Case Summaries
December 10, 2021

No Opinions
11 Grants

GRANTS

PROCEDURE—APPELLATE
Permissive Interlocutory Appeals

Industrial Specialists, LLC v. Blanchard Refining Co., 2019 WL 4197046 (Tex. App.—Houston [1st Dist.] 2019), *pet. granted*, — Tex. Sup. Ct. J. — (December 10, 2021) [20-0174]

At issue in this case is whether a court of appeals can abuse its discretion by declining to hear a permissive interlocutory appeal without providing its reasoning. Employees of Industrial Specialists, LLC (ISI) were working at a Galveston refinery when a fire broke out. The injured employees brought personal-injury suits against the owners of the refinery, Blanchard Refining Company LLC and Marathon Petroleum Company LP (together, the Marathon Plaintiffs). Citing an indemnity provision in the parties' service contract, the Marathon Plaintiffs requested—and failed to obtain—indemnity from ISI. After the Marathon Plaintiffs settled the personal-injury suits, they sued ISI for breach of contract and sought a declaration that ISI owed them a duty of indemnification. The trial court denied ISI's summary-judgment motion, but it certified its order for appeal pursuant to section 51.014(d) of the Civil Practice and Remedies Code. The court of appeals denied ISI permission to appeal on the basis that the petition failed to satisfy the requirements of Texas Rule of Civil Procedure 28.3(e)(4).

ISI petitioned the Supreme Court. The parties agree that the court of appeals erred by declining to hear the appeal. However, ISI contends that the Marathon Plaintiffs cannot recover the portion of the settlement amount for which ISI is allegedly responsible because (1) under *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19 (Tex. 1987), a party cannot settle more than its share of liability; (2) the indemnity provision violates the express-negligence doctrine; and (3) even if the indemnity provision is enforceable, it does not encompass voluntary settlements. The Marathon

Plaintiffs argue that neither *Jinkins* nor the express-negligence test is applicable, and they further assert that ISI's duty to indemnify extends to voluntary settlements.

The Supreme Court granted ISI's petition for review and set oral argument for February 1, 2022.

GOVERNMENTAL IMMUNITY
Texas Whistleblower Act

City of Fort Worth v. Pridgen, 2020 WL 3286753 (Tex. App.—Dallas 2020), *pet. granted*, — Tex. Sup. Ct. J. — (Dec. 10, 2021) [20-0700]

This whistleblower dispute asks (1) what constitutes a covered report for purposes of the Texas Whistleblower Act, (2) whether the alleged report was based on an objectively reasonable belief that criminal activity had occurred, and (3) whether there was legally sufficient evidence that the report caused an adverse employment action.

In December 2016, an arrest by a City of Fort Worth police officer was livestreamed on social media and gained widespread media attention. Abdul Pridgen and Vance Keyes were high-level officers within the police department and were involved in the internal investigation about the arrest. Pridgen and Keyes conveyed their belief to the chief of police that the officer had committed crimes and should be terminated. The officer was instead suspended for ten days. Later, confidential materials, including the officer's body-camera footage, were leaked to the public. After an internal investigation into the leak, Pridgen and Keyes were deemed responsible and demoted. They sued the City, alleging violations of the Texas Whistleblower Act. The City moved for summary judgment, arguing that governmental immunity had not been waived. The trial court denied the motion.

The court of appeals affirmed. The court reasoned that neither the statute nor caselaw required the recipient authority to be unaware of the violation at the time the report is made. The court also held that Pridgen and Keyes established an objectively reasonable basis for the belief that a crime had occurred. The court also held that the evidence raised a fact issue about whether the report caused the demotion.

The City petitioned for review, arguing that the court of appeals departed from settled law that a covered report requires a disclosure of information. The City also argued that Pridgen and Keyes's cursory review did not provide an objective basis to believe the officer committed a crime and that the circumstantial evidence of causation relied on by the court of appeals was wholly unrelated to the demotion.

The Court granted the City's petition, and oral argument will be held on February 1, 2022.

ATTORNEY IMMUNITY
Evidence

***Taylor v. Tolbert*, 629 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2020), *pet. granted*, 65 Tex. Sup. Ct. J. — (Dec. 10, 2021) [20-0727]**

The question presented in this case is whether attorney immunity applies to an alleged violation of both the Texas Wiretap Act, Texas Penal Code § 16.02(b), and the Federal Wiretap Act, 18 U.S.C. § 2511(1). This appeal arises from a civil suit for damages filed against an attorney, Terisa Taylor, who allegedly violated both the Texas and Federal Wiretap Acts. The alleged violations occurred during a child-custody modification proceeding, where Taylor represented the ex-husband against his ex-wife, Vivian Robbins, who is one of the respondents in this case. Robbins alleged that her ex-husband provided Taylor with an iPad that was receiving Robbins' text messages and emails because it was logged in to her account, unbeknownst to Robbins. Taylor, in turn, allegedly provided the iPad to a forensic consultant, produced the communications to Robbins' attorney, used the communications in pleadings and disclosed them to the trial court, and threatened to display a posterboard during trial of an intercepted nude photograph of Robbins. Robbins, along with Nizzera Kimball and Carl Tolbert, two friends whose messages with Robbins had also been intercepted on the iPad, sued Taylor.

The trial court granted summary judgment based on Taylor's attorney immunity defense. The court of appeals reversed, finding the attorney immunity defense was precluded by Taylor's allegedly criminal conduct in violation of the Texas and Federal Wiretap Acts, which is foreign to the duties of an attorney.

In her petition for review, Taylor argues that the court of appeals erred because (1) it issued a categorical rule precluding attorney immunity for criminal allegations in violation of Supreme Court precedent, and (2) Taylor's actions as described in the pleadings were only for purposes of litigation preparation, which is normal attorney conduct that should be protected by attorney immunity. The Court granted the petition for review. A date for oral argument has not yet been set.

REAL PROPERTY
Dead Restrictions

***JBrice Holdings LLC v. Wilcrest Walk Townhomes Ass'n, Inc.*, 2020 WL 4759947 (Tex. App.—Houston [14th Dist.] 2020) *pet. granted* Dec. 07, 2021 [20-0857].**

This declaratory judgment suit addressed whether a property's deed restrictions allowed the property owners' association to prohibit an owner's short-term rentals of the property.

JBrice Holdings, LLC owned two townhomes in the Wilcrest Walk subdivision and leased them out as short-term rentals. The Wilcrest Walk property owners'

association demanded that JBrice cease renting the properties for short terms and later adopted rules prohibiting short-term rentals. Texas Property Code section 204.010(a)(6) allows property owners' associations in that county to make rules regulating property use unless the deed restrictions "otherwise provide."

The properties' deed restrictions included a leasing clause that allowed leasing of the properties in general and prohibited restrictions on the owner's leasing right other than those listed in the deed restrictions themselves. The deed restrictions also included a residential-use clause, which prohibited a property owner from using the property "for any purpose other than as a private single-family residence" for the owner or his tenants.

JBrice sought a declaratory judgment that the deed restrictions allowed short-term rentals. The Association counterclaimed for breach of several restrictive covenants. JBrice then asked the court to declare the Association's amended rules invalid. The Association moved for summary judgment on the declaratory judgment claim and its own claim that JBrice's use violated the residential-use restriction.

The trial court granted partial summary judgment to the Association on its claims that JBrice had breached the deed restrictions by renting for short terms. The court issued a permanent injunction on rentals of terms less than 7 days. The remaining issues were also decided in favor of the Association.

After JBrice noticed its appeal, the Supreme Court decided *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274, 291 (Tex. 2018), holding that residential-use deed restrictions in that case did not prohibit short-term rentals. JBrice chiefly relied on that holding on appeal, as well as on the leasing clause's express prohibition on additional leasing restrictions. But the court of appeals affirmed the trial court, concluding that the record supported the Association's assertion that the Property Code authorized it to adopt rules barring short-term rentals because, the court reasoned, the deed restrictions and other governing documents were silent as to short-term rental use, and thus they did not "otherwise provide." The court also rejected JBrice's contention that the attorney's fees award should be reversed.

JBrice appealed to the Supreme Court on the theories that the deed restrictions do "otherwise provide" and thus prohibit the Association from adopting rules barring short-term rentals, and that the Supreme Court's holding in *Tarr* applied to the deed restrictions at issue here. *See Tarr*, 556 S.W.3d at 291.

The Supreme Court granted the petition for review. Oral argument is set for February 2, 2022.

OIL & GAS
Offset production clause

***Martin v. Rosetta Res. Operating, LP*, 2020 WL 5887566 (Tex. App.—Corpus Christi–Edinburg 2020), *pet. granted*, — Tex. Sup. Ct. J. — (Dec. 10, 2021) [20-0898]**

This suit involves the interpretation of a mineral lease and asks (1) whether the lease's offset production clause created a general duty to protect against all drainage, even when the allegedly draining well did not trigger the duty; (2) whether the court of appeals relied on an argument barred by res judicata; (3) whether there was a fact dispute about the existence of drainage; and (4) whether the court of appeals erred by reversing a summary judgment on unchallenged claims.

Kevin Martin, Jamie Martin, and Ashley Lusk (the Martins) entered into a series of mineral leases. The leases contained an offset clause requiring the lessee to "protect the . . . undrilled acreage from drainage" if a well was drilled on or in a unit containing the leased acreage or on adjoining acreage. The original lessee assigned its rights to Rosetta Resources Operating, LP. Rosetta formed a pooled unit with other companies (collectively Newfield) containing part of the Martins' leased acreage and drilled a well (the Martin Well) on the unit. Newfield later drilled a well (the Simmons Well) on a separate, nonadjacent unit. The Martins sued Rosetta and Newfield under several theories, including breach of contract for failure to protect the undrilled leased acreage from drainage by the Simmons Well. The trial court granted Newfield's motion for summary judgment. The Martins appealed this judgment, and the court of appeals affirmed, holding that the Simmons Well did not trigger a contractual duty to protect because it was not on or adjoining the leased acreage.

Rosetta then moved for summary judgment as to all claims on essentially the same basis. The Martins moved for partial summary judgment on their contract claim, asserting a new theory that, by drilling the Martin Well, Rosetta triggered a general duty to protect against drainage, including from the Simmons Well. The trial court denied the Martins' motion and granted summary judgment for Rosetta as to all claims.

The court of appeals reversed and remanded with instructions to grant the Martins' motion. The court of appeals held that the leases created a general duty to protect the Martins' undrilled land against all drainage that was triggered when Rosetta drilled the Martin Well. The court held the Martins' new argument was not barred by res judicata. Finally, the court held Rosetta was required to spud an offset well or release the undrilled acreage because there was no dispute that drainage was occurring.

Rosetta petitioned for review, arguing that the court of appeals' creation of a general duty to protect against all drainage defied the language of the offset production clause in the lease and imposed an onerous burden. According to Rosetta, the duty to protect was limited to drainage caused by the well triggering the duty. Rosetta also argued that the Martins' theory was barred by res judicata, that Rosetta disputed the existence of drainage in the trial court, and that the court of appeals erroneously reversed the trial court's judgment as to claims not challenged on appeal.

The Court granted the petition, and the case is set for argument on February 2, 2022.

EMPLOYMENT LAW
Employment Contracts

***Perthuis v. Baylor Miraca Genetics Lab'ys*, 2020 WL 7062321 (Tex. App.—Houston [1st Dist.] 2020), *pet. granted*, — Tex. Sup. Ct. J. — (Dec. 10, 2021) [21-0036]**

The issue in this case is whether a sales executive who negotiated a long-term contract but was terminated before any sales were made is entitled to a million-dollar commission. Baylor Miraca Genetics Laboratories hired Brandon Perthuis to help develop genetic tests and serve as the company's head of sales. Perthuis's employment agreement stated "Your commission will be 3.5% of your net sales" but did not define "net sales" or explain the parameters of the commission structure.

Perthuis spent months negotiating a contract extension with Natera, one of BMGL's partners. BMGL fired Perthuis, then signed the Natera deal the following day with the same material terms that Perthuis negotiated. Over the next twenty months, BMGL brought in over forty million dollars in revenue from Natera. BMGL did not pay Perthuis commission on any of those sales.

Perthuis sued for lost commissions on the post-termination sales. The jury returned a verdict in favor of Perthuis, awarding him more than $962,000. The court of appeals reversed and rendered judgment that Perthuis take nothing. Focusing on the terms "commission" and "net sales," the court found that the plain language of the commission agreement indicated that it was intended as compensation for Perthuis's continued employment with BMGL. The court of appeals noted that the employment agreement called for net sales, not procuring buyers or for future sales that the salesman worked on but was unable to finalize.

Perthuis filed a petition for review, arguing that the court of appeals erred in declining to apply a "procuring cause" standard to his employment agreement when the agreement is silent on whether he is entitled to commissions on post-termination sales. In the absence of language in the employment agreement to the contrary, Perthuis argues that the procuring cause standard is the default rule. BMGL counters that the procuring cause standard is inapplicable because BMGL terminated Perthuis before any sales—the commission-earning event—materialized.

The Supreme Court granted the petition for review, and oral argument is set for February 2, 2022.

INSURANCE
Premium and Maintenance Taxes

***Hegar v. Health Care Serv. Corp.*, 2020 WL 7294614 (Tex. App.—Austin 2020), *pet. granted*, 65 Tex. Sup. Ct. J. — (Dec. 10, 2021) [21-0080]**

This tax dispute centers on the classification of stop-loss insurance issued to employers with self-funded health benefit plans. Health Care Service Corporation,

d/b/a Blue Cross and Blue Shield of Texas (BCBS) offers stop-loss insurance policies to employers that self-fund their employee's health benefit plans. Because employee healthcare costs can vary widely from year to year, self-insured employers expose themselves to unpredictable liability. Stop-loss insurance offers protection to these self-insured employers by placing a set cap on that employer's healthcare costs. The stop-loss insurer pays costs above that cap.

Texas Insurance Code § 222.002 (the premium tax) imposes a tax on premiums received from any policy that covers risks on individuals or groups located in the state and that arises from the business of health insurance. Texas Insurance Code § 257.003 (the maintenance tax) imposes a tax on premiums collected from writing health insurance in the state. Under protest, BCBS paid $3,005,270.13 in premium taxes and $68,691.89 in maintenance taxes. BCBS sued the Comptroller for a refund. The trial court granted summary judgment in favor of BCBS. The court of appeals affirmed.

The Comptroller filed a petition for review. The Comptroller argues that this type of stop-loss insurance is a form of health insurance and that stop-loss insurance covers risks on individuals or groups. Thus, these stop-loss premiums are subject to the premium tax and the maintenance tax. BCBS argues that stop-loss insurance is distinct from health insurance, and stop-loss insurance covers risks on entities—which are neither individuals nor groups. Thus, stop-loss premiums are not subject to the premium tax or the maintenance tax.

The Supreme Court granted the Comptroller's petition for review. Oral argument has been set for February 3, 2022.

NEGLIGENCE
Medical Malpractice

***Pediatrics Cool Care v. Thompson*, 2021 WL 307306 (Tex. App.—Houston 2021), *pet. granted*, (December 7, 2021) [21-0238].**

At issue in this case is whether there was legally sufficient evidence to support a jury's finding that a doctor's negligence caused a young girl's suicide.

A.W., a child, visited Pediatrics Cool Care's office with her mother, complaining of depression. A physician's assistant met with them, and prescribed A.W. Celexa, an antidepressant with a "black box" label warning that it could lead to adverse effects like suicidal ideation. Five months after this visit, A.W. completed suicide. Her parents sued Pediatrics Cool Care, alleging that they were negligent in their treatment of A.W., and that if they had met the standard of care, A.W. would not have harmed herself.

At trial, the plaintiffs relied on causation testimony from an expert psychiatrist for the proposition that, had the defendants met the standard of care by scheduling follow-ups with A.W., interviewing her out of the presence of her mother, etc., A.W. would likely be alive. A jury found for the plaintiffs. The defendants appealed, arguing that the expert's testimony was too conclusory to be reliable and that there was legally insufficient evidence to uphold the jury's verdict. The defendants also argued that the trial court applied the incorrect causation standard to this case—substantial-factor causation rather than the more stringent but-for test. The court of appeals affirmed the jury verdict, holding that the expert's testimony was not conclusory, that there was

legally sufficient evidence, and that the trial court did not err in applying the substantial-factor standard.

The Supreme Court granted Pediatrics Cool Care's petition for review. Oral argument has been scheduled for February 3, 2022.

PROCEDURE-APPELLATE
Jurisdiction

***Mitschke v. Behrens*, 2021 WL 386428 (Tex. App.—Amarillo 2020), *pet. granted*, __ Tex. Sup. Ct. J. __ (December 10, 2021), consolidated for oral argument with *Mitschke v. Borromeo*, 2021 WL 386429 (Tex. App.—Amarillo 2020), *pet. granted*, __ Tex. Sup. Ct. J. __ (December 10, 2021) [20-0331, 20-0326]**

These cases, consolidated for briefing, raise two issues. First, they concern whether misnumbering and misfiling a timely motion for new trial constitutes proper grounds for dismissal of the subsequent appeal as untimely. Second, they address whether transferee courts of appeals should apply principles of horizontal stare decisis when identifying a transferor court's controlling precedent.

Mitschke's son died in an All-Terrain Vehicle accident. Mitschke, individually and on behalf of his son's estate, brought negligence claims against Borromeo, Blackjack LLC, and several other defendants. The trial court granted Borromeo and Blackjack's motions for summary judgment. It subsequently severed Borromeo and Blackjack's claims and assigned them a new cause number. The claims against the other defendants remained pending in the original cause. Mitschke filed a motion for new trial that stated that its purpose was to appeal the summary judgment and extend the appellate deadlines. However, Mitschke filed the motion in the original cause number, not the new cause number corresponding to Blackjack and Borromeo's severed claims and the corresponding final judgment. Eighty-seven days later, Mitschke filed notices of appeal in both the original and severed actions stating his intent to appeal the summary judgment. The case was transferred from the Third Court to the Seventh Court as part of Texas' docket equalization program.

The Seventh Court dismissed the appeal in the original case for want of jurisdiction since it lacked a final judgment. The issue in the second case was whether Mitschke's misfiled motion for new trial extended the appellate timetable. The court of appeals acknowledged that under its own precedent, the mistake would not have precluded review. However, Texas Rule of Appellate Procedure 41.3 requires transferee courts of appeals to "decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court." Tex. R. App. P. 41.3. The Third Court's case law regarding this issue conflicts. Two recent cases held that a motion for new trial does not extend appellate deadlines. Yet, in two earlier cases the Third Court came to the opposite conclusion. The Seventh Court concluded that no authority squarely addresses how to apply Rule 41.3 in this

situation. Reasoning that it should apply the most recent case law from the Third Court on the question, it dismissed Mitschke's appeal for want of jurisdiction.

Mitschke appealed the ruling to the Supreme Court of Texas. He argues that the Supreme Court of Texas has long disfavored technical applications of procedural rules that deny litigants their right to appeal. To the extent that older precedent conflicts with this well-developed policy, it should be overruled. He claims that since his misnumbered motion for new trial constituted a bona fide attempt to invoke the appellate court's jurisdiction, it extended his time to appeal. He also argues that the Seventh Court should have relied upon principles of horizontal stare decisis when deciding which of the Third Court's precedents controlled under Rule 41.3. Under these principles, a court of appeals' earliest precedent controls over subsequent conflicting precedent. Therefore, the Seventh Court should have found that its case law is consistent with the Third Court's controlling precedent and heard his appeal on the merits.

The Supreme Court granted oral argument, which is set for February 3, 2022.

MUNICIPAL LAW
Drainage Fees

***Jones v. Turner*, 2020 WL 7074232 (Tex. App.—Houston[1st Dist.] 2020), *pet. granted*, — Tex. Sup. Ct. J. — (December 7, 2021) [21-0358]**

This is a suit challenging the CA's ruling that two municipal taxpayers lacked taxpayer standing to challenge Houston City Officials alleged illegal misallocation of their property tax proceeds. In November 2018, Houston voters passed Proposition A which amended the Houston City Charter to create a drainage and street fund receiving revenue from various sources, including fees imposed on real property owners. The fund was to ensure that Houston's drainage and streets could be maintained without issuing new bonds or otherwise incurring new debt.

In October 2019, James Jones and Allen Watson, municipal voters and taxpayers in Houston, sued Mayor Sylvester Turner and the members of the Houston City Council alleging that they violated the City Charter and exceeded their authority by misallocating funds from the drainage and street fund to other municipal services. The trial court denied the City Officials' plea for interlocutory appeal. The court of appeals reversed and dismissed the lawsuit for want of jurisdiction – specifically holding that Jones and Watson lacked standing to challenge the allocation of their property tax proceeds. A motion for reconsideration was filed *en banc*; however, the court of appeals denied the motion. Jones and Watson then filed a petition for review. The petition argues that Jones and Watson have taxpayer standing to challenge the expenditures because the funds are being expended in an illegal manner.

The Supreme Court granted the petition for review and has scheduled oral argument for February 22, 2022.