Case Summaries
December 16, 2022

Case summaries are prepared by court staff as a courtesy. They are not a substitute for the actual opinions.

OPINIONS

NEGLIGENCE
Railroad Crossing

Kan. City S. Ry. Co. v. Horton, 2021 WL 926281 (Tex. App.—Dallas 2021), *pet. granted* (Dec. 16, 2022) [21-0769]

This case, which arises from the collision of a train and a car at a railroad crossing, raises questions of federal preemption, evidentiary sufficiency, and charge error.

Ladonna Sue Rigsby was killed by a train operated by Kansas City Southern Railroad Company while driving across a railroad crossing. Her children sued the Railroad Company, alleging that its failure to correct a raised hump in the mid-point of the crossing and its failure to maintain a yield sign at the crossing were proximate causes of the accident. The jury found the Railroad Company and Rigsby both negligent and equally responsible for the accident. The trial court entered a judgment awarding the plaintiffs damages for the Railroad Company's negligence.

The Railroad Company appealed, raising three issues: (1) whether the federal Interstate Commerce Commission Termination Act preempts common-law tort suits against a railroad based on a humped crossing; (2) whether there is legally insufficient evidence to support a finding that the Railroad Company's failure to maintain a yield sign at the crossing proximately caused the collision; and (3) if one of the plaintiff's liability theories is invalid, whether the submission of both in a single broad-form question requires a new trial. A divided court of appeals reversed and remanded. The majority concluded that the plaintiffs' humped-crossing theory is preempted by federal law and that the submission of both the humped-crossing theory and the yield-sign theory in a single liability question was harmful error under *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). The court remanded for a new trial on the yield-sign theory alone.

Both sides petitioned for review. The plaintiffs challenge the court of appeals' holding that the humped-crossing theory is preempted by federal law, and the Railroad Company challenges the court of appeals' conclusion that the plaintiffs presented legally sufficient evidence of causation on the yield-sign theory. The Supreme Court granted both petitions and set oral argument for January 31, 2023.

ARBITRATION

Enforcement of Arbitration Agreement

Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley, 625 S.W.3d 569 (Tex. App.— Houston [14th dist.] 2021), *pet. granted* (Dec. 16, 2022) [21-0783]

The issue in this case is whether an arbitration agreement in a recorded deed runs with the land and therefore binds the home's successive purchasers.

A homebuyer purchased a house from Lennar Homes. Both the deed and the home's warranty, which was attached to the purchase agreement, included an arbitration agreement. The original homebuyer later sold the home to Kara Whiteley. Soon after Whiteley purchased the home, she sued Lennar for negligent construction and breach of implied warranties, alleging that construction defects caused a serious mold problem in her home.

The trial court initially stayed the case for arbitration over Whiteley's objection. The arbitrator denied Whiteley all relief and awarded Lennar attorney's fees and costs. But after arbitration, the trial court vacated the award against Whiteley. Lennar appealed.

The court of appeals affirmed, holding that Whiteley was not bound by the arbitration provision in the deed. Lennar also argued that four other, independent reasons required Whiteley to arbitrate her claims. But the court of appeals disagreed, holding that (1) Whiteley did not expressly or impliedly assume the arbitration agreement in the deed when she purchased the home; (2) Whiteley was not a third-party beneficiary of the warranty; (3) direct-benefits estoppel did not bind Whiteley to the arbitration agreement in the warranty; and (4) Whiteley did not waive her objection to arbitration by her actions during arbitration.

Lennar petitioned the Supreme Court for review. Lennar's main argument is that the arbitration provision in the recorded deed runs with the land, binding Whiteley and requiring her to arbitrate her claims. The Court granted the petition for review and set oral argument for January 31, 2023.

MUNICIPAL LAW

Authority

Hotze v. Turner, 634 S.W.3d 508 (Tex. App.— Houston [14th Dist.] 2021), *pet. granted* (Dec. 16, 2022) [21-1037]

This case concerns a pair of ballot propositions, Propositions 1 and 2, that were submitted to Houston voters in 2004. Both were designed to provide tax relief to city residents. The ordinance submitting them to an election included a "poison pill" provision after the text of Proposition 1. The provision stated that "[i]f another proposition for a Charter amendment relating to limitations in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective."

Both propositions passed but Proposition 1 received more votes. The city then refused to enforce Proposition 2, relying on the poison-pill provision in the election ordinance and Article IX, Section 19 of the Houston City Charter. The charter provision states that if "at any election for the adoption of amendments if the provisions of two or more proposed amendments approved at said election are inconsistent the amendment receiving the highest number of votes shall prevail."

Hotze, one of the citizens who had petitioned to get Proposition 2 on the ballot,

filed the underlying declaratory-judgment action to have Proposition 2 enforced. After dispositive motions and a bench trial, the trial court signed a judgment declaring that Proposition 2 is not effective due to the poison pill, the city-charter provision does not apply, and the city complied with Proposition 1. A divided court of appeals affirmed. The Supreme Court granted Hotze's petition for review and set oral argument for February 1, 2023.

PROCEDURE—TRIAL AND POST-TRIAL

Jury Instructions and Questions

Schindler Elevator Corp. v. Ceasar, 2021 WL 5570136 (Tex. App.—Beaumont 2021), *pet. granted* (Dec. 16, 2022) [22-0030]

This appeal concerns whether the trial court in this personal-injury case erred in excluding evidence, charging the jury, and imposing sanctions (including mid-trial document production) and whether those errors, if any, were harmful.

Darren Ceasar sued Schindler Elevator Corporation for personal injuries resulting from an elevator coming to an abrupt stop. At trial, the court refused to allow Schindler to introduce evidence of Ceasar's denied application for Social Security disability benefits and an earlier lawsuit for personal injuries. In the jury charge, the trial court refused to include a spoliation instruction regarding a post-accident video Ceasar had deleted, and it instructed the jury, over Schindler's objection, on *res ipsa loquitur*. The trial court also required Schindler to produce documents mid-trial and imposed monetary sanctions for discovery abuse against Schindler. The jury returned a 10–2 verdict for Ceasar.

Schindler appealed, raising several issues, including the exclusion of evidence, the jury charge, and the mid-trial document production and sanctions. The court of appeals rejected Schindler's arguments and affirmed the judgment.

Schindler petitioned the Supreme Court for review, asserting the trial court committed harmful error by (1) excluding evidence of Ceasar's disability application and earlier lawsuit, (2) instructing the jury on *res ipsa loquitur*, (3) refusing Schindler's requested spoliation instruction, and (4) requiring Schindler to produce documents during trial and imposing monetary sanctions.

The Court granted Schindler's petition and set oral argument for February 1, 2023.

OIL AND GAS

Royalty Payments

1776 Energy Partners, LLC v. Freeport-McMoRan Oil & Gas LLC, 2021 WL 6127930 (Tex. App.—San Antonio 2021), *pet. granted* (Dec. 16, 2022) [22-0095]

The issue in this case is whether a title dispute permits a payor of oil-and-gas proceeds to withhold payments without interest under the safe-harbor provision of the Texas Natural Resources Code. The safe-harbor statute permits payors of oil-and-gas proceeds to withhold payments without interest if there is a payee title dispute that would affect distribution of payments or reasonable doubt as to the payee's clear title.

Oil-and-gas operator Ovintiv agreed to pay 1776 Energy certain proceeds from the development of oil-and-gas interests. During the agreements' operative period, a third party sued and won a judgment against 1776 Energy. The judgment ordered 1776 Energy to transfer its legal title to the production payments. 1776 Energy promptly posted a supersedeas bond and appealed. In light of the judgment and appeal, Ovintiv

suspended its payments to 1776 Energy under the safe harbor. While the appeal was pending, 1776 Energy sued Ovintiv for wrongfully withholding production payments.

Ovintiv moved for summary judgment, arguing that the title dispute affected distribution of payments or engendered reasonable doubt as to 1776 Energy's clear title, so Ovintiv was entitled to suspend payments under the safe harbor. The trial court granted summary judgment, but the court of appeals reversed. The court of appeals held that Ovintiv was always obligated to pay 1776 Energy because the supersedeas bond suspended the judgment and 1776 Energy never relinquished legal title, so no title dispute affected the payments. The court of appeals also held that genuine issues of material fact precluded summary judgment on whether Ovintiv had reasonable doubt as to clear title because Ovintiv's corporate representative testified that Ovintiv knew that 1776 Energy would hold the assets until it transferred legal title, and because no other payor suspended payments to 1776 Energy.

Ovintiv petitioned for review, arguing that the safe harbor entitled it to suspend payments in light of the litigation, since it created reasonable doubt as to clear title and affected which payee would ultimately be entitled to the payments. The Supreme Court granted review and set oral argument for February 1, 2023.

PROCEDURE—PRETRIAL

Dismissal

CAE SimuFlite, Inc. v. Talavera, 2022 WL 202987 (Tex. App.—Dallas 2022), *pet. granted* (Dec. 16, 2022) [22-0180]

The main issues in this case are whether Texas should recognize a cause of action for educational malpractice and whether a trial court must grant a Rule 91a motion to dismiss any time a novel claim is asserted.

This case arises out of a plane crash in which the two pilots on board, Talavera and Flores, were killed. The pilots' heirs and representatives sued the two flight-training centers that trained the pilots, CAE and American, alleging negligent training and breach of contract. The pilots' lawsuit centered on the allegation that the crash resulted from the flight-training centers' inadequate training and instruction. Both CAE and American moved to dismiss the pilots' claims on the basis that Texas law has never recognized a claim for educational malpractice. The trial court denied the motions to dismiss but authorized a permissive interlocutory appeal. The court of appeals denied the petition and dismissed the appeal for want of jurisdiction.

The flight-training centers petitioned for review, arguing that (1) the pilots' claims are claims of educational malpractice; (2) Texas should not recognize a cause of action for educational malpractice; and (3) Rule 91a requires a trial court to grant a motion to dismiss any time a novel claim is asserted. The Supreme Court granted the petition for review and set oral argument for February 2, 2023.

TAXES

Property Tax

Iraan-Sheffield Indep. Sch. Dist. v. Pecos Cnty. Appraisal Dist., 645 S.W.3d 827 (Tex. App.—El Paso 2022), *pet. granted* (Dec. 16, 2022) [22-0313]

The main issue on appeal is whether Iraan-Sheffield ISD lawfully entered into a contingent-fee agreement with an attorney under Section 6.30(c) of the Texas Tax Code, which authorizes taxing units to hire private counsel on a contingent-fee basis "to represent the unit to enforce the collection of delinquent taxes."

The school district contracted with attorney D. Brent Lemon to pursue claims against Kinder Morgan for delinquent taxes. The district contends that Kinder Morgan inaccurately or fraudulently valued its mineral interests and, as a result, underpaid ad valorem taxes. The school district's challenge to the appraisal district's valuation was unsuccessful, so Lemon timely perfected an administrative appeal to the district court. In that proceeding, Kinder Morgan and the appraisal district jointly filed a Rule 12 motion to show authority, alleging the school district lacked statutory authority to hire Lemon on a contingent-fee basis. Kinder Morgan contends that Section 6.30(c) does not authorize Lemon's engagement because the school district's contract with Lemon is in reality a "tax ferret contract" to identify new property that is not on the tax rolls for a contingent fee. The trial court granted the motion, struck all pleadings filed by Lemon, and dismissed the suit with prejudice.

The court of appeals reversed and remanded, holding that despite having features of a tax-ferret contract, Section 6.30(c) authorized the engagement because "delinquent taxes," as used in Section 6.30, should not be given the restrictive, technical meaning derived from other provisions of the Tax Code.

Kinder Morgan and the appraisal district petitioned the Supreme Court for review, arguing that no statute, including Section 6.30(c), authorized the school district to enter into a contingent-fee agreement with Lemon because the engagement does not involve the collection of "delinquent" taxes as the word is used throughout the Tax Code. The Court granted Kinder Morgan and the appraisal district's petition for review and set oral argument for February 2, 2023.