OPINION SUMMARIES
APRIL 22, 2022

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OPINIONS

INTENTIONAL TORTS
Defamation

Mem'l Hermann Health Sys. v. Gomez, — S.W.3d —, (Tex. Apr. 22, 2022) [19-0872]

At issue in this defamation and business disparagement case was whether any evidence supported the jury's findings that certain statements were published and caused damages.

Miguel A. Gomez, III, M.D., was a cardiovascular surgeon at a Memorial Hermann hospital campus in Houston. When Methodist West opened a nearby campus, Gomez began to discuss splitting his practice between the two hospitals. A Memorial Hermann employee—Jennifer Todd—contacted a Methodist West employee—Cyndi Peña—to share concerns about Gomez's reputation as a surgeon. Peña had heard this before, and informed Methodist West's CEO. Methodist West hired Gomez. Meanwhile, Memorial Hermann began to review non-risk-adjusted surgeon mortality rates. This review flagged Gomez as a surgeon with a particularly high mortality rate. Gomez objected to the use of this data, arguing it was statistically invalid. However, a Memorial Hermann employee—Byron Auzenne—told Gomez that the data was being widely shared. Gomez eventually resigned his privileges at Memorial Hermann and moved his practice entirely to Methodist West.

Gomez sued Memorial Hermann for antitrust violations, and defamation (to him) and business disparagement (to his professional association). Gomez argued that Memorial Hermann used faulty data as part of a "whisper campaign" to ruin his reputation and prevent him from pulling patients to a rival hospital. The jury charge provided two statements in quotation marks—one from Auzenne to Gomez, and one from Todd to Peña—and asked the jury to answer the defamation and disparagement questions "with respect to" the quoted statements. The jury rejected Gomez's antitrust claims but awarded him over $6 million in damages for defamation and business disparagement. The court of appeals affirmed, holding that Auzenne's statement encompassed the mortality data generally, and that Todd's statement represented the alleged whisper campaign.

The Supreme Court reversed and rendered judgment for Memorial Hermann. The Court first interpreted the jury charge, which provided specific quoted statements, instructed the jury to answer the questions "with respect to" the provided statements, and referred the jury back to "the statement." The Court held that the jury charge only asked the jury about the quoted statements themselves, not the mortality data in general or the alleged whisper campaign.

Accordingly, the Court held that no evidence supported the jury's finding that Auzenne's statement to Gomez was published. Auzenne made the statement to Gomez alone. There was no evidence that the quoted statement properly before the jury was communicated to a third party besides Gomez. Similarly, the Court held that no evidence supported the jury's finding that Todd's statement to Peña caused any of Gomez's claimed damages. The Court reasoned that the jury charge did not encompass a widespread whisper campaign but asked about the specific statement that Todd made to Peña. The evidence showed that Peña had already heard from others what Todd reported to her. Nothing connected Peña to any of Gomez's referring physicians. While Peña informed Methodist West's CEO of what she heard, no harm came of it—Methodist West still offered Gomez a position at the hospital.

INSURANCE

Insurer's Tort Liability

Elephant Ins. Co., LLC v. Lorraine Kenyon, — S.W.3d — (Tex. Apr. 22, 2022) [20-0366]

The issue in this wrongful-death and survival action is whether an automobile insurer owed an insured motorist a duty either to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request.

Following a single-vehicle automobile accident, the insured called her husband from the accident scene and then called her insurer to report the accident. In response to the insured's inquiry about whether to take pictures, the insurer's call center representative replied, "Yes, ma'am. Go ahead and take pictures." At some point, the insured's husband arrived at the accident scene, and while taking pictures, he was struck and killed by another vehicle. The insured sued the insurer under negligence and gross-negligence theories that were based, in whole or part, on the insured's contention that the insurer's call-center employee was negligent in "instructing" her to take unnecessary photographs of a single-vehicle accident because the instruction substantially increased the risk of harm to her husband and such photos would be of nominal or no value in processing any claim. The insured argued that, given the "special relationship" between them, the insurer had a general "duty to act as a reasonable and prudent insurance company" and breached that duty "when it instructed the insureds to take photographs."

The trial court denied the insurer's motion for summary judgment on the insured's policy-benefits claims but granted summary judgment on the insured's negligence claims, ruling the insurer "owed no duty" to the insured or her husband with respect to those claims. Deeming the duty issue a controlling question of law, the court authorized a permissive appeal as to the portion of the summary-judgment order pertaining to that question.

The court of appeals affirmed in a divided panel opinion. On en banc rehearing, the court split again but came to the opposite decision, reversing and remanding. Strictly construing the permissive appeal as constrained to the existence of any duty at all, the court held that (1) insurers generally owe their insureds a duty of good faith and fair dealing and (2) the insurer failed to conclusively negate that duty because the record bore some evidence that the "request or instruction [to] take accident scene pictures" had "[some]thing to do with the processing [or paying] of claims." The court further held that the insurer had voluntarily undertaken a duty for the insured's benefit or protection and, in doing so, increased the risk of harm to the insured and her husband. Finally, and in response to the dissents, the court held that even if a duty did not already exist between insurer and insured, one should be recognized based on the *Phillips* factors—an array of considerations courts balance in determining the existence and parameters of a common-law duty. *See Greater Hous. Transp. Co. v. Phillips*, 801, S.W.2d 523, 525 (Tex. 1990). The dissents asserted that the majority had adopted a "new duty" and, along the way, had misapplied the *Phillips* factors, the duty of good faith and fair dealing, and the common-law negligent-undertaking theory.

The Supreme Court unanimously reversed. The Court first clarified that once accepted by an appellate court, a permissive interlocutory appeal is an appeal like any other. That being the case, and in light of such an appeal being from "the order," the scope of review is not strictly construed with respect to the controlling question of law. Here, the question of the insurer's duty involved not only the existence but also the scope of any duty, and the Court held that the insured's negligence claims failed for want of an *applicable* legal duty. The Court explained that (1) the duty of good faith and fair dealing applies to an insurer's sharp practices and, thus, does not encompass the conduct alleged here; (2) the *Phillips* factors do not weigh in favor of recognizing a new duty requiring insurers to refrain from requesting accident-scene photos or of doing so only with a safety admonishment; and (3) the insurer did not, by answering a phone call and responding to a question about taking photographs, voluntarily undertake an affirmative course of action that was "necessary" to "protect" the insureds or their property from "harm." The Court therefore rendered a take-nothing judgment for the insurer on the insured's negligence and gross-negligence claims.

The concurrence opined that, in the modern era, it is unlikely courts could properly "discover" a new duty lurking in the shadows, especially when, as here, the degree of positive law and regulation is considerable. The concurrence suggested that, in an appropriate case, the Court might re-examine the judicial role in recognizing tort duties, observing that the *Phillips* factors require "weighing" and "balancing" considerations that are more suited for the legislative branch than the judiciary.

MEDICAL MALPRACTICE

Damages—Periodic Payments Statute

Columbia Valley v. A.M.A., — S.W.3d — (Tex. Apr. 22, 2022) [20-0681]

In this medical negligence case, the jury awarded more than $10 million to the plaintiff, who was born with his umbilical cord wrapped tightly around his neck and later was diagnosed with cerebral palsy. The jury found that his injuries were caused by the defendant because, for example, nurses long delayed calling the obstetrician

after observing the baby's heartrate drop dangerously. The defendant asked the trial judge to apply the Periodic Payments Statute to the award of future medical damages. *See* Tex. Civ. Prac. & Rem. Code § 74.501, *et seq*. The trial court awarded $604,000 annually for five years and ordered that the remainder be paid to a special-needs trust up front and in a lump sum. After trial, the defendant challenged the jury award and the application of the periodic-payments statute. The court of appeals affirmed the trial court.

The Supreme Court's only other opinion interpreting the periodic-payment statute, *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020), was published after the trial court made its decision in this case. In *Regent Care*, the Supreme Court examined the periodic-payment statute for the first time and gave guidance to trial courts in applying the statute to jury awards. Because the trial court made its decision without *Regent Care*'s guidance, the Supreme Court remands the case to the trial court to apply the periodic-payments statute in light of *Regent Care* and this opinion.

Accordingly, the Court affirms the jury award but reverses the lower courts' decision on the application of the periodic-payments statute. Specifically, the trial court must point to evidence, either contained in the record or gathered in further hearings about the structure of the periodic payments, to justify how it structures any periodic-payments order, including any amount paid up front as a lump sum. The court's order cannot contradict the jury award. Finally, the award must not evade the statutory requirement that payments of future medical costs cease if the beneficiary dies before the payments are complete. *See* Tex. Civ. Prac. & Rem. Code § 74.506(b).

Therefore, the Court affirms in part and reverses in part and remands for further proceedings regarding the periodic-payments award structure.

REAL PROPERTY

Deed Restrictions

JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n, Inc., — S.W.3d — (Tex. Apr. 22, 2022), [20-0857]

This declaratory judgment suit involves whether neighborhood deed restrictions prohibited a property owner's short-term rentals of the property.

JBrice Holdings, L.L.C. 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, claiming rule-making authority under Texas Property Code Section 204.010(a)(6). The neighborhood deed restrictions included a leasing clause that allowed leasing of the properties in general and prohibited restrictions on an owner's leasing rights other than those listed in the deed restrictions themselves. The deed restrictions included a residential-use clause that prohibited use of 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 its short-term rentals. The association counterclaimed for breach of the restrictive covenants and passed rules prohibiting short-term leases of fewer than 30 days. JBrice then asked the court to declare the association's amended rules invalid. The

trial court granted partial summary judgment to the association on its claim that JBrice had breached the deed restrictions by renting for short terms. The court issued a permanent injunction on rentals of fewer than seven days and awarded attorney's fees. The court of appeals affirmed, concluding that Property Code Section 204.101(a)(6) authorized the association to adopt rules barring short-term rentals because the deed restrictions were silent as to short-term use.

The Supreme Court reversed the judgment of the court of appeals, vacated the permanent injunction, and remanded the case for consideration of attorney's fees. The Court held that, under *Tarr v. Timberwood Park Owners Assoc., Inc.,* 556 S.W.3d 274, 291 (Tex. 2018), the residential-use covenant did not prohibit short-term rentals. Further, because the deed restrictions expressly prohibited restraints on leasing other than those contained within the covenants themselves, the association had no authority to adopt rules prohibiting short-term rentals under Property Code Section 204.101(a)(6).

STATUTE OF LIMITATIONS

Tolling

Zive v. Sandberg, — S.W.3d —, 2022 WL — (Tex. Apr. 22, 2022) [20-0922]

At issue in this case was whether the rule announced in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991)—that the statute of limitations for a legal malpractice claim is tolled until all appeals of the underlying action are concluded—applies to appellate proceedings in which the malpractice plaintiff does not participate. Jeffrey R. Sandberg represented Youval Zive in a deficiency action arising out of Zive's personal guaranty of a loan. Settlement attempts failed, allegedly because of Sandberg's malpractice, and the trial court entered summary judgment in the lender's favor. Zive and his co-parties appealed, and on April 1, 2016, the Supreme Court denied Zive's petition for review and the separate petition filed by his co-parties. Zive took no further action regarding his petition, and when his co-parties filed a petition for writ of certiorari in the United States Supreme Court, he did not attempt to join or otherwise support their petition.

On October 1, 2018, Zive filed this legal malpractice suit against Sandberg. Sandberg moved for summary judgment, arguing that Zive's malpractice claim accrued on April 1, 2016, and therefore was barred by the two-year statute of limitations. The trial court granted Sandberg's motion and rendered a take-nothing judgment. The court of appeals affirmed. A dissent contended that Hughes tolling should encompass the period in which further appellate relief is available to a party, even if the party ultimately does not pursue it.

The Supreme Court affirmed the court of appeals' judgment. First, the Court held that Hughes tolling extends through only the appellate proceedings in which the malpractice plaintiff participates. Noting its preference for bright-line rules, the Court concluded it would be easier for courts and litigants to calculate Hughes tolling's end date by looking to the last action taken by the malpractice plaintiff. The Court also observed that this rule did not impose a burden on the malpractice plaintiff, who could benefit from Hughes tolling during the pendency of appellate proceedings initiated by a co-party so long as he joined in those proceedings. Finally, the Court reasoned that this rule was most consistent with the general principle that a reversal

on appeal as to one party does not warrant a reversal as to non-appealing parties.

The Court further held that for purposes of Hughes tolling, the date on which the litigation is "finally concluded" is the date the court in which the case is pending rules on the last action taken by the malpractice plaintiff. Although it acknowledged that there were other potential terminal points, the Court determined that these alternatives would overcomplicate the straightforward Hughes analysis. Applying Hughes to this case, the Court concluded that Hughes tolling ended on April 1, 2016, when the Court denied Zive's petition for review in the underlying case.

PROCEDURE—APPELLATE

Vacatur

DFPS v. N.J., — S.W.3d. — (Tex. Apr. 22, 2022) [20-0940]

The issue in this case is whether the Supreme Court should vacate the court of appeals' opinion after part of the case became moot on appeal.

The Department of Family and Protective Services initiated termination proceedings against 15-year-old N.J. three months after she gave birth. N.J. was never served with citation of the petition. The case went to trial, which N.J. participated in personally and through her court-appointed attorney ad litem. The jury returned a verdict terminating N.J.'s parental rights and appointing the Department as the child's managing conservator.

The court of appeals reversed and remanded the case for a new trial, concluding that the trial court lacked personal jurisdiction over N.J. The court held that N.J. could not waive service or consent to the court's jurisdiction because she is a minor.

The department petitioned for review. While the case was pending in the Supreme Court, N.J., now 18, executed an affidavit relinquishing her parental rights. The department declined to notify the Court of this development for over a year, and the Court granted the petition for review. Ten days before argument, the department moved to (1) dismiss the appeal as moot, (2) vacate the court of appeals' judgment, (3) vacate the trial court's judgment in part, and (4) vacate the court of appeals' opinion.

The Supreme Court granted the Department's motion in part. The Court held that the portion of the case appealed by N.J. was moot. Accordingly, the Court vacated the court of appeals' judgment and the portion of the trial court's judgment terminating N.J.'s parental rights. But the Court rejected the department's request to vacate the court of appeals' opinion. The Court concluded that vacatur of the court of appeals' opinion did not serve the public interest because (1) a parent's decision to voluntarily terminate his or her parental rights is not one that would be motivated by a desire to manipulate precedent, and (2) the department substantially delayed notifying the Court of the events that rendered the case moot.

Justice Lehrmann filed a concurring opinion. The concurrence agreed with the Court's opinion but emphasized that the Court's decision to let the court of appeals' opinion stand was not an endorsement of its rationale or holding.

TEXAS TIM COLE ACT
Eligibility for Compensation

In re G.S., — S.W.3d —, 2022 WL — (Tex. Apr. 22, 2022) [21-0127]

This case concerns whether an applicant under the Tim Cole Act adequately established his "actual innocence."

In September 2010, G.S. pleaded guilty to indecency with a child and was sentenced to seven years' imprisonment. Four years later, he applied for a writ of habeas corpus, arguing that his attorney had provided ineffective assistance by incorrectly advising him when he would be eligible for parole. After a hearing, the trial court recommended that the Court of Criminal Appeals reverse G.S.'s conviction. It did and remanded the case for a new trial. While the case was pending in the trial court on remand, G.S.'s alleged victim admitted that she had lied. The district attorney moved that the case be dismissed "pending further investigation."

In September 2015, G.S. applied for wrongful-imprisonment compensation under the Tim Cole Act. He included with his application a copy of the Court of Criminal Appeals' opinion granting him habeas relief based on the trial court's findings that G.S.'s attorney gave him "erroneous advice regarding parole eligibility." He also included a copy of the district attorney's motion to dismiss the charges.

The Texas Comptroller of Public Accounts denied G.S.'s application for compensation. G.S. filed an application to cure in November 2015 and included a copy of the alleged victim's written declaration recanting her accusations. The Comptroller denied that application as well.

In October 2016, the district attorney recommended that all records regarding G.S.'s arrest and conviction be expunged, which the trial court granted. Over the next four years, G.S. filed four more applications for compensation, with which he included copies of the expunction recommendation and order. The Comptroller denied all four. G.S. filed his petition for writ of mandamus in the Supreme Court.

The Court held that G.S. had not established that he is "actual innocent" as the Act requires. The Act provides three methods of establishing eligibility, two relevant to this case. The claimant can show he "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced," or that the trial court dismissed the charge against the claimant "based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and . . . the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced."

The Court held that G.S. did not establish that he was granted habeas relief "based on a court finding or determination" that he "is actually innocent of the crime" for which he was sentenced. G.S. argued he satisfied this eligibility method the same way the applicant did in *In re Allen*, 366 S.W.3d 696 (Tex. 2012), in which the Court held that the Court of Criminal Appeals implicitly made a *Schlup*-type actual-innocence finding when it granted habeas relief based on ineffective assistance of counsel. But G.S.'s habeas petition was not based on a *Schlup*-type claim for relief. *Schlup* applies when a procedural bar prevents a claimant from obtaining habeas relief despite the existence of new evidence establishing the claimant's actual innocence. G.S.'s constitutional claim was not procedurally barred and was, in fact, heard and ruled upon by the trial court and the Court of Criminal Appeals.

The Supreme Court then held that G.S. did not establish that the trial court dismissed the charge against him "based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and . . . the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced." Here, the trial court dismissed the case based on the district attorney's motion, but the motion stated only that the district attorney wished to dismiss "pending further investigation." The Court therefore denied mandamus relief.

Justice Lehrmann joined the majority opinion but also filed a concurring opinion to express her concern that the statute can in some cases deny relief to the very people the Act was intended to compensate. In this case, if the exculpatory evidence had surfaced earlier, G.S. could have been entitled to habeas relief on actual-innocence grounds and thus eligible for compensation under the Tim Cole Act. Or if the case hadn't been dismissed, the district attorney could have filed a motion with the requisite statutory language regarding a lack of credible evidence and the attorney's belief of G.S.'s actual innocence. Second, relief could hinge on the apparently unbridled discretion of the state's attorney to include or not include the requisite language in a motion to dismiss following receipt of exculpatory evidence. Justice Lehrmann suggested the legislature consider amending the Act to address these concerns.

ARBITRATION

Enforcement of Arbitration Agreement

In re Whataburger Restaurants LLC, — S.W.3d —, 2022 WL (Tex. Apr. 22, 2022) [21-0165]

There are two issues in this mandamus proceeding: (1) whether a party who does not receive notice of an order in time to appeal because of a trial court clerk's error may appeal; and (2) whether an arbitration agreement between Whataburger Restaurants LLC (Relator) and Yvonne Cardwell (Real Party in Interest) is illusory. On both issues, the Supreme Court held in Whataburger's favor.

In February 2013, Cardwell sued her employer, Whataburger, alleging that she had been injured while working as a dishwasher at one of Whataburger's El Paso restaurants. Whataburger moved to compel arbitration based on its mandatory arbitration policy. The trial court denied Whataburger's motion, holding that the policy was unconscionable. The court of appeals reversed the trial court's order and remanded with instructions to the trial court to grant Whataburger's motion and order arbitration, but the court of appeals failed to adjudicate Cardwell's cross-points. The Supreme Court granted Cardwell's petition for review, and without hearing oral argument, issued a short per curiam opinion reversing and remanding to the court of appeals to either address Cardwell's alternative arguments or remand the case to the trial court to address them. On remand, the court of appeals rejected all of Cardwell's remaining arguments but one: that the policy was illusory because Whataburger could revoke it at any time. The court declined to resolve the issue and instead remanded the case to the trial court because (1) neither party had entered the entire handbook into the record, and (2) it was unclear to the court of appeals whether the trial court had passed on the illusoriness issue when it denied Whataburger's motion to compel

initially.

From there, Whataburger filed a supplemental motion to compel arbitration addressing Cardwell's illusoriness argument. A month later, the trial court denied the motion with a one-sentence order (the August 2018 order). However, the clerk failed to give Whataburger or Cardwell notice of the order denying the supplemental motion to compel arbitration. Whataburger received notice of the order 153 days after it had been issued—long after both the 20-day deadline to appeal and the 90-day deadline extension allowed by TEX. R. CIV. P. 306a. Eight days after learning of the denial of its supplemental motion to compel, Whataburger moved for reconsideration and for a determination of the date it received notice of the order. The trial court denied the motion to reconsider. It then issued an order establishing that Whataburger had not received notice of its order denying the supplemental motion to compel within 90 days of its issuance. Whataburger sought mandamus relief in the court of appeals, and without hearing argument a divided court denied relief in January 2021.

The Supreme Court first held that Whataburger lacks an adequate appellate remedy by appeal. The Court reasoned that Whataburger was deprived of its right to appeal an interlocutory order by the trial court clerk's failure to give the required notice of the August 2018 order, and then by the trial court's refusal to vacate the August 2018 order and decide Cardwell's illusoriness challenge anew. The Court explained that counsel should have some right to rely on the text of TEX. R. CIV. P. 306a, which imposes a duty on clerks to provide notice of trial court orders. Further, the Court noted that Whataburger acted promptly to protect is right to appellate review upon learning of the August 2018 order, and as a result, it had not slept on its rights.

Second, the Court held that the trial court abused its discretion in denying Whataburger's motion to compel arbitration. Here, the Court addressed Cardwell's illusoriness argument, noting that the policy contains detailed restrictions on Whataburger's ability to change the policy. Pointing to a case with similar arbitration policy language, the Court concluded that the policy's restrictions on Whataburger's ability to modify or revoke the policy rendered it not illusory. The Court then turned to Cardwell's additional illusoriness argument: the policy's language conditions the parties' promises to arbitrate on Cardwell's continued, at-will employment. The Court again pointed to a prior case with substantially similar policy language that the Court had upheld. The Court explained that the policy here makes clear that the parties' agreement to arbitrate was not dependent on Cardwell employment status, and as a result the policy is not illusory.

For these reasons, the Court conditionally granted mandamus relief.

ARBITRATION

Enforcement of Arbitration Agreement

CHG Hospital Bellaire, LLC v. Johnson, — S.W.3d —, 2022 WL (Tex. Apr. 22, 2022) (per curiam) [21-0441]

This case concerns whether an employee's sworn testimony that she did not recall acknowledging an electronic arbitration agreement is sufficient to create a fact issue as to its validity. Seketa Johnson was injured on the job and sued her employer, CHG Bellaire, LLC, for negligence, gross negligence, and premises liability. CHG

moved to compel arbitration, arguing that the parties had consented to an enforceable arbitration agreement. The trial court denied the motion. The court of appeals affirmed, holding that Johnson's sworn testimony that she did not recall acknowledging the arbitration agreement at issue created a fact question as to its validity.

After the court of appeals issued its opinion, we decided *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021). CHG appealed, and the parties agreed that under *Aerotek*, Johnson failed to raise a fact issue as to whether she consented to the arbitration agreement. Accordingly, the Supreme Court reversed the court of appeals' judgment and remanded the case so it could consider Johnson's alternative argument that her claims do not fall within the scope of the arbitration agreement.