SUPREME COURT OF TEXAS UPDATE

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

July 1, 2016 – June 30, 2017

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SUPREME COURT OF TEXAS UPDATE

Phil Johnson
Justice
Supreme Court of Texas

I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from July 1, 2016 through June 30, 2017. Petitions granted but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Public Information Act

1. Paxton v. City of Dallas, 509 S.W.3d 247 (Tex. Feb. 3, 2017) [15-0073].

At issue in this case was whether the Texas Public Information Act (PIA) mandates public dissemination of otherwise confidential attorney-client communications merely because a governmental body missed a statutory deadline.

The City of Dallas received information requests that would require disclosure of information protected by the attorney-client privilege. The City failed to timely ask the Attorney General for an opinion on whether the information is excepted from required public disclosure within the ten-business-day statutory deadline. When the statutory deadline is missed, the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." TEX. GOV'T CODE § 552.302. When the City untimely requested an attorney general opinion, the City asserted the attorney-client privilege as the "compelling reason."

The Supreme Court concluded that the language of the compelling-reason standard does not require a compelling reason for untimeliness or lack of diligence, but rather a "compelling reason to withhold the information" from public disclosure. The significant interests advanced and protected by the attorney-client privilege meet that standard. The privilege ensures the free flow of information between attorney and client, serving the broad societal interest in the effective administration of justice and protecting the government's interest in litigation, business transactions, and other matters affecting the public, thereby also protecting the public fisc. Depriving the privilege of its force compromises the public's interest at both discrete and systemic levels. The compelling-reason safeguard the Legislature enacted exists to prevent such deprivation.

The Court therefore held that, absent waiver, the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption that arises on expiration of the PIA's statutory deadline. Because the statute creates a rebuttable presumption in the event of an untimely request for an attorney general opinion, not a waiver of the privilege, the City did not waive the attorney-client privilege solely by failing to timely request an attorney general opinion.

Justice Boyd, joined by Justice Johnson, dissented, concluding that the attorney-client privilege cannot independently constitute a compelling reason to permit the government to withhold public information when the government fails to assert the privilege as and when the PIA requires. Rather, facts and circumstances of the particular case establish a compelling reason that effectively demands that the information be withheld from the public despite the government's failure to timely comply with the PIA. The City's vague assertions of substantial harm if the information is released do not provide sufficient evidence that the facts and circumstances of this case demand that the information be withheld from the public. Thus, the dissent would hold that the PIA requires the information at issue to be disclosed.

B. Public Utility Commission

1. Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Texas, 507 S.W.3d 706 (Tex. Jan. 9, 2017) [15-0005].

At issue in this case is a final order of the Public Utility Commission (PUC) increasing rates for electric transmission and distribution services by Oncor Electric Delivery Company. Multiple appellants raised several issues in the district court and in the court of appeals, but, in the Supreme Court, only three issues remained.

On a petition brought by various state agencies and institutions (State Universities), the Court—affirming the PUC and the court of appeals—held that Public Utilities Regulatory Act (PURA), TEX. UTIL. CODE § 36.351, which requires electric utilities to discount charges for service provided to state college and university facilities, does not apply to transmission and distribution utilities like Oncor because they provide service to retail electric providers and not to the providers' customers. Section 36.351 requires an electric utility to "discount charges for electric service provided" to facilities of certain state educational institutions; the Court reasoned that it unambiguously did not apply to transmission and distribution utilities like Oncor. The Court reasoned that such entities, after they were unbundled from power generation companies and retail electric providers, did not sell or provide electric service to any retail customers. Only retail electric providers provide service to customers.

On a point brought in Oncor's petition, the Court reversed the court of appeals judgment and affirmed the PUC. The Court held that former PURA section 36.060(a), which required an electric utility's income taxes to be computed as though it had filed a consolidated return with a group of its affiliates eligible to do so under federal tax law, did not require a utility to adopt a corporate structure so as to be part of the group. Oncor was originally a subsidiary of Energy Future Holdings Corporation, but after EFH sold an interest in Oncor to two international investors, it became a partnership for federal tax purposes and was no longer a "member of an affiliated group eligible to file a consolidated tax return."

On petitions brought by both Oncor and a Steering Committee of Cities Served by Oncor, the Court reversed the court of appeals' judgment (and the PUC), holding that the evidence here establishes that franchise charges negotiated by the transmission and distribution utility with various municipalities were reasonable and necessary operating expenses under PURA section 33.008. The Court concluded that section 33.008(f) does not restrict renegotiated franchise charges to only those agreed to on the expiration of franchise agreements existing on September 1, 1999.

The Supreme Court remanded the case to the PUC for further proceedings consistent with its opinion.

C. Railroad Commission

1. Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422 (Tex. Apr. 28, 2017) [14-0979].

At issue in this case was whether the Railroad Commission (RRC) has exclusive jurisdiction over environmental contamination claims and whether the arbitration award at issue was proper.

Forest Oil Corporation has been conducting oil and gas operations on a ranch owned by James A. McAllen for over thirty years. In a previous case, both parties agreed to a Settlement Agreement that required Forest to remediate any environmental damage on the ranch. Subsequently, McAllen sued Forest for environmental contamination, among other common-law claims, and was awarded damages in arbitration. Forest moved to vacate the award on several grounds, including that the RRC had exclusive or primary jurisdiction over McAllen's claims, precluding the arbitration. Forest also asserted that there was evidence of partiality of one of the arbitrators, Donato Ramos, because McAllen had earlier objected to using Ramos as a mediator in another case, apparently to avoid any conflict in Ramos' serving as an arbitrator in this case. Forest also argued that the damages awards were in manifest disregard of Texas law, and that the parties had agreed to expanded judicial review of the arbitration award. The trial court largely upheld the arbitration damages, and the court of appeals affirmed.

The Supreme Court affirmed. The Court first determined that the RRC did not have

exclusive jurisdiction over contamination claims. While the legislature had put a statutory remedy in place through the RRC, it did not abrogate common-law claims. Without clear legislative intent to abrogate common-law claims, the Court will give full effect to either remedy. Accordingly, the RRC did not have primary jurisdiction because Forest's duty to remediate contamination is grounded in common-law and statute. Furthermore, the Court concluded that Ramos was still an impartial arbitrator because the evidence that he was aware of McAllen's objection in a prior case was circumstantial. The damages awarded were within the discretion of the arbitration panel and were awarded pursuant to the Settlement Agreement. Lastly, the Settlement Agreement prohibited Forest's request of expanded judicial review.

D. Rulemaking

1. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n, 511 S.W.3d 28 (Tex. Feb. 24, 2017) [15-0299].

At issue in this case was whether an administrative rule authorizing marriage and family therapists to conduct "diagnostic assessments" exceeded the regulating agency's rulemaking authority. The Licensed Marriage and Family Therapists Act regulates the practice of marriage and family therapy and defines the practice as, among other things, "the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems." The Texas State Board of Marriage and Family Therapists promulgated an administrative rule authorizing therapists to provide "diagnostic assessments."

The Texas Medical Association filed a declaratory judgment action against the Board claiming the Board exceeded its administrative rulemaking authority by authorizing diagnostic assessments, because only doctors can diagnose patients. The trial court held that the administrative rule exceeded the Board's authority and was therefore invalid. The court of appeals affirmed, concluding that the authority to diagnose is reserved to doctors under the Medical Practices Act.

The Supreme Court reversed the court of appeals judgment, holding that the Therapists Act authorized the therapists to make "diagnostic assessments." "Evaluate," as used in the enabling statute, includes the ability to judge the nature of a dysfunction, and such a determination is necessary to "remediate" the condition. Further, mental diseases or disorders are types of dysfunctions that a therapist is authorized to evaluate. The Court held the rule was therefore valid.

E. Texas Alcoholic Beverage Commission

1. Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318 (Tex. Apr. 28, 2016) [14-0819].

At issue in this case was whether the Texas Alcoholic Beverage Code section 102.07(a)(1)—a "tied-house" prohibition—was violated when a retail-permit applicant's parent company had an interest in a holding company which holds three downstream, subsidiary brewers.

Petitioner Cadena Comercial is a Texas corporation organized to own and operate convenience stores in Texas under the "OXXO" brand name. Cadena is a wholly-owned subsidiary of Fomento Economico Mexicano, S.A.B. (FEMSA), which owns Cadena through several intermediary Mexican holding companies. FEMSA, through several intermediary UK holding companies, also has a combined 20% stock interest in two Heineken holding companies, which in turn—and also through various intermediaries—own three foreign Heineken brewers. Some of these brewers hold Texas non-resident manufacturing permits to manufacture beer.

Section 102.07(a)(1) of the Texas Alcoholic Beverage Code prohibits any person with "an interest in the business of a . . . brewer" from owning or having "a direct or indirect interest in the business . . . of a retailer." Under this statute, the Texas Alcoholic Beverage Commission (TABC), trial court, and court of appeals all held that ownership of both a brewer and a retailer, no matter how small or attenuated, violates the tied house prohibition.

The Supreme Court affirmed, primarily focusing on the meaning of the phrase "interest in the business of a . . . brewer." After looking at the definition of interest in the context of the comprehensive statutory scheme, the Court

reasoned that the Legislature intended a broad reading of the term "interest" to ensure the strict separation between the three tiers of the alcohol industry. The Court eventually adopted the court of appeals' holding: an interest in the business of a brewer "broadly encompasses any commercial or economic interest that provides a stake in the financial performance of an entity engaged in the manufacture . . . of alcoholic beverages." The Court also refused Cadena's corporate separateness arguments because it reasoned the statute's breadth authorized looking beyond the corporate fiction when enforcing the tied house prohibitions. Finally, the Court found that Cadena's equal protection claim had failed because it did not provide evidence of similarly situated entities that were treated differently in the permitting process.

Justice Willett filed a dissenting opinion, which Chief Justice Hecht joined. The dissent reasoned that "interest" could not mean any interest, no matter how attenuated. Rather, the dissent would reverse, holding that interest "connotes the ability to control, coerce, or influence business operations of another"—a standard the TABC had not met.

F. Texas Clean Air Act

1. AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality, 2016 WL 7335866 (Tex. App.—Austin 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 651 (Mar. 31, 2017) [16-0260].

At issue in this appeal is whether the trial court abused its discretion by granting a Rule 91a motion to dismiss when a plaintiff failed to effect service on the Texas Commission for Environmental Quality (TCEQ) within 30 days after filing suit. AC Interests, L.P. sued the TCEQ after its application for certification of air-emission reduction credits under the Texas Clean Air Act was denied. AC Interests invoked both the Clean Air Act and the Water Code as waivers of sovereign immunity. Although AC Interests provided TCEQ with hand-delivered notice of the suit within two days of filing, it did not effect formal service until 58 days after filing the original petition. As a result, TCEQ filed and the trial court granted a Rule 91a motion to dismiss for lack of timely service as required by the Texas Clean Air Act.

Holding that the Clean Air Act's 30-day service requirement controlled the litigation, and not the Water Code's more lenient 1-year service requirement, the court of appeals determined the Clean Air Act's service requirement was mandatory, not directory. The court of appeals held that whether TCEQ had actual knowledge of the suit, whether AC Interests was in substantial compliance by hand delivering notice, and whether AC Interests had good and sufficient cause for delay of service, is not relevant to the analysis because of the failure to fulfill the mandatory service requirement under the Clean Air Act.

The Supreme Court granted AC Interests' petition for review and will hear oral argument on October 11, 2017.

III. ARBITRATION

A. Waiver of Arbitration

1. Henry v. Cash Biz, LP, S.W.3d (Tex. App.—San Antonio 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0854].

At issue in this case is whether claims for malicious prosecution and other steps to collect a civil debt fall within the scope of an arbitration provision and if so, whether filing criminal complaints with district attorneys for bad checks and seeking criminal restitution substantially invokes the judicial process, waiving the contractual right to arbitrate.

Cash Biz, LP, Cash Zone, LLC d/b/a Cash Biz, and Redwood Financials, LLC (collectively, Cash Biz) are payday loan companies. Hiawatha Henry, Addie Harris, Montray Norris, and Roosevelt Coleman, Jr. (the Borrowing Parties) entered into written credit-service agreements with Cash Biz to obtain short-term loans. Each loan contract contained a provision entitled "Waiver of Jury Trial and Arbitration Agreement." As part of its business model, Cash Biz requires that customers provide a post-dated personal check in the amount of the loan, plus a finance charge. Upon the Borrowing Parties' default, Cash Biz attempted to deposit the post-dated personal checks, which were returned due to insufficient funds. Cash Biz contacted local district attorneys, providing the evidence necessary to bring criminal charges for check fraud. The local district attorneys then filed

criminal charges against each of the Borrowing Parties for issuing bad checks and sent demand letters to the Borrowing Parties. The criminal charges were eventually dismissed, but that did not prevent many of the Borrowing Parties from being arrested or detained; others were assessed jail time, fines, and criminal restitution. The Borrowing Parties filed a class-action lawsuit, raising claims for malicious prosecution, violation of the Texas Deceptive Trade Practices–Consumer Protection Act, fraud, and violation of Texas Finance Code section 392.301. The trial court denied Cash Biz's motion to compel arbitration and ruled that Cash Biz waived its right to arbitration by substantially invoking the judicial system. Cash Biz filed an interlocutory appeal. The court of appeals reversed, holding that the Borrowing Parties' claims fell within the scope of the arbitration agreement and that Cash Biz did not waive its right to arbitration by supplying information to local district attorneys.

The Supreme Court granted the Borrowing Parties' petition for review and will hear oral argument on September 15, 2017.

2. RSL Funding, LLC v. Pippins, 499 S.W.3d 423 (Tex. July 1, 2016) [14-0457].

The main issue in this case was whether a plaintiff, through its litigation conduct with regard to defendants with whom it had no arbitration agreement, impliedly waived the right to arbitrate with other defendants with whom it had an arbitration agreement.

Three individuals—Cheveze Pippins, Daniel Morris, and Donna O'Brien (the Individuals)—owned annuity contracts they agreed to sell to RSL Funding, LLC. The assignment agreements contained broad arbitration clauses. However, neither RSL nor the Individuals had arbitration agreements with the companies that wrote the annuity contracts—Metropolitan Life Insurance Company, MetLife Insurance Company of Connecticut, and MetLife Investors USA Insurance Company (collectively MetLife). In June 2011, RSL sued MetLife and the Individuals for a declaratory judgment after MetLife refused to honor the assignment agreements. Affidavits filed with the suit indicated the Individuals initially acquiesced in the action, but disputes between RSL and the Individuals soon arose. RSL moved to compel arbitration with one individual in September 2011 and moved to stay proceedings pending arbitration in February 2012, eventually seeking arbitration with all three Individuals. In the time leading up to its motion to stay, RSL had non-suited its claims; targeted its discovery solely at MetLife; sought summary judgment as to MetLife's counterclaims—the only remaining claims in the suit—but reset the hearing until after its motion to stay proceedings. While the Individuals initiated a separate suit against RSL and MetLife, nothing in the record reflected that RSL asserted any new claims against the Individuals or sought affirmative relief in that separate suit.

The trial court denied RSL's motion to stay pending arbitration. A split court of appeals affirmed, reasoning that RSL—through its litigation conduct related to both MetLife and the Individuals—impliedly waived its right to arbitrate. The appeals court also noted that RSL failed to address a potential alternate ground on which the trial court could have based its denial.

In a per curiam opinion, the Court held that RSL did not waive its right to arbitrate. The Court held that only RSL's conduct with regard to the Individuals was relevant to the waiver analysis. RSL's initial inclusion of the Individuals as parties was to preserve procedural rights and RSL did not unreasonably delay in seeking arbitration once arbitrable disputes arose. The Court concluded that RSL's participation in discovery was limited to non-arbitrable claims against MetLife, as was RSL's motion for summary judgment, which RSL reset until after its motion to stay could be heard.

However, the Court agreed with the appeals court that RSL had failed to address an alternate ground on which the trial court could have denied the motion to stay. On that basis, the Court affirmed the court of appeals' judgment and remanded to the trial court.

IV. ATTORNEYS

A. Fees

1. Hill v. Shamoun & Norman, LLP, 483 S.W.3d 767 (Tex. App.—Dallas 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1230 (June 16, 2017) [16-0107].

At issue in this case is whether Texas Government Code section 82.065(c) permits

recovery in quantum meruit for an unenforceable oral-contingency fee agreement, and if not, whether Shamoun & Norman LLP (S&N) is allowed quantum meruit recovery under common law. Also at issue in this case is whether S&N's damages expert improperly based his damages model on an unenforceable continency-fee agreement.

Albert Hill was involved in multiple lawsuits involving multiple family members, trusts, and business entities. Hill's personal attorney, Francis Wright, recommended that Hill hire Gregory Shamoun and S&N for specific cases. Hill signed contracts with S&N providing a maximum hourly rate. Although S&N had been hired for specific cases, Wright discussed with Shamoun Hill's intention to settle the "web of litigation" and offered Shamoun an incentive bonus to be split between Wright and Shamoun if a certain settlement was reached. Shamoun claimed that Hill also agreed to this bonus. Shamoun participated in global settlement discussions and attended mediation hearings on behalf of Hill. A final global settlement was eventually reached, but Hill terminated Shamoun and S&N. S&N subsequently filed suit against Hill seeking damages for breach of contract or under a quantum meruit theory of recovery. Hill filed counterclaims for breach of fiduciary duty, breach of contract, and civil conspiracy. Following a jury trial, the jury awarded S&N $7.25 million under the quantum meruit theory, concluding that S&N had provided compensable global-settlement services to Hill. The jury further found in S&N's favor on all of Hill's counterclaims, but did not award attorney's fees to S&N. Hill filed a motion to disregard the jury's verdict because (1) the agreement violated the statute of frauds; (2) the award violated equitable and constitutional protections against excessive awards; and (3) quantum meruit is not available for work performed under a preexisting contract. The trial court set aside the jury's findings and rendered a take-nothing judgment in Hill's favor.

The court of appeals reversed the trial court's take-nothing judgment and reinstated the jury's verdict. The court also reversed the trial court's judgment regarding attorney's fees and remanded to the trial court for determination of S&N's reasonable and necessary attorney's fees in prosecuting the quantum-meruit claim. The court affirmed all other aspects of the trial court's judgment.

The Supreme Court granted Hill's petition for review and will hear oral argument on October 10, 2017.

2. In re Davenport, S.W.3d , 60 Tex. Sup. Ct. J. 1306 (Tex. June 16, 2017) [15-0882].

This case concerned the construction of an attorney-fee agreement. Dean Davenport hired attorneys Tom Hall and Blake Dietzmann to represent him in a dispute concerning Davenport's claimed interest in a partnership called WECO. A fee agreement provided that as to Davenport's "claim arising out of business dealings with WECO," the attorneys were entitled to a fee of "Forty percent (40%) of the gross amount recovered [e]xcept that Attorneys will not take a fee out the ownership of 5 D Water Resources and Dillon Water Services," and that "[b]y GROSS AMOUNT is meant the total sums recovered." Hall and Dietzmann won a large judgment for Davenport and advised him to settle because of doubts about the strength of the verdict on appeal. Davenport settled with other WECO partners for cash and interests in WECO. The lawyers then sued Davenport for unpaid attorney's fees, alleging they were entitled to an ownership interest in WECO and other amounts. The case went to trial, and the jury found that the lawyers were entitled to recover certain expenses but were not entitled to an ownership interest in WECO. The trial court eventually ordered a new trial, concluding that the fee agreement unambiguously provided that the attorneys were entitled to fees to be paid out of any ownership interest recovered in the litigation, save for any interest in the two entities expressly excepted in the agreement. Davenport sought mandamus relief from the new trial order in the court of appeals and then in the Supreme Court.

The Supreme Court held the unambiguous agreement did not provide for payment of attorney's fees for Davenport's recovery of an ownership interest in WECO. The Court reasoned that the plain meaning of "sums" is a quantity of money and does not include a non-cash benefit. The express provision that the attorneys could not take an ownership interest in 5 D Water Resources

and Dillon Water Services did not imply that the attorneys could take an ownership interest in WECO, especially considering evidence that the "except clause" was included to reflect a summary judgment Davenport had obtained before hiring Hall and Dietzmann. The Court also relied on common-law rules that place the burden on the attorney to detect and repair omissions in fee agreements and to express whether the contingent fee includes non-cash benefits.

Justice Boyd concurred, but rather than holding as a matter of law that the fee agreement did not cover an ownership interest in WECO, he would have held that the contract was ambiguous and its construction should have been left to the jury's determination.

B. Legal Malpractice

1. Rogers v. Zanetti, 518 S.W.3d 394 (Tex. Apr. 28, 2017) [15-0557].

The principal issues in this legal-malpractice case were whether a client who lost an underlying fraud case proved that his attorneys' negligence caused the loss and whether the traditional case-within-a-case standard—that the client would have obtained a more favorable result but for the legal malpractice—should apply. The underlying case concerned James Rogers' investment in a privately owned company whose owners subsequently sued Rogers for fraud and financial misfeasance. Several years after losing the fraud case, Rogers sued both the attorney who drafted the investment agreement and the attorney who defended the subsequent litigation. Rogers alleged that (1) drafting errors in the investment agreement caused him to lose the fraud case, (2) he might have avoided the fraud judgment had he been advised of the plaintiffs' settlement offer, and (3) had his attorney designated an expert to rebut the plaintiffs' expert's valuation of the company, the judgment against him would have been less.

The trial court granted the attorneys' motion for summary judgment, and the court of appeals affirmed, holding there was no evidence that the attorneys' alleged negligence caused Rogers' loss. The Supreme Court affirmed, holding that the summary judgment evidence failed to raise a fact issue as to causation under the traditional cause-in-fact standard and that the lower courts had not erred in applying that standard to Rogers' malpractice claims. The Court concluded that the alleged drafting errors were rendered causally irrelevant by the jury's finding of Rogers' antecedent fraud. Moreover, the summary-judgment evidence failed to raise a fact issue as to causation regarding the un-communicated settlement offer because no evidence existed that the case would have settled on those terms or any others. Finally, as to the failure to designate a rebuttal expert, Rogers' burden was to offer some competent evidence that the allegedly inflated verdict was more likely than not caused by the rebuttal expert's absence, which he did not do.

C. Patent Agents

1. In re Silver, 500 S.W.3d 644 (Tex. App.—Dallas 2016), *argument granted on pet. for writ of mandamus*, 60 Tex. Sup. Ct. J. 1231 (June 23, 2017) [16-0682].

The issue in this case is whether Texas law protects against the disclosure of confidential communications between non-attorney patent agents and their clients relating to the prosecution of patents.

Andrew Silver claims to own two patents for the technology comprising the Ziosk, a device installed at tables in restaurants that allows customers to order meals, play games, and pay their bills. While Silver was prosecuting the first of the patents in 2008, he entered into a contract with Tabletop Media, LLC, under which Tabletop agreed to purchase a later-issued patent if it contained the claims in Silver's patent application as it was written in April 2008. Silver's patent application was ultimately rejected. Tabletop asserted that Silver materially changed the claims in his patent application as a result of the rejection and that those claims no longer covered or assisted Tabletop's Ziosk device. Tabletop also claimed both parties understood that the contract was no longer in effect, the parties had no further rights or obligations under the contract, and Silver would retain ownership of the patent arising from the materially altered patent application.

Silver sued Tabletop for breach of contract after Tabletop failed to pay him royalties pursuant to the contract. The same day, Tabletop sued Silver, seeking a declaratory judgment that it did not owe anything to Silver under the contract. The suits were consolidated. During discovery,

Silver withheld certain emails from production on the grounds that they were privileged communications between Silver and his non-attorney patent agent related to the prosecution of the patents before the United State Patent and Trademark Office. Tabletop argues that these documents were not privileged because a patent agent is not an attorney. The trial court agreed with Tabletop and ordered Silver to produce the documents. Silver filed a motion for reconsideration in light of the recently decided *In re Queen's University at Kingston*, in which the Federal Circuit held that a patent-agent privilege protects communications between clients and non-attorney patent agents in federal courts. 820 F.3d 1287 (Fed. Cir. 2016). The trial court denied the motion.

The court of appeals denied Silver's petition for writ of mandamus. The court determined that only privileges grounded in the Texas Constitution, statutes, the Texas Rules of Evidence, or other rules established pursuant to statute are recognized in Texas. Because no Texas statute or rule has recognized or adopted a patent-agent privilege, the court declined to recognize such a privilege in this case. The court of appeals also held that *Queen's University* was not binding because the Federal Circuit applies its own law for substantive and procedural issues if those issues involve the enforcement of substantive patent rights. This case, according to the court of appeals, is not a patent infringement case but rather a breach-of-contract case governed by Texas law, which does not recognize a patent-agent privilege.

The Supreme Court granted Silver's petition for writ of mandamus and will hear oral argument on November 9, 2017.

D. Tort Liability

1. First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214 (Tex. Mar. 17, 2017) [15-0708].

At issue in this case was whether the court of appeals erred in affirming summary judgment on tort claims arising from an attorney's embezzlement of client funds.

The First United Pentecostal Church of Beaumont recovered more than $1 million in a suit against its property-casualty insurer. The funds were to be held in the Lamb Law Firm's trust account pending the initiation of restorative work at the Church. The funds were misappropriated by an attorney at the firm who was subsequently sentenced to prison for the theft. In addition to suing that attorney and the law firm, the Church sued Leigh Parker—another attorney employed by the law firm—to recover damages for breach of fiduciary duty, joint venture, civil conspiracy, and aiding and abetting, among others. Parker denied misappropriating any funds, claimed he did not discover the theft until after it occurred, disclaimed any authority over or access to the trust account, and denied being anything other than a contract attorney at the firm. Parker admitted that he consciously delayed reporting the theft to the Church and lied to facilitate a cover-up, expecting to replace the funds with proceeds from another project. When the Church pressed the firm for the money, Parker disclosed that the funds were gone. Without the funds, the Church contends it was unable to close on a construction loan.

Parker filed traditional and no-evidence summary judgment motions on all claims, which the trial court granted. The court of appeals affirmed.

The Supreme Court affirmed in part and reversed in part. The Court affirmed the court of appeals' judgment on the civil conspiracy and joint venture claims because there was insufficient evidence of causation required for a conspiracy claim, or of the agreement necessary to establish a conspiracy or joint venture claim. The Court found that the court of appeals had erred by requiring the Church to show causation of damages for breach of fiduciary duty because such a claim might entitle the Church to equitable relief, for which no causation is required. The Court also found that the aiding and abetting claim had been waived by the Church and affirmed on that claim. The Court remanded the case to the trial court for further proceedings.

V. CONSTITUTIONAL LAW

A. Home Equity Loans

1. Kyle v. Strasburger, S.W.3d , 60 Tex. Sup. Ct. J. 1313 (Tex. June 16, 2017) [16-0046].

This case, stemming from an allegedly forged home-equity loan, presented issues

addressed in *Garofolo v. Ocwen Loan Servicing*, 497 S.W.3d 474 (Tex. 2016), and *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). Wendy Kyle alleged that, in 2004, her then-husband, Mark, forged her signature on the closing documents of a home-equity loan secured by a deed of trust on the couple's homestead. Over eight years later, she sued Mark, lender Fidelity Bank of Texas, and several related entities, bringing claims under the Texas Constitution for forfeiture of principal and interest paid on the loan and for a declaratory judgment that the deed of trust was void. She also sought to declare void a special warranty deed in which she had conveyed her interest in the homestead to Mark in their divorce, alleging she was induced to convey that interest by Fidelity's misrepresentations regarding the loan's purported validity and by Fidelity's commencement of foreclosure proceedings. Fidelity moved for summary judgment on several grounds, including limitations. The trial court granted the motion without stating its reasons. The court of appeals affirmed, holding that Kyle's constitutional claims, along with several ancillary statutory claims, were barred by the statute of limitations, and that Kyle had failed to preserve her appeal of the summary judgment on her claim to declare the warranty deed invalid.

In a per curiam opinion, the Supreme Court affirmed in part and reversed in part. As to the declaratory-judgment claim that the deed of trust was void and the ancillary statutory claims, the court of appeals erred in concluding that the statute of limitations barred those claims in light of *Wood*, in which the Court held that a lien securing a constitutionally noncompliant home-equity loan is not valid unless and until the defect is cured and that no statute of limitations applies to a borrower's claim to quiet title on that lien. The Court also disagreed with the court of appeals that Kyle waived her claim to declare the warranty deed invalid on appeal. But the Court held that Kyle's constitutional forfeiture claim was foreclosed by the Court's holding in *Garofolo* that forfeiture is not an independent cause of action under the Texas Constitution. Finally, the Court held that Mark's sale of the home while the case was on appeal did not moot Kyle's declaratory-judgment claims to the extent they underlay other pending claims. The Court remanded the case to the court of appeals to consider various unaddressed issues and arguments.

B. Same-sex Marriage

1. Pidgeon v. Turner, S.W.3d , 60 Tex. Sup. Ct. J. 1502 (Tex. June 30, 2017) [15-0688].

At issue in this case was the impact of a United States Supreme Court opinion on the judgments of the lower courts. Former Houston Mayor Annise Parker extended employee marital benefits to the spouses of same-sex couples on equal terms as opposite-sex couples. Jack Pidgeon and Larry Hicks, two Houston taxpayers, sued the Mayor and the City seeking to enjoin Houston from spending funds on same-sex marital benefits, claiming such actions violated the Texas Constitution, the Texas Family Code, and the Houston City Charter.

The trial court entered a preliminary injunction preventing the Mayor and the City from extending benefits to same-sex spouses. The Mayor and City took an interlocutory appeal asserting that they were immune from suit. While the court of appeals was considering the appeal, the United States Supreme Court issued its opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), recognizing a fundamental right to same-sex marriage on the "same terms and conditions" as opposite-sex marriage. Shortly after *Obergefell*, the Court of Appeals for the Fifth Circuit held, in *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), that Texas laws limiting marriage and its benefits to opposite-sex couples are unconstitutional and enjoined the Texas executive branch from enforcing them. The court of appeals reversed the judgement of the trial court and remanded for proceedings "consistent with" both *Obergefell* and *De Leon*. Pidgeon petitioned for review and the Supreme Court granted review on rehearing.

The Supreme Court reversed the judgment of the court of appeals insofar as it could be understood to say that *De Leon* was binding on Texas state courts and remanded for a consideration of the merits. After determining that it had jurisdiction over the interlocutory appeal, the court held that *De Leon* was not binding on Texas State courts because only the United State Supreme Court may bind Texas State

Courts. Thus, to the extent the trial court could have understood that it was bound to apply *De Leon*, the court of appeals' instruction was error. Next, the Court denied Hicks's request to preserve the injunction to the extent that the injunction provided "claw-back" relief because the injunction provided no such relief. Finally, the Court declined to provide the trial court with instructions to construe *Obergefell* narrowly, as Hicks requested but determined that Hicks should be able to make his arguments on remand. It also agreed with Pidgeon that *Obergefell* did not address the specific substantive issue of publicly funded employment benefits to same-sex spouses. The Court reversed the court of appeals' judgment, vacated the trial court's temporary injunction order, and remanded the case to the trial court for further proceedings.

C. Texas Elections Code

1. King Street Patriots v. Tex. Democratic Party, S.W.3d , 60 Tex. Sup. Ct. J. 1485 (Tex. June 30, 2017) [15-0320].

At issue in this case was the facial constitutionality of various provisions of the Texas Election Code. The Texas Democratic Party sued King Street Patriots, claiming that the group was a political committee and violating the Texas Election Code. King Street Patriots asserted in a counterclaim that various provisions of the Texas Election Code were facially unconstitutional and thus could not be enforced against it. The parties obtained an agreed order severing King Street Patriots's facial claims and abating the Texas Democratic Party's claims and King Street Patriots's as-applied challenges. The parties each moved for summary judgment on the facial claims. The trial court concluded the Texas Election Code was facially constitutional and accordingly granted the Texas Democratic Party's motion and denied King Street Patriots's motion. The court of appeals affirmed.

Because the validity of Texas statutes were at issue, the Supreme Court called for the views of the Solicitor General, who argued that King Street Patriots did not qualify as a political committee under the Texas Election Code. Based on the limited record of the severed action, the Court agreed and therefore held King Street Patriots' challenges to the political committee definitions were not ripe as a prudential matter. Because King Street Patriots' other challenges to the Texas Election Code were ripe, the Court addressed the merits of these claims and upheld the facial constitutionality of the Code's private right of action provisions, the campaign and political contribution definitions, and the ban on corporate contributions. Accordingly, the Court affirmed the court of appeals' judgment in part, vacated the lower courts' judgments as to the political committee definitions, and remanded to the trial court for proceedings consistent with the opinion.

Justice Devine concurred and agreed that the Court was bound to follow a United States Supreme Court opinion holding corporate contribution bans constitutional under the First Amendment, but he wrote to explain how corporate contribution bans are inconsistent with the First Amendment and recent United States Supreme Court precedent.

VI. CONTRACTS

A. Breach of Contract

1. Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc., 518 S.W.3d 432 (Tex. Apr. 28, 2017) [16-0054].

At issue in this case was whether a party's nonmaterial breach of a contract could excuse another party's first-in-time nonmaterial breach. Cimco Refrigeration, Inc. contracted with Bartush-Schnitzius Foods Co. to provide a refrigeration unit for their food preparation facility. The system Cimco provided was unable to maintain the temperature Bartush needed in order to fulfill particular food orders. Bartush subsequently withheld payment on its contract with Cimco, and Cimco sued Bartush for breach of contract due to the nonpayment. Bartush counterclaimed, accusing Cimco of breach of contract for its failure to provide a system that could maintain Bartush's needed temperature.

The case went to trial, and a jury found that both parties breached, Cimco breached first, and Bartush's breach was not excused by Cimco's prior breach. The trial court rendered judgment solely for Bartush. Cimco appealed. The court of appeals reversed and remanded for entry of a judgment that Bartush take nothing on the ground that the jury's finding that Bartush's breach was

not excused included an implied finding that Cimco's breach was nonmaterial.

In a per curiam opinion, the Supreme Court held that although the jury's verdict did include an implied finding that Cimco's breach was nonmaterial, the finding did not preclude Bartush's recovery because a subsequent breach cannot excuse a prior breach and because a party can recover damages for a nonmaterial breach. The Court remanded the case to the court of appeals to consider unaddressed issues.

B. Forum-Selection Clauses

1. Pinto Tech. Ventures, L.P. v. Sheldon, S.W.3d , 60 Tex. Sup. Ct. J. 1015 (Tex. May 19, 2017) [16-0007].

At issue in this case was whether a forum-selection clause governed (1) tort claims factually predicated on the existence or terms of a shareholder agreement, and (2) certain parties as signatories or nonsignatories to the agreement.

Jeffery Sheldon and Andras Konya (collectively, the Shareholders) are minority shareholders in IDev Technologies, Inc. (IDEV). Several amendments in the governing shareholder agreement and coinciding financing actions taken by the corporation caused the proportional ownership interests of the Shareholders to decrease. The Shareholders subsequently sued IDEV's venture-capital majority shareholders, chief finance officer, chief executive officer, and directors (collectively, the IDEV Parties) for fraud, breach of fiduciary duty, minority shareholder oppression, state securities law violations, and conspiracy. The IDEV Parties moved to dismiss based on a Delaware forum-selection clause in the shareholder agreement. The trial court granted the IDEV Parties' motion to dismiss, but the court of appeals reversed, concluding the extra-contractual claims did not fall within the scope of the forum-selection clause.

Focusing on the substantive factual allegations and not the labels, the Supreme Court reversed and held that non-contractual claims fall within the forum-selection clause's scope when the existence or terms of the agreement are operative facts in the dispute and "but for" that agreement the shareholders would not be aggrieved. Applying this standard, the Court concluded the claims asserted depended on the existence of the agreement, resolution of the case involved the validity of that agreement, and the operative facts implicated the IDEV Parties' authority to act pursuant to that agreement.

The Court concluded that both Shareholders were bound by the Delaware forum-selection clause. Sheldon signed each amended agreement, indisputably subjecting him to the forum-selection clause. Konya, on the other hand, did not sign the amended agreement, which moved the designated forum from Texas to Delaware. However, because Konya signed the earlier shareholder agreement authorizing written amendments with the assent of IDEV and a majority of the stockholders, the Court concluded he was also subject to the forum-selection clause in the amended agreement.

The Court also concluded that most of the IDEV Parties, as signatories, could enforce the forum-selection clause against the Shareholders, but the CEO and CFO, as nonsignatories, could not. The CEO and CFO sought to enforce the forum-selection clause under three theories: the transaction-participation theory; the concerted-misconduct doctrine; and the application of the major-transaction mandatory-venue provision. But the Court held the three theories were inapplicable to the facts of this case. First, the transaction-participation theory was precluded by the agreement's express disclaimer of any intent to confer rights or remedies under the agreement on nonsignatories. Second, the Court previously declined to adopt the concerted-misconduct doctrine, and the parties did not address or distinguish that prior case. Third, although the record indicated IDEV's financing transaction met the $1 million minimum for the major-transaction mandatory-venue provision to apply, the writing detailing this transaction was in a financing agreement rather than the shareholder agreement, thus the major-transaction mandatory-venue provision did not require enforcement of the shareholder agreement's forum-selection clause. Accordingly, the Court reversed the court of appeals' judgment, rendered judgment dismissing the Shareholders' claims in part, and remanded the case to the trial court for further proceedings.

C. Interpretation

1. Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, S.W.3d , 60 Tex. Sup. Ct. J. 1269 (Tex. June 16, 2017) [14-1033].

At issue in this case was whether the court of appeals erred by reversing the trial court's order granting summary judgment in favor of multiple defendants on the plaintiff's claims for breach of contract and tortious interference.

Thomas Jackson, the chief executive officer of College Station Medical Center (Hospital), sought to hire a cardiovascular surgeon. Acting as an intermediary between Dr. Henry Andrew Hansen, II, and Regional Employee Assistance Program (REAP), a non-profit corporation that employs physicians, Jackson negotiated the terms of Dr. Hansen's contract with REAP, under which Dr. Hansen would work at the Hospital. REAP and Dr. Hansen ultimately entered into a five-year employment contract, which ran from June 1, 2007, to April 30, 2012. Dr. Hansen's contract provided that it could be terminated only for cause during the first three years. After the third year, however, either party could terminate the contract without cause with sixty days' notice if Dr. Hansen's "annual practice losses" exceeded $500,000 "at the end of years three, four or five." Although Dr. Hansen's practice at the Hospital was initially successful, the number of cardiovascular surgeries performed by Dr. Hansen began to decline significantly at the end of 2008. Leslie Luke, vice president of Community Health Systems Professional Services Corporation (PSC), a subsidiary of the holding company that indirectly owned and operated the Hospital, REAP, and PSC recommended to Jackson in February 2009 that Dr. Hansen's employment be terminated "without cause" at the end of the third year. After the next board meeting, a decision to that effect was made and REAP notified Dr. Hansen that it was terminating the contract without cause in sixty days.

Dr. Hansen sued numerous parties alleging multiple causes of action, including a breach of contract claim against REAP and tortious interference claims against the Hospital, Jackson, and PSC. The trial court granted the defendants' traditional and no-evidence motions for summary judgment, dismissing all of Dr. Hansen's claims. The court of appeals reversed, holding that REAP had not established the grounds for which it terminated Dr. Hansen and that the Hospital, Jackson, and PSC's summary-judgment grounds did not support the dismissal of the tortious interference claims.

The Supreme Court rendered a take-nothing judgment against Dr. Hansen. The Court held that REAP was not required to prove the reason it terminated Dr. Hansen's contract "without cause," that the contract's use of the term "annual practice losses" was not ambiguous, and that REAP was entitled to summary judgment on Dr. Hansen's breach of contract claim because the evidence conclusively established that the "annual practice losses" condition subsequent was satisfied when REAP exercised its right to terminate the contract. The Court also held that the Hospital and Jackson were entitled to summary judgment because Dr. Hansen failed to present evidence of willful or intentional inference, despite the conclusive evidence of an agency relationship between Jackson and REAP. Finally, the Court held that PSC conclusively established its justification defense under a similar agency theory and was therefore entitled to summary judgment.

2. URI, Inc. v. Kleberg Cty., 2016 WL 363114 (Tex. App.—Corpus Christi–Edinburg 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0336].

At issue in this case is (1) whether the court of appeals correctly interpreted a settlement agreement and (2) whether URI, Inc. waived its right to challenge the trial court's failure to award attorney's fees.

URI operated the Kingsville Dome uranium mine. The mine is divided into three production areas: PAA-1, PAA-2, and PAA-3. In 1985, URI tested the groundwater in PAA-1 and Well I-11 met the then-current standards for irrigation. But when URI retested the wells in 1987, Well I-11 had a higher level of uranium, rendering it unsuitable for irrigation. Also in 1987, URI submitted a permit application to the Texas Water Commission and included only the 1985 data. URI received a mining permit in 1988 and began mining. Later, URI and Kleberg County entered into a Settlement Agreement. The Agreement required URI to restore ninety percent of the wells in PAA-1 "for which a pre-mining baseline

existed" before URI could resume mining PAA-3. URI relied on the 1987 data to restore PAA-1. URI sued Kleberg County for declaratory relief and offered the 1987 data as proof of compliance. Kleberg County claimed that only the 1985 data established the correct baseline for restoration.

The trial court issued a mixed ruling. Because Well I-11 was not restored to use for irrigation purposes prior to mining recommencing in PAA-3, URI failed to restore ninety percent of the wells in PAA-1 to their previously suitable use. The trial court based its conclusion on the 1985 data because the data was known by Kleberg to have existed at the time the Agreement was executed. In the interest of justice, however, the trial court declined to issue an order barring URI from mining, but ordered URI to restore the water in Well I-11 to suitability for irrigation.

The court of appeals affirmed in part and reversed and remanded in part. The court of appeals held that only the 1985 data could be used to establish the baseline because the 1987 data would impermissibly render other provisions of the Agreement meaningless. Furthermore, the trial court abused its discretion by failing to award Kleberg attorney's fees and by ordering specific performance inconsistent with the terms of the Agreement.

URI petitioned for review. First, URI argues that the "surrounding circumstances" rule of contractual interpretation does not apply to this case because evidence of intent is impermissible parole evidence. The court of appeals erred by adding a new requirement to the Agreement—that the data relied on by URI be known to Kleberg at the time of execution. Second, URI asserts that the court of appeals did not correctly interpret the Agreement because it considered evidence beyond the plain and unambiguous meaning of the Agreement. URI was free, if not required, to use whatever data met the four explicit requirements set forth in the Agreement. Finally, URI contends that it did not waive its right to seek review of the issue of attorney's fees because attorney's fees are inextricably intertwined with breach of contract claims.

The Supreme Court granted URI's petition for review and will hear oral argument on October 12, 2017.

D. Third-Party Beneficiaries

1. First Bank v. Brumitt, 519 S.W.3d 95 (Tex. May 12, 2017) [15-0844].

At issue in this case was whether a contract sufficiently identified the prospective seller of a business as an intended third-party beneficiary of a loan agreement.

Don Oprea applied for a loan from First Bank to finance the acquisition of a company owned by Richard Brumitt. After almost a year of First Bank making repeated representations that it would finance the loan, Brumitt's company lost its value and the loan agreement fell through. Oprea sued First Bank for breach of contract and misrepresentation. Brumitt intervened, alleging that he was a third-party beneficiary of the loan agreement.

The trial court submitted a question to the jury asking it to find whether Brumitt was a third-party beneficiary of the contract and allowed the jury to consider evidence extrinsic to the loan agreement. The jury found that Brumitt was a third-party beneficiary of the contract and that First Bank breached both the contract and engaged in misrepresentation. First Bank appealed and the court of appeals affirmed holding that the Supreme Court's decision in *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.* allows courts to consider extrinsic evidence to determine whether someone is a third-party beneficiary of a contract. 348 S.W.3d 894 (Tex. 2011). The court also held that the damages attributable to breach of contract and misrepresentation ran afoul of the economic loss rule and therefore reversed the misrepresentation judgment.

The Supreme Court reversed the judgment of the court of appeals and remanded to that court. The Court clarified that *Basic Capital* did not change the longstanding contractual interpretation doctrine that unambiguous contracts are interpreted as a matter of law without reference to parol evidence. Thus, the trial court erred by submitting the third-party beneficiary question to the jury and permitting the consideration of extrinsic evidence of intent. Moreover, the unambiguous contract did not convey a clear intent to make Brumitt a third-party beneficiary, notwithstanding the fact that Brumitt may have incidentally benefitted from the loan. The Court rejected the argument that the judgment was

supported by the evidence of an oral contract between the two parties because Brumitt never pleaded such a claim and did not receive a jury finding of an oral contract.

Because the court of appeals' sole reason to reverse the misrepresentation judgment was the economic loss rule—applicable where an economic injury is compensable under a breach of contract claim—the Court remanded to the court of appeals to consider the misrepresentation judgment.

VII. CORPORATIONS

A. Breach of Fiduciary Duty

1. Longview Energy Co. v. Huff Energy Fund LP, S.W.3d , 60 Tex. Sup. Ct. J. 1195 (Tex. June 9, 2017) [15-0968].

This case concerned whether two directors breached their fiduciary duties to a corporation, and if so, whether the evidence and jury findings supported the remedies imposed by the trial court. Longview Energy Company is an oil and gas exploration and production company. The Huff Energy Fund LP (HEF) is a limited partnership that invests in energy companies. HEF purchased approximately 39% of Longview's shares and, pursuant to the purchase agreement, HEF appointed Bill Huff and Rick D'Angelo to serve on Longview's board of directors. HEF asked its portfolio companies, including Longview, to look into investment opportunities related to the Eagle Ford Shale in South Texas. In September 2009, Longview began investigating possible investments in the Eagle Ford, including working with land brokers in the area who provided Longview with a map of general areas available for lease. Unbeknowst to Longview, in October 2009, HEF and Bobby Riley created the Riley-Huff Energy Group LLC to also investigate possible investments in the Eagle Ford. In early 2010, Longview scheduled a board of directors meeting and submitted a proposal recommending a possible investment in the Eagle Ford. After the board meeting, D'Angelo announced that HEF would not support Longview's investment. Longview later learned that Riley-Huff had agreed to purchase Eagle Ford leases from the same broker Longview had consulted with and that some of the mineral leases Riley-Huff acquired were within the general areas that Longview's board had considered.

Longview sued the parties involved in Riley-Huff's acquisition of the Eagle Ford leases, alleging various causes of action, including fraud, breach of fiduciary duty, usurpation of corporate opportunity, tortious interference with business relationships, misappropriation of trade secrets, aiding and abetting, and conspiracy. The case went to trial, and the jury found that Riley-Huff wrongfully obtained assets in the Eagle Ford as a result of breaches of fiduciary duties by Huff and D'Angelo. The trial court rendered judgment and awarded Longview $95.5 million; imposed a constructive trust in Longview's favor on substantially all of Riley-Huff's Eagle Ford Shale leases, associated properties, and future production from the leases; and ordered Riley-Huff to transfer the leases and properties to Longview. Riley-Huff appealed. The court of appeals reversed and rendered a take-nothing judgment in favor of Riley-Huff.

The Supreme Court affirmed, holding that there was no evidence Riley-Huff acquired any specific leases identified by, recommended to, or selected by Longview or its board for pursuit or purchase. Therefore, the Court reasoned that there was no evidence tracing a breach of fiduciary duty by Huff or D'Angelo to specific leases in order to support the imposition of a constructive trust on those leases. Thus, the Court determined that the trial court erred by rendering judgment imposing the constructive trust on and requiring the transfer of leases and property to Longview. The Court also held that the trial court was only authorized to order Riley-Huff to pay Longview the amount it profited as a result from Huff's or D'Angelo's breaches of fiduciary duties. But the jury was asked only to find the amount of revenues Riley-Huff received. Because an incorrect measurement for equitable disgorgement of profit was submitted to the jury and no other questions could be used to calculate Riley-Huff's profit, there was no basis for the trial court to render judgment for a monetary award in favor of Longview.

VIII. COUNTIES

A. Commissioners Court Authority

1. Henry v. Cox, S.W.3d , 60 Tex. Sup. Ct. J. 1007 (Tex. May 19, 2017) [15-0993].

This case concerned who has the authority to set the salary of a county judicial employee. In 2000, the Galveston County Commissioners Court hired Bonita Quiroga as Director of Justice Administration to handle court-related matters for various county judges. In 2014, County Judge Mark Henry fired Quiroga. The Commissioners Court later ratified this decision. District Judge Lonnie Cox issued an order requiring Henry to reinstate Quiroga. Eventually the Commissioners Court and the County's district judges agreed that Quiroga would be hired to a new position: Director of Court Administration (DCA). The judges requested a salary range of $85,000 to $120,000. Before this proposal could be considered, the area judges, led by Judge Cox, informed the Commissioners Court that the judges intended to reinstate Quiroga at her former salary of $113,000. Judge Cox issued another order to this effect, directed at Judge Henry and the Commissioners Court. The Commissioners Court considered and accepted most of the judges' suggestions regarding the hiring of Quiroga to the DCA position, but with a starting salary below the range requested by the judges.

Judge Cox sued Judge Henry in Judge Cox's own court (but before a visiting judge), complaining that the salary range for the new position was unreasonable. The trial court issued an injunction ordering Judge Henry to reinstate Quiroga with specified duties and her old salary of $113,000. The court of appeals affirmed the temporary injunction, holding that the trial court acted within its constitutional authority in maintaining the status quo while the suit was pending.

The Supreme Court reversed the court of appeals' judgment and held the trial court erred when it granted the temporary injunction. The Court held that the other members of the Commissioners Court, or at least the Commissioners Court as a body, were indispensable parties because Judge Henry lacked the authority to act in place of the Commissioners Court. Therefore, Judge Cox's failure to name them deprived the trial court of the authority to bind them. The Court further held that a court lacked the authority to require the Commissioners Court to hire a county employee at a specific salary. It held that under section 75.401(d) of the Government Code, the judges served by a court administrator may only consider whether the Commissioners Court abused its discretion when selecting a reasonable salary range for the administrator.

IX. DAMAGES

A. Lost Profits

1. Horizon Health Corp. v. Acadia Healthcare Co., S.W.3d , 60 Tex. Sup. Ct. J. 1085 (Tex. May 26, 2017) [15-0819].

At issue in this case was whether legally sufficient evidence supported a jury's award of lost profits and whether the jury's exemplary-damages award was unconstitutionally excessive despite the court of appeals' suggested remittitur.

Horizon Health Corp. manages mental-health programs for hospitals and other healthcare providers. In 2011, four Horizon executives began discussing the creation of a subsidiary within Acadia Healthcare Co., one of Horizon's competitors, that would provide management services similar to those offered by Horizon. While employed by Horizon, the executives began soliciting a Horizon salesman for the Acadia subsidiary. The four executives and the salesman subsequently resigned from Horizon to join Acadia's new subsidiary, Psychiatric Resource Partners (PRP). Horizon later discovered that the executives had coordinated their departures and had made copies of Horizon's confidential documents preceding their move and used those documents to compete directly with Horizon. Horizon sued the executives and salesman, as well as Acadia and PRP, alleging multiple causes of action, including misappropriation of trade secrets, fraud, and conspiracy. Horizon also claimed that the executives breached their covenants not to compete and covenants not to solicit.

At trial, the jury entered a verdict on many of Horizon's claims, awarding Horizon $898,000 in future lost profits for the loss of a prospective client that Acadia won in direct competition with Horizon and $3,300,000 in future lost profits based on the executives' failures to comply with

their covenants not to solicit—constituting Horizon's lost sales from the salesman's future sales production. The jury also awarded Horizon $50,000 for the stolen property or trade secrets and $5,049.24 in fraud damages for travel expenses charged to Horizon by three executives for expenses incurred while making plans for PRP. Finally, the jury awarded $1,750,000 in exemplary damages and $900,000 in attorney's fees, and the trial court imposed sanctions against one of the executives based on pretrial discovery misconduct. The court of appeals reversed, holding that no evidence supported the jury's award of future lost profits damages. Because only $55,049.24 in compensatory damages remained, the court held that the exemplary-damages award was unconstitutionally excessive and remanded for a new trial on attorney's fees. The court suggested a remittitur of the exemplary-damages award to $220,196.96 for each individual defendant, totaling $1,100,984.80. The court also reversed the trial court's judgment holding Acadia and PRP jointly and severally liable for the exemplary damages assessed against the individual defendants and affirmed the trial court's imposition of discovery sanctions.

The Supreme Court affirmed the court of appeals' judgment reversing the award of future lost profits damages, holding that Horizon presented no evidence that it would have won the prospective client's business absent the defendants' misconduct, and that Horizon presented no evidence regarding the profitability of the contracts the salesman would have sold had he remained at Horizon. The Court also held that the exemplary-damages award remained unconstitutionally excessive despite the court of appeals' suggested remittitur, reasoning that the constitutionality of an exemplary-damages award must be assessed by considering the due-process rights of each defendant rather than by comparing the exemplary-damages award to the overall judgment against all defendants. The Court affirmed the court of appeals' judgment holding that Acadia and PRP cannot be jointly and severally liable for the exemplary-damages awarded against the individual defendants. Finally, the Court held that the court of appeals properly remanded for a new trial on attorney's fees and that the trial court did not err by imposing discovery sanctions against one of the defendants.

B. Mental Anguish Damages

1. Nelson v. SCI Tex. Funeral Servs., Inc., 484 S.W.3d 248 (Tex. App.—Eastland 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1351 (June 23, 2016) [16-0297].

At issue in this case is whether a decedent's next of kin may recover mental-anguish damages for negligent handling of a corpse without establishing a contractual relationship with the defendant. Sharlene Lobban unexpectedly passed away on October 11, 2007. Her son, Cody Nelson, had the statutory right to control the disposition of her remains, but he could not be contacted for two weeks following his mother's death. Despite not obtaining Nelson's consent, SCI Texas Funeral Services (SCI) cremated Lobban's remains at the behest of her siblings less than forty-eight hours after her death.

Nelson sued SCI for negligence in cremating his mother's body without his authorization. The trial court found SCI negligent *per se* in cremating Lobban's remains in contravention of the statute governing priority over an individual's remains. *See* TEX. HEALTH & SAFETY CODE § 711.002. The trial court further held that Nelson had no damages other than mental-anguish damages, but that such damages were not available as a matter of law because Nelson failed to establish a contractual relationship with SCI. The trial court rendered summary judgment for SCI and dismissed Nelson's claims with prejudice.

The court of appeals reversed and remanded, holding that Nelson was not required to show contractual privity with SCI in order to for mental-anguish damages. The court of appeals based its holding largely on *Evanston Insurance Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383 (Tex. 2012), in which the Court held that a decedent's next of kin holds a quasi-property right in the decedent's remains.

The Supreme Court granted SCI's petition for review and will hear oral argument on December 6, 2017.

C. Punitive Damages

1. Bennett v. Grant, S.W.3d , 60 Tex. Sup. Ct. J. 791 (Tex. Apr. 28, 2017) [15-0338].

In this appeal, the Supreme Court considered several issues arising from a malicious prosecution action. Thomas Bennett and Randy Reynolds owned ranches. When thirteen cattle belonging to Reynolds wandered onto Bennett's ranch, Bennett instructed his ranch hand, Larry Wayne Grant, to round up and sell the cattle, which he did. Grant called Bennett and told Bennett he had photos of the cattle as they were sold. Bennett was indicted but acquitted of cattle theft, but Bennett and his company, James B. Bonham Corp., were found liable to Reynolds in a civil conversion suit.

Bennett accused Grant of trying to blackmail him, and contacted authorities in several counties with the blackmail claim. Bennett also brought a civil slander suit against Grant, and Grant counterclaimed for malicious prosecution in that suit. A special prosecutor eventually brought felony charges against Grant, but the criminal charges were quashed on grounds they were barred by limitations. In the civil suit, the jury found for Grant, and the trial court awarded $10,703 in actual damages, $1 million each in punitive damages against Bennett and Bonham Corp., and sanctions against Bennett for filing a frivolous slander claim. The court of appeals reduced the award of punitive damages to $512,109 each against Bennett and Bonham Corp. This amount was based on actual damages found by the jury plus $160,000, the minimum Grant would have received under a statutory compensation scheme available to wrongfully convicted defendants, and then applying a constitutionally acceptable ratio of three to one for punitive over actual damages.

The Supreme Court affirmed the award of actual damages, concluding there was legally sufficient evidence of mental anguish and attorney's fees comprising the actual damages award. The Court agreed with the court of appeals that an exception to a statutory cap on punitive damages applied. The applicable exception was securing execution of a document—the indictment—by deception. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(c)(11); TEX. PENAL CODE § 32.46(a). The Court also agreed with the court of appeals that Bonham Corp. was properly joined as a third-party defendant. And the Court agreed with the court of appeals that sanctions against Bennett for filing a groundless slander claim were proper.

But the Supreme Court reversed the award of punitive damages as remitted by the court of appeals. The Supreme Court reasoned that the award was still too high to meet the constitutional requirement that the punitive damages bear a reasonable relation to the actual harm suffered by the plaintiff or the harm likely to result. While under state and federal precedents punitive damages may reflect "the harm likely to result" from the defendant's conduct, compensation in this suit for wrongful imprisonment did not meet this standard. Wrongful imprisonment was not likely to result because the statute of limitations barred conviction and imprisonment for blackmail. The Court remanded the case to the court of appeals for a more substantial remittitur.

X. EMPLOYMENT LAW

A. Collective Bargaining

1. Jefferson Cty. v. Jefferson Cty. Constables Ass'n, 512 S.W.3d 434 (Tex. App.—Corpus Christi–Edinburg 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 651 (Mar. 31, 2017) [16-0498].

At issue in this case is whether deputy constables have enforceable collective bargaining rights under Chapter 174 of the Texas Local Government Code.

In October 2007, Jefferson County and the Jefferson County Constables Association entered a collective bargaining agreement. The Agreement decreed binding arbitration to settle disputes over its interpretation, application, or violation. Thereafter, the County abolished several deputy constable positions. The constables claimed that this action breached the Agreement's mandate that seniority would solely govern layoffs. An arbitrator ruled that the County breached the Agreement by failing to budget for and dismissing the deputy constables regardless of seniority. The arbitrator ordered the County to rehire the dismissed constables, according to seniority, and pay back-wages, less any income earned by a deputy in other employment. The County filed an original petition to vacate the arbitration award claiming the arbitrator: (1) lacked jurisdiction to render the

award, (2) exceeded his jurisdiction by controlling the County's budget, (3) did not support his award with competent, material, or substantial evidence found in the record, and (4) did not properly interpret the agreement.

The parties sought summary judgment. The County argued to dismiss the arbitration award on two grounds. First, the County averred that the arbitrator could not reinstate the deputy constables because Texas Local Government Code section 86.011 empowers the Constable and County Commissioner's Court to appoint deputy constables. Second, the arbitrator exceeded his powers by ignoring the Agreement's provision allowing the County to abolish positions for lack of work or want of funds. The Constables countered that the arbitration award should be affirmed as it was supported by the agreement's provision that seniority solely govern layoff decisions. The trial court agreed with the County and vacated the arbitration award.

The court of appeals reversed and ruled that the Fire and Police Employee Relations Act ensured the constables' collective bargaining rights as essential, emergency employees. The County appealed, claiming that the Constables could not collectively bargain since they were not police officers under the Act. The Constables continued to claim that they could collectively bargain under the Act since they qualified as police officers.

The Supreme Court granted Jefferson County's petition for review and will hear oral argument on November 7, 2017.

B. Employment Discrimination

1. Exxon Mobil Corp. v. Rincones, S.W.3d , 60 Tex. Sup. Ct. J. 1054 (Tex. May 26, 2017) [15-0240].

This case presented multiple employment law, defamation, and procedural issues. Gilberto Rincones is a Hispanic male who worked for WHM Custom Services, Inc. (WHM), a subcontractor of Exxon Mobil Corp. The case arose from reports that Rincones failed a drug test administered by DISA, Inc. He was then put on "inactive status," meaning he could not be scheduled for work at Exxon's Baytown refinery. Rincones maintained he did not use illegal drugs. He also claimed that following the drug test, he was treated differently because of his race and national origin.

Rincones sued WHM, Exxon, and DISA on multiple claims including discrimination, retaliation, negligence, tortious interference with contract, and defamation. The district court granted summary judgment for the defendants on all claims except one which it dismissed for want of jurisdiction. The court of appeals reversed the trial court's judgment as to many of Rincones's claims. It held that Rincones could maintain a cause of action for compelled self-defamation and the trial court erred by granting summary judgment; Rincones created a fact issue on his prima facie cases for discrimination and retaliation under TCHRA that precluded summary judgment; that his tortious interference and negligence claims were not barred by limitations; and the dismissal of Rincones's practice-or-pattern discrimination claim for lack of subject matter jurisdiction was improper.

The Supreme Court reversed in part and vacated in part, rendering judgment that the trial court's final take-nothing judgment be reinstated. The Court expressly declined to recognize a theory of compelled self-defamation, joining the majority of other jurisdictions that have considered the issue. It also held that Rincones failed to meet his burden to establish a prima facie case of discrimination and that he had no claim for retaliation. The Court further held that Rincones's negligence and tortious interference claims against Exxon failed because DISA was not an agent of Exxon and that those claims were barred by limitations. Finally, the Court found that Rincones's pattern-or-practice claims had been abandoned and therefore vacated the court of appeals' judgment as to those issues.

C. Law Enforcement Officers

1. Colo. Cty. v. Staff, 510 S.W.3d 435 (Tex. Feb. 3, 2017) [15-0912].

At issue in this case was whether Chapter 614, Subchapter B of the Texas Government Code, which provides covered peace officers certain procedural safeguards before termination, applied to an at-will employment relationship and, if so, whether the sheriff's office complied with the procedural requirements.

Marc Staff was fired from his position as an at-will deputy sheriff with the Colorado County Sheriff's Office. The impetus for Staff's dismissal was an internal investigation initiated after the county attorney informed Sheriff R.H. "Curly" Wied that Staff's behavior during a recorded traffic incident was "inappropriate and needed to be addressed." Contemporaneously with his dismissal, Staff received a performance deficiency notice signed by his supervisor. Staff sought declaratory judgment that Colorado County and Sheriff Wied had violated Subchapter B when they terminated him. Per Subchapter B, a covered peace officer cannot be disciplined based on a "complaint" unless the complaint is (1) in writing, (2) "signed by the person making the complaint," and (3) presented to the employee "within a reasonable time after the complaint is filed." The trial court granted summary judgment against Staff and dismissed his claims. The court of appeals reversed and remanded, holding that Sheriff Wied violated Subchapter B when he terminated Staff's employment.

The Supreme Court reversed the court of appeals' judgment. The Court held that (1) Subchapter B does not alter the at-will relationship, but imposes requirements when the employer elects to terminate employment based on a complaint of misconduct rather than terminating at will; (2) the statutory phrase "the person making the complaint" is not limited to the "victim" of the alleged misconduct and may include other individuals, such as Staff's supervisor; and (3) the signed deficiency notice met the procedural requirements of Subchapter B, providing Staff with sufficient opportunity to defend himself to the final decision maker. The Court rendered judgment in Sheriff Weid's and the County's favor.

D. Sex Discrimination

1. Alamo Heights Indep. Sch. Dist. v. Clark, 2015 WL 6163252 (Tex. App.—San Antonio Oct. 21, 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 10, 2017) [16-0244].

At issue in this case is whether Catherine Clark, a physical education teacher, made out a prima facie case of same-sex sexual harassment and retaliation against Alamo Heights Independent School District. Clark argues that she was subjected to daily sexual harassment by her coworkers until she was terminated in 2009. But, Clark's Equal Employment Opportunity Commission charge was dismissed because there was insufficient evidence to establish the harassment was related to gender discrimination. After she was terminated, Clark filed suit against AHISD for sexual harassment and retaliation under the Texas Commission of Human Rights Act.

At trial, AHISD moved for dismissal, asserting lack of subject matter jurisdiction because Clark did not make out a prima facie case, and therefore failed to invoke the Act's waiver of governmental immunity. The trial court denied AHISD's plea to jurisdiction, determining that Clark made out a prima facie case of sexual harassment and retaliation. The court of appeals affirmed the trial courts ruling.

The Supreme Court granted Alamo Heights ISD's petition for review and will hear oral argument on September 13, 2017.

E. Statutory Retaliation Claim

1. El Paso Healthcare, Ltd. v. Murphy, 518 S.W.3d 412 (Tex. Apr. 28, 2017) [15-0575].

This case concerned a statutory retaliation claim under section 161.135 of the Texas Health & Safety Code. The issues in this case were whether: (1) a plaintiff's good-faith belief that she was reporting a violation of law was sufficient to support a claim, (2) the plaintiff here established that she had such a good-faith belief, and (3) the plaintiff's evidence was sufficient to support the damages awarded.

Laura Murphy, a nurse anesthetist, was an at-will employee of West Texas OB Anesthesia (WTOA). She was assigned to work at Las Palmas Medical Center (the Hospital) pursuant to its contract with WTOA. One evening, Murphy visited with a high-risk-pregnancy patient who was anxious about delivering her child via C-section. Murphy encouraged the patient to speak with Dr. Frederick Harlass—the hospital's high-risk delivery specialist—about her worries. When the doctor arrived, he and another nurse, and without Murphy present, visited with the patient for about five minutes. When the doctor emerged from the room, he was upset because he thought that Murphy was interfering with a needed

procedure. Although the patient eventually consented to the C-section, Murphy filed a complaint with the Hospital alleging that the doctor failed to get the patient's informed-consent. The doctor filed a complaint against Murphy for meddling in his practice. Afterwards, the Hospital asked WTOA not to schedule Murphy for two weeks until the complaints were resolved. Murphy sued the Hospital for retaliation under section 161.135 which provides that hospitals and other health facilities "may not retaliate against a person who is not an employee for reporting a violation of law."

At trial, the jury found that Murphy's ethics violation complaint was made in good-faith, the Hospital's adverse employment actions were retaliatory, the Hospital interfered with a prospective business relationship between Murphy and WTOA, and that the Hospital did not believe in good-faith that it had a right to interfere with Murphy's prospective contract. The court awarded $631,000 in damages and attorney's fees.

The Court of Appeals affirmed, finding sufficient evidence that the Hospital retaliated against Murphy for reporting a violation of law and for the jury's damages award. The court did not address whether there was legally sufficient evidence to support Murphy's claim that her report was made in good-faith.

The Supreme Court reversed and rendered. The Court held that a retaliation claim under section 161.135 did not require proof of an actual violation of law but only of a good-faith belief that the physician's conduct was a violation of law. However, the Court further ruled that Murphy did not make her report in good faith, mainly because she was not present when the doctor discussed the procedure with the patient and no other evidence suggested a violation of law. Finally, the Court determined that the evidence did not support the jury's finding that the Hospital interfered with Murphy's legal rights under her contract with WTOA.

F. Texas Commission on Human Rights Act

1. B.C. v. Steak N Shake Operations, Inc., 512 S.W.3d 276 (Tex. Feb. 24, 2017) [15-0404].

At issue in this case was whether B.C.'s remedy in a sexual assault case against her employer arises exclusively within the statutory sexual harassment framework found in the Texas Commission on Human Rights Act or whether B.C. can bring a separate common-law claim for assault.

B.C. alleged that she was sexually assaulted by her supervisor in an employee restroom during an overnight shift. B.C. reported the incident to Steak N Shake and to the police, but Steak N Shake was unable to confirm her allegations. Steak N Shake offered B.C. the option to return to work at any Steak N Shake location, but she instead opted to terminate her employment.

B.C. filed suit against Steak N Shake and the supervisor, asserting causes of action for assault, sexual assault, battery, negligence, gross negligence, and intentional infliction of emotional distress. Steak N Shake moved for summary judgment on all claims, asserting that the TCHRA's statutory cause of action preempted B.C.'s common-law claims. The trial court agreed and granted Steak N Shake's motion for summary judgment without providing a basis for its ruling. B.C. appealed only the trial court's ruling on her assault claim against Steak N Shake. The court of appeals, relying on the Texas Supreme Court's decision in *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), affirmed the trial court's ruling, concluding that the TCHRA provides the exclusive remedy for sexual harassment in the workplace.

The Supreme Court reversed the judgment of the court of appeals and remanded to the court of appeals for consideration of issues not previously addressed. In its decision, the Court distinguished *Waffle House* and determined whether a clear repugnance existed between the common-law claim for assault and the TCHRA claim for sexual harassment. The Court held that when the gravamen of the claim is assault, rather than harassment—as is the case here—the TCHRA does not preempt a common-law assault claim. The Court further held that the TCHRA does not foreclose B.C.'s assault claim even when predicated on the same facts that would presumably constitute a sexual harassment claim. The Court remanded the case to the court of appeals to address whether the trial court's summary judgment could be affirmed on non-preemption grounds.

2. Green v. Dall. Cty. Sch., S.W.3d , 60 Tex. Sup. Ct. J. 945 (Tex. May 12, 2017) [16-0214].

Paul Green was a bus monitor employed by the Dallas County Schools. He suffered a bout of incontinence while working on a bus route and was later terminated. Green sued for disability discrimination under the Labor Code, alleging that he was terminated as a result of a disability. Green suffered from congestive heart failure and took medication for this condition. The jury agreed with Green on his disability discrimination claim and the trial court rendered judgment in his favor. The court of appeals reversed, reasoning that Green had provided no evidence that his heart condition or his medication had caused the incontinence episode.

The Supreme Court reversed the court of appeals' judgment and remanded to that court to address issues it had not reached. The Supreme Court reasoned that Green could recover under the theory that the incontinence itself was a disability. The jury charge instructed the jury that Green had a disability, and as worded, the charge allowed the jury to conclude that the incontinence itself was a disability. The Court further held that Green had not waived this argument in the trial court or the court of appeals, and that there was evidence that Green's incontinence was a disability-level chronic condition.

G. Unemployment Compensation

1. Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n, 519 S.W.3d 113 (Tex. May 12, 2017) [16-0346].

The issues in this case were: (1) under the Texas Unemployment Compensation Act, were members of the Harris County Appraisal Review Board employed by the Harris County Appraisal District; and (2) did members of the Harris County Appraisal Review Board meet the employment exception for members of the judiciary?

Each appraisal district in Texas has a statutorily created appraisal review board. The members of these boards are appointed to adjudicate appeal hearings and render decisions regarding taxpayer challenges of property tax valuations made by appraisal districts. Sixteen former members of the Harris County Appraisal Review Board (the Board) filed claims for unemployment benefits naming Harris County Appraisal District (HCAD) as their employer. The Texas Workforce Commission (TWC) approved the awards of unemployment benefits, concluding that HCAD was the employer of each Board member. HCAD filed suits, later consolidated, for de novo review of the TWC's decision. The trial court granted HCAD's motion for summary judgment and entered judgment setting aside the TWC's determination. The court of appeals reversed and rendered judgment for the TWC, holding both that substantial evidence supported the TWC's decision that Board members were HCAD employees and that the "member of the judiciary" exception did not apply to Board members.

The Supreme Court affirmed. The Court held that the employment determination is a factual one, to be analyzed under the factors provided in the TWC's regulation. Under the factors, there was substantial evidence to support employment. The Court also held that the Unemployment Act provisions controlled over the Tax Code provisions prohibiting HCAD from exercising "control" over the Board—"control" being the linchpin of the employment analysis. The Court also held that the "members of the judiciary" exemption in the Unemployment Code did not apply to the Board because the statute only applies to members of the judiciary proper and not quasi-judicial administrative review boards.

H. Vicarious Liability

1. Painter v. Amerimex Drilling I, Ltd., 511 S.W.3d 700 (Tex. App.—El Paso 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 10, 2017) [16-0120].

At issue is whether Amerimex Drilling I, Ltd. can be held vicariously liable for the negligence of one of its employees. Amerimex paid its employee, J.C. Burchett, a driver's bonus to transport a drilling crew from an Amerimex drill site to an Amerimex bunkhouse. During the drive, Burchett negligently caused an accident. Burchett and passenger Steven Painter were injured. Two other passengers were killed. Burchett received worker's compensation for his injuries because, according to the Texas Department of Insurance Worker's Compensation Division, he was in the course and scope of his employment at the time of the accident.

Amerimex tried to initiate worker's compensation proceedings on behalf of Painter and the deceased, but the Worker's Compensation Division found that Amerimex lacked standing to do so.

Painter sued Amerimex, contending Amerimex was liable for Burchett's negligence. The trial court granted summary judgment for Amerimex on Painter's vicarious-liability claim. The court of appeals affirmed. First, the court of appeals held that, even if Burchett was in the course of scope of his employment for the purposes of worker's compensation, he was not necessarily so for the purposes of vicarious liability. Second, Painter was required to, but failed to, present evidence that Amerimex controlled Burchett at the time of the accident.

Painter petitioned the Supreme Court for review. Painter argued that Amerimex was vicariously liable for the driver's negligence because Amerimex was obligated—by its contract with the owner of the land on which the drill site was located—to transport its drivers to and from the drill site, and Amerimex assigned this duty to, among others, the driver that caused the accident. In other words, Painter contends, the driver was performing a task for Amerimex when he caused the accident.

The Court granted Painter's petition for review and will hear oral argument on September 13, 2017.

XI. FAMILY LAW

A. Conservatorship

1. Office of the Attorney Gen. of Tex. v. C.W.H., 2015 WL 6560623 (Tex. App.—Tyler 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 13, 2017) [15-0944].

At issue in this case is whether an associate judge, appointed to hear a Title IV-D case under Texas Family Code Chapter 201 Subchapter B, has the authority to modify conservatorship. In 2010, C.W.H. was named sole managing conservator of his three children. Shortly thereafter, C.W.H. sent the children to live with their maternal grandparents. C.W.H. was subsequently arrested and imprisoned. In 2014, the Office of the Attorney General (O.A.G.) filed a "Notice of Status and Motion for Further Orders" alleging that C.W.H. had voluntarily relinquished primary care and possession of the children and that conservatorship and support should be modified. A Title IV-D associate judge presided over a hearing on the motion, but C.W.H. was not notified of the hearing, his request for a bench warrant was denied, and although he timely filed an answer to the O.A.G.'s notice, the hearing was conducted as though he were in default. The associate judge issued an order modifying the 2010 conservatorship order, naming the mother and grandparents joint managing conservators and ordering C.W.H. to have no contact with the children.

The court of appeals reversed and remanded, holding that the trial court abused its discretion by denying C.W.H.'s request to participate in the hearing and that the Title IV-D associate judge who presided over the hearing did not have the authority to rule on conservatorship. The O.A.G. petitioned for review arguing that, absent a timely objection, an associate judge appointed under Chapter 201 of the Family Code has the authority to render a final judgment on any matter referred to them, including conservatorship.

The Supreme Court granted the O.A.G.'s petition for review and will hear oral argument on September 12, 2017.

B. Divorce Decrees

1. Kramer v. Kastleman, 508 S.W.3d 211 (Tex. Jan. 30, 2017) [14-1038].

This case concerns an appeal seeking to set aside a final divorce decree. At issue is whether the acceptance of benefits doctrine requires a showing of prejudice and whether child custody and sanctions complaints are severable and still appealable if property division complaints are dismissed.

Lisa Kramer and Bryan Kastleman engaged in an informal negotiation to reach a settlement agreement concerning their child and the division of their property. The trial court approved the agreement, which, in part, awarded Kramer interests in two partnerships that own real estate in the Midland/Odessa area. Kramer subsequently filed motions to set aside the settlement agreement, final divorce decree, and a sanctions order against her. The trial court denied her motions and entered a corrected divorce decree. On appeal, Kastleman filed a motion to dismiss, arguing that Kramer was estopped from

challenging the final judgment because she had accepted benefits under the divorce decree in the form of rental income from the Midland/Odessa properties. The court of appeals granted Kastleman's motion and dismissed the appeal in its entirety, including Kramer's complaints about child custody issues and the sanctions order.

On appeal to the Supreme Court, Kramer argued that the acceptance of benefits doctrine should not have foreclosed her appeal of the property division without a showing that Kastleman had been prejudiced by her acceptance of benefits. Kramer further argued that her appellate complaints about child custody issues and the sanctions order should not have been dismissed based on the acceptance of property division benefits.

The Court concluded the court of appeals erred by dismissing Kramer's entire appeal based on the acceptance of benefits doctrine, as the record did not demonstrate that Kramer intended to acquiesce in the judgment. The Court clarified its previous holding in *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950), stating that prejudice must be established as a predicate to the denial of a merits-based disposition of an appeal. Kramer's alleged acceptance of the benefits of the divorce decree, including ownership and control of real property awarded to Kramer, partnership interests in Kastleman's corporations, collection of rent from community-property apartment complexes, the refinancing of a loan pursuant to the divorce decree, and the retrieval of personal property awarded to Kramer from a condominium in the process of being sold, did not amount to prejudice to Kastleman.

The Court outlined that mere acceptance, possession, and control of community property does not equate to acquiescence in the final judgment and all of the alleged benefits accepted by Kramer could be returned or taken into account in a new just-and-right division of property, should the appeal be successful. Kramer's dominion over the marital assets does not rise to the level of estoppel and thus, absent disadvantage to the opposing party, an appellant must not be denied a merits-based disposition of its appeal. Because the court of appeals erroneously denied a review on the merits based on an overly-narrow application of *Carle*, the Court reversed and remanded back to that court for further proceedings on the merits.

C. Mediated Settlement Agreements

1. Loya v. Loya, S.W.3d , 60 Tex. Sup. Ct. J. 914 (Tex. May 12, 2017) [15-0763].

The central issue in this case was whether Miguel Loya's 2011 bonus was partitioned by the mediated settlement agreement (MSA) in his divorce.

Miguel Angel Loya and Leticia B. Loya married in 1980. In 1992, Miguel began working at Vitol Inc., an energy and commodity trading company. As an employee of Vitol, Miguel was eligible—but not entitled—to receive an annual "discretionary" bonus. Leticia filed for divorce in 2008. The TC ordered mediation, and the ensuing negotiations resulted in a detailed MSA signed by Leticia, Miguel, and their respective attorneys on June 13, 2010. The MSA divided all future income and earnings. The next day, Leticia presented the agreement to the trial court, and the court orally rendered judgment. While the parties were in the process of drafting the divorce decree and the agreement incident to divorce (AID), disagreements arose and the parties went to arbitration. One of the disagreements related to the partition of future income and earnings. In an e-mail, the arbitrator directed the parties to include the following language in the AID: "All future income and earnings are partitioned as of June 13, 2010."

On June 22, Leticia filed a motion to set aside the MSA arguing there was no mutual assent because the parties "did not reach an agreement as to the division of . . . the community's interest in Miguel Angel Loya's bonus to be paid in 2011, nearly half of which pertains to [Miguel's] services through June 13, 2010." The trial court denied Leticia's motion and signed the final divorce decree. Leticia did not appeal. On March 15, 2011, Miguel received a $4.5 million bonus from Vitol. In June 2012, Leticia filed an original petition for post-divorce division of property, seeking to divide Miguel's 2011 bonus. The trial court granted partial summary judgment for Miguel.

The court of appeals reversed and remanded, concluding "that the bonus was not considered, disposed of, or partitioned in the divorce decree,

and Leticia raised a fact issue concerning the characterization of the bonus."

The Supreme Court reversed, holding that the MSA partitioned Miguel's 2011 discretionary bonus—which was neither owed nor paid to him until nine months after the MSA was signed—as "future income." The Court expressly did not reach the issue of whether the portion of a purely discretionary bonus based on services performed during the marriage constitutes community property.

D. Termination of Parental Rights

1. In re K.S.L., 499 S.W.3d 109 (Tex. App.—San Antonio 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1353 (June 23, 2017) [16-0558].

At issue in this appeal from a parental termination suit is whether a voluntary affidavit of relinquishment of parental rights is sufficient to prove best interests of the child by clear and convincing evidence. The Texas Department of Family and Protective services filed suits affecting the parent/child relationship against the parents of K.S.L., chronicling neglect and abuse. The trial court terminated the rights of both parents based on limited testimony from a caseworker and each parent's signed affidavit of relinquishment, finding the terminations to be in the best interest of K.S.L.

On appeal, the parents argued there was insufficient evidence to support the trial court's finding and the Fourth Court of Appeals agreed, holding that a voluntary affidavit of relinquishment does not relieve the State of its burden to prove both prongs of Texas Family Code section 161.001 by clear and convincing evidence, as is constitutionally required. The court of appeals held that the first prong—a list of enumerated grounds for termination, one of which is a voluntary affidavit of relinquishment of parental rights—could not ipso facto prove the second prong of best interests of the child.

While the court of appeals restored the parental rights of the parents, it affirmed the trial court's holding that the Department remain K.S.L.'s managing conservator, leaving the child with no recourse for adoption. The Department of Family and Protective Services appealed.

The Supreme Court granted the Department of Family and Protective Services ' petition for review and will hear oral argument on September 15, 2017.

XII. GOVERNMENTAL IMMUNITY

A. Contract Claims

1. Byrdson Servs., LLC v. Se .Tex. Reg'l Planning Comm'n, 516 S.W.3d 483 (Tex. Dec. 23, 2016) [15-0158].

In this case, Byrdson Services, LLC entered into contracts with the South East Regional Planning Commission, a state governmental entity. The Commission had received funding from the State to provide hurricane repair services to homes within its region. The Commission hired Byrdson as a subcontractor to provide some of the repairs on five homes. A dispute arose as to the quality of the repair work and the amounts due to Byrdson under its contracts with the Commission. The Commission filed a plea to the jurisdiction, alleging governmental immunity. Byrdson responded that immunity was waived by chapter 271.152 of the Local Government Code which provides that immunity is waived on written contracts stating the essential terms of an agreement "for providing goods or services to the local governmental entity." The trial court denied the plea. On interlocutory appeal, the court of appeals reversed, agreeing with the Commission that the contracts in issue did not provide services to the Commission, but instead provided services to the private homeowners whose homes were repaired.

The Supreme Court reversed the court of appeals' judgment and held that the contracts provided services to the Commission. The Court relied on its decisions which held that services to the governmental entity need not be the primary purpose of the agreement, and "services" under chapter 271 covers a wide array of activities and generally includes any act performed for the benefit of another. The Court held that the contracts between Byrdson and the Commission provided services to the Commission because Byrdson provided services that the Commission was otherwise obligated to perform itself under the contract between the State and the Commission. Under its contract with the State, the Commission was obligated to provide homeowner repair services with the funding it had received from the State.

B. Finality of Judgments

1. Engelman Irrigation Dist. v. Shields Bros., Inc., 514 S.W.3d. 746 (Tex. Mar. 17, 2017) [15-0188].

In this case, Shields Brothers, Inc. obtained a judgment against the Engelman Irrigation District for breach of contract. During that litigation (*Engelman I*), Engelman, a governmental entity, argued that the trial court lacked subject-matter jurisdiction because Engelman possessed governmental immunity from suit. The trial court rejected this argument, as did the court of appeals. The Supreme Court denied review. In *Engelman II*, Engelman attempted to seek bankruptcy protection from the *Engelman I* judgment through an administrative proceeding. This effort was unsuccessful. After appeals had been exhausted and the *Engelman I* judgment became final, the Supreme Court decided *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). *Tooke* gave Engelman an argument that the trial court in *Engelman I* lacked subject-matter jurisdiction because under *Tooke*, "sue and be sued" language in the statute governing water districts such as Engelman did not effect a waiver of sovereign immunity. Engelman then brought a declaratory judgment action, *Engelman III*, seeking a declaration that the *Engelman I* judgment was void. The trial court denied the request for declaratory relief, and the court of appeals affirmed.

The Supreme Court affirmed the court of appeals' judgment. The Court held, based on prior decisions, that sovereign immunity "implicated" subject-matter jurisdiction, noting that sovereign immunity can be raised in a plea to the jurisdiction, interlocutory appellate review is available, and the issue can be raised on appeal even if not raised in the trial court. But the court held that holding the *Engelman I* judgment void would run afoul of the fundamental doctrine of res judicata. Principles of finality are essential to the functioning of any rational and workable judicial system. While generally a judgment is subject to collateral attack if the trial court lacked subject-matter jurisdiction, the Court held that sovereign immunity does not so implicate subject-matter jurisdiction as to upend foundational principles of claim preclusion. Recognizing finality is particularly warranted when, as in this case (1) the trial court in the first suit was a court of general jurisdiction and (2) the issue of subject-matter jurisdiction was actually litigated. The Court held that separation-of-powers concerns did not warrant reopening the *Engelman I* judgment. It held that deciding the retroactive effect of one of the Court's own decisions on an earlier final judgment was a matter for the courts. The Court also held that equitable considerations did not justify ignoring principles of res judicata. Enforcing the *Engelman I* judgment would simply mean that Engelman would be compelled to answer for a breach of contract as would any private party.

C. Texas Tort Claims Act

1. City of Dallas v. Sanchez, 494 S.W.3d 722 (Tex. July 1, 2016) [15-0094].

At issue in this wrongful-death action was whether the requisite causal nexus existed between an alleged defective condition of property and an injury to establish a waiver of governmental immunity under the Texas Tort Claims Act (TTCA). The parents of a drug-overdose victim, Matthew Sanchez, sued the City of Dallas, alleging the defective condition of the City's emergency telephone system was a proximate cause of their son's death. A 9-1-1 call was placed on Sanchez's behalf that provided the 9-1-1 dispatcher with information regarding the nature of the emergency and Sanchez's address, including the apartment number, but the telephone system allegedly malfunctioned and caused the call to become disconnected. Approximately ten minutes earlier, 9-1-1 dispatchers had received a similar call requesting assistance for a different drug overdose victim at the same apartment complex. Although an ambulance was dispatched to Sanchez's apartment complex, the emergency personnel provided assistance to the other drug-overdose victim and left without aiding Sanchez, erroneously concluding the two closely timed 9-1-1 calls were redundant. Sanchez's parents claimed the defective condition of the City's telephone system caused their son's death by prematurely disconnecting the 9-1-1 call, precluding emergency responders from determining the calls were not duplicative and preventing their son from receiving timely emergency assistance.

The City filed a motion to dismiss, asserting Sanchez's parents failed to establish a valid waiver of the City's immunity under the TTCA. The trial court granted the City's motion to dismiss in part, but denied the City's motion in regards to the defective condition claim. The court of appeals affirmed. The Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing the case.

The Court held that the City's governmental immunity was not waived, because the requisite causal nexus between the alleged defective condition and Sanchez's injury was lacking. The Court reasoned that the disconnection of the telephone call approximately six hours before Sanchez's death may have contributed to the various circumstances that delayed the potentially life-saving assistance, but the alleged defect did not actually cause or hasten Sanchez's death. Accordingly, the malfunction was too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause of death. The Court thus concluded the pleadings failed to establish a defect in the City's telephone system was a proximate cause of Sanchez's death as required to establish a waiver of governmental immunity under the TTCA.

2. Fort Worth Transp. Auth. v. Rodriquez, 2016 WL 3453183 (Tex. App.—Fort Worth 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1230 (June 16, 2017) [16-0542].

The issue in this case is whether a regional transportation authority and its two independent contractors are individually or cumulatively liable for damages in a wrongful death case and whether the employee of one of those contractors is an employee of a governmental unit under the Texas Tort Claims Act (the Act).

Judith Peterson was walking across a downtown street when she was accidentally struck by a Fort Worth Transportation Authority bus and killed. The bus was driven by Leshawn Vaughn, who was an employee of MTI, an independent contractor of FWTA. Peterson's daughter, Michelle Rodriguez, brought a claim of negligent operation of a motor-driven vehicle under the Act against FWTA, its two independent contractors MTI and MTA, and Vaughn, for the wrongful death of her mother. MTI did not deny its liability, but the parties filed competing motions for partial summary judgment regarding the Act's damage caps. Rodriguez sought declaration that the TTCA's damage cap applies separately to each entity, assuming each is liable, and that the potential liability of Vaughn is not capped. The petitioners—FWTA, MTI, and MTA, and Vaughn—sought summary judgment declaring the opposite: that all defendants were subject to a single $100,000 cap and that Rodriguez's claims against Vaughn should be dismissed under § 101.106 of the Act, which creates an "Election of Remedies" when the employee of a governmental unit is sued. The TC granted the petitioners' motion, denied Rodriguez's motion, and entered a final judgment limiting her recovery against FWTA and its independent contractors to $100,000, dismissing all of Rodriguez's other claims. It rendered a final judgment ordering Rodriguez recover $100,000 after the exhaustion of all appeals and dismissed Rodriguez's claims with prejudice.

The court of appeals reversed, declaring the $100,000 tort-liability limit applies separately to each corporate defendant. The court of appeals also stated that Vaughn's potential tort liability was not capped and she has unlimited personal liability. Further, the CA held that the TTCA's election of remedies provision does not apply to the employee of an independent contractor. The court of appeals remanded the case for a trial on the merits.

The Supreme Court granted review and will hear oral argument on November 8, 2017.

3. Laverie v. Wetherbe, 517 S.W.3d 748 (Tex. Apr. 7, 2017) [15-0217].

At issue in this case was whether Debra Laverie, a Texas Tech University professor and associate dean, was entitled to dismissal from a defamation suit pursuant to the election-of-remedies provision in the Tort Claims Act. James Wetherbe, also a Texas Tech professor, sued Laverie after Wetherbe was passed over for promotion. Wetherbe claimed Laverie scuttled his bid to become the dean of Texas Tech's business school by telling Texas Tech's provost that the faculty's perception was that Wetherbe was a preferred inside candidate for the job and

that he was reportedly using technology to eavesdrop at the business school.

Wetherbe sued Laverie for defamation and Laverie moved for summary judgment, arguing the Tort Claims Act's election-of-remedies provision compelled her dismissal because she acted within the scope of her employment when she made the allegedly defamatory statements. The trial court denied Laverie's motion and the court of appeals affirmed, holding that the record did not conclusively establish that Laverie was serving any purpose of her employer, as opposed to furthering only her own purposes.

The Supreme Court reversed, holding the court of appeals erred when it concluded Laverie's burden was to conclusively establish her motivation for making the allegedly defamatory statements. Instead, the Court held that Laverie was entitled to dismissal if she could show her statements were within the scope of her employment regardless of any personal motivation she might have had. There is no threshold requirement that government employees conclusively prove their subjective intent to establish they acted in the scope of their employment. The scope-of-employment analysis, therefore, remains fundamentally objective, turning on a connection between the employee's job duties and the alleged tortious conduct. The Court then concluded Laverie objectively acted within the scope of her employment in her role as associate dean of the business school and a member of the dean search committee when she made the allegedly defamatory statements to the provost. Accordingly, the Court reversed the court of appeals' judgment and rendered judgment dismissing Laverie from Wetherbe's suit.

4. Marino v. Lenoir, S.W.3d , 60 Tex. Sup. Ct. J. 832 (Tex. Apr. 28, 2017) [15-0610].

The issue in this case was whether a resident physician was the "employee" of a governmental unit under the Texas Tort Claims Act. Dr. Leah Anne Gonski Marino was sued for medical malpractice in the course of her treatment of Shana Lenoir at the University of Texas Physicians Clinic in Houston. Dr. Gonski was a resident physician participating in a residency program offered by the University of Texas Health Science Center at Houston (UTHSCH). The University of Texas Medical Foundation is involved in the administration of this and other University of Texas residency programs. Dr. Gonski sought dismissal of the suit under section 101.106(f) of the Act, which provides that an employee of a governmental unit may seek dismissal unless the plaintiff amends her pleadings to substitute the governmental unit as defendant. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(f). An "employee" under the Act means a person in the paid service of a governmental unit, but does not include a person "who performs tasks the details of which the governmental unit does not have the legal right to control." Dr. Gonski claimed she was an employee of the Foundation. The trial court granted Dr. Gonski's motion to dismiss. The court of appeals reversed.

The Supreme Court affirmed, noting undisputed record evidence that Dr. Gonski was paid by the Foundation, and she therefore met the "paid service" element of employee status. But the Court concluded that she was not an employee of the Foundation because the details of her tasks as a medical resident were not controlled by the Foundation. The Court noted that under Dr. Gonski's contractual notice of appointment to the residency program, she agreed to abide by the Graduate Medical Education Resident Handbook and the policies of the Foundation. The Handbook provided that the resident perform duties, responsibilities, and rotations as assigned by the residency program's director. The program director for the residency program attested that she was a full-time employee of UTHSCH, that UT Clinics are staffed exclusively by full-time employees of UTHSCH, and that UTHSCH is at all times responsible for the quality of medical care at these Clinics. The Foundation's bylaws stated that the Foundation does not control physicians like Dr. Gonski who work at hospitals not owned by the Foundation. Based on this and other evidence, the Court concluded that Dr. Gonski was not an employee of the Foundation so she was not entitled to dismissal of the suit against her.

5. Univ. of Tex. Health Sci. Ctr. at Hous. v. Rios, 507 S.W.3d 312 (Tex. App.—Houston [1st Dist.] 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0836].

At issue in this case is whether a plaintiff may amend his original petition under the Texas Tort Claims Act (TTCA) to avoid dismissal of governmental employees after a section 101.106(e) motion has been filed.

Dr. Tomas Rios brought suit under the TTCA against UT Health Science Center and several individual defendant doctors after his appointment with UT Health was rescinded. UT Health filed a motion to dismiss the individual defendants under section 101.106(e) of the TTCA's election-of-remedies provision. Before the trial court ruled on the motion, Dr. Rios filed an amended petition, which removed the common-law tort claims against UT Health, but reasserted them against the individual defendants. In response, UT Health filed an amended section 101.106(e) motion to dismiss. The trial court denied the motion to dismiss the individual defendants. The court of appeals affirmed. UT Health appealed, arguing that the election-of-remedies provision of the TTCA prohibited Rios from amending his petition to avoid dismissal of the individual defendant doctors, who were entitled to dismissal by its section 101.106(e) motion to dismiss.

The Supreme Court granted UT Health's petition for review and will hear oral argument on October 12, 2017.

D. Ultra Vires Claims

1. Hall v. McRaven, 508 S.W.3d 232 (Tex. Jan. 27, 2017) [16-0773].

At issue in this case was whether a member of the University of Texas Board of Regents could overcome the state's sovereign immunity in a suit against the Chancellor of the UT System.

After concerns about improprieties within the UT Austin admissions process came to light, the former Chancellor of the UT System commissioned an external investigation into the issue. Kroll Associates, Inc. performed the investigation and discovered that the then-President of the University had exerted substantial oversight in the admissions process. During the pendency of the investigation, Admiral William McRaven became the Chancellor of the UT System. The findings in the "Kroll Report" became available to the public but the underlying student-admissions information did not. Regent Wallace Hall requested access to those underlying records.

Chancellor McRaven originally refused the request, and the request went to a Board vote. The Board voted to grant Hall access subject to the Chancellor's determination on whether privacy law, namely the Federal Educational Rights and Privacy Act (FERPA), restricted Hall's right to access. FERPA withholds federal funding from those institutions who disclose private student information, but FERPA also allows disclosure to school officials which the institution determines possess a "legitimate educational interest." After Hall requested access to the unredacted records again, McRaven proposed a two-step offer of access. First, the Chancellor's office would redact protected information, and then Hall could articulate a specific need for particular unredacted information in order to gain further access. This two-step offer of access was later endorsed by the Board.

Hall sued McRaven, claiming that McRaven's continuing redaction of records was *ultra vires*—without state authority. The trial court granted McRaven's plea to the jurisdiction, finding Hall did not satisfy the *ultra vires* exception to sovereign immunity. The court of appeals agreed, holding that the Board's subsequent endorsement of McRaven's two-step offer of access meant that McRaven acted within his authority in withholding the records.

The Supreme Court ruled that McRaven did not act *ultra vires*. Although the Court held that McRaven retained some discretion despite the Board's later endorsement, McRaven's discretion was absolute under the Court's framework from *Houston Belt & Terminal Railway v. City of Houston*, 497 S.W.3d 154 (Tex. 2015). In reaching that decision, the Court clarified that not all misinterpretations of law are per se *ultra vires*, only those mistakes that are made without authority. McRaven's conferred authority directed him to interpret FERPA, but was otherwise unconstrained.

Justice Willett concurred, expressing concerns about the actions of the Chancellor and the Board in restricting Hall's access to records.

Justice Guzman concurred, emphasizing the importance of being inquisitive, but writing separately to underscore that the Court's jurisdictional principles prohibited it from reaching the merits of the case.

Justice Lehrmann concurred, highlighting the great value of student privacy in this legal debate.

Justice Brown concurred, agreeing that sovereign immunity barred the case and noting that discussion of the merits was therefore unnecessary.

XIII. INSURANCE

A. Assignment of Claims

1. Great Am. Ins. Co. v. Hamel, S.W.3d , 60 Tex. Sup. Ct. J. 1257 (Tex. June 16, 2017) [14-1007].

At issue in this case was whether the underlying judgment against an insured builder was enforceable against the builder's insurer, or if it ran afoul of the "fully adversarial trial" requirement.

Glen and Marsha Hamel contracted with Terry Mitchell Builder, Inc. (TMB) to complete construction of their home after the original contractor abandoned the project. Five years after the home's completion, the Hamels noticed signs of water intrusion. The Hamels sued TMB, asserting multiple claims relating to TMB's failure to construct and inspect the home in a good and workmanlike manner. TMB initially maintained that it was not liable for any of the Hamels' damages. Great American Insurance Company and Great American Lloyds Insurance Company (collectively, GAIC) insured TMB under annually-issued commercial general liability insurance policies. GAIC refused to defend TMB based on an exclusion for damage relating to exterior stucco, eventually conceding that this refusal was wrongful because the operative policy did not include the exclusion. TMB had limited assets to pay for its defense or to satisfy any potential judgment without the benefit of GAIC's coverage. Prior to trial, the Hamels and TMB entered into a Rule 11 agreement in which the Hamels promised not to execute any judgment awarded on TMB's assets and agreed to not attempt to pierce the corporate veil. The Hamels asserted that this agreement was meant to secure TMB's appearance and prevent a continuance or default judgment.

Shortly thereafter, TMB signed stipulations conceding, among other things, that TMB's conduct fell below the standard of care, TMB was responsible for the previous builder's construction work, and TMB was liable for all of the Hamels' damages. Further, the stipulations included factual recitations that the damage was not attributable to exterior stucco. Following a bench trial, in which TMB was represented by counsel, the trial court signed the Hamels' proposed findings of fact and conclusions of law and proposed judgment without modification. The judgment awarded the Hamels damages for repairs to the home, mental anguish, temporary housing costs, moving costs, and stigma. Thereafter, TMB assigned most of its claims against GAIC to the Hamels. After GAIC refused to pay the damages assessed against TMB, the Hamels sued GAIC for breach of contract. The trial court rendered judgment for the Hamels, holding that the underlying judgment against TMB was covered under the policy and resulted from a fully adversarial trial. The court of appeals affirmed but struck the award of mental anguish damages.

The Supreme Court reversed. The Court held that, not withstanding GAIC's breach of its duty to defend, the underlying judgment was not enforceable against GAIC because it did not result from a fully adversarial trial. The Court clarified the meaning of "fully adversarial," holding that the standard was not fulfilled in this case because the Rule 11 agreement removed all meaningful incentive for TMB to defend the Hamels' suit. However, the Court held that the lack of adversity could be cured by a second trial encompassing the liability and damage issues involved in the first suit. The Court remanded the case to the trial court for a new trial in the interest of justice because at the time of the first suit, it was not clear that the issues in the underlying case could be relitigated and because GAIC breached its duty to defend.

B. Duty to Defend

1. Great Am. Ins. Co. v. Primo, 512 S.W.3d 890 (Tex. Feb. 24, 2017) [15-0317].

At issue in this case was whether an insured-v.-insured exclusion precluded coverage and the

corresponding duty to defend when the insured's claim was assigned to a third party.

Briar Green Condominium Association alleged that Robert Primo, the association's former director and treasurer, misappropriated association funds. Briar Green then made a claim for the alleged loss with its fidelity insurer, Travelers Casualty & Surety Company. Travelers paid the claim in exchange for a written assignment of all of Briar Green's rights and claims against Primo for the loss. Travelers then sued Primo to recover the funds. Prior to mutual non-suits and dismissal of this suit, Primo requested that Great American Insurance Company, the errors and omissions carrier for Briar Green and its officers, reimburse his defense costs in the Travelers suit. Thereafter, Primo brought suit against Briar Green seeking contractual indemnification which he was entitled to under the association's bylaws. The court entered judgment in this suit for reasonable fees and defense costs. During the pendency of this indemnity action, Primo sued Great American alleging numerous causes of action and again seeking reimbursement for defense costs associated with the Travelers suit, along with exemplary damages and interest. Great American moved for summary judgment. First, Great American urged the D&O policy's insured-v.-insured exclusion barred Primo's claims. Alternatively, Great American argued the claims were barred by collateral estoppel based on the final judgment rendered in the indemnity suit. The district court agreed and rendered a take-nothing judgment on Primo's claims. But the court of appeals reversed, concluding that Great American failed to prove as a matter of law that Primo's claims were excluded under the insurance policy or barred by collateral estoppel and the one-satisfaction rule. The Supreme Court reversed and rendered judgment for Great American.

The Court held that Briar Green's policy's insured-v.-insured exclusion precluded coverage of Primo's claims even following Briar Green's assignment of its claims to Travelers. Because the exclusionary language applied to "any Claim made against any Insured by, or for the benefit of, or at the behest of [Briar Green] or . . . any person or entity which succeeds to the interest of [Briar Green]," Travelers had succeeded to Briar Green's interest and the policy exclusion applied. Accordingly, Primo was not entitled to coverage under the policy and the trial court's disposal of Primo's claims on summary judgment was correct.

C. Insurance Code Liability

1. USAA Tex. Lloyds Co. v. Menchaca, S.W.3d , 60 Tex. Sup. Ct. J. 672 (Tex. Apr. 7, 2017) [14-0721].

At issue in this case was whether an insurer may be liable under the Insurance Code if there was no finding that it breached the underlying insurance policy. Gail Menchaca's home was damaged by Hurricane Ike. She filed a claim with her insurer, USAA Texas Lloyds. After two inspections, USAA concluded that the cost of property damage was less than Menchaca's policy deductible and therefore refused to pay her policy benefits.

Menchaca sued, alleging that USAA breached the terms of the insurance policy and violated the Insurance Code. The jury returned its verdict, finding that USAA had not failed to comply with the terms of the policy. But the jury did find that USAA violated the Insurance Code's prohibition against unreasonable inspections, and that Menchaca suffered $11,350 in damages based on what USAA "should have paid" her. USAA moved for judgment notwithstanding the verdict, alleging that there could be no statutory liability without a finding of breach of contract. The trial court entered judgment in favor of Menchaca. The court of appeals affirmed, finding that the Insurance Code does not require plaintiff to prove breach to establish statutory liability: the jury only must find a statutory violation and damages.

The Supreme Court reversed. Although Menchaca did not need to prove that USAA "breached" the policy, she had the obligation to show that she was entitled to benefits under the policy in order to collect under the Insurance Code. The Court established five rules for future claims. First, the Court stated the "general rule" that an insured cannot recover policy benefits under the statute absent a showing she is entitled to benefits. Second is the "entitled-to-benefits" rule: an insured may recover policy benefits under the statute as actual damages if the insured establishes a right to receive those benefits under the policy. Third, the "benefits-lost" rule allows

insureds to recover in cases in which the insured has no contractual right to benefits if the insurer's statutory violation caused the insured to lose the contractual right. Fourth, the "independent injury" rule allows for insureds to collect damages when the insurer's misconduct caused damages independent from lost policy benefits. Fifth, the "no-recovery" rule applies in cases in which insureds cannot prove that they are entitled to benefits, that they lost benefits, or that they suffered an independent injury. In such cases, an insured may not collect anything under the statute.

After clarifying the law, the Court remanded in the interest of justice to allow the parties to litigate the claim under the clarified framework.

D. Policies/Coverage

1. Nassar v. Liberty Mut. Fire Ins. Co., 508 S.W.3d 254 (Tex. Jan. 27, 2017) [15-0978].

At issue in this case was whether Elie and Rhonda Nassar's homeowners insurance policy provided coverage for a system of fencing attached to their home under the policy's "dwelling" provision or under the "other structures" provision. Under the "dwelling" provision, Liberty Mutual provided the Nassars up to $247,200 in coverage for "the dwelling on the residence premises . . . including structures attached to the dwelling." Under the "other structures" provision, Liberty Mutual provided the Nassars up to $24,720 in coverage for "[o]ther structures on the residence premises set apart from the dwelling by clear space." This included coverage for "structures connected to the dwelling by only a fence, utility line or similar connection." After Hurricane Ike caused substantial damage to the Nassars' property, including to their home and fencing system, the Nassars brought suit against Liberty Mutual alleging that their fencing should have been covered under the policy's "dwelling" provision.

Both parties filed summary judgment motions concerning whether the fencing fell under the "dwelling" or "other structures" provisions. The Nassars argued that their fencing was a "structure[] attached to the dwelling." Liberty Mutual argued the fencing was an "other structure." The trial court agreed with Liberty Mutual and granted its motion. The court of appeals affirmed the trial court's judgment in a split opinion. It held the policy was not ambiguous and the Nassars' interpretation was unreasonable.

The Texas Supreme Court reversed the decision of the court of appeals, holding the Nassars' fencing system was covered under the "dwelling" provision. Applying settled rules of contract interpretation, the Court reasoned the policy language was unambiguous, the Nassars' interpretation was reasonable, and Liberty Mutual's interpretation was unreasonable. Although the word "structure" was not defined in the policy, the Court applied the term's ordinary meaning and concluded the Nassars' fence was "attached to the dwelling" by bolts or cement. "Other structures," the Court noted, were not "attached to the dwelling" but were "set apart from the dwelling by clear space." Contrary to Liberty Mutual's interpretation, a fence could constitute a "connection" under the "other structures" provision and be covered as a "structure[] attached to the dwelling." The Court also held there was a fact issue for the jury to decide regarding at what point on the 4,000 foot fence did it change, if at all, from a structure "attached to the dwelling" to an "other structure" that is "set apart from the dwelling by clear space." The Court held that this question should be decided on remand because a fact finder could conclude only part of the fencing system, which at some points was constructed of different materials, constituted a "structure attached to the dwelling."

E. Premium Finance Agreements

1. BankDirect Capital Fin., LLC v. Plasma Fab, LLC, 519 S.W.3d 76 (Tex. May 12, 2017) [15-0635].

This case concerned the cancellation of an insurance policy. Plasma Fab, LLC had a general liability insurance policy from Scottsdale Insurance Co. Plasma Fab financed the policy with BankDirect Capital Finance, LLC. BankDirect had contractual authority to cancel the policy for late payment "after proper notice has been mailed as required by" section 651.161 of the Texas Insurance Code. Section 651.161 provides the premium finance company must mail to the insured a notice of intent to cancel the policy that states a time by which default may be

cured and provides the "stated time may not be earlier than the 10th day after the date the notice is mailed." When Plasma Fab failed to pay its premium, BankDirect sent a notice of intent to cancel effective December 4. The notice was dated ten days before the cancellation date, but was mailed only nine days before the cure deadline. BankDirect sent a notice of cancellation to Scottsdale on December 4. Four days later, a fire destroyed an apartment complex where Plasma Fab's employees worked. The next day, Plasma Fab tendered the overdue amount, but Scottsdale refused to reinstate the policy. A large judgment was rendered against Plasma Fab as a result of the fire.

Plasma Fab sued Scottsdale and BankDirect for breach of contract and other claims, alleging the defendants had no right to cancel the policy. The trial court granted summary judgment for both defendants. The court of appeals reversed as to Plasma Fab's claims against BankDirect.

The Supreme Court affirmed the court of appeals' judgment. The Court held that the cancellation violated section 651.161 because the cure date in the notice of intent to cancel was less than ten days after the notice was mailed. The Court held that the statute was not subject to a substantial compliance doctrine, because unlike other statutory provisions in the Insurance Code and elsewhere, section 651.161 was not by its terms subject to a substantial compliance rule. The Court also held that, while it had recognized substantial compliance in *Roccaforte v. Jefferson County*, 341 S.W.3d 919 (Tex. 2011), that case was distinguishable because it did not concern substantial compliance with a time period. The Court concluded that a deadline or time-period requirement was not subject to substantial compliance.

Justice Guzman concurred, concluding that substantial compliance with section 651.161 might be possible, but here BankDirect did not comply with the statute, substantially or otherwise, because it both stated a shortened cure deadline and prematurely cancelled the insurance policy.

Justice Johnson, joined by Chief Justice Hecht, dissented. The dissent would have reversed the judgment of the court of appeals on grounds that BankDirect substantially complied with section 651.161's requirements in giving notice to Plasma Fab and in cancelling the policy.

XIV. INTENTIONAL TORTS

A. Defamation

1. Brady v. Klentzman, 515 S.W.3d 878 (Tex. Jan. 27, 2017) [15-0056].

The issue in this defamation case was whether an underlying newspaper story reported on a matter of public concern and, if so, whether the jury was correctly charged on the private plaintiff's burden of proof. Wade Brady, the son of Fort Bend County's chief deputy sheriff, sued reporter LeaAnne Klentzman and The West Fort Bend Star over a news story about his father's improper intervention in incidents involving the son and other law-enforcement officers. The son claimed he was defamed by the story, which reported on his arrest (but not his subsequent acquittal) as a teenager for alcohol possession and on his being handcuffed (but not arrested) by a state trooper for intoxicated behavior in another incident.

After a jury found the story to be defamatory, the TC awarded the son general damages for loss of reputation and mental anguish, as well as punitive damages. The CA reversed and remanded, concluding that the jury charge improperly submitted the defamation claim against the newspaper because the news story reported on a matter of public concern.

The Supreme Court affirmed, agreeing that the jury had been erroneously charged in the case. The Court rejected the son's argument that his inclusion in the story was gratuitous and not a matter of public concern, noting that the son's encounters with law enforcement directly related to the general subject matter of the story: the chief deputy's use of authority on his son's behalf. The Court noted that a private individual who sues a media defendant for defamation over statements of public concern must prove the statements were false, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986), and to recover punitive damages the individual must prove the defendant acted with "actual malice," that is, with "knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Thus, this jury charge was defective

because it did not require the plaintiff to prove a falsehood or actual malice.

The newspaper also filed a petition for review, arguing that the CA erred in not rendering judgment in its favor because there was no evidence that the son had suffered any actual damages. The Court disagreed, concluding that the record contained some evidence of damage to the son's reputation.

Chief Justice Hecht, joined by Justice Green, Justice Willett, and Justice Brown, dissented, arguing that rendition was the proper judgment because no evidence of actual damages existed.

2. D Magazine Partners, L.P. v. Rosenthal, S.W.3d , 60 Tex. Sup. Ct. J. 617 (Tex. Mar. 17, 2017) [15-0790].

The issues in this case were: (1) when, if ever, is it appropriate for a court of appeals to cite or rely on Wikipedia; and (2) did the court of appeals err when it determined that respondent made a prima facie case of defamation sufficient to defeat a motion to dismiss under the Texas Citizens Participation Act (TCPA)?

In March 2013, D Magazine published an article under the heading "CRIME" titled "THE PARK CITIES WELFARE QUEEN." In the subheading, the article identified Janay Rosenthal as a "University Park mom" who "has figured out how to get food stamps while living in the lap of luxury." Rosenthal's mug shot from a prior unrelated arrest was featured prominently next to the title. The body of the article described how Rosenthal "pulls it off" despite the assumption that someone in her situation would "never qualify."

Rosenthal sued D Magazine for defamation and violation of the Deceptive Trade Practices Act (DTPA) on behalf of herself and her daughter. D Magazine moved to dismiss all of Rosenthal's claims under the Texas Citizen's Participation Act. The trial court granted the motion as to Rosenthal's DTPA claims and all claims asserted on behalf of her daughter, but denied the motion as to Rosenthal's personal defamation claims. D Magazine appealed and the court of appeals affirmed, holding that Rosenthal established a prima facie case for each element of the defamation claim by clear and specific evidence. The court of appeals determined that the gist of the article included the assertion that Rosenthal committed welfare fraud. As part of its analysis, the court relied on a Wikipedia-supplied definition of "welfare queen" to determine the meaning of the term contained in the article's title. D Magazine appealed, arguing the court of appeals should not have looked to Wikipedia to define the term "welfare queen" and that it misconstrued the gist of the article.

The Supreme Court affirmed the court of appeals' judgment in part, reversed in part, and remanded the case to the trial court for further proceedings. While the Court held that a bright-line rule about the use of Wikipedia was untenable, in this case, the court of appeals improperly relied on the Wikipedia definition of "welfare queen" as a lynchpin in its analysis. The Court affirmed the court of appeals' gist holding because, viewing the article as a whole, a reasonable person would perceive it as accusing Rosenthal of providing false information in order to obtain benefits to which she was not entitled and thus Rosenthal made a prima facie case of each element of a defamation claim. The Court reversed and remanded on attorney's fees, holding that D Magazine was entitled to an award of attorney's fees with respect to the claims the trial court dismissed.

B. Fraud

1. JPMorgan Chase Bank, N.A. v. Orca Assets, G.P., LLC, 2015 WL 4736786 (Tex. App.—Dallas 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 10, 2017) [15-0712].

At issue in this case is whether the negation-of-warranty clause in a lease forecloses Orca Assets, G.P.'s reliance argument.

In June 2010, JPMorgan Chase Bank, N.A. leased property in DeWitt County to GeoSouthern. Over the next few months, JPMorgan's representative negotiated a lease of the same property to Orca. Orca conducted title searches of the property, but only searched backwards from November 2010. GeoSouthern recorded its lease in December, so Orca was not alerted to the recording issue. Upon its discovery of GeoSouthern's interest in the property, Orca sued for fraud, negligent misrepresentation, and breach of contract. The trial court dismissed Orca's claims, finding JPMorgan was entitled to

judgment as a matter of law on all claims. The court found (1) the leases were unambiguous; (2) the parties knowingly entered into lease agreements that provided no warranties and left no recourse for failure of title; and (3) Orca could not prove the elements of fraud or negligent misrepresentation because it could not prove justifiable reliance. The court of appeals reversed the trial court's dismissal of the fraud and negligent misrepresentation claims, holding there was not a direct conflict between JPMorgan's representations of clear title and the leases' language. The court also held that the issues regarding justifiable reliance were fact questions best left to the jury.

JPMorgan filed a petition for review, arguing it is entitled to judgment as a matter of law on the fraud and negligent misrepresentation claims. JPMorgan argues Orca's reliance argument is entirely foreclosed, because Orca knowingly entered into a lease that allowed for title searches, specifically provided that no warranties of title were being made, and left no available remedy for failure of title. Orca argues there was only an inconsistency between what the leases provided and what JPMorgan's representative told Orca about the land's availability. Because there is no direct conflict, argues Orca, it may argue justifiable reliance.

The Supreme Court granted JPMorgan's petition for review and will hear oral argument on November 7, 2017.

XV. JURISDICTION

A. Personal Jurisdiction

1. M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., 512 S.W.3d 878 (Tex. Mar. 3, 2017) [15-0083].

The principal issue in this special-appearance case was whether Texas courts have specific personal jurisdiction over related nonresident corporate defendants. Pepsi-Cola Metropolitan Bottling Company, Inc. sued two groups of defendants: the Cooper defendants, which operated in Texas, and the nonresident Mafco defendants, which included PCT International Holdings, Inc. Pepsi challenged a settlement agreement and accompanying agreements (Plan C agreements) that resolved a New York lawsuit involving Pneumo Abex LLC, a then-subsidiary of PCT International. Because the Plan C agreements operated to divest certain Mafco and Cooper defendants of asbestos claim liability to Pneumo Abex, which in turn owed indemnification and defense obligations to Pepsi for asbestos-related claims, Pepsi alleged the Plan C agreements tortiously interfered with Pepsi's contractual right to be indemnified by Pneumo Abex. The Mafco defendants filed special appearances, arguing they lacked minimum contacts with Texas related to Pepsi's claims. The trial court denied the special appearances without making findings. The court of appeals affirmed, concluding the Mafco defendants established minimum contacts with Texas through two Texas trips during which Plan C was discussed, ongoing communication with a Texas resident, and the creation of a Texas-operated trust to assume ownership of Pneumo Abex and to manage and fund its indemnity obligations.

The Supreme Court reversed, holding that the Mafco defendants' contacts with Texas did not rise to the level of purposeful availment and did not justify a conclusion that those defendants could reasonably anticipate being haled into a Texas court. With respect to the Plan C negotiations that took place in Texas, the Court noted that Pepsi did not allege that the Mafco defendants had committed torts in Texas by virtue of those negotiations; rather, the torts at issue hinged on the execution of the New York settlement agreement and related conduct that occurred outside Texas. Further, the Court discounted for jurisdictional purposes the fact that Pneumo Abex contracted with a Texas-based company to manage Pneumo Abex's indemnity obligations. The Plan C agreements contemplated the establishment of a trust under Delaware law to fund those obligations and for Pneumo Abex to contract with a management company to manage day-to-day affairs, but did not call for a specific company or require that it operate from any particular location. The Court explained that, although some evidence reflected that the Mafco defendants knew the identity and location of the company Pneumo Abex intended to use when the Plan C agreements were executed, no evidence showed the Mafco defendants had any involvement in or authority regarding that decision. The Court concluded that the contract

did not contemplate or require performance in Texas, nor did it involve an effort by the Mafco defendants to get extensive business in or from Texas. Accordingly, the Court held that Texas lacked specific jurisdiction over the Mafco defendants and remanded the case to the court of appeals to consider Pepsi's unaddressed arguments regarding general jurisdiction.

XVI. MARITIME LAW

A. Jones Act

1. Helix Energy Solutions Grp., Inc. v. Gold, S.W.3d , 60 Tex. Sup. Ct. J. 1318 (Tex. June 16, 2017) [16-0075].

At issue in this case was whether a maritime worker, Kelvin Gold, was a "seaman" under the Jones Act during his time onboard a watercraft, the Helix 534.

Helix Energy Solutions Group, Inc. purchased the 534 in August 2012 and towed her to a shipyard. The 534 previously functioned as a drill ship (a ship that drills wells), and Helix purchased her with the intent to convert her into a well-intervention ship (a ship that services wells). The conversion involved the addition and removal of equipment as well as an overhaul of the 534's engines, thrusters, generators, and in-line propulsion equipment. The conversion lasted 20 months and cost $115,000,000, approximately 135% of the 534's purchase price. In November 2012, in the midst of the conversion, Helix hired Gold in anticipation that he would serve as an offshore worker. Gold served alternating hitches until April 2013 and suffered two injuries during the course of his service. Throughout the time Gold served onboard the 534 (almost five months), the 534 lacked the ability to move on her own and needed the assistance of tugs or tows to move across the water.

When Helix stopped paying Gold maintenance-and-cure benefits, Gold sued Helix—claiming seaman status under the Jones Act—for additional maintenance-and-cure benefits as well as actual and punitive damages. Helix responded that Gold was not a Jones Act seaman because the 534 was not a "vessel in navigation" during the course of her conversion. The trial court granted Helix summary judgment, and the court of appeals reversed, finding a jury question on the vessel-in-navigation issue.

The Supreme Court reversed, holding that the 534 was not a vessel in navigation during the course of Gold's employment and thus, Gold was not a Jones Act seaman. The Court concluded that a major overhaul can take a ship out of navigation so long as the overhaul renders the ship practically incapable of maritime transportation. The court held further that the undisputed evidence conclusively proved that the 534's overhaul was a major conversion as opposed to merely routine repair work and that the 534 lacked any ability to self-navigate throughout the entire course of Gold's employment. As such, the Court found Helix satisfied the standard for judgment.

Justice Johnson, joined by justice Green, Justice Lehrmann, and Justice Boyd dissented, and would have held that Helix failed to conclusively prove that the 534 was out of navigation because Helix failed to offer evidence of the ship's navigability for a longer, relevant time period extending before and after Gold's time onboard. Justice Johnson contended that the majority's opinion took an improper "snapshot" by viewing the evidence only during the months of Gold's onboard employment.

XVII. MEDICAL LIABILITY

A. Causation

1. Bustamante v. Ponte, 490 S.W.3d 70 (Tex. App.—Dallas 2015), *pet. granted*, 59 Tex. Sup. Ct. J. 1656 (Sept. 23, 2016) [15-0509].

The issue in this medical liability case is whether the Bustamantes produced legally sufficient evidence to support a jury finding that medical negligence proximately caused their infant daughter's vision loss. Due to a severely premature birth, the Bustamantes' daughter had a strong likelihood of developing retinopathy of prematurity (ROP), a condition that can cause vision loss but is frequently preventable with early detection and surgical treatment. At around ten weeks, the child was diagnosed with ROP and, despite surgical intervention, lost all vision in one eye and significant vision in the other. The Bustamantes sued two of their child's physicians and their employers asserting the doctors negligently failed to regularly screen, timely diagnose, and timely and properly treat their daughter's ROP.

At trial, the Bustamantes presented expert testimony, supported by statistical data and clinical experience, that the doctors' actions and omissions proximately caused their child's vision loss. The jury agreed and awarded damages. The court of appeals reversed and rendered a take-nothing judgment, holding the Bustamantes failed to produce legally sufficient evidence of but-for causation. The court of appeals found (1) the expert testimony was conclusory because it focused on the combined negligence of the two doctors, rather than each individual negligent act, and did not explain how different screening and treatment would have overcome the child's preexisting adverse risk factors; and (2) the statistical data only showed that different screening and treatment more likely than not *could* have, not *would* have, resulted in a positive outcome because the Bustamantes did not demonstrate that their child, with her additional risk factors, was sufficiently similar to the study participants who had positive outcomes.

The Bustamantes appealed, arguing they produced legally sufficient evidence of but-for causation because (1) their experts were not required to identify and exclude all other possible causes; (2) when there are multiple negligent acts, a "substantial factor" cause may be evidence of a "but for" cause; and (3) statistical data can support an inference that it was reasonably medically probable that the Bustamantes' child would have had a sighted life absent medical negligence. The Supreme Court granted the Bustamantes' petition for review and heard oral argument on December 8, 2016. The Court granted the parties' Motion to Abate the case to effectuate a settlement.

B. Expert Reports

1. Baty v. Futrell, 2015 WL 7443677 (Tex. App.—Waco 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 651 (Mar. 31, 2017) [16-0164].

At issue in this case is whether an expert medical report sufficiently described the standard of care of a nurse anesthetist in a cataract surgery.

During a cataract surgery, nurse anesthetist Olga Futrell allegedly inserted a needle into Barbara Baty's left optic nerve while attempting to administer anaesthesia. Baty sued Futrell for negligence and her employer, Complete Anaesthesia Care, P.C., for vicarious liability. After submitting a deficient expert medical report, Baty submitted an amended report that generally alleged that Futrell violated the standard of care. Importantly, the report stated that some doctors use a different instrument under similar circumstances, though it did not expressly describe this as the "standard of care." The trial court determined that the second report was similarly deficient and dismissed the case with prejudice.

The court of appeals affirmed. The court held that the expert report offered a standard of care that was too conclusory to support Baty's claims. And even if the expert report adequately described the standard of care, it did not explain how Futrell breached it. One justice dissented, contending that whether an expert report meets the standard for good faith is a question of law which the courts of appeals should review de novo. Moreover, he asserted that the expert report indicated that some doctors would have administered the procedure differently, which is enough to establish the standard of care.

Baty petitioned for review, raising two issues. First, Baty suggests that the sufficiency of expert medical reports is a question of law for which the trial court should receive no deference. Second, Baty contends that the expert report adequately described the standard of care. The report meets the statute's lenient "good faith" standard and makes clear that Futrell's standard of care was to not puncture Baty's optic nerve and Futrell breached that standard.

The Supreme Court granted Baty's petition for review and will hear oral argument on October 11, 2017.

2. Columbia Valley Healthcare Sys., L.P. v. Zamarripa, S.W.3d , 60 Tex. Sup. Ct. J. 1189 (Tex. June 9, 2017) [15-0909].

At issue in this case was (1) whether the court of appeals properly determined that the expert reports underlying a Texas Medical Liability Act claim sufficiently addressed causation and (2) whether a nurse could opine on the standard of care of registered nurses in labor and delivery units when the nurse was not a registered nurse in a labor and delivery unit at the time of the report.

Yolanda Flores was pregnant when she was diagnosed with placenta acreta. The Doctors at Valley Regional Medical Center in Brownsville—which is owned and operated by Columbia Valley Healthcare System—determined that she needed to be transferred to a hospital better-equipped to handle such complications. While she was in the ambulance to Bay Area Hospital in Corpus Christi, she suffered a placental abruption that caused internal bleeding. Flores and child both died.

The guardian of Flores's children, Maria Zamarripa sued Columbia Valley, alleging that the nurses at Valley Regional violated the standard of care by failing to advocate against Flores's transfer. To substantiate her claim, Zamarripa offered the expert reports of Nurse Spears and Dr. Harlass. Nurse Spears reported that it was a violation of the standard of care for an RN in a labor and delivery unit to not advocate against the transfer of the patient suffering placenta acreta. Dr. Harlass reported that Flores died because she suffered a placental abruption in an ambulance that was not properly equipped to handle such an emergency. The trial court denied Columbia Valley's motion to dismiss based on insufficiency of the expert reports. The court of appeals affirmed. It held that the expert reports at issue constituted a good-faith effort required by TEX. CIV. PRAC. & REM. CODE § 74.351(l). It also held that Nurse Spears was qualified to opine about the standard of care for RNs in a labor and delivery unit because she was currently an RN and used to work in a labor and delivery unit.

The Supreme Court reversed, holding that an expert report is required to address proximate cause and the plaintiff failed to meet this requirement. The Court also found that the trial court was within its discretion to determine that Nurse Spears's training as a Registered Nurse and her prior experience in a labor and delivery unit qualified her to opine on the applicable standard of care. The Supreme Court remanded the case to the trial court for further proceedings.

3. Ransom v. Eaton, 503 S.W.3d 411 (Tex. Dec. 2, 2016) [16-0079].

This case presented a nearly identical issue as *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016). In *Hebner*, the Supreme Court held that the expert-report requirement under the Texas Medical Liability Act (TMCA) was satisfied when a plaintiff served a report before filing suit but mistakenly served the wrong report after suit. In this case the plaintiff served an expert report before filing suit and never attempted to re-serve the report after filing suit. Applying *Hebner* in a per curiam opinion, the Court concluded the plaintiff satisfied the TMLA expert-report service requirement when she served the defendant with a report concurrent with pre-suit notice. The Court further held, as it did in *Hebner*, that the defendant waived any objection to the sufficiency of the plaintiff's expert report by failing to object within 21 days of filing her original answer.

XVIII. NEGLIGENCE

A. Designating Responsible Third Parties

1. Pagayon v. Exxon Mobil Corp., S.W.3d , 60 Tex. Sup. Ct. J. 1405 (Tex. June 23, 2017) [15-0642].

At issue in this case was whether Exxon Mobil had a duty to control its employee when the employee engaged in a fist-fight at work which ultimately resulted in a death. J.R. Pagayon and Carlos Cabulang were both employees at an Exxon Mobil Corp. convenience store. The two had a tumultuous relationship which eventually led to a physical altercation at the store that included the two men and J.R.'s father, Alfredo Pagayon. Alfredo died several weeks later from complications attributed to his injuries. The Pagayons brought suit against Exxon on behalf of Alfredo's estate based on vicarious and direct liability. The jury found for the Pagayons.

The court of appeals rejected Exxon's no-liability argument, but reversed and remanded the case to the trial court on other grounds. Both the Pagayons and Exxon filed petitions for review. The Supreme Court reversed the judgment of the court of appeals and rendered judgment for Exxon. The Court held that whatever duty an employer may have to control its employees, such duty could not extend to this case. The Court emphasized that it has never adopted the broad employer duty described in the Second Restatement of Torts, despite some courts of appeals believing that it had.

Justice Boyd filed an opinion concurring only in the judgment. The concurrence argued

that the Court should not have explicitly rejected the duty outlined in the Restatement because whether it accepted or rejected that duty was irrelevant to the outcome of this case. By rejecting the Restatement, but failing to otherwise define an employer duty, the Court provided little guidance to trial courts facing this issue.

B. Negligent Entrustment

1. 4Front Engineered Solutions, Inc. v. Rosales, 505 S.W.3d 905 (Tex. Dec. 23, 2016) [15-0298].

At issue in this case was whether a property owner can be liable to an independent contractor for the negligent entrustment of equipment.

4Front Engineered Solutions, Inc. hired an electrician as an independent contractor to fix a sign on the outside of its warehouse. The electrician hired Carlos Rosales to assist him. The electrician (who was not OSHA-certified to use forklifts) borrowed 4Front's forklift to reach the sign. Rosales stood in a man-basket attached to the forklift and was lifted up to the sign. The electrician drove off a sidewalk and tipped the forklift. Rosales fell some twenty feet and was injured.

Rosales sued 4Front for negligent entrustment and premises liability. He prevailed on both theories, and was awarded $10 million at trial. The jury attributed 75% of the liability to 4Front on the theory that 4Front negligently entrusted the forklift to the electrician. The court of appeals reduced the damages but otherwise affirmed. 4Front petitioned for review, arguing that negligent entrustment does not apply to forklifts or in the context of entrusting independent contractors and that Chapter 95 of the Texas Civil Practice and Remedies Code bars liability both for the negligent entrustment claim and the premises liability claim.

The Supreme Court held that there was no evidence that 4Front knew or should have known that the electrician was incompetent to operate the forklift or that he would operate it recklessly. There was no evidence that the electrician had incompetently or recklessly operated equipment before. In fact, the electrician had operated the same forklift in the same location two days before without incident. Although a negligent entrustment claim can be supported by a defendant's failure to "screen" or inquire about a contractor's experience, the screening or inquiry must reveal the risk of incompetence or recklessness. Here, Rosales claimed that further inquiry from 4Front would have revealed that the electrician was not OSHA certified. The Court held that lack of formal training or certification is not evidence of incompetence. Although the electrician may have been negligent in operating the forklift, there was no evidence that he was operating it incompetently or recklessly.

The Court also held that Rosales's premises liability claim failed because no condition of the premises posed an unreasonable risk of harm. The condition of the sign was neither dangerous nor the proximate cause of the accident. Any danger presented by the sidewalk was open and obvious.

The Court reversed the judgment against 4Front. The trial court's judgment also imposed liability on the electrician, who was not a party to the appeal. The Court therefore remanded the case to the trial court to determine disposition of Rosales's claim against the electrician.

C. Premises Liability

1. UDR Texas Props., L.P. v. Petrie, 517 S.W.3d 98 (Tex. Jan. 27, 2017) [15-0197].

The Court reiterated that when determining the existence of a duty on a property owner to protect invitees from third party criminal acts, courts must separately consider both whether the crime was foreseeable and whether the risk of harm was unreasonable.

Petrie was attacked and seriously wounded in an apartment complex's visitor parking lot. He sued the complex and its ownership, but after a pretrial hearing the trial court concluded the complex owed no duty to Petrie and signed a take-nothing judgment in the complex's favor. The court of appeals reversed. Applying the *Timberwalk* factors, it concluded there was evidence of foreseeable and unreasonable violent crime. In doing so, the court of appeals took the position that the potential unreasonableness and foreseeability of harm is considered as a whole, not as separate elements requiring independent proof. Accordingly, it took the view that whether a crime is both foreseeable and unreasonable is resolved by application of the *Timberwalk* factors.

The Supreme Court reversed, holding foreseeability and unreasonableness are discrete

inquiries. The *Timberwalk* factors were conceived as a means to aid courts in determining foreseeability specifically. Their application, without more, cannot determine the reasonableness of a risk of harm, which turns on the risk and likelihood of injury to the plaintiffs as well as the magnitude and consequences of placing a duty on the defendant. Therefore, a risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk. The Court acknowledged its previous holding that unreasonableness of a risk cannot be completely separated from its foreseeability, but reiterated that the *Timberwalk* factors alone do not weigh risk of harm against the consequences of placing a burden on the defendant and society to reduce or eliminate the risk.

The Court rendered judgment in the complex's favor because Petrie failed to offer evidence of the burden that would be imposed on Gallery to prevent or reduce the risk from similar crime.

Justice Willett concurred, expressing concern that the Court's duty analysis, in cases involving landowner liability for criminal acts, may be assigning to the trial court questions that are traditionally left to the jury. The concurrence noted that questions of duty in these cases—questions assigned to the trial judge—are similar to questions usually left to the jury in making negligence and proximate-cause determinations, in that all of these questions concern foreseeability of harm to the plaintiff, magnitude of harm to the plaintiff, and the burden on the defendant of preventing the harm.

2. United Scaffolding, Inc. v. Levine, S.W.3d , 60 Tex. Sup. Ct. J. 1515 (Tex. June 30, 2017) [15-0921].

At issue in this case was whether a contractor's claim sounds in premises liability or general negligence. On December 26, 2005, James Levine, a pipefitter for Valero Energy Corp. and an employee at its Port Arthur refinery, was injured while working on a scaffold when he slipped on a piece of plywood that had not been nailed down, causing him to fall up to his arms through a hole in the scaffold. The scaffold was constructed by United Scaffolding, Inc. (USI), a contractor hired by Valero to build scaffolds at the Port Arthur refinery. According to both USI's and Valero's policies, and Occupational Safety and Health Administration regulations, USI was required to inspect its scaffolds at the refinery before each work shift and before each scaffold's use. The scaffold at issue was assembled approximately one week before Levine's work began.

Levine filed suit against USI, claiming that USI improperly constructed the scaffold and failed to warn of, or remedy, a dangerous condition on the scaffold, causing his injury. At trial, the jury found both USI and Levine liable and awarded Levine damages for only future medical expenses. Levine moved for a new trial, which was granted on grounds that the verdict was against the great weight and preponderance of the evidence. USI filed two petitions for writs of mandamus, and the Supreme Court granted both, ultimately directing the trial court to resolve any ambiguity regarding its decision to grant a new trial. The trial court amended its order, and the case was tried for a second time. Following the second trial, the trial court submitted a general negligence question to the jury, which allocated 100% responsibility to USI and awarded Levine nearly $2 million in damages. The court of appeals affirmed the trial court's judgment.

The Supreme Court reversed the court of appeals' judgment and rendered a take-nothing judgment. The Court held that Levine's pleadings and the evidence at trial compelled the conclusion that his claims required USI to control the premises at the time of Levine's injury. Also finding that Levine's injury was the result of a property condition, rather than the result of a contemporaneous negligent activity on the property, the Court held that Levine's claim sounded in premises liability. Therefore, the Court concluded that the general-negligence findings could not support recovery, reasoning that a simple negligence question unaccompanied by the four elements laid out in *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex. 1983), cannot support recovery under premises liability.

Justice Boyd, joined by Justices Lehrmann and Devine, dissented. The dissent concluded that the Court misstated the standard of review, the evidence, and the pleadings. The dissent would

have affirmed the trial court's judgment because under the pleadings and the evidence the case was properly submitted to the jury under an ordinary negligence theory, and because USI invited the alleged charge error and waived its complaint.

XIX. OIL AND GAS

A. Assignments

1. Davis v. Mueller, S.W.3d , 60 Tex. Sup. Ct. J. 1131 (Tex. May 26, 2017) [16-0155].

At issue in this case was whether the general granting clause in a conveyance of mineral rights was too ambiguous to be enforceable. Mueller sued Davis to quiet title to the mineral claim previously conveyed to Davis on the theory that Davis's deed did not satisfy the Statute of Frauds. Davis asserted that the deed's general granting clause was sufficient to pass title of all the grantors' mineral interests in Harrison County. The trial court granted Davis's motion for summary judgment without stating the grounds and rendered a take-nothing judgment against Mueller. On appeal, the court of appeals found the general granting clause too ambiguous to convey all the mineral interests in Harrison County and reversed the trial court's summary judgment. The Supreme Court found the deed an unambiguous grant of all property in Harrison County, reversed the court of appeals' judgment, and rendered judgment in favor of Davis.

The Court held that the general granting clause was not ambiguous just because it was contained in the same paragraph as a Mother Hubbard clause, a general catch-all conveyance for small tracts of land. If the general granting clause were meant only to refer to the Mother Hubbard clause, then it would have no independent meaning and would accomplish nothing. Because the general grant conveyed all land within Harrison County, the Statute of Frauds was not implicated because no larger unidentified tract was described. Hence, Davis's title was superior because his conveyances preceded the conveyances of the same interest to Mueller.

The Court dismissed Mueller's claims for statutory fraud, conversion, and adverse possession because Davis had the full interest in the conveyed mineral rights, and without superior title, Davis had no standing to assert these claims.

B. Common-Carrier Status

1. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. Jan. 6, 2017) [15-0225].

At issue in this case was whether Denbury Green satisfied the common-carrier test established in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC (Texas Rice I)*, 363 S.W.3d 192, 202 (Tex. 2012). In *Texas Rice I*, the Supreme Court established that for a pipeline company to be considered a common carrier, it must show a reasonable probability that the pipeline will, at some point after construction, serve the public by transporting gas to one or more customers who will either retain ownership of the gas or sell it to parties other than the carrier. Denbury Green's common-carrier status was rejected by the Court in *Texas Rice I* because the evidence showed only a possibility of future customers using its pipeline rather than any identifiable potential customers.

On remand, Denbury Green provided evidence of transportation agreements with two unaffiliated companies entered into after construction of its pipeline in 2010. The first agreement showed that an unaffiliated entity contracting with Denbury Green would retain ownership of the carbon dioxide after transport through the pipeline, and the second showed Denbury Green would transport gas for an unaffiliated entity's benefit but would ultimately obtain ownership of the carbon dioxide. The trial court found Denbury Green's evidence sufficient to demonstrate public use and granted summary judgment in Denbury Green's favor. The court of appeals reversed. Focusing on Denbury Green's intent at the time it contemplated the pipeline in 2008, the court held the post-construction agreements and other evidence did not show a reasonable probability that Denbury Green's pipeline would serve the public. Additionally, the court held that a fact issue was raised as to whether the future use of the pipeline would serve a substantial public interest.

The Texas Supreme Court reversed, holding Denbury Green's summary judgment evidence sufficient to conclusively establish public use under the common-carrier test. The Court held post-construction agreements entered into for the benefit of an unaffiliated entity were relevant to

establishing a reasonable probability that, at some point after construction, the pipeline would serve the public. The Court also rejected the substantial-use requirement applied by the court of appeals, noting that the public-use requirement is satisfied if there is a reasonable probability that, at some point after construction, the pipeline serves even one customer unaffiliated with the pipeline. Considering the pipeline's close proximity to identifiable potential customers and the post-construction transportation agreements, in which one unaffiliated entity retained title to the gas after transfer through the pipeline, the Court held it was more likely than not the pipeline would serve the public at some point after construction and reinstated the trial court's judgment.

C. Contract Interpretation

1. N. Shore Energy, L.L.C. v. Harkins, 501 S.W.3d 598 (Tex. Oct. 28, 2016) [14-0552].

At issue in this case was whether an option agreement between landowners and an oil and gas company was ambiguous, requiring reversal of the trial court's summary judgment. The Harkins family granted North Shore Energy, L.L.C., the exclusive option to select land from a described tract on which to execute oil and gas leases. North Shore exercised its option, but the parcel selected contained a large portion of a tract purportedly excluded from the option contract. A well was drilled. When it began to produce oil, Dynamic Production, Inc. contacted North Shore in an effort to negotiate a deal to "shoot seismic" across the optioned acreage. When negotiations failed, Dynamic reviewed the contract and determined that North Shore did not have the right to lease the land where the well was located. The Harkins family subsequently leased the tract purportedly excluded from the North Shore contract to Dynamic, prompting North Shore to sue the Harkins family and Dynamic to quiet title. The Harkins family counterclaimed, alleging trespass, tortious interference with contract, and conversion. North Shore later amended its petition, rescinded its request for reformation, and sought specific performance and damages resulting from Dynamic's geophysical trespass and tortious interference with the option contract. The trial court granted summary judgment in favor of North Shore. The court of appeals, on rehearing, reversed, holding that the option contract was ambiguous and that the interpretation of the description of the excluded tracts was an issue of fact.

The Supreme Court affirmed on different grounds and remanded the case for further proceedings consistent with the Court's opinion.

The Court held that North Shore's interpretation of the option contract was not reasonable because the plain and express language of the contract specifically excluded the tract of land where the well was located. Therefore, because there was only one reasonable interpretation of the option contract, the contract was not ambiguous. The Court rejected North Shore's argument that the option agreement allowed North Shore to select any desired acreage out of the parent tract. Accordingly, the Court held that the Harkins family was not liable for breach of contract or attorney's fees based on North Shore's breach of contract claim, nor was Dynamic liable for tortious interference for taking a lease on the excluded tract. Finally, the Court held that North Shore did not have standing to sue for geophysical trespass because an option agreement alone does not pass title or convey an interest in property. Therefore, because North Shore did not execute the lease attached to the option contract, North Shore did not have an exclusive right to explore the land or exclude others from exploring the land.

D. Indemnification Agreements

1. Noble Energy, Inc. v. ConocoPhillips Co., S.W.3d , 60 Tex. Sup. Ct. J. 1385 (Tex. June 23, 2017) [15-0502].

At issue in this case was whether an indemnification agreement survived the sale of oil and gas interests in bankruptcy as well as a subsequent merger. Noble Energy's predecessor-in-interest entered into an Exchange Agreement for oil and gas interests in 1994 with ConocoPhillips's predecessor-in-interest. The agreement included mutual indemnification provisions. Noble came to acquire the interest through Chapter 11 bankruptcy proceedings and a subsequent merger. Conoco acquired its interest through merger. In 2010, environmental claims were brought against Conoco, and it sought to enforce the indemnification agreement that it

asserts Noble received by purchase and assignment.

Both parties filed motions for summary judgment. The trial court granted summary judgment for Noble after finding that Noble was not a party to, and did not assume, the obligations under the Exchange Agreement and assignment. The court of appeals reversed the trial court's judgment and found that the original assignment, the sale in bankruptcy, and the subsequent merger each transferred the indemnification obligation.

The Supreme Court affirmed. The Court first concluded that the Exchange Agreement was an executory contract. The Court then agreed with Conoco that, under the plain terms of the bankruptcy court order, Noble was assigned the undisclosed contractual indemnity obligation.

Justice Johnson, joined by Justices Green and Guzman, dissented. The dissent argued that Noble could not have assigned the indemnity obligations because the provisions of the Bankruptcy Code require that an executory contract be disclosed—which this one was not—before a purchaser may acquire an executory contract in a Bankruptcy Plan.

E. Leases

1. BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476 (Tex. Mar. 3, 2017) [15-0248].

At issue in this case was whether a top lease violated the Rule Against Perpetuities (the Rule), and whether the jury's findings that a bottom lease failed to produce in paying quantities over a specified period supported the trial court's judgment terminating that lease. BP acquired an oil and gas lease that continued in its secondary term for as long as oil or gas was produced in paying quantities. Beginning in August 2005, production from the lone producing well on the leased property slowed significantly for approximately 15 months. Shortly after this period, Laddex executed a top lease on the same property. Laddex then filed suit seeking termination of BP's bottom lease. BP moved to dismiss, claiming Laddex lacked standing because its top lease violated the Rule and was therefore void. The trial court denied the motion, and the case proceeded to trial. The jury found that the BP lease failed to produce in paying quantities over the 15-month period of slowed production, and the trial court rendered judgment declaring BP's bottom lease terminated. The court of appeals reversed in part and remanded for a new trial, holding (1) the Laddex lease did not violate the Rule, (2) the jury question on production in paying quantities that isolated the 15-month period was erroneous because it did not reflect the true profitability of the lease, and (3) the evidence would have allowed a reasonable jury to differ as to whether the lease produced in paying quantities when a reasonable period of time was considered.

The Supreme Court affirmed. Noting that the Rule does not apply to vested interests like a lessor's possibility of reverter, the Court held that the Laddex lease could plausibly be construed as a present partial alienation of the lessors' possibility of reverter under the BP lease, meaning that the lease presently conveyed a vested interest and thus did not violate the Rule. Although BP's interpretation—that the vesting of Laddex's interest under the top lease was contingent on the BP lease's uncertain expiration in contravention of the Rule—was also plausible, the Court applied a well-settled rule of construction with respect to instruments equally open to two interpretations, pursuant to which courts accept the construction that renders the instrument valid rather than void.

Turning to the jury findings, the Supreme Court held that the trial court erroneously charged the jury by directing it to consider only the period of slowed production in evaluating whether the pertinent well failed to produce in paying quantities. The Court reaffirmed the proposition announced in *Clifton v. Koontz*, 325 S.W.2d 684 (Tex. 1959), that there can be no limit as to time to be taken into consideration in determining whether paying production has ceased. Thus, narrowing the jury's consideration to a particular period of time is necessarily arbitrary and improper. The Court explained that, while the parties were entitled to (and did) emphasize specific time periods to the jury, the trial court could not do so in the charge without unduly influencing the jury and violating *Clifton*. Finally, agreeing with the court of appeals that reasonable jurors could have differed as to whether the well ceased to produce in paying quantities under the appropriate standard, the Court concluded that remand for a new trial was appropriate.

F. Ownership of Oil and Gas Royalties

1. Wenske v. Ealy, S.W.3d , 60 Tex. Sup. Ct. J. 1433 (Tex. June 23, 2017) [16-0353].

At issue in this case was which party in an oil and gas lease bore the burden of an outstanding 1/4th non-participating royalty interest (NPRI).

The Wenskes purchased a mineral estate from Marian Vyvjala and Margie Novak, who each separately reserved a 1/8th floating NPRI. Later the Wenskes sold the property to the Ealys by warranty deed, reserving a 3/8ths undivided mineral interest. This conveyance was expressly made "subject to the Reservations and Exceptions to the Conveyance and Warranty," and the exceptions provision specifically mentioned Novak's and Vyvjala's interests. The Wenkses and Ealys entered into an oil and gas lease providing for a royalty from production, and a dispute soon arose concerning whose share of the royalties the 1/4th floating NPRI would be deducted from. The trial court entered a declaratory judgment in favor of the Ealys and found that the Wenskes and Ealys would share the burden of the NPRI in proportion to their respective fractional interests—*i.e.*, the Wenskes would contribute 3/8ths of the 1/4th and the Ealys would contribute the remaining 5/8ths of the 1/4th. The court of appeals affirmed, finding that the "subject to" clause did not relieve the Wenskes of their obligation to contribute to the NPRI and that, in the absence of express language to the contrary, a default rule in Texas is that floating royalties carved out of the mineral estate are shared by the subsequent mineral interest owners. The Wenskes filed a petition for review, arguing that the conveyance's exception clause, in concert with the "subject to" clause contemplated the Ealys taking over the full burden of the NPRI.

The Supreme Court held that the language of the deed required the Wenskes and Ealys to bear the Vyvjala NPRI burden in shares proportionate to their fractional interests in the minerals. The Court emphasized the importance of ascertaining the parties' intent as expressed by the words of a deed read in its entirety. The Court reaffirmed that it disfavors the use of rigid, mechanical rules. Though the court of appeals resorted to such rules, the Supreme Court nonetheless affirmed its judgment because, reading the deed in its entirety and harmonizing all of its parts, the Court could not conclude the parties intended to convey the entire burden of the Vyvjala NPRI.

Justice Boyd, joined by Justice Willett, Justice Lehrmann, and Justice Devine, dissented. Justice Boyd found that under the deed's plain language, only the interest granted to the Ealys was "subject to" the excepted interest. Therefore, Justice Boyd concluded that the interest the Ealys received, and only that interest, bore the burden of the excepted interest. Justice Boyd also expressed concern that the Court's disapproval of certain rules of construction would create uncertainty in the law.

G. Pooling

1. Samson Expl., LLC v. T.S. Reed Props., Inc., S.W.3d , 60 Tex. Sup. Ct. J. 1413 (Tex. June 23, 2017) [15-0886].

This case presents multiple issues related to an oil and gas lessee's obligation to pay royalties on pooled units unilaterally formed under lease pooling provisions. The lessors and other stakeholders in two pooled units alleged the lessee underpaid royalties owed to them in accordance with their mineral leases and pooling agreements. Stakeholders in one of the pooled units asserted claims arising from a unit-designation amendment that changed the unit's boundaries in a way that withdrew a producing well from that unit (the Unpooling Stakeholders). The lessee argued no royalties were owed to the Unpooling Stakeholders for the excluded well because those stakeholders had ratified the unit as amended. Stakeholders in the other pooled unit sought to enforce a contractual obligation to pay royalties on two wells included within the pooled unit's boundaries, even though one of those wells had already been included within the boundaries of a different pooled unit at the time the subject unit was designated (the Overlapping Unit Stakeholders). The lessee was solely responsible for delineating the boundaries of the pooled units and drafted the pooled-unit designation in a way that caused the overlap. Though the pooled unit plainly included the disputed well, the lessee sought to avoid paying royalties, asserting the overlap had been a mistake. The lessee argued any contractual obligation to pay royalties on a well shared by two pooled units is invalid as to the later-created unit because pooling requires a

cross-conveyance of title and it is impossible to simultaneously cross-convey title to the same lands and depths more than once. The lessee's other defenses to contract enforcement included quasi-estoppel and an alleged "scrivener's error" in failing to specify a depth limitation in the later-formed unit that would have avoided any overlap.

Following a series of interlocutory summary-judgment orders on liability and defensive issues, the trial court awarded breach-of-contract damages to the stakeholders in both pooled units. But in doing so, the court reduced royalties owed to the Overlapping Unit Stakeholders based on a proportionate-reduction clause in the underlying mineral lease. On appeal, the court of appeals reversed and rendered judgment on the Unpooling Stakeholders' claims, applying the Supreme Court's opinion in *Hooks v. Samson Lone Star, Ltd. Partnership*, 457 S.W.3d 52 (Tex. 2015), and holding that the stakeholders had ratified the amended unit by accepting royalty payments with knowledge that the unit designation had been amended. The court affirmed the award of royalties to the Overlapping Unit Stakeholders, holding (1) title was irrelevant to the breach-of-contract issue, (2) the lessee did not raise a fact issue on its affirmative defenses, and (3) the trial court properly applied the proportionate-reduction clause.

On cross-petitions for review, the Supreme Court affirmed. The parties disputed whether pooling is effective if title is cross-conveyed and whether and in what manner intent to cross-convey title can be contractually disclaimed. The Court, however, found these issues immaterial to the narrow question of whether a contract for a conveyance can be enforced as a contract if it fails to effect a conveyance. The Court also rejected the lessee's quasi-estoppel and scrivener's error defenses to contract enforcement. As to the latter, no evidence existed that both the lessee and the Overlapping Unit Stakeholders were operating under a misunderstanding regarding the pooled unit's boundaries; rather, the evidence established that the lessee bore sole responsibility for determining the pooled unit's boundaries and no mutual mistake had occurred. As to the ratification and proportionate-reduction issues, the Court held that (1) as a procedural matter, the lessee timely and properly raised ratification as an affirmative defense in the trial court by moving for summary judgment with evidentiary support before the court rendered final judgment, (2) as an evidentiary matter, *Hooks* was dispositive of the Unpooling Stakeholders' ratification claims, and (3) the lower courts properly construed and applied the unambiguous proportionate-reduction clause to the Overlapping Unit Stakeholders' fifty percent mineral interest in the leased lands.

H. Rule Against Perpetuities

1. Conocophillips Co. v. Koopmann, S.W.3d (Tex. App.—Corpus Christi–Edinburg 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1231 (June 16, 2017) [16-0662].

The issues in this case are (1) whether a non-participating royalty reservation violates the Rule against Perpetuities, (2) whether the savings clause in the royalty deed prevented termination of the royalty interest, (3) whether Texas Natural Resources Code section 91.402 precludes a payee from suing a payor for breach of contract or tort theories stemming from the failure to pay royalties, and (4) whether a partially successful nonmoving party is the prevailing party under Texas Rule of Civil Procedure 91a and is entitled to recover its fees and costs.

Lois Streiber, by warranty deed to the Koopmanns, conveyed fee-simple title to a tract of land but reserved a ½ non-participating royalty interest (NPRI) for herself. The NPRI had a 15-year term, but could be extended without actual production if a "payment of shut-in royalties or any other similar payments" were made to the Koopmanns. The Koopmanns entered an oil and gas lease covering the tract with a Conoco subsidiary that was set to expire in December 2011. Twenty days before the NPRI was set to expire, and with a well planned but not producing, Conoco tendered a shut-in royalty payment in anticipation of a producing well to the Koopmanns, which they returned. Oil and gas was eventually produced two months after the end of the 15-year term, but it is unclear when the well was actually capable of producing in paying quantities.

Not knowing whom to pay, Conoco withheld royalty payments pursuant to Natural Resources Code section 91.402. The Koopmanns sued for declaratory judgment seeking a construction of the

deed and filed other claims against Conoco for failure to pay royalties. Burlington Resources Oil and Gas, the current oil and gas lessee, filed a Texas Rule of Civil Procedure 91a motion to dismiss the non-declaratory claims on belief that section 91.402 of the Natural Resources Code barred common-law claims for failure to pay royalties during a legitimate title dispute. The trial court denied that motion, but later granted Conoco's summary judgment motion on the same grounds. But the trial court awarded the Koopmanns fees and costs on the earlier Rule 91a motion. As to the declaratory judgment, the court considered the competing motions for summary judgment and concluded that there was no actual production in paying quantities at the end of the 15-year term, the savings clause thus did not operate to extend the term, the NPRI did not violate the Rule Against Perpetuities, and the disputed royalties rightfully belong to the Koopmanns.

The court of appeals affirmed in part, reversed in part, and remanded. It held that the NPRI did not violate the Rule Against Perpetuities under the two-grant theory, but found that the savings clause was ambiguous and remanded for a jury determination. The court also held that Natural Resources Code section 91.402 did not bar the breach of contract claims stemming from the withheld royalties and that the Koopmanns were entitled to attorney's fees under Rule 91a's loser-pays provision.

The Supreme Court granted Conoco's petition for review and will hear oral argument on December 5, 2017.

I. Shut-In Royalty Provisions

1. BP Am. Prod. Co. v. Red Deer Res., LLC, S.W.3d , 60 Tex. Sup. Ct. J. 813 (Tex. Apr. 28, 2017) [15-0569].

At issue in this case was whether a jury's finding that the only well possibly capable of holding a mineral lease was not capable of producing in paying quantities the day after it was shut in supported a judgment terminating the operator's lease. The Vera Murray #11 was a marginal well on a lease owned by BP America Production Company that had dwindled to the point of producing only every few days. Red Deer Resources, LLC, acquired top-leases on the property, which would take effect upon the termination of BP's lease. On June 4, 2012, the #11 produced gas for the last time, and BP turned the well valve off eight days later. The next day, BP notified the lessors that it was invoking the lease's shut-in royalty clause to maintain the lease, enclosing a shut-in royalty payment. The shut-in royalty clause reads, "Where gas from any well or wells capable of producing gas . . . is not sold or used . . . lessee may pay or tender as shut-in royalty . . . , payable annually on or before the end of each twelve month period during which gas is not sold or used . . . ." Red Deer filed suit seeking to terminate BP's lease more than sixty days after BP had shut-in the #11, asserting that the well had experienced a total cessation of production and that no savings provision, including the shut-in royalty clause, sustained the lease. In the ensuing trial, the jury found that the #11 was not capable of producing in paying quantities on June 13, 2012, the day after it was shut-in. The trial court ruled that the shut-in clause could not operate to save BP's lease, opening the door for Red Deer to enforce its top leases. The court of appeals affirmed.

The Supreme Court reversed and held that, by the express terms of the lease, a shut-in royalty payment covers the twelve-month period following the last day on which gas is "sold or used," not the date on which the lessor was notified or the lessee claimed to invoke the shut-in royalty clause. Therefore, BP's shut-in royalty payment related back to the last day that gas was "used or sold," which was June 4, 2012. Red Deer, who carried the burden of proof to show that the lease had terminated, had to obtain a finding that the #11 was not capable of producing in paying quantities on that date in order to prevent BP from maintaining the lease through the shut-in royalty clause. Because Red Deer failed to obtain such a finding, the Court reversed the court of appeals' judgment and rendered a take-nothing judgment in favor of BP.

J. Subsurface Trespass

1. Lightning Oil Co. v. Anadarko E&P Onshore, LLC, S.W.3d , 60 Tex. Sup. Ct. J. 997 (Tex. May 19, 2017) [15-0910].

This case concerned whose permission was necessary for an oil and gas operator to drill

through a mineral estate it did not own to reach minerals under an adjacent tract of land.

Andarko E&P Onshore, LLC, entered a lease to produce the minerals underlying the Chaparral Wildlife Management area. The lease imposed onerous surface use restrictions. As a result, Anadarko entered into an agreement with the adjacent surface owner, Briscoe Ranch, Inc., to locate its well on the ranch and drill horizontally into Anadarko's minerals. The minerals beneath the ranch were leased by Lightning Oil Co. Although no one disputed that Anadarko would not seek to produce Lightning's minerals, Lightning nevertheless objected to Anadarko drilling activities on grounds that the initial vertical lengths of Anadarko's wells would pierce mineral-bearing formations Lightning held under its lease. Lightning believed that the resulting damage to its mineral estate—the cuttings removed during the drilling process and permanent well structures left in the formations—was sufficient to enjoin Anadarko's planned activities as a trespass. Lightning also brought a tortious interference with contract claim against Anadarko based on the same activities. The trial court dismissed the claims. The court of appeals affirmed, reasoning that Lightning did not have the right to exclude Anadarko's activities because it does not own or exclusively control the earth surrounding the oil and gas molecules. The court of appeals also affirmed the trial court's dismissal of the tortious interference claim because Anadarko established its justification defense as it was acting within its legal rights.

The Supreme Court affirmed. The Court agreed with the court of appeals' holding that the mineral owner does not control the matrix of the earth surrounding the oil and gas molecules. But the Court indicated that the court of appeals did not address the right to exclude with respect to Lightning's minerals suspended in the mineral bearing formations that will inevitably be destroyed or displaced through Anadarko's planned drilling. To resolve this issue, the Court balanced Lightning's interest in the minerals against Anadarko's interests in drilling and the interests of the oil and gas industry as a whole. Under this inquiry, the Court held that the balancing favored allowing Anadarko's proposed drilling because Lightning's mineral loss was negligible and these off-sight drilling techniques greatly increase the efficient production of minerals. As a result, the Court held that Anadarko was acting within its legal rights and affirmed the dismissal of the tortious interference claim because Anadarko established a justification defense.

K. The *Duhig* Doctrine

1. Perryman v. Spartan Tex. Six Capital Partners, Ltd., 494 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0804].

The primary issues in this case are (1) whether the *Duhig* doctrine applies to non-participating royalty interest reservations in two deeds and, if so, whether the lower court's judgment correctly reflects the relevant ownership interests; and (2) whether judicial estoppel precludes claiming ownership in a royalty interest based on certain statements made during bankruptcy proceedings.

Benjamin Perryman conveyed a tract of land in fee simple to his son Gary and Gary's wife (the Perrymans), reserving ½ of the mineral royalties. The Perrymans sought a mortgage, and the Bank required the Perrymans to convey the property to a business entity. The Perrymans then conveyed the fee to GNP, Inc., but reserved ½ of the royalties "which are now owned by" them. In turn, GNP executed a Deed of Trust with the Bank, but again reserved ½ of the royalties that GNP then owned. GNP later declared bankruptcy, and the Bank foreclosed on the land. GNP and Gary abandoned all remaining property interests subject to the lien. The Bank then sold back to the Perrymans 125 surface acres. Later, the Bank conveyed the land and minerals to David and Dion Johnson. When the Johnsons divorced, Dion conveyed to David all of her interest in the land, but reserved ½ of the minerals. David conveyed some of the minerals to Spartan Texas Six Capital Partners, Ltd., and the rest to another grantee not a party to this litigation. Spartan and Dion leased the land to EOG Resources, Inc. and, after production was attained, a dispute arose concerning pooling and royalty payments. The Perrymans were joined as third-party defendants and the suit quickly turned into a title dispute. Specifically, Spartan and Dion argued that the

Perryman–GNP deed and Deed of Trust (collectively, the subject deeds) violated *Duhig* as an overconveyance and, along with statements made during bankruptcy, estopped the Perrymans from claiming any royalties. The trial court disagreed, found that *Duhig* did not apply, and conformed its declaration of ownership as such.

The court of appeals reversed, finding that *Duhig* applied to the subject deeds and estopped the Perrymans from claiming any royalty interest under same. The court also found that judicial estoppel did not preclude the Perrymans claims and overruled all other issues and cross-issues. Finally, the court struck EOG as an appellee because it had settled its claims with Spartan.

On appeal before the Supreme Court, the Perrymans claim that the subject deeds do not violate *Duhig*. In response, Spartan argues that judicial estoppel and the deed executed to the Bank during the bankruptcy proceedings, under its interpretation, served to extinguish the Perrymans claims to the royalties. Spartan also cross-petitioned, claiming the court of appeals erred by not applying *Duhig* to the interests conveyed to the third party from David Johnson. Finally, EOG appeals, generally aligned with the Perrymans, but also asserts that the court of appeals erred by striking it as a party.

The Supreme Court granted review and will hear oral argument on December 5, 2017.

XX. PROBATE: WILLS, TRUSTS, ESTATES, & GUARDIANSHIPS

A. Guardianships

1. In re Guardianship of Tonner, 513 S.W.3d 496 (Tex. Dec. 2, 2016) [14-0940].

The issue presented in this case was whether a ward whose guardian had died could apply for full or partial restoration of legal capacity. Years after his guardian's death, Ryan Tonner applied for restoration of capacity. The trial court dismissed the application, finding that his capacity had not been restored. The court of appeals affirmed and Tonner appealed.

The Supreme Court affirmed the court of appeals' judgment, but on different grounds. The Court held that because Tonner had no guardian at the time of the trial court's decision, the trial court could not determine whether a non-existent guardian's powers should be restricted or remain unchanged.

B. Sovereign Immunity

1. In re Guardianship of Wooley, 2016 WL 3179643 (Tex. App.—Fort Worth 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0617].

At issue in this case is whether the Department of Aging and Disability Services (DADS) has immunity in a suit to make it a permanent guardian even though DADS currently serves as the ward's temporary guardian. The Department of Family and Protective Services (DFPS) filed, and the probate court signed, a petition under Chapter 48 of the Human Resources Code to have Edwin Wooley, a seventy-six-year-old man with dementia, placed in a nursing facility. DFPS later notified the probate court that it had made a referral to DADS for guardianship services for Wooley. Thereafter, a court investigator filed an application for the appointment of permanent guardian of the person and of the estate for Wooley, seeking the appointment of "an eligible and suitable person . . . , possibly the Department of Aging and Disability Services." DADS filed a plea to the jurisdiction, asserting that it had sovereign immunity as a state agency and that, because it had not filed an application to be appointed as permanent guardian, had not agreed to accept the appointment, and had determined that guardianship was not appropriate, the probate court did not have jurisdiction to appoint it as permanent guardian.

The day before the hearing on the application for permanent guardianship, Wooley's guardian ad litem filed an application for the appointment of a temporary guardian, proposing that DADS be appointed. Following the hearing, the probate court appointed DADS as temporary guardian. DADS filed an amended plea to the jurisdiction, again asserting that the probate court did not have jurisdiction to appoint it as permanent guardian. The probate court denied the plea. A divided court of appeals affirmed, holding that DADS is not immune from suit. The lead opinion reasoned that "due to the [*in rem*] nature of guardianship proceedings generally and this proceeding specifically, DADS was not entitled to a dismissal

under the doctrine of sovereign immunity" because "[t]he purpose of a guardianship proceeding is not to control a state agency, but to promote and protect the well-being of an incapacitated person." Further, the court explained that the Legislature "has given the probate court jurisdiction to make DADS a party to guardianship proceedings" and that "the administration of the guardianship estate is one proceeding" "from the moment an application for the appointment of a guardian is filed until the time at which the guardianship is closed." Thus, the court concluded that DADS' general immunity from suit under the doctrine of sovereign immunity had no application to Wooley's guardianship suit.

The Supreme Court granted DADS' petition for review and will hear oral argument on November 8, 2017.

C. Tortious Interference with Inheritance Rights

1. Archer v. Anderson, 490 S.W.3d 175 (Tex. App.—Austin 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1230 (June 16, 2016) [16-0256].

At issue in this case is whether Texas law should recognize a cause of action for tortious interference with inheritance rights. Jack Archer's 1991 Will divided his estate among his brother and his brother's children and provided certain mineral interests to be divided among 12 charities. Jack had also established a trust for the benefit of his nieces and nephews. Jack suffered an incapacitating stroke in 1998. Sometime thereafter, Ted Anderson and others caused Jack to execute various documents, including powers of attorney, estate planning documents, property transfers, a trust, and several new wills. The Archers were disinherited by these transactions which bequeathed the entire $7.5 million estate to several charities. The Archers sought a declaratory judgment regarding the validity of the inter-vivos trust disinheriting them. The Archers and the charities settled this dispute after the charities agreed not to probate the new wills. Ultimately, the 1991 Will was probated following Jack's death. The Archers then sued Ted Anderson and others for tortious interference with an inheritance.

A jury found that Anderson tortiously interfered with the Archers' inheritance and awarded $2,006,150 in damages. In its judgment, the trial court awarded an additional $588,054 representing the sum the Archers paid the charities over the amount they were to receive under the 1991 Will. Both parties appealed the judgment. The Court of Appeals reversed the trial court's judgment, ruling that Texas does not recognize a cause of action for tortious interference with inheritance. The Archers petitioned the Supreme Court for review, arguing that Texas law either does or should recognize tortious interference with inheritance rights.

The Court granted the petition for review and will hear oral argument on October 11, 2017.

2. Kinsel v. Lindsey, S.W.3d , 60 Tex. Sup. Ct. J. 1070 (Tex. May 26, 2017) [15-0403].

In this case, the Court was asked to recognize tortious interference with an inheritance as a viable cause of action in Texas. The Court acknowledged that some courts of appeals have recognized the tort, but declined to do so in this case because a constructive trust imposed on a disputed inheritance provided an adequate remedy.

The dispute arose over the sale of a family-owned ranch. Lesey Kinsel owned a majority share, and her trust provided that her interest would pass to some of her step-children and step-grandchildren on her death. But the trust was silent as to what would happen if the ranch were sold during Lesey's lifetime. Lesey died shortly after the ranch was sold, and her proceeds from the sale flowed to Jane Lindsey, the trust's residual beneficiary and Lesey's niece. The Kinsels that argued Jane and others misled owners of the ranch to agree to sell by misrepresenting Lesey's financial condition in order to position Jane to receive Lesey's share of the sale proceeds.

The Supreme Court agreed with the court of appeals' conclusion that sufficient evidence supported the jury's finding that Lesey lacked the requisite mental capacity to agree to sell the ranch and execute various amendments to her estate-planning documents. The Court further agreed with the court of appeals that the Kinsels' fraud claims were not cognizable under an out-of-pocket damages theory. Out-of-pocket damages,

the Court observed, constitute the difference between the value of the Kinsels' interests at the time of sale and what they received at the time of sale, whereas the Kinsels argued their damages amounted to the loss of the inheritances they hoped to later receive.

Acknowledging the difficulty with fitting their claims into a fraud cause of action, the Kinsels urged the Court to uphold the jury's award for tortious interference with their inheritances. The Court disagreed that it had recognized the tort in a previous case or that the Legislature had done so by statute. But the Court concluded consideration of the cause of action in this case was inappropriate because a constructive trust imposed by the trial court on money that Jane received from Lesey's trust constituted an adequate remedy for the Kinsels' claims even if it did not ultimately provide the full measure of relief the jury awarded. Noting that this was not a case in which the law does not address the Kinsels' claims, the Court concluded the constructive-trust remedy both acknowledges and provided redress to the Kinsels' injuries.

XXI. PROCEDURE—APPELLATE

A. Interlocutory Appeal Jurisdiction

1. Univ. of the Incarnate Word v. Redus, 518 S.W.3d 905 (Tex. May 12, 2017) [15-0732].

At issue in this case was whether the court of appeals had jurisdiction to consider the University of the Incarnate Word's interlocutory appeal of the trial court's denial of its plea to the jurisdiction. The University contended in a plea to the jurisdiction that governmental immunity barred the Reduses' suit. The Reduses sued the University and a police officer employed by the University for negligence after the officer shot and killed their son. The court of appeals held that it lacked jurisdiction over the University's appeal because the University was not a "governmental unit" under section 51.014(a)(8) of the Texas Civil Practice & Remedies Code, which authorizes interlocutory appeals from trial court decisions granting or denying governmental units' pleas to the jurisdiction.

The Supreme Court held that the University is a governmental unit when defending actions arising from its law-enforcement function such that the court of appeals has jurisdiction over the interlocutory appeal. Section 51.014(a)(8) incorporates the Texas Tort Claims Act's definition of "governmental unit," which in relevant part requires the University to be an "institution, agency or organ of government . . . deriving its status and authority . . . from laws passed by the legislature." The University is an "organ of government" because, by authorizing private universities to operate police departments and commission and employ peace officers with the same characteristics as peace officers employed by municipalities and generally treating the police departments of private universities like other police departments, the Legislature made private universities with police departments part of the state's law-enforcement system. The University derives its status and authority as an organ of government from laws passed by the Legislature because the Legislature authorized it to operate a police department and to commission and employ peace officers. Thus, the University is a governmental unit such that the court of appeals had jurisdiction over the trial court's denial of its plea to the jurisdiction.

B. Supersedeas Bonds

1. McFadin v. Broadway Coffeehouse, LLC, S.W.3d (Tex. App.—San Antonio 2016), *pet. granted*, 60 Sup. Ct. J. 1474 (June 30, 2017) [16 0560].

At issue is whether the trial court erred in ordering a defendant to pay the amount of his supersedeas bond when he lost on appeal.

The underlying suit, brought by Broadway Coffeehouse, LLC, was for the partition of real property. The trial court determined Lee Nick McFadin III had no interest in the property and ordered the property partitioned by judicial sale. When McFadin appealed, the trial court required him to post a supersedeas bond equivalent to six months of the property's rent. McFadin lost on appeal. The trial court then ruled that McFadin owed the entire amount of the supersedeas bond without determining whether the defendants were harmed by McFadin's appeal. The court of appeals held that it lacked jurisdiction to review the trial court's decision because the decision was not a final judgment but a postjudgment interlocutory order.

McFadin petitioned the Supreme Court for review. He argues that (1) the trial court lacked jurisdiction to pay the bond once the court of appeals issued its mandate; (2) the trial court's order was final and appealable because, rather than merely effectuating the partition judgment, it imposed new obligations on McFadin; (3) when a trial-court judgment is void, a court of appeals can declare the judgment void; and (4) the trial court deprived McFadin of his constitutional right to due process by not requiring Broadway Coffeehouse to show it was harmed by McFadin's appeal.

The Court granted McFadin's petition for review and will hear oral argument on November 9, 2017.

XXII. PROCEDURE—PRETRIAL

A. Certificates of Merit

1. Levinson Alcoser Assocs. v. El Pistolón II, Ltd., 513 S.W.3d 487 (Tex. Feb. 24, 2017) [15-0232].

This was an interlocutory appeal from an order denying a motion to dismiss under Chapter 150 of the Civil Practice and Remedies Code, the statute that applies to suits against architects, engineers, surveyors, and landscape architects. The chapter generally requires that a sworn "certificate of merit" accompany a plaintiff's complaint in any case "arising out of the provision of professional services by a licensed or registered professional" named in the statute. TEX. CIV. PRAC. & REM. CODE § 150.001(a). The certificate or affidavit must be from a similarly licensed professional, who meets certain qualifications and attests to the merit of the underlying claim. If the plaintiff fails to file a compliant certificate of merit, the statute directs dismissal of the complaint.

The defendant architects complain that the affidavit filed by the plaintiff with its complaint was insufficient because (1) the expert was not properly qualified under the statute to give a professional opinion and (2) his professional opinion failed to supply the "factual basis" for the underlying claims as the statute requires. On the subject of qualifications, the statute provides that the certificate of merit must come from a competent third-party expert who (1) holds the same professional license or registration as the defendant, (2) is licensed or registered in this state, (3) is actively engaged in the practice, and (4) is knowledgeable in the defendant's area of practice.

The trial court and court of appeals held the certificate of merit was sufficient to support the plaintiff's underlying negligence claim, but the Supreme Court disagreed. The Court noted that the statute requires dismissal of the plaintiff's complaint if the plaintiff fails "to file the affidavit in accordance with this section." TEX. CIV. PRAC. & REM. CODE § 150.002(e). The Court noted further that the section requires, among other things, that the licensed or registered professional providing the affidavit be "knowledgeable in the area of practice of the defendant." *Id.* § 150.002(a)(3). Because the plaintiff failed to qualify its expert as a third-party professional who was knowledgeable in the defendant's area of practice, the Court concluded the affidavit was non-compliant and thus not filed "in accordance with this section." *Id.* § 150.002(e). The Court accordingly reversed the court of appeals' judgment and remanded the cause to the trial court for it to determine whether the plaintiff's claim should be dismissed with or without prejudice.

Justice Brown concurred in the judgment. He would have held the certificate of merit deficient for a different reason—it failed to provide a factual basis for the plaintiff's underlying negligence claim.

2. Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp., S.W.3d , 60 Tex. Sup. Ct. J. 1204 (Tex. June 9, 2017) [16-0078].

In the underlying case, the East Rio Hondo Water Supply Corp. sued Melden & Hunt, Inc. over what the water supply agency claimed was a negligently designed water-treatment plant. Because the suit arose out of the provision of professional services by an engineering firm, the plaintiff was required to file a sworn certificate or affidavit from a third-party expert attesting to the suit's merit. TEX. CIV. PRAC. & REM. CODE § 150.002(a). To support its claim, the water-supply agency presented an affidavit by an expert who identified himself as an engineering-firm president with 23 years of civil engineering experience, including design and analysis of water treatment plants. Melden &

Hunt challenged his credentials and moved to dismiss, arguing that the expert's affidavit was statutorily insufficient. The court of appeals affirmed the trial court's denial of Melden & Hunt's dismissal motion. The Supreme Court affirmed.

The statute provides that an expert is to provide a "factual basis" for the lawsuit, and the primary dispute in the Court concerned the meaning of this requirement. The statute, as amended in 2009, requires that the expert's affidavit

> set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and *the factual basis for each such claim*.

Id. § 150.002(b) (emphasis added). Before the amendment, the statute simply provided that the affidavit "set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim."

Melden argued that the 2009 amendment expanded the statute's factual-basis requirement to require the expert's affidavit to address the elements of the plaintiff's various theories or causes of action. The Court disagreed, concluding that the 2009 amendments did not enlarge the factual-basis requirement or otherwise change its core purpose. Before the 2009 amendment, the factual basis for each such claim referred to the "negligent act, error, or omission" the expert claimed to exist. After the amendment, the factual basis for each such claim referred to the "negligence, if any, or other action, error, or omission" the expert claimed to exist. Therefore, the Court concluded that the trial court did not abuse its discretion by denying Melden & Hunt's motion to dismiss based on the certificate of merit's sufficiency.

3. Pedernal Energy, LLC v. Bruington Eng'g, Ltd., S.W.3d , 60 Tex. Sup. Ct. J. 781 (Tex. Apr. 28, 2017) [15-0123].

At issue in this case was whether the trial court abused its discretion by dismissing the plaintiff's claims without prejudice instead of with prejudice under section 150.002 of the Texas Civil Practice and Remedies Code. Section 150.002 requires a plaintiff to file an expert affidavit in a lawsuit arising out of the provision of professional services by licensed or registered professionals. Section 150.002(e) provides that if an affidavit is not filed in accordance with the statute, the trial court *shall* dismiss the claim and the dismissal *may* be with prejudice.

Pedernal Energy, Ltd. sued Bruington Engineering, Ltd., alleging that Bruington provided substandard engineering services in connection with a well-fracturing operation. Pedernal failed to file a certificate of merit expert affidavit with its claim. Bruington moved for dismissal and Pedernal non-suited, then re-sued Bruington, but this time filing an expert affidavit. Bruington again moved for dismissal. The trial court denied Bruington's motion, and Bruington appealed. The court of appeals reversed and remanded, concluding that section 150.002 required dismissal and directing the trial court to determine whether dismissal should be with or without prejudice. On remand, the trial court ordered dismissal without prejudice, and Bruington again appealed. This time the court of appeals held that section 150.002(e) required Pedernal's claim to be dismissed with prejudice because an expert affidavit was not filed with the original petition.

The Supreme Court disagreed. The Court concluded that while section 150.002 requires dismissal if a plaintiff fails to file an affidavit contemporaneously with the complaint, it does not require dismissal with prejudice. Rather, it gives the trial court discretion to do so. And Pedernal's failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice. The Court also rejected Bruington's claim that the affidavit Pedernal filed with its amended petition demonstrated a lack of merit in Pedernal's claims. The Court concluded that even assuming the

affidavit was deficient, those deficiencies were not such that the trial court abused its discretion by not dismissing Pedernal's claims with prejudice. The Court reversed the court of appeals' judgment and reinstated the judgment of the trial court.

Justice Devine concurred to point out that he would not reinstate the trial court's dismissal order, but would instead remand for the trial court to reconsider the motion to dismiss unburdened by what he perceived to be an erroneous mandate from the court of appeals in the previous interlocutory appeal.

B. Discovery

1. In re City of Dallas, 501 S.W.3d 71 (Tex. Sept. 30, 2016) [15-0794].

The Court considered in this case whether the trial court had jurisdiction to order pre-suit discovery. A group of local government entities filed a Texas Rule of Civil Procedure 202 petition for pre-suit discovery in a county court at law to investigate a potential tortious interference claim against the City of Dallas. The court authorized depositions, and Dallas sought mandamus relief. The court of appeals granted relief narrowing the scope of the depositions but kept the Rule 202 order in place.

The Supreme Court conditionally vacated the Rule 202 order and remanded the case to the county court at law with instructions to determine its jurisdiction over the potential claim. The Court reiterated that a trial court must have subject-matter jurisdiction over the anticipated action to grant a Rule 202 petition. In this case, evidence suggested the amount in controversy of the anticipated action would exceed the county court at law's jurisdictional maximum, and counsel conceded on record at the Rule 202 hearing that the county court at law would not have jurisdiction if the parties were litigating the underlying potential lawsuit.

2. In re Keenan, 501 S.W.3d 74 (Tex. Sept. 30, 2016) [15-0777].

In this mandamus proceeding, Carolyn Frost Keenan was sued by River Oaks Property Owners, Inc. (ROPO), a homeowners association authorized to enforce deed restrictions. ROPO complained that Keenan, a River Oaks homeowner, had violated a deed restriction that limited impervious ground cover. Keenan contended that ROPO had received insufficient votes to enact the restriction T issue. Keenan sought production of the ballots with a request for production. ROPO resisted discovery, arguing that the ballots were confidential, privileged, and irrelevant. The trial court entered an order allowing Kennan's attorney to review the ballots but prohibiting disclosure of the contents of the ballots to anyone else and prohibiting copying of the ballots. At a hearing on Keenan's request to modify the order, the trial court orally stated that it "might" allow Keenan to subpoena the ballots at trial and would allow Keenan's attorney to share his notes on the ballots with Keenan's expert.

Keenan moved for mandamus relief in the court of appeals, which denied relief. Keenan then sought relief in the Supreme Court. Keenan complained that her counsel should not be required to testify at trial on a key factual dispute. The parties disagreed on whether the oral order trumped the earlier written order.

The Supreme Court conditionally granted mandamus relief. It reasoned that Keenan's attorney should not be placed in the unnecessary position of either being required to testify on a key factual matter or withdrawing. Likewise, Keenan's proof at trial should not have to depend on the reliability and credibility of her own attorney, by making the expert's testimony depend on what the lawyer gleaned from his review of the ballots and then conveyed to the expert. The Court held that Keenan should have access to the ballots for purposes of discovery, expert preparation, trial preparation, and trial. The ballots should also be included in the record. The Court did not foreclose the trial court from entering an appropriate protective order if it determined that the confidentiality of the ballots was an interest that should be protected. The trial court could enter an appropriate protective order sealing the ballots or imposing some other appropriate measures such as redacting the identity of the homeowners, limiting persons who could see the ballots, or limiting disclosure of the contents of the ballots.

3. In re N. Cypress Med. Ctr. Operating Co., 2016 WL 6134457 (Tex. App.—Houston [14th Dist.] 2016), *argument granted on pet. for writ of mandamus*, 60 Tex. Sup. Ct. J. 1353 (June 23, 2017) [16-0851].

At issue in this case is whether a hospital's payor agreements and reimbursement information for insurers and federal Medicare and Medicaid providers are relevant and discoverable in a case brought by an uninsured patient challenging the reasonableness of the hospital's charges. Following an automobile accident, Crystal Ann Roberts was taken by ambulance to North Cypress Medical Center. Roberts had no insurance, and North Cypress billed her $11,037.35 for its services and filed a hospital lien in that amount. Roberts sued North Cypress under the Deceptive Trade Practices Act, the Texas Debt Collection Act, and for Texas Property Code violations, alleging that the hospital billing was intentionally excessive. Roberts sought discovery of the contracts and reimbursement rates negotiated between North Cypress and insurers and Medicare and Medicaid. North Cypress objected to the discovery requests on the grounds that the documents were neither relevant nor reasonably calculated to lead to discovery of relevant evidence.

The trial court denied North Cypress's motion for protective order and granted Roberts's motion to compel. North Cypress filed a petition for writ of mandamus with the Fourteenth Court of Appeals, which denied relief.

The Supreme Court granted argument on North Cypress's petition for writ of mandamus and will hear oral argument on November 9, 2017.

4. In re Nat'l Lloyds Ins., S.W.3d , 60 Tex. Sup. Ct. J. 1165 (Tex. June 9, 2017) [15-0591].

At issue in this case was whether a defendant's attorney-billing information was discoverable when the party challenged the plaintiff's attorney-fee request as unreasonable or unnecessary.

Homeowners filed suit against their insurance carrier, National Lloyds Insurance Company, alleging underpayment of insurance claims arising from a hailstorm. Among other damages, the homeowners sought recovery of attorney's fees from the insurer. The insurer's counsel was designated as a testifying expert in this case and then testified in a similar case that an opposing party's fees could be considered as "a factor" in determining a reasonable fee recovery. The homeowners then sought discovery of the insurer's attorney-billing information. The trial court compelled discovery of the attorney-billing information—although providing for redaction of privileged information—and the court of appeals denied the insurer's petition for mandamus relief.

The Supreme Court conditionally granted mandamus relief and directed the trial court to vacate its order compelling discovery of the insurer's attorney-billing information. The Court concluded compelling en masse production of a party's billing records invades the attorney work-product privilege, redaction is insufficient to protect the privilege, and the privilege is not waived merely because the party resisting discovery has challenged the opponent's attorney's fees request. Additionally, the Court held that the factual billing information the homeowners sought through interrogatories was generally irrelevant. The insurer may freely choose to spend more or less time or money than would be reasonable, so long as it neither seeks to recover its own attorney's fees or use its fees as a comparator, and the tasks, roles, and motivations differ between plaintiffs and defendants such that comparisons are generally inapt. To the extent any marginal, theoretical relevance exists, discovery should ordinarily be denied because the billing information lacks genuine probative value, discovery would spawn unnecessary case-within-a-case litigation, and there exists a genuine threat of abusive discovery practices. Finally, although certain billing information may be discoverable as expert discovery considering the insurer designated its counsel as a testifying expert, the homeowners did not utilize permissible discovery methods pursuant to the rules of civil procedure for properly requesting information concerning expert witnesses.

Justice Johnson, joined by Justice Lehrmann and Justice Boyd, dissented. According to the dissent, the trial court did not abuse its discretion by compelling discovery. The trial court could have, in its discretion, considered the billing information relevant to both the reasonableness

and necessity of the homeowners' attorney's fees and for cross-examining the insurer's expert.

C. Electronic Discovery

1. In re State Farm Lloyds, S.W.3d , 60 Tex. Sup. Ct. J. 1114 (Tex. May 26, 2017) [15-0903, 15-0905].

At issue in these consolidated mandamus proceedings were trial court orders adopting a proposed protocol for the exchange of electronic discovery that required State Farm Lloyds to produce documents in "native" formats. State Farm had offered to produce the requested documents in searchable "static" formats, which it argued were reasonably usable, convenient, and cost effective. The court of appeals upheld the trial court's orders requiring production in native format.

The Supreme Court held that Texas Rule of Civil Procedure 196.4 does not allow either the requesting or producing party to unilaterally dictate the format of electronic discovery. Further, when a reasonably usable format is readily available in the ordinary course of business, the trial court must assess whether any enhanced burden or expense associated with a requested format is justified when weighed against the proportional needs of the case. Proportionality requires case-specific balancing according to the following factors: (1) the likely benefit of the requested discovery; (2) the needs of the case; (3) the amount in controversy; (4) the parties' resources; (5) the importance of the issues at stake in the litigation; (6) the importance of the proposed discovery in resolving the litigation; and (7) any other articulable factor bearing on proportionality. In accordance with these holdings, the Court denied the requested mandamus relief without prejudice to allow State Farm to seek reconsideration by the trial court in light of the opinion.

D. Joinder of Parties

1. Crawford v. XTO Energy, 509 S.W.3d 906 (Tex. Feb. 3, 2017) [15-0142].

At issue in this case involving an oil-and-gas lessee's failure to pay royalties is whether the trial court abused its discretion in holding that the lessor's neighboring landowners were necessary parties under Texas Rule of Civil Procedure 39 and dismissing the lessor's claims for failing to join them. In 1964, Mary Ruth Crawford conveyed an eight-acre strip of her surface estate to TESCO, an electric company. In that conveyance, she expressly reserved the minerals under the tract (the Crawford tract), as well as a conditional right of ingress and egress for exploration and development. Twenty years later, Mary Ruth conveyed fee simple title to the lands north and south of the Crawford tract. In 2004, Mary Ruth executed an oil and gas lease on the Crawford tract with XTO Energy's predecessor, and XTO later pooled the lease with hundreds of others. Mary Ruth died in 2007, and her son, Richard Crawford, inherited her estate and ratified the XTO lease. A well on the pooled acreage began producing, and Crawford executed a division order. However, XTO obtained and followed a title opinion concluding that the portion of royalties attributable to the Crawford tract should be paid to the tract's forty-four adjacent landowners per the strip-and-gore doctrine. Crawford sued XTO for breach of contract, declaratory judgment, and related claims arising out of XTO's failure to pay royalties. XTO moved to abate and compel joinder of the adjacent landowners. The trial court granted the motion, then granted XTO's motion to dismiss when Crawford failed to comply. The court of appeals affirmed, holding that the adjacent landowners had a pecuniary interest in the outcome of the litigation by virtue of the royalty payments and that a judgment in Crawford's favor could result in subsequent litigation.

The Supreme Court reversed and remanded to the trial court for further proceedings. First, the Court rejected XTO's waiver arguments, holding that Crawford brought forward an adequate appellate record and that his appellate arguments did not go beyond his petition's statement of issues. Next, the Court held that the trial court abused its discretion in requiring joinder of the adjacent landowners. Rule 39(a), in pertinent part, requires joinder of a party who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or (2) leave any of the persons already parties subject to a substantial risk of incurring double,

multiple, or otherwise inconsistent obligations by reason of his claimed interest." Although XTO argued that the adjacent landowners had an ownership interest in the Crawford tract minerals by virtue of the strip-and-gore doctrine, the Court noted that the landowners' deeds and leases did not reference the Crawford tract, nor did the record reflect any conduct or statements by any of the landowners regarding such an interest. Thus, despite XTO's assertions, the landowners themselves had not claimed an interest in the subject of the litigation. In sum, the Court held that Rule 39 does not require joinder of persons who potentially could claim an interest in the subject of the action; it requires joinder, in certain circumstances, of persons who actually claim such an interest.

E. Statute of Limitations

1. ExxonMobil Corp. v. Lazy R Ranch, LP, 511 S.W.3d 538 (Tex. Feb. 24, 2017) [15–0270].

At issue in this case is whether claims of groundwater and soil contamination by Lazy R Ranch were barred by the statute of limitations and whether the discovery rule or fraudulent concealment allowed for tolling. The Ranch sued ExxonMobil for injunctive relief to abate hydrocarbon contamination at four sites on the leased property. Exxon had been conducting operations on the Ranch for almost sixty years. The trial court granted Exxon's motion for summary judgment, and the Ranch appealed. The court of appeals reversed and remanded. The Supreme Court affirmed in part, reversed in part, and remanded.

The Court held that two of the sites had been abandoned for more than four years and thus all claims regarding those sites were barred by the maximum four-year statute of limitations. As to the other two sites that were still in use within the four-year period, Exxon was not entitled to summary judgment because issues of fact existed as to when the contamination occurred. Further, the Court declined to extend the discovery rule to the contamination in this case because it was not inherently undiscoverable. The application of the discovery rule is rare for oil and gas nuisances because property owners are aware of the contamination risks and can inspect for contamination at any time. Finally, the Ranch produced no evidence showing that Exxon concealed any of the contamination, barring the use of fraudulent concealment to toll the statute of limitations. The issue of whether the Ranch was entitled to injunctive relief at all was not properly raised by the parties and therefore was not addressed by the Court.

F. Summary Judgment

1. Chavez v. Kan. City S. Ry. Co., S.W.3d , 60 Tex. Sup. Ct. J. 1083 (Tex. May 26, 2017) [15-0717].

At issue in this case was whether a summary judgment non-movant was required to overcome a rebuttable evidentiary presumption operating in the movant's favor. Luz Chavez sued Kansas City Southern Railway Company for the wrongful death of her husband and son. During settlement negotiations, an attorney representing Chavez at trial approved a settlement agreement on Chavez's behalf. KC Southern later filed the settlement agreement and a breach of contract counterclaim against Chavez for refusing to release her claims, and moved for summary judgment. Chavez contended that her attorney lacked authority to bind her to the agreement. The court of appeals affirmed the trial court's judgment, holding that Chavez produced no summary judgment evidence raising a fact issue regarding her attorney's authority.

The Supreme Court reversed and held that Chavez was not required to produce evidence raising a fact issue regarding her attorney's authority. The trial court required Chavez to provide evidence to rebut the presumption of attorney authority, but a movant in a traditional summary judgment proceeding cannot shift the burden of production to the opposing party by relying upon a presumption. The Court reversed and remanded to the Court of Appeals.

G. Venue

1. In re Red Dot Building Sys., Inc., 504 S.W.3d 320 (Tex. Dec. 2, 2016) [15-1007].

In this venue dispute, Red Dot Building System, Inc. sued Rigney Construction & Development, LLC in Henderson County over payment allegedly due on a contract. Under the contract, Rigney subcontracted certain work on a school building to Red Dot. Rigney later sued

Red Dot in Hidalgo County on claims relating to the same contract. The parties disagreed as to whether Red Dot had performed its obligations under the contract. The two trial courts each denied pleas in abatement and set their respective cases for trial. Red Dot sought mandamus relief in the court of appeals, which denied relief. Red Dot then sought mandamus relief in the Supreme Court, which conditionally granted relief.

The Supreme Court held that mandamus relief was available if a trial court abuses its discretion in failing to grant a plea in abatement on grounds that a trial court in another county has dominant jurisdiction. In instances where inherently interrelated suits are pending in two counties, and venue is proper in either county, the court in which suit was first filed acquires dominant jurisdiction, and the second suit should be abated. There are recognized exceptions to this rule, but the Court concluded that no exception applied in this case. The Court therefore held that the Henderson County court had dominant jurisdiction and mandamus relief was available to enforce that court's dominant jurisdiction. The Court conditionally granted mandamus relief, directing the Hidalgo County trial court to abate the suit pending in that court and to vacate an injunction that prohibited Red Dot from prosecuting its suit in Henderson County.

XXIII. PROCEDURE—TRIAL AND POST-TRIAL

A. Findings of Fact and Conclusions of Law

1. Ad Villarai, LLC v. Pak, 519 S.W.3d 132 (Tex. May 12, 2017) [16-0373].

At issue in this case was whether a newly elected district-court judge or the former judge she replaced could file findings of fact following a bench trial over which the former judge presided before his term expired. AD Villarai, LLC sued Chan Il Pak for breach of fiduciary duty and related claims. In March 2014, Judge Martin Lowy entered an interlocutory permanent injunction against Pak. That month, Judge Lowy lost in the primary election to Staci Williams. Judge Lowy conducted a bench trial in October 2014 and entered a final judgment on November 24, 2014. Pak timely filed a request for findings of fact and conclusions of law on December 1. Judge Lowy failed to file the findings within twenty days. Pak then filed a notice of past-due findings on December 31, the last day of Judge Lowy's term. Judge Williams took office on January 1, 2015 and filed findings of fact and conclusions of law on January 12, 2015, the last available day to file findings.

Pak appealed the trial court's judgment and argued, in part, that Judge Williams's findings were invalid because she lacked authority to file them. The court of appeals held that neither judge could file the findings, reversed the judgment against Pak, and remanded the case to the trial court for a new trial.

The Supreme Court reversed, agreeing that the new judge lacked authority to file the findings but holding that the former judge did have the ability to file the findings. The Court rejected Villarai's argument that Pak waived any complaint about Judge Williams's authority to file findings because Pak's filing of a notice of past due findings was sufficient to preserve error for unfiled findings and he was under no obligation to object to the trial court's void actions. The Court also rejected all arguments for accepting Judge Williams's findings as valid. First, Texas Rules of Civil Procedure 18 provides that a successor judge can determine undisposed motions when the predecessor judge "dies, resigns, or becomes unable to hold court." But, "unable to hold court" only refers to a physical or mental incapacity. Thus, even when construed liberally, Rule 18 does not apply to a successor when a judge is displaced by an election. Second, although section 30.002(a) of the Civil Practice and Remedies Code grants a former judge authority to file findings after his or her term of office expires, it does not imply a similar grant of authority to the successor. Third, construing Texas Rules of Civil Procedure 296 and 297 to permit the successor judge, as the "court," to file findings in all circumstances would render Rule 18 and section 30.002(b) superfluous. Finally, a successor judge does not have an inherent power to file findings. But the Supreme Court did agree with AD Villarai that Judge Lowy had the authority to file findings. Because his term of office expired on December 31, which was within the period for filing the findings Pak requested, section 30.002(a) granted Judge Lowy authority to file the findings even after his term expired. The Court remanded the

case to the court of appeals with instructions that it abate the appeal and direct the trial court to correct the error by requesting that the former judge file findings.

B. Jury Instructions and Questions

1. Benge v. Williams, 472 S.W.3d 684 (Tex. App.—Houston [1st Dist.] 2014), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 10, 2017) [14-1057].

At issue in this case, in which both parties filed petitions for review, is (1) whether *Casteel* error exists in a jury charge that submits only one theory of liability and (2) whether Lauren Williams's physician qualifies as a testifying expert witness. At trial, Lauren Williams claimed that Dr. Jim Benge negligently injured her during surgery. The court submitted a single question to the jury regarding whether Dr. Benge was negligent, which the jury answered in the affirmative. Dr. Benge argued statutory requirements disqualify Williams's sole testifying expert witness, but the district court overruled this objection. The court of appeals held Williams's expert was qualified to testify, but remanded for a new trial after concluding that the jury charge contained *Casteel* error. Williams petitioned this court for review as to whether *Casteel* error exists in the charge and Dr. Benge petitioned for review regarding the expert-testifying-witness-qualification issue.

The Supreme Court granted Benge's petition for review and will hear oral argument on September 12, 2017.

C. Post-Judgment Filing Deadlines

1. In re Heredia, 501 S.W.3d 70 (Tex. Sept. 30, 2016) [16-0270].

At issue in this case was whether a court reporter may challenge an appellant's indigence claim after the ten-day deadline set forth in Texas Rule of Appellate Procedure 20.1.

Relator Norma Heredia sued Wal-Mart Stores Texas, L.L.C. in a slip-and-fall case. Wal-Mart moved for summary judgment, which the trial court granted. Heredia appealed and filed her affidavit of indigence in the trial court. The trial court did not notify the court reporter, and no one challenged the affidavit within the next ten days. But a month later, the court of appeals issued an order sua sponte, purportedly allowing any interested party to file a challenge to Heredia's affidavit in the ten days following the date of the order. The court reporter filed a challenge to Heredia's affidavit three days later. The trial court set a hearing on the contest.

Heredia filed a motion to stay the hearing and a petition for writ of mandamus in the Supreme Court. The Court ruled that the Rules of Appellate Procedure allow for suspension of a rule's operation when good cause exists, but lack of notice to a court reporter of the filing of an affidavit of indigence was not good cause. The Court ordered that Heredia be allowed to proceed with her appeal without payment of costs.

D. Reversal of Judgment Notwithstanding the Verdict

1. Dudley Constr., Ltd. v. ACT Pipe & Supply, Inc., 2016 WL 3917211 (Tex. App.—Texarkana 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0651].

The first issue in this case is whether Texas Rule of Civil Procedure 324 and Texas Rule of Appellate Procedure 38.2(b)(1) require a court of appeals to render judgment in harmony with a jury's original verdict when it reverses the trial court's Judgment Notwithstanding the Verdict (JNOV) and the appellee did not assert insufficiency of evidence in a cross-point error. The second issue is whether a plaintiff can recover attorney's fees for a Texas Construction Trust Fund Act claim.

ACT Pipe & Supply (ACT) supplied Dudley Construction, Ltd. (Dudley) with pipe for two projects: the Reclaimed Water Project for the City of College Station and the Tabor Project for the City of Bryan. Disputes arose regarding the cost of supplies. ACT sued for the cost of supplies for the project and for the Reclaimed Water Project. Among other claims, ACT sought attorney's fees under the Texas Construction Trust Fund Act.

The jury charge contained 16 questions, some of which the jury answered despite instructions not to based on answers to other questions. But the jury generally found in favor of Dudley. ACT moved for JNOV. The trial court granted the motion, concluding the jury should have found that the prices ACT sought were agreed upon by ACT and Dudley. The trial

court awarded damages and attorney's fees to ACT.

The Court of Appeals concluded that sufficient evidence supported the no-recovery jury finding on ACT's sworn-account claim on the Tabor Project, but that fact issues remained as to ACT's trust-fund claim. The court also concluded that attorney's fees had to be decided on remand. One justice dissented, asserting that the court had to render a judgment of zero damages on ACT's trust-fund cause of action since ACT did not raise a cross-point appeal that the evidence was insufficient to support the jury's damage award.

Dudley appealed arguing that the court of appeals was required to render judgment in harmony with the jury's verdict when it reversed the trial court's JNOV because ACT did not assert insufficiency of the evidence as a cross point of error. Dudley also averred that ACT's Texas Construction Trust Fund Act claim did not permit recovery of attorney's fees. The Supreme Court granted review and will hear oral argument on December 5, 2017.

XXIV. REAL PROPERTY

A. Easements

1. Lance v. Robinson, 2016 WL 147236 (Tex. App.—San Antonio 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0323].

At issue in this case is (1) whether the plaintiffs must bring their claims in a trespass-to-try-title suit, (2) whether evidence relied on by the lower courts was part of the summary judgment record, and (3) whether the trial court and court of appeals correctly determined the plaintiffs' rights.

The Lances and the Robinsons are neighbors on Medina Lake. When the Lances purchased their property, they also received a deed without warranty that purported to convey the corresponding beachfront property between their lot and the lake. The residents near Medina Lake use the beach front property as community property and have constructed improvements on the portion the Lances now purport to own. When the Lances warned their neighbors that they planned to fence off the disputed property, the Robinsons sued them for declaratory relief. The Robinsons contend that all of the neighbors have an easement appurtenant to the beachfront property.

The trial court concluded that the entire subdivision had an easement appurtenant to the beachfront property and that the Lances did not have an exclusive interest in the disputed property because the deed without warranty did not convey any interest.

The court of appeals affirmed. First, it held that the deeds at issue in the case were part of the summary judgment record and therefore could form the basis of the summary judgment. Second, it held that the Robinsons correctly brought their claims as a declaratory judgment action rather than as a trespass to try title suit. Third, after concluding that the Lances waived a number of issues, it held that both the Lances and the Robinsons had appurtenant easement rights and that the Lances' deed without warranty did not convey them an exclusive interest in the disputed property.

The Lances petitioned for review. First, they assert that the deeds relied upon by the trial court were not part of the summary judgment record. Second, they contend that the Robinsons can only bring a trespass to try title suit. Third, they argue that the record does not conclusively establish that the Robinsons have any easement rights as a matter of law and therefore the Lances interest from the deed without warranty has not been displaced.

The Supreme Court granted the Lances' petition for review and will hear oral argument on November 7, 2017.

B. Leases

1. Shields Ltd. P'ship v. Bradberry, S.W.3d , 60 Tex. Sup. Ct. J. 919 (Tex. May 12, 2017) [15-0803].

At issue in this case was whether waiver of a nonwaiver provision can be anchored in the same conduct the parties specifically agreed would not give rise to a waiver of contract rights.

Boo Nathaniel Bradberry and 40/40 Enterprises, Inc. (collectively, Bradberry) leased commercial property from Shields Limited Partnership (Shields). A nonwaiver provision in their lease agreement expressly disclaimed acceptance of late rental payments as constituting waiver of Shields' enforcement rights. Although

Bradberry frequently paid rent after the due date, Shields regularly accepted the late rent without protest. Eventually, however, after another missed rent payment deadline, Shields sent Bradberry a letter of default asking for payment and warning of further action. After further late rent, Shields sent Bradberry a letter of termination. Bradberry refused to vacate, and Shields filed an eviction suit. The trial court entered judgment for Bradberry and the court of appeals affirmed.

The Supreme Court concluded Shields was entitled to possession of the commercial property because nonwaiver provisions generally are binding and enforceable and Shields had not waived the provision by regularly accepting late rent from Bradberry. Although the Court recognized that a nonwaiver provision may be waived through intentional conduct inconsistent with the provision's terms, Shields' conduct of regularly accepting late rent without protest was not inconsistent with the nonwaiver provision because the provision expressly stated this conduct did not constitute waiver. The Court, therefore, held that engaging in the conduct disclaimed as a basis for waiver cannot be sufficient to waive the nonwaiver provision. Hence, Shields did not waive its right to enforce all lease provisions including terminating the lease for failure to pay timely rent.

The Court also held Shields was not estopped from terminating the lease. Although Bradberry asserted it invested money improving the leased premises based on agreements and representations that it would have an option to extend the lease at a low rental rate, it failed to identify any false or misleading representations to support equitable estoppel.

Accordingly, the Court reversed the court of appeals' judgment, rendered judgment that Shields has a superior right to immediate possession of the leased premises, and remanded the case to the trial court for an award of attorney's fees in accordance with the parties' contract.

C. Lis Pendens

1. Sommers v. Sandcastle Homes, Inc., S.W.3d , 60 Tex. Sup. Ct. J. 1291 (Tex. June 16, 2017) [15-0847, 15-0848].

At issue in this case was the extent to which actual and constructive notice were extinguished following the expunction of a notice of lis pendens.

Alleging fraudulent transfers of partnership property, Jay Cohen sued subsequent purchasers, Sandcastle Homes and Newbiss Property, and sought to set aside their purchases of tracts of land. Sandcastle and Newbiss moved for summary judgment raising bona-fide-purchaser defenses. A lis pendens was in effect on the property at the time of Sandcastle's purchase, but the trial court later expunged the notice. Sandcastle and Newbiss each claimed reliance on the expunction to legally eradicate any actual and constructive notice they may have had regarding a claim on the property. The trial court granted motions for summary judgment in their favor. The court of appeals affirmed. Sommers, the bankruptcy trustee and Cohen's successor-in-interest, appealed. He argued the parties had obtained independent knowledge of the property claim and therefore could not establish their respective affirmative defenses of bona-fide-purchaser protection.

The Supreme Court held that the language of the expunction statute expressly limited a subsequent purchaser's protection to the information contained in the "notice of lis pendens" and "any information derived from the notice." Accordingly, a fact issue precluded summary judgment in favor of both Sandcastle and Newbiss. That statutory language has since been amended, effective September 1, 2017. The amended provision applies to "the notice of lis pendens and any information derived or that could be derived from the notice."

Justice Lehrmann concurred in part and dissented in part. She would have held that all subsequent purchasers may rely on the expunction order, regardless of how they learned of the underlying lis-pendens action. For this reason, she would have affirmed summary judgment for Newbiss. But because a stay of the expunction order was in effect at the time Sandcastle purchased its tract, it could not have relied on that order to purchase the property free of notice of Cohen's claim of interest. Thus, she agreed that Sandcastle was not entitled to summary judgment.

Justice Willett dissented and was joined by Chief Justice Hecht and Justice Devine. The dissent would have affirmed the trial court's

summary judgments as to both Sandcastle and Newbiss based on its reading of the statutory language that any and all of the subsequent purchaser's notice or knowledge of the underlying suit is legally eradicated by the expunction order.

D. Nuisance

1. Town of DISH v. Atmos Energy Corp., S.W.3d , 60 Tex. Sup. Ct. J. 990 (Tex. May 19, 2017) [15-0613].

This case arose out of a dispute between residents of the Town of Dish and various energy companies that operate natural-gas compressor stations just outside the town. Dish and its residents brought nuisance and trespass claims against the energy companies primarily complaining of the noise and odor emanating from the facilities. The trial court granted motions for summary judgment in favor of the energy companies on various grounds, including limitations.

The court of appeals reversed the trial court on limitations and considered whether the residents' nuisance claims were preempted by state and federal environmental regulatory schemes and whether the residents' trespass claims were cognizable as a matter of law. The Supreme Court did not reach those issues, concluding instead that the claims were time-barred by the two-year statute of limitations for nuisance and trespass claims. The Court noted that although residents began complaining about the facilities in 2006, they did not sue until 2011.

Dish and its residents argued their causes of action did not accrue until the Ponder station—a reference to all the energy companies' compressor stations—was finally complete in the Summer of 2009. But the Court noted that the last facility to come online, a metering station, could not have contributed to the noise and odor about which the residents complained. Rather, it was undisputed that construction on the compressor stations was complete by May 2008. The Court cited complaints, public meetings, litigation threats, and media coverage all before that date, and concluded as a matter of law that if the residents' claims accrued at all, they did so before February 28, 2009.

Dish and its residents argued that the residents' affidavits stating that conditions worsened in mid-to-late 2009 and the results of an environmental study concluded in 2009 constitute evidence that the residents' claims accrued later. The Court disagreed, stating that an accrual date does not turn on the plaintiffs' subjective beliefs, but on whether substantial interference with the use and enjoyment of land caused unreasonable discomfort or annoyance to persons of ordinary sensibilities. And the Court concluded that reliance on the environmental study to control the accrual date amounted to a backdoor attempt to invoke the unpleaded discovery rule. The study amounted, at most, to evidence that the residents did not previously comprehend the full extent of their injury, not that they were unaware a legal injury had occurred. The Court reversed the court of appeals' judgment and reinstated the trial court's take-nothing judgment.

XXV. TAXES

A. Franchise Tax

1. Graphic Packaging Corp. v. Hegar, 471 S.W.3d 138 (Tex. App.—Austin 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 1230 (June 16, 2017) [15-0669].

This dispute centers on whether "franchise tax" falls within the meaning of "income tax" as defined by Chapter 141 of the Multistate Tax Compact (MTC). Graphic Packaging Corporation conducts some of its business in Texas, requiring the company to pay a "franchise tax" based on its taxable margin derived from its Texas sales. In its 2008 and 2009 franchise tax reports, Graphic used the single-factor formula from Chapter 171 of the MTC. However, in its 2010 franchise tax report, it used the three-factor formula from Chapter 141. Because Graphic only participates in retail and wholesale activities in Texas and does not have any manufacturing options in the state, Graphic's franchise tax liability is reduced using the three-factor method. The Comptroller concluded that Graphic was required to use Chapter 171's single-factor formula. Graphic filed suit and moved for summary judgment on the ground that it properly used Chapter 141's three-factor formula. The Comptroller filed a cross motion for summary judgment, which the trial court granted.

On appeal, Graphic argued that it properly elected to use Chapter 141's three-factor formula when calculating its margin to Texas for three reasons: (1) section 171.106(a) did not impliedly

repeal Chapter 141's election and formula, (2) if section 171.106(a) did impliedly repeal Chapter 141's formula, the repeal was invalid because the MTC is an interstate agreement that is binding on the party states unless and until they withdraw, and (3) if Chapter 141's formula were not repealed, the Texas franchise tax falls within the MTC's definition of income tax. The court of appeals affirmed the trial court's judgment holding that, according to the plain and common meaning of statute, the Texas franchise tax is not an income tax under Chapter 141. The Court did not reach Graphic's other claims. Graphic appealed and the question now before the Supreme Court is whether the franchise tax falls within the meaning of "income tax" as defined in Chapter 141 of the MTC. The Court granted review and will hear oral argument on September 13, 2017.

B. Heavy Equipment

1. EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist., 475 S.W.3d 421 (Tex. App.—Houston [14th Dist.] 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 564 (Mar. 10, 2017) [15-0683].

At issue in this case is whether: (1) leased heavy equipment should be valued for tax purposes according to Tax Code sections 23.1241 and 23.1242 (the heavy equipment statutes); (2) sections 23.1241 and 23.1242 are constitutional; and (3) the heavy equipment's situs is EXLP Leasing's principal place of business.

EXLP leases natural gas compressors to other Exterran subsidiaries who then provide compression services to Texas oil and gas producers. EXLP's principal place of business and natural gas compressor storage yard are located in Washington County. EXLP filed a declaration with the Galveston Central Appraisal District stating that its leased units located in Galveston County are taxable in Washington County. The Appraisal District rejected EXLP's declaration and appraised the compression units located in Galveston County as general business personal property with a situs of Galveston County. EXLP sought judicial review of the appraisal. Both parties filed motions for summary judgment. The trial court granted the Appraisal District's motion in part, holding that the heavy equipment statutes apply to EXLP's inventory and are unconstitutional as applied to that inventory. The court also determined that Galveston County is the taxable situs for EXLP's leased compressors located there.

The court of appeals affirmed on the ground that Galveston County was the taxable situs for the leased compressors. The court also reversed and remanded on the unconstitutionality of the heavy equipment statutes, holding that neither EXLP nor the Appraisal District met the summary judgment burden regarding constitutionality.

EXLP appealed to the Supreme Court claiming that: (1) the court of appeals erred by treating the heavy equipment statutes' reasonableness requirement as a fact question; (2) the Appraisal District made a facial challenge to the constitutionality of the statutes; (3) the Appraisal District had the burden of proof on the question of the statutes' constitutionality; (4) the heavy equipment statutes are constitutional; (5) the compressors qualified as heavy equipment inventory; and (6) Washington County is the inventory's situs, not Galveston County.

The Court granted EXLP's petition for review and will hear oral argument on October 10, 2017.

C. Property Tax

1. Valero Refining–Tex., L.P. v. Galveston Cent. Appraisal Dist., 519 S.W.3d 66 (Tex. Feb. 24, 2017) [15-0492].

At issue in this case was whether an owner's complaint of unequal taxation could be directed to only a portion of a divided single tract of land, not the tract as a whole.

Valero protested the District's appraisal of its production facilities, arguing that the appraised value was too high when compared to two other refineries that were in the District. Furthermore, Valero argued that including the other segments of the tract, containing largely tax-exempt pollution control equipment (PCE), artificially lowered the overvaluation of the production facilities. At trial, the jury found the production facilities were overvalued by the amount calculated excluding the PCE. On appeal, the District argued that the other refineries in the district were not sufficiently comparable to allow for comparison in tax evaluation and that the entire tract should be treated as one valuation, not

allowing the exclusion of the PCE. The court of appeals held that the refineries were similar enough to allow for comparison, but that the PCE was an essential part of the refinery and Valero was required to explain why the exclusion was appropriate.

The Supreme Court reversed the court of appeals' judgment and remanded the case to that court for further proceedings. The Court found as a matter of law that the divided pieces of property could be separately analyzed for a complaint of unequal taxation. Each portion of the property was apprised under a separate tax account and the tax code defines property broadly as "any matter of private ownership." Further, the jury's finding that the three refineries were similar enough for valuation comparisons was reasonable. The District had the authority to divide the property into separate tax accounts, and in doing so, allowed Valero to treat each account as a separate property valuation. The Court remanded the case to the court of appeals to address other issues the District raised, including the sufficiency of the evidence to support the verdict.

XXVI. TEXAS CITIZENS PARTICIPATION ACT

A. Dismissal Standard

1. ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. Feb. 24, 2017) [15-0407].

At issue in this case is whether the Texas Citizens Participation Act applies to alleged communications among ExxonMobil Pipeline Co. (EMPCo) employees about Travis Coleman, a former EMPCo terminal technician.

EMPCo terminated Coleman's employment for failure to gauge and record tank 7840 fluid volumes. Coleman filed suit against EMPCo and two of his former supervisors for defamation, asserting that he had documentary proof that he gauged tank 7840 and that the statements made by his former employees and the EMPCo investigator were false. The trial court denied EMPCo's motion to dismiss under the provisions of the TCPA. The court of appeals affirmed the trial court's judgment. The court of appeals held that EMPCo did not meet its burden to show that the TCPA applies to Coleman's suit because the communications among EMPCo employees related only to a personnel matter and had no "tangential relationship" to health, safety, environmental, and economic concerns. The court of appeals concluded that the consequences from failing to properly gauge tank 7840 did not transform communications regarding private employment matters into public concern. In his petition to the Supreme Court, Coleman argued against TCPA applicability by relying on his own conclusory testimony that failure to gauge a tank will not result in serious safety and environmental risks, by disputing that his supervisors' accusations were discussed in a safety meeting, and by asserting that the court of appeals properly required a nexus between a communication and a matter of public concern.

In a per curiam opinion, the Texas Supreme Court reversed the judgment of the court of appeals and remanded the case to the court of appeals for further proceedings consistent with the Court's opinion. The Court held that EMPCo successfully established TCPA applicability because the alleged communications were made in connection with environmental, health, safety, and economic concerns, which are matters of public concern. The Court concluded that any evidence suggesting user-provided statements constitutes communication in connection with a public matter should be ignored because Coleman failed to cite a provision of the TCPA, or a Texas court interpreting the statute, that provides support for an untrue affidavit defeating TCPA's applicability. The Court remanded the case for consideration of whether Coleman met his burden under the TCPA of establishing a prima facie case by clear and specific evidence.

B. Initial Burden

1. Bedford v. Spassoff, S.W.3d , 60 Tex. Sup. Ct. J. 1213 (Tex. June 9, 2017) [16-0229].

At issue in this case was wether defamation plaintiffs established a prima facie case that could survive a motion to dismiss under the Texas Citizens Participation Act (TCPA). Darin Spassoff was the sole owner of the Dallas Dodgers Baseball Club, a youth baseball-instructional organization. The Dodgers' batting coach allegedly engaged in an inappropriate relationship with Stephen Nolan Bedford's wife, whose son was a member of the Dodgers. Bedford posted a statement to Facebook

that recounted his allegations and made various assertions about the Dodger's response to the allegations. Spassoff and the Dodgers sued Bedford for defamation. The trial court denied Bedford's motion to dismiss under the TCPA. The court of appeals affirmed as to that issue, holding that while the TCPA did apply, Spassoff and the Dodgers established a prima facie case under the TCPA and therefore the trial court correctly denied the motion to dismiss.

In a per curiam opinion, the Supreme Court reversed the court of appeals' judgment. It held that Bedford's statements did not constitute defamation per se and therefore Spassoff and the Dodgers had the burden to establish damages by clear and specific evidence. The Court held that Spassoff and the Dodgers' general averments of losses were insufficient to establish that necessary element. The Court therefore remanded the libel claim to the trial court for dismissal and determination of attorney's fees.

2. Harper v. Best, 493 S.W.3d 105 (Tex. App.—Waco 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1352 (June 23, 2017) [16-0647].

The issues in this case are whether a removal petition under Chapter 87 of the Texas Local Government Code is subject to dismissal under the Texas Citizens Participation Act (TCPA) and whether the State is immune from an award of costs, attorney's fees, or sanctions under the TCPA.

George Best, a citizen of Somervell County, filed a petition to remove Paul Reed Harper from his position as a board member of the Somervell County Hospital District. Best alleged that Harper was incompetent to hold office based on his motion during a 2014 board meeting to eliminate the Hospital District tax and also based on a condemnation of other board members appearing on Harper's wife's blog. The State subsequently appeared in the suit and amended the style of the case to reflect that the petition for removal was brought in the name of the State and on the relation of Best. In response to the removal action, Harper filed a motion to dismiss under the Texas Citizens Participation Act, to which the State presented no affidavits in response. The trial court denied the motion.

Harper filed an accelerated appeal. The court of appeals reversed and remanded, holding that the State's removal petition was subject to the TCPA and the State had not met the "clear and specific evidence" standard to avoid dismissal under the Act.

The Supreme Court granted the State's petition for review and will hear oral argument on November 8, 2017.

3. Hersh v. Tatum, S.W.3d , 60 Tex. Sup. Ct. J. 1547 (Tex. June 30, 2017) [16-0096].

At issue in this case was whether a defendant could invoke the Texas Citizens Participation Act in a lawsuit for intentional infliction of emotional distress while simultaneously denying she made the alleged statements.

John and Mary Ann Tatum's son, Paul Tatum, was involved in a car accident. Shortly thereafter, Paul committed suicide. The Tatums published an obituary in the Dallas Morning News linking Paul's death to the car accident, but omitting any mention of suicide. Later, a columnist for the Dallas Morning News, Steve Blow, published a column criticizing the practice of concealing suicide from obituaries and used Paul's death (though not referring to Paul by name) as an example of such a practice. Blow published the column shortly after having several conversations with Julie Hersh, a suicide-awareness advocate who shares Blow's beliefs about the importance of including suicide in obituaries.

The Tatums sued Hersh for intentional infliction of emotional distress, claiming that Hersh provided Blow with specific details about Paul's death and encouraged Blow to write about the Tatum family in a critical manner. Hersh denied making those specific statements and moved to dismiss the case under the Texas Citizens Participation Act, claiming that the "legal action [was] based on, relates to, or is in response to [her] exercise of the right of free speech." The trial court dismissed the case. The court of appeals reversed, finding that a movant cannot invoke the dismissal procedures of the Act if the movant simultaneously denies engaging in the alleged speech.

The Court reversed and held that a defendant who denies making the alleged communication

can invoke the Act. The plain text of the statute requires courts to consider the pleadings. When it is clear from the plaintiff's petition that an action is covered by the Act, the defendant need show no more. The Court further held that the communication alleged in this case was not extreme and outrageous to support an action for intentional infliction of emotional distress. The Court remanded the case to the court of appeals to consider whether the trial court erred by refusing to award Hersh her attorney's fees and sanctions.

Justice Boyd concurred, arguing that the Court improperly limited the scope and effect of the Act. Hersh admitted to speaking with Blow about suicide awareness and prevention, which are matters of public concern. Because the Tatums' suit related to these issues, the Court did not need to, and thus should not have, addressed whether Hersh could invoke the Act if she denied making a communication altogether.

C. Litigation Privilege Defense

1. Youngkin v. Hines, 2016 WL 3896494 (Tex. App.—Waco 2016) *pet. granted*, 60 Tex. Sup. Ct. J.1353 (June 23, 2017) [16-0935].

The issues in this case are (1) whether the movant established by a preponderance of the evidence that the nonmovant's legal action was based on, related to, or was in response to the exercise of the right to petition, (2) whether the nonmovant established by clear and specific evidence a prima facie case for each essential element of his claims, and (3) whether the movant established by a preponderance of the evidence each essential element of a litigation privilege defense.

Bill Youngkin, an attorney, represented Buetta Scott and Rajena Scott (the Scotts) in a suit against Billy G. Hines, Jr. involving the ownership of a 285-acre tract in Brazos County. The case was resolved by a settlement agreement, which Youngkin announced in open court. Pursuant to the agreement, Hines would convey his undivided interest in the surface estate of the 285-acre tract to the Scotts, but would retain his mineral interests. In return, the Scotts would convey their undivided one half interest in a 45-acre tract, thus giving Hines 100 percent ownership in that tract. Hines's attorney subsequently sent a letter to Youngkin memorializing the agreement. The letter was signed by Hines, his attorney, and Youngkin on behalf of the Scotts. Hines subsequently conveyed his interest in the surface estate of the 285-acre tract to the Scotts. However, the Scotts, in a deed prepared by Youngkin, conveyed their interest in the 45-acre tract to Curtis Capps. Capps later executed a deed, also prepared by Youngkin, to Hines for only Hines's individual undivided interest in the 45-acre tract, rather than the 100 percent the Scotts and Hines agreed to. Youngkin, on behalf of Capps, then filed suit against any known and unknown Scott heirs for title to the 45-acre tract.

Hines filed suit against the Scotts and Capps for fraud, seeking to rescind the agreement and cancel the deed he executed, or alternatively, to enforce the agreement and reform the deed to compel the Scotts and Capps to convey the 45-acre tract to him. Hines later amended his suit to add Youngkin as a defendant, asserting claims for common law fraud, statutory fraud, and conspiracy. Hines also filed a motion to disqualify Youngkin from serving as counsel to the defendants. In response, Youngkin filed a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA), arguing that Hines's claims were filed in retaliation for Youngkin's First Amendment activities in the underlying suit. The trial court denied Youngkin's motion to dismiss. Youngkin filed an interlocutory appeal.

The court of appeals affirmed, holding that Hines's live pleading and the parties' summary-judgment evidence demonstrated that Hines's claims against Youngkin were primarily based on his in-court statements pertaining to the settlement agreement. Therefore, the court determined that Youngkin showed by a preponderance of the evidence that Hines's claims were based on Youngkin's exercise of the right to petition. The court also concluded that Hines established by clear and specific evidence a prima facie case for each essential element of his claims against Youngkin. However, the court of appeals held that Youngkin did not establish his litigation privilege defense by a preponderance of the evidence and, therefore, affirmed the trial court's denial of Youngkin's motion to dismiss.

The Supreme Court granted Youngkin's petition for review and will hear oral argument on December 6, 2017.

XXVII. UTILITIES

A. Cost of Relocating and/or Removal of Facilities

1. City of Richardson v. Oncor Elec. Delivery Co., 2015 WL 4736827 (Tex. App.—Dallas 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 650 (Mar. 31, 2017) [15-1008].

At issue in this case is whether a pro forma provision in an electric utility company's tariff abrogates both its contractual obligation and the common law duty to pay the cost of relocating or removing facilities at a city's request to accommodate public rights-of-way.

Oncor Electric Delivery Company, LLC services customers throughout Texas, including customers in the City of Richardson. In August 2006, the City approved an ordinance granting Oncor's predecessor, its successors, and assigns the right to use the City's public rights-of-way for the transmission and distribution of electric power. Oncor's predecessor, TXU, formally accepted the ordinance in writing. Together, the ordinance and TXU's acceptance formed the Franchise Contract. The Franchise Contract requires Oncor to relocate or remove facilities at the City's request in order to accommodate any change in the public rights-of-way. The Franchise Contract incorporated the City's right-of-way ordinance, which further requires Oncor to pay for the cost of removal or relocation. In 2010, the City's voters approved a reconstruction and widening project, which necessitated the relocation of 150 electric utility poles. Oncor refused to pay for the relocation. Meanwhile, in 2011, Oncor entered into a settlement agreement in an unrelated rate case with the Public Utility Commission (PUC) of Texas. Pursuant to the terms of the settlement, the City enacted an ordinance agreeing to Oncor's new Tariff. The Tariff included pro forma language as required by the PUC, which included a provision stating that an entity requesting removal or relocation must pay the utility company for the cost of removal. Although identical pro forma language was on file in 2006 when the City and Oncor first entered into their Franchise Contract, Oncor argued that this pro forma provision relieves it of its existing contractual and common law obligations to absorb the costs of relocation at the City's request.

The City declared Oncor in default of the Franchise Contract and sued for damages, specific performance, and injunctive relief. Oncor counterclaimed for breach of contract and declaratory judgment. Both parties sought summary judgment, arguing that the other was obligated to pay for the relocation costs. The trial court granted the City's motion for summary judgment, rendering judgment in its favor.

The court of appeals reversed and rendered judgment for Oncor. The court of appeals determined that the pro forma Tariff language trumped both the common law and the parties' Franchise Contract. Additionally, the City's adoption of the Tariff constituted an agreement between the parties sufficient to negate any common law obligation requiring Oncor to pay relocation costs.

The City appealed, arguing that long-established statutory and common law obligations require utility companies to bear relocation costs as a condition of their public right-of-way use. Additionally, the parties' freely negotiated Franchise Contract requires Oncor to pay for the relocation of facilities and expressly incorporates the City's ordinance requiring utility companies to pay for relocation costs. The City further argues that the Tariff does not abrogate the common law or the Franchise Contract for the following reasons: (1) unmistakable clarity is required to abrogate the common law; (2) the PUC's non-discretionary pro forma Tariff does not modify the Franchise Contract with unmistakable clarity; (3) the PUC lacks the power to limit cities' home-rule powers because the Legislature did not expressly give the PUC such power; and (4) the pro forma language in the Tariff did not create a new contract. When all the documents are read in harmony, the City argues that the Franchise Contract controls in the event of a conflict and requires Oncor to pay for the relocation costs.

The Court granted the City's petition for review and will hear oral argument on September 12, 2017.

XXVIII. WORKERS' COMPENSATION

A. Course and Scope of Employment

1. State Office of Risk Mgmt. v. Martinez, 2016 WL 548115 (Tex. App.—San Antonio 2016), *pet. granted*, 60 Tex. Sup. Ct. J. 1230 (June 16, 2017) [16-0337].

At issue in this case is whether the trial court lacked jurisdiction to consider the State Office of Risk Management's statutory ground for denying workers' compensation compensability because it was not raised as a ground for denying compensability at the administrative level.

Edna Martinez was a CPS case worker with the Department of Public and Regulatory Services (DPRS). Martinez submitted a workers' compensation claim for an injury sustained after slipping in her kitchen while working from home. The claim was refused by her supervisor and eventually the State Office of Risk Management (SORM). Administrative proceedings ensued. At the benefit review conference, SORM argued that Martinez's employer was not aware that she had been taking work home over the weekend and that she had not received pre-approval for any overtime at home, meaning that Martinez was not in the course of scope of her employment at the time of the accident. SORM did not dispute that Martinez was performing tasks related to her duties as a case worker; rather, SORM argued that Martinez was working at home without the employer's knowledge and prior permission to work overtime in violation of a DPRS standard of conduct. At a contested case hearing, the hearing officer concluded that Martinez did not sustain a compensable injury because her injury did not involve an instrumentality inherent in the employment. Martinez filed a request for review to the appeals panel, which reversed the hearing officer's decision.

SORM brought suit for judicial review. SORM filed a motion for summary judgment, arguing that Martinez's injury is not compensable because she was working at home without prior permission in violation of Government Code sections 658.010 and 659.018, which regulate state employee work hours, including the location of where work may be performed. Martinez also filed a motion for summary judgment, arguing that SORM could not challenge compensability on judicial review on any ground because SORM failed to appeal the contested case hearing to the appeals panel. The trial court granted SORM's motion and denied Martinez's. Martinez appealed. The court of appeals reversed the trial court's judgment granting SORM's motion for summary judgment, affirmed the denial of Martinez's motion for summary judgment, and remanded the case for further proceedings. The court of appeals held that because SORM did not raise the Government Code violations at the administrative level, it was precluded from raising that argument on judicial review.

The Supreme Court granted SORM's and Martinez's petitions for review and will hear oral argument on October 12, 2017.

B. Exclusive Remedy Defense

1. Arnold v. Gonzalez, 2015 WL 5109757 (Tex. App.—Corpus Christi–Edinburg 2015), *pet. granted*, 60 Tex. Sup. Ct. J. 650 (Mar. 31, 2017) [15-0729].

The primary issue in this case is whether the Texas Workers' Compensation Act's exclusive-remedy affirmative defense bars a premises-liability suit brought by an employee against his employer's president/owner in his personal capacity as premises owner. A–W Produce Company, Inc. employee Gerardo Gonzalez was injured while repairing a conveyor belt. A–W was owned by Daniel Arnold, who also personally owned the premises where the conveyor belt was located.

Gonzalez sued Arnold for negligence and premises liability. The claims were tried before a jury, and the trial court denied Arnold's requested jury question. The jury found Arnold negligent and attributed sixty-five percent of the responsibility for Gonzalez's injuries to Arnold, with twenty percent of the responsibility attributed to A–W. The trial court awarded damages to Gonzalez and held Arnold jointly and severally liable for the damages attributable to A–W.

Arnold appealed, arguing that Gonzalez could not recover damages because the Texas Workers' Compensation Act's exclusive-remedy provision makes recovery of workers' compensation benefits the sole remedy for an employee injured in a work-related accident. The court of appeals upheld the trial court's judgment

on the ground that Arnold failed to establish each element of an exclusive-remedy defense.

The Supreme Court granted Arnold's petition for review and will hear oral argument on October 10, 2017.

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