Case Summaries
January 28, 2022

Grants

EMINENT DOMAIN
Condemnation Authority and Valuation Testimony

***Hlavinka v. HSC Pipeline P'ship, LLC*, 605 S.W.3d 819 (Tex. App.—Houston [1st Dist.] 2020), *pet. granted*, — Tex. Sup. Ct. J. — (January 28, 2022) [20-0567]**

The primary issues in this case are whether (1) Texas law grants eminent domain authority to a pipeline owner shipping polymer grade propylene; (2) a pipeline shipping a product from the pipeline owner's sole manager to an unaffiliated customer constitutes a public use; and (3) the landowner may properly testify that the highest-and-best use of the taken land is as a pipeline corridor, and value the land through comparisons to past, private pipeline easement sales.

The pipeline at issue is owned by HSC and operated by Enterprise Products Operating, LLC. The pipeline transports polymer grade propylene (PGP). It begins in Texas City, runs through Brazoria County, and ends at a Braskem America facility near the coast. Braskem is not affiliated with HSC or Enterprise. Braskem is the only customer currently served by the pipeline, and Braskem purchases the PGP from Enterprise before it enters the pipeline.

The Hlavinkas own about 15,000 acres in Brazoria County. This land has many uses, but the Hlavinkas' primary purpose in buying the land was to sell pipeline easements. For the last decade or so, the Hlavinkas have negotiated about one pipeline easement per year on the property. HSC attempted to negotiate a right of way on the Hlavinkas' property. The parties could not reach a deal, and HSC initiated a condemnation proceeding. The Hlavinkas challenged HSC's eminent domain authority.

The trial court granted summary judgment for HSC on the issue of condemnation authority. At the valuation stage, the Hlavinkas sought to introduce testimony from Terrance Hlavinka (the landowner) that the highest and best use of the condemned land was a pipeline corridor worth $3.3 million. The trial court

excluded this evidence, and awarded the Hlavinkas $132,293.36—representing 108,967.36 for crop and surface damage and $23,326 for the easements and workspace. The parties entered a stipulation, listing issues that could be appealed.

The court of appeals determined that Texas law grants eminent domain authority to shippers of PGP. But it held that a fact issue existed as to whether this specific pipeline would be for a public use. The court of appeals declined to consider the Hlavinkas' challenge to the admissibility of certain affidavits supporting HSC's eminent domain authority, as the parties' stipulation did not include this as an appealable issue. Finally, the court of appeals determined that Terrance Hlavinka's testimony was admissible because he established that the taken land was a separate economic unit that should be valued as a pipeline easement.

Both parties filed petitions for review in the Supreme Court. The Hlavinkas argue that (1) Texas law does not grant eminent domain authority to a pipeline shipping PGP; and (2) the parties' stipulation did not prevent the Hlavinkas from challenging the admissibility of HSC's affidavits. HSC argues that (1) the pipeline is for a public use because it serves an unaffiliated customer who retains title to the product; and (2) Terrance Hlavinka's testimony should be excluded because it improperly uses the taking itself to define the separate economic unit, and relies on discredited valuation methodologies.

The Supreme Court granted the petitions for review. Oral argument has been set for February 23, 2022.

MEDICAL MALPRACTICE
Damages

***Columbia Valley Healthcare Sys., L.P. v. A.M.A.*, 2020 WL 4382264 (Tex. App.—Corpus Christi–Edinburg 2020), *pet. granted*, — Tex. Sup. Ct. J. — (January 28, 2022) [20-0681]**

The principal issue in this case is whether the district court is required to submit questions on life expectancy and annual healthcare expenses to the jury under the Periodic Payment Statute. Ana Ramirez (Ramirez) went to Valley Regional Medical Center (Valley Regional) for premature labor with her son. Ramirez was primarily under the care of her nurses. Her obstetrician was on call. During her stay, the baby's heartbeat repeatedly dropped. Ramirez's obstetrician performed an emergency c-section. The umbilical cord was tightly wrapped around the baby's neck, cutting off oxygen. The baby was ultimately diagnosed with cerebral palsy.

Ramirez sued Valley Regional for medical malpractice, alleging that the nurses were negligent in not calling her obstetrician earlier, causing severe oxygen deprivation to her son and thus his developing cerebral palsy. Valley Regional invoked Chapter 74 of the Texas Civil Practice and Remedies Code—the Periodic Payment Statute—which allows a party to request that the district court structure

any award of future medical expenses as periodic payments. The hospital further requested that the jury make findings on life expectancy and annual healthcare expenses as a basis for the court's periodic payment structure. The district court granted the request for periodic payments but denied its request for jury questions.

The jury awarded Ramirez about $10.3 million in damages. Ramirez submitted a proposed periodic payment structure that the district court accepted. Valley Regional appealed, challenging the district court's refusal to submit its jury instructions, the structure of the periodic payment award, and the sufficiency of the evidence. The court of appeals affirmed.

Valley Regional filed a petition for review, arguing that the district court erred in failing to submit questions of life expectancy and annual healthcare expenses to the jury because those findings were necessary for the district court to structure the periodic payments under the Periodic Payment Statute. Valley Regional separately argues that the periodic payment structure was against the evidence and the jury verdict.

The Supreme Court granted Valley Regional's petition. Oral argument will be heard on February 23, 2022.

JURISDICTION
Standing

***Berry v. Berry*, 2020 WL 1060576 (Tex. App.—Corpus Christi-Edinburg 2020), *pet. granted*, __ Tex. Sup. Ct. J. __ (January 28, 2022)**

This case, a dispute regarding the lease of a family ranch, raises four primary issues. First, does a person named in a trust agreement as a contingent beneficiary have standing under the Trust Code to bring claims against trustees? Second, does a co-trustee of a trust have standing to bring claims against non-co-trustee third parties? Third, does a co-trustee of a trust that owns a limited partnership share of a partnership have derivative standing to bring claims on behalf of the partnership? And fourth, is a co-trustee with arguable notice of other co-trustees' likely breach of fiduciary duty required to search public records for evidence of that breach?

The Berry family owns and operates various business, including the Flying Bull Ranch. The Ranch is controlled by a partnership with one limited and one general partner, and the limited partnership share is owned and controlled by a trust. The beneficiaries and co-trustees of the trust are the four Berry brothers, whose descendants are also trust beneficiaries. One of the brothers, Kenneth, and his daughter sued various family enterprises and Kenneth's brothers/co-trustees alleging that a lease of the Ranch to one of the family's businesses violated the partnership agreement and that his co-trustees had breached their fiduciary duty. The trial court granted the family's plea to the jurisdiction on the grounds that (1) the daughter did not have standing as a contingent beneficiary to sue; (2) Kenneth did not have standing as a trustee to bring claims against non-co-trustee third parties; and (3)

Kenneth did not have derivative standing to sue on behalf of the partnership. The trial court also granted the family's motion for summary judgment on the grounds that Kenneth was on notice of the alleged breach of fiduciary duty in 2012 because the lease at issue had been memorialized and recorded in the public county records. Consequently, the statute of limitations on Kenneth's claim had run and the claim was not timely. Kenneth appealed.

The court of appeals affirmed the grant of the plea to the jurisdiction and reversed the grant of summary judgment. It reasoned that the trial court was correct to find that Kenneth lacked derivative standing and standing to sue third parties and that his daughter lacked standing as a contingent beneficiary. It further held, based on the Supreme Court of Texas' 2018 ruling in *Archer v. Tregellas*, 566 S.W.3d 281 (Tex. 2018), that Kenneth had no duty to search county records for evidence of a lease on the Ranch. As such, Kenneth's breach of fiduciary duty claim did not accrue until 2015, when he allegedly discovered the lease at issue, and the claim was timely.

Both parties appealed the ruling to the Supreme Court of Texas. Kenneth's petition argues that the holdings that he and his daughter lack standing were contrary to the text of the Trust Code. The family's cross-petition argues that Kenneth had constructive notice of the lease well before 2015 and that the court of appeals misread *Archer* in holding that Kenneth was not required to search the county records. The Supreme Court granted both petitions for review and has set oral argument for February 24, 2022.

REAL PROPERTY
Zoning & Ordinances

***Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, 610 S.W.3d 521 (Tex. App.—Amarillo 2020), *pet. granted*, — Tex. Sup. Ct. J. — (Jan. 28, 2022) [20-0855]**

The issues in this case are (1) whether a homeowners' association has standing to sue a planning and zoning commission for approving a nonconforming plat, and (2) whether mandamus relief is available to compel that commission to rescind its approval of the plat until the plat complies with relevant regulations.

Escalera Ranch is a subdivision located in the City of Georgetown's extraterritorial jurisdiction. The Escalera Ranch Owners' Association, the HOA representing residents in the subdivision, opposed a plat application for an adjoining subdivision, alleging it violates the City's unified development code regarding access and traffic levels. The City's Planning and Zoning Commission approved the plat application despite these concerns.

The HOA sued the members of the Commission in their official capacities. The HOA sought injunctive relief and a writ of mandamus to correct the Commission's approval of a nonconforming plat. The Commission filed a plea to the jurisdiction, arguing that the HOA lacked standing and that mandamus relief was not available because the Commission had a ministerial duty to approve the plat as submitted. The trial court granted the Commission's plea.

The court of appeals reversed. The court held that the HOA had associational standing to sue on behalf of its members because the alleged injury was particularized and specific to Escalera Ranch residents. The court also held that the HOA may be entitled to mandamus relief because the Commission failed to conclusively establish it performed a purely ministerial act.

The Commission filed a petition for review. The Commission argues that the HOA's members have not suffered an injury in fact because they do not have a legally protected interest in avoiding increased traffic. The Commission also contends that mandamus relief is inappropriate because the plat complies with regulations and thus the Commission had a duty to approve it. The HOA counters that its members would have standing because they are at imminent risk of suffering a particularized injury. The HOA further argues that the Commission's decision to approve a nonconforming plat was discretionary. Thus, the HOA should be given an opportunity to prove that the Commission abused its discretion, warranting mandamus relief.

The Supreme Court granted the Commission's petition for review. The case is set for argument on February 23, 2022.

FAMILY LAW
Termination of Parental Rights

***Tex. Dep't of Family & Protective Servs. v. N.J.*, 613 S.W.3d 317 (Tex. App.—Austin 2020), *pet. granted*, ___ Tex. Sup. Ct. J. ___ (January 28, 2022) [20-0940]**

At issue in this parental rights termination case is whether the trial court acquired personal jurisdiction over the mother, N.J.

N.J. was a minor when she gave birth. The Department of Family & Protective Services opened an investigation after receiving a report of negligent supervision and that N.J. was engaging in illegal drug use. Shortly thereafter, N.J. was arrested for assaulting her father, with whom she was living at the time, and was placed in a juvenile detention center. The Department filed for conservatorship of the child and termination of N.J.'s parental rights. The child was removed from N.J.'s care after an emergency hearing. N.J. was not served with citation, but the Department requested the trial court appoint N.J. an attorney ad litem, which the trial court did.

At the ensuing adversarial hearing and subsequent hearings, N.J. and her attorney ad litem personally appeared and participated. N.J. and her attorney ad litem also personally appeared and participated in the three-day jury trial, and N.J. testified. N.J.'s parental rights were terminated. N.J. appealed, asserting that the trial court lacked personal jurisdiction over her because she was never personally served.

The court of appeals agreed. The court of appeals stated that although N.J. appeared, which would normally have waived personal service, she was a minor and therefore lacked capacity to consent to suit except as otherwise provided by law. The court further stated that N.J. could only have been joined to the suit by either personal service or through her legal guardian or next friend. Since N.J. did not

appear with a guardian and was not personally served, the court of appeals held that trial court lacked jurisdiction. The court of appeals accordingly reversed and remanded for a new trial.

The Department argues on petition for review that N.J.'s attorney ad litem served the dual role of attorney and guardian ad litem, and therefore her appearance with N.J. at the hearings and trial before the trial court effectively waived personal service on N.J. The Department thus asserts N.J.'s interests were adequately protected and the trial court had personal jurisdiction. N.J. disagrees, arguing that the attorney ad litem was not appointed to a dual role as guardian ad litem and her appearance with the attorney ad litem was not enough to adequately protect her interests.

The Supreme Court granted the petition for review. Oral argument has been set for February 24, 2022.

ADMINISTRATIVE LAW
Texas Water Code

***Pape Partners, Ltd, Glenn R. Pape, and Kenneth W. Pape v. DRR Family Properties, LP*, 623 S.W.3d 436 (Tex. App.—Waco 2020), *pet. granted* — Tex. Sup. Ct. J. — (January 28, 2022) [21-0049]**

The issue in this case is whether the Texas Commission on Environmental Quality (TCEQ) has original and exclusive jurisdiction over actions to try title to surface water rights.

Pape Partners, Glenn Pape, and Kenneth Pape (the Papes) sued DRR family Properties (DRR) to try title, to quiet title, and for claims of adverse possession and prescription with respect to a 1,086-acre property along the Brazos River. Both parties claimed an interest in certain water rights related to the property, and the TCEQ had recorded those claimed interests. The Papes originally sought an agency determination as to who owned the water rights, but TCEQ refused to decide the case. Agency staff said TCEQ lacks any process for adjudicating property rights such as surface water rights. The Papes sued DRR, and DRR filed a motion to dismiss for lack of subject-matter jurisdiction, contending that the case must be decided in the first instance by TCEQ.

The district court granted the motion to dismiss, and the court of appeals affirmed. The court of appeals held, over a dissent, that the Texas Water Code creates a pervasive regulatory scheme that indicates a legislative intent to confer original and exclusive jurisdiction over adjudication of water rights to TCEQ. The Papes filed their petition for review in the Texas Supreme Court on the issue of whether TCEQ has original and exclusive jurisdiction.

The Papes contend that only an express conferral of original jurisdiction on the TCEQ is sufficient to establish an exhaustion requirement when property rights are

at issue. The Papes further contend that, even if only pervasive regulation is required, that standard is not met here. They also argue that interpreting the statute to confer such jurisdiction would violate the separation of powers created by the Texas Constitution. DRR, in response, contends that precedent establishes the constitutionality of a such a conferral of jurisdiction and that the Water Code creates a pervasive regulatory scheme sufficient to satisfy the standard for inferring an exhaustion requirement. Finally, DRR also contends that the Papes should have sought judicial review of the administrative decision to record the claims using the procedural framework established by the Water Code, the Administrative Code, and the Government Code.

Various amici, including TCEQ, support the Papes' position, and TCEQ expressly disclaims jurisdiction over adjudication of surface water rights under the facts here.

The Court granted argument on the Papes' petition on January 28, 2022. Oral argument will be heard on March 24, 2022.

JURISDICTION
Collateral Attack

Mitchell v. Map Resources, Inc., 615 S.W.3d 212 (Tex. App.—El Paso 2020) *pet. granted* Jan. 25, 2022 [21-0124]

At issue in this case is whether courts are barred from considering deed records in a collateral attack on a default judgment. A second issue is whether a rule that bars such evidence shields a default judgment from an otherwise meritorious due process claim. Other issues raised are whether a property owner's due process rights were violated in obtaining the default judgment and whether the doctrine of laches or provisions in the Tax Code bar a collateral attack on the judgment.

In 1999, Reeves County taxing authorities sued several hundred property owners, including Elizabeth Mitchell, for delinquent taxes. The taxing districts served the defendants by posting notice at the Reeves County courthouse after the districts' attorney attested in an affidavit, pursuant to Texas Rule of Civil Procedure 117a, that the defendants' names or addresses were unknown or unable to be ascertained after diligent inquiry. At the tax trial, the court entered a default judgment against all of the defendants, placing liens on their property interests and ordering their sale. Map Resources acquired the property belonging to Elizabeth Mitchell after her interest was foreclosed.

In 2015, Elizabeth Mitchell's heirs sued for a declaratory judgment, claiming that the tax judgment is void and that the subsequent deed attesting to Map Resources' ownership is also void. The Mitchells alleged that eight warranty deeds that included her address were recorded in county deed records. The Mitchells argue that service of process was constitutionally deficient, and the trial court thus failed to obtain jurisdiction. Map Resources raised defenses of limitations, failure to comply with statutory conditions precedent, waiver, and laches. Map Resources also moved for

summary judgment on the grounds that the county records were barred from review by the rule prohibiting the review of extrinsic evidence when collaterally attacking a judgment. The trial court granted Map Resources' motion for summary judgment, denied the Mitchells' summary judgment motion, and ordered a take-nothing judgment on their claims for declaratory judgment.

A divided court of appeals affirmed. The majority determined that the deed records constituted extrinsic evidence that could not be used to collaterally attack the judgment, and regardless, the Mitchells had not conclusively proved that the trial court had lacked jurisdiction. A concurring justice questioned the rule barring consideration of extrinsic evidence in collateral attacks in these circumstances. And a dissenting justice would have allowed review of the deeds when due process rights are at issue. The dissent also reasoned that the evidence was enough to establish jurisdictional defects and thus would have reversed.

The Mitchells petitioned for review. They argue that deeds in county records are not extrinsic evidence in these circumstances because the taxing district and the trial court incorporated them by reference in the pleadings and the judgment. They also argue that due process rights take precedence over evidentiary rules, so the bar on extrinsic evidence in collateral attacks does not apply. Map Resources contests the Mitchells' arguments and raises the defense of laches.

The Supreme Court granted the Mitchells' petition for review and will hear oral argument on February 22, 2022.

JURISDICTION
Personal jurisdiction

***State v. Volkswagen Aktiengesellschaft*, 2020 WL 7640037 (Tex. App.—Austin 2020), *pet. granted*, — Tex. Sup. Ct. J. —, Jan. 28, 2022 [21-0130].**
Consolidated with *State v. Audi Aktiengesellschaft*, 2020 WL 7640037 (Tex. App.—Austin 2020), *pet. granted*, — Tex. Sup. Ct. J. —, Jan. 28, 2022 [21-0133].

The sole issue in this petition is whether Texas courts have personal jurisdiction over a nonresident defendant when that defendant directs its actions toward the United States as a whole, but not Texas specifically. Volkswagen Aktiengesellschaft (VW Germany) and its subsidiaries, including Audi Aktiengesellschaft (Audi Germany) and Volkswagen Group of America, Inc., violated U.S. environmental laws by installing defeat devices in their cars. Defeat devices reduce the effectiveness of a car's emissions system and are illegal in the United States. Seeking to avoid complying with federal environmental regulations, VW Germany and Audi Germany jointly decided to install defeat devices in their cars sold in the United States. When the defeat devices began to develop hardware failures, VW Germany and Audi Germany installed software fixes in in-use, post-sale cars throughout the United States. They did this by (1) issuing recalls and installing the software fixes and (2) updating the software when customers brought their cars in for normal maintenance. They never revealed the purpose of these software updates.

When these actions came to light, the state of Texas sued Volkswagen Group of America and other American entities in a civil environmental enforcement action, seeking civil penalties and injunctive relief for violations of the Texas Clean Air Act. Throughout the litigation, the parties have referred to the original factory installation of defeat devices as "original tampering." They have used the term "recall tampering" for the allegations of installing the software fixes via recall and service campaigns. The American defendants moved for summary judgment, arguing that federal law preempted the State's claims. The State later added VW Germany and Audi Germany as defendants. The trial court granted partial summary judgment for the defendants on the original-tampering claims, denying it as to the recall-tampering claims. The German entities specially appeared; when the trial court denied their special appearances, the German entities filed an interlocutory appeal.

A divided court of appeals reversed and dismissed the claims against the German entities, holding that they had not purposefully availed themselves of Texas because they directed recall-tampering toward the United States as a whole, not Texas specifically. Texas courts therefore had no personal jurisdiction over them.

The State filed a petition for review, arguing that the German entities purposefully availed themselves of Texas's jurisdiction by effectuating the recall campaigns through an American subsidiary and by maintaining ongoing relationships with the cars. The German entities counter that because their conduct was directed toward the United States as a whole, not Texas specifically, they did not purposefully avail themselves of Texas. The Court granted the petition for review, consolidating the cases for oral argument; argument has been set for February 22, 2022.

MUNICIPAL LAW
Authority

***Builder Recovery Services, LLC v. Town of Westlake*, 2021 WL 62135 (Tex. Ct. App.—Fort Worth 2021), *pet. granted*, 65 Tex. Sup. Ct. J. ___ (Jan. 28, 2022) [21-0173]**

The issues in this case are (1) whether Texas Health and Safety Code § 363.111 empowers a Type A general-law municipality to impose licensing requirements on commercial solid waste operators and impose a percentage of revenue fee; (2) whether a municipal ordinance adopted by Westlake is preempted by Texas Health and Safety Code § 361.0961; (3) whether the license fee imposed by Westlake's ordinance is an unconstitutional occupation tax, and whether this issue was mooted when Westlake lowered the fee from 15% to 3%; and (4) whether the court of appeals erred by remanding the issue of attorney's fees to the trial court.

Builder Recovery Services, LLC (BRS) is a temporary construction waste service provider that operates in Westlake, a Type A general-law municipality. Westlake adopted Ordinance No. 851, which permitted non-franchised waste collection services like BRS to operate in the town. The Ordinance established a

license requirement and a license fee equal to 15% of the gross revenue obtained from operating in Westlake. The parties dispute whether the fee amount is related to administrative costs or was chosen to punish BRS for resisting the Ordinance. BRS sough a temporary injunction, which was not awarded after a hearing.

Of BRS's five requests for declaratory relief, the trial court denied four and granted one. After the trial court's final judgment, Westlake amended the Ordinance to decrease the license fee from 15% to 3%. Both parties appealed. The court of appeals affirmed in part and reversed in part, holding that (1) Westlake had no statutory authority to impose the license requirements and fees; (2) the Ordinance was not preempted by Health and Safety Code § 361.0961; (3) BRS's challenge to the 15% fee was moot; and (4) BRS's attorney's fees claim should be remanded to the trial court.

BRS sought relief in the Supreme Court, appealing all four of the court of appeals' holdings. The Court granted its petition for review and a date for oral argument has been set for March 23, 2022.

APPELLATE PROCEDURE

Warren Chen and DynaColor, Inc. v. Razberi Technologies, Inc., et al., 2020 WL 6390507 (Tex. App.—Dallas 2020, *pet. granted*, __ Tex. Sup. Ct. J. ___ (Jan. 28, 2022)[21-0499])

The issue is: Does an interlocutory appeal of a special appearance become procedurally moot when the trial court enters a final judgment merging the denial of the special appearance into the final judgment?

After Razberi sued for fallout from a business deal, Chen and DynaColor each specially appeared. The trial court denied those special appearances and began exercising jurisdiction over both. Chen took an interlocutory appeal under Civ. Prac. & Rem. § 51.014(a)(7), so the parties briefed an interlocutory appeal, while the merits disputed raged on below as the court of appeals denied a stay. With the jurisdictional issue fully briefed above, the trial court granted summary judgment and rendered a final judgment against Chen and merged all previous orders into the judgment. Chen did not file a notice of appeal from the final judgment. Razberi then moved to dismiss the interlocutory appeal as procedurally moot. The court of appeals granted Razberi's motion. Then, each side traded rehearing motions, leading the court of appeals to withdraw then reinstate the original opinion dismissing the interlocutory appeal as procedurally moot.

Chen petitioned to the Texas Supreme Court. He argues that Rule of Appellate Procedure 27.3, as interpreted by *ERCOT v. Panda Power Generation Infrastructure Fund*, 619 S.W.3d 628 (Tex. 2021) and *Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919 (Tex. 2011), saves his appeal. Razberi disagrees because *Panda Power* cites the

original court of appeals opinion, on the text of Rule 27.3, and because of the constitutional nature of mootness.

The Texas Supreme Court granted review on January 28, 2022. Oral argument is set for March 23, 2022.