed, holding that legally sufficient evidence allowed the jury to reasonably infer that the speed-limit sign did not adequately warn Perry of the dangerous condition.

The Supreme Court HOLDS that the speed-limit sign was not adequate to warn of the pothole danger. A "be careful" warning might be some evidence that the premises owner was not negligent, but it is not conclusive in a situation such as this where the posted speed-limit sign was only a general instruction. The sign neither informed the driver of road hazards generally, nor did it identify the particular hazard that TXI now says the sign was meant to warn against. The inadequacy of the sign is supported by the evidence that Perry was following the sign's instruction at the time of his injury.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

Justice Hecht DISSENTING, joined by Justices Medina and Willett:

A maximum speed-limit sign is not what the Court believes it means. Texas law provides that speed faster than legal limits is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful. The inverse is not true: a speed below the legal limit is not, prima facie, reasonable and prudent. Texas law provides that, regardless of any maximum speed limit set by law, a driver may not operate a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing. Had Perry driven up to the cattle guard the first time, noted the 15 mph speed limit sign, thought to himself that the sign assured a safe speed, driven through the pothole, and been injured, he could at least argue that the sign misled him. But that is not, according to him, what happened.

[Hecht dissent in HTML](#)

[Hecht dissent in PDF](#)

07-0599

Retamco Operating Inc. v. Republic Drilling Co.

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

For petitioner: James L. Drought, San Antonio

For respondent: Douglas W. Alexander, Austin

REVERSED AND REMANDED, opinion by Justice Green:

The issue arising from this fraud and contract action over royalties is whether Texas has personal jurisdiction over Republic, a California company that acquired passive, non-operating mineral interests with a liability assumption for a pro rate share of operating and well-abandonment expenses. Republic got the mineral interests from Paradigm Oil in transactions in California and Colorado while Retamco's fraud and breach-of-contract suit was pending. Paradigm later declared bankruptcy. The trial court denied Republic's special appearance to challenge personal jurisdiction, but the appeals court reversed.

The Supreme Court HOLDS that Republic has sufficient contacts with Texas to establish this state's personal jurisdiction over it. Republic does not dispute that the property at issue is in Texas or that it was transferred to Republic. The company argues that jurisdiction is negated because the transaction causing the transfer occurred in California. Republic's contacts with Texas were purposeful, not random, fortuitous, or attenuated. Republic, by taking assignment of Texas real property, reached out and created a continuing relationship in Texas. Under the assignment, it is liable for obligations and expenses related to the interests and allows Republic to benefits and protections of Texas laws. Unlike personal property, Republic's real property will always be in Texas, leaving no doubt of the continuing relationship that this ownership creates.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

07-0901

In re Bank of America, N.A.

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

Justice Johnson did not participate

MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether the holding in *In re Prudential* — that a contractual waiver of a jury trial is enforceable — creates a presumption against waiver that places the burden on the party seeking enforcement to prove that the opposing party knowingly and voluntarily agreed to waive its constitutional right to a jury trial. The Supreme Court HOLDS that *Prudential* does not impose a presumption against a contractual jury waiver. But the court of appeals' inference of a presumed waiver is erroneous for two reasons: the presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on Bank of America, which is contrary to the burden-shifting rule in *In re General Electric*, and would create an unnecessary distinction between arbitration and jury-waiver clauses.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

08-0398

Jerry Gurkoff, D.O. v. Rosemary Jersak

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

Justice Brister DISSENTING from petition for review denied, joined by Justice Hecht:

In this medical-malpractice case, no expert report was ever filed, so the statute deems it meritless. Yet the courts below refused to shift any costs because the defendant sought recovery from the plaintiff's attorney rather than the plaintiff — who had died without assets. If it was not clear before, it is surely clear now: Some courts simply will not enforce this statute. The Court declines to enforce it too.

[Brister dissent in HTML](#)

[Brister dissent in PDF](#)

[Briefs](#)

08-0405

Retamco Operating Inc. v Douglas B. McCallum, LLC

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

REVERSED AND REMANDED, per curiam opinion:

The Court HOLDS that the rule in *Retamco*, 07-0599, above, controls in a transaction occurring in Colorado.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

08-0482

In re Joanne Lovito-Nelson

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

MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether Texas Rule of Civil Procedure 329b(c) requirement that a new trial must be granted only by a written and signed order is satisfied by the trial court's scheduling order for a new trial. The Supreme Court HOLDS that it is not.

[Opinion in HTML](#)

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[Briefs](#)

08-0805

In re Jindal Saw Ltd., et al.

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

MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether an arbitration agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their claims against the employer. The Supreme Court HOLDS that *In re Labatt Food Service*, decided February 13, controls and requires arbitration.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

ISSUES SUMMARIES FOR PETITIONS GRANTED ORAL ARGUMENT IN TODAY'S ORDERS

08-0110

American General Finance Inc. v. Kyle Allen

from Bexar County and the Fourth District Court of Appeals, Corpus Christi/Edinburg

Oral argument set March 31

A principal issue is whether a borrower qualifies as a consumer under the Deceptive Trade Practices Act when the lender promised escrow services in addition to the loan.

[Briefs](#)

[Court of appeals opinion](#)

08-0172

Texas Comptroller of Public Accounts

v. Attorney General of Texas and The Dallas Morning News

from Travis County and the Third District Court of Appeal, Austin

Oral argument date pending

The issues in this open-records challenge are (1) whether the Texas Public Information Act exempts state employees' birth dates from disclosure, (2) whether the newspaper, as intervenor, is entitled to attorneys fees under the act, or (3) entitled to attorneys fees under the Uniform Declaratory Judgment Act.

[Briefs](#)

[Court of appeals opinion](#)

08-0444

Myrad Properties Inc. v. LaSalle Bank National Association, et al.

from Bell County and the Third District Court of Appeals, Austin Oral argument set March 31

In this action to set aside a property sale following foreclosure the principal issues are (1) whether the foreclosure notice was sufficient, given an alleged mistake in the property description, and (2) whether a correction deed may be used to add an additional property following a foreclosure sale.

[Briefs](#)

[Court of appeals opinion](#)

[Dissent](#) (Patterson)