



Case Summaries February 24, 2023

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OPINIONS

INTENTIONAL TORTS

Defamation

Lilith Fund for Reprod. Equity v. Dickson and Dickson v. Afiya Ctr., ___ S.W.3d ___, 2023 WL ___ (Tex. Feb. 24, 2023) [[21-0978](#), [21-1039](#)]

The issue in these consolidated cases is whether an advocate against legalized abortion defamed advocacy groups supporting legalized abortion when he called them “criminal organizations.”

Mark Lee Dickson lobbied the city council in Waskom to pass an ordinance declaring abortion an act of murder. The ordinance identified The Lilith Fund for Reproductive Equity, the Afiya Center, and Texas Equal Access Fund as “criminal organizations” because they assist individuals in obtaining abortions. Dickson reproduced portions of the ordinance on his Facebook page and added his own commentary that the groups are criminal organizations because they “exist to help pregnant Mothers murder their babies” and “murder innocent unborn children.” The groups sued Dickson for defamation in Travis and Dallas counties. In both suits, Dickson filed motions to dismiss under the Texas Citizens Participation Act, which were denied. The Fifth Court of Appeals affirmed, concluding that Dickson’s statements were not legally verifiable under the Texas Penal Code. The Seventh Court of Appeals reversed, holding that Dickson’s statements were constitutionally protected statements of opinion. The Supreme Court granted review and consolidated the cases for oral argument.

The Supreme Court held that a reasonable reader would conclude that Dickson’s statements were opinions that expressed disagreement with legal protections for abortion. Courts consider the entire context of an alleged defamatory statement from the perspective of a reasonable reader, who is knowledgeable of current events and sensitive to the manner of dissemination. A reasonable reader, apprised of the ongoing national debate surrounding abortion and informed by Dickson’s exhortatory, first-person tone, would understand Dickson’s speech to advance longstanding arguments about the morality and legality of abortion in the service of advocating that *Roe v. Wade* be overturned. Such opinions are constitutionally protected. An examination of the statements and their context shows no abuse of the constitutional right to freely speak. Dickson did not urge or threaten violence, nor did he misrepresent the underlying conduct in expressing his opinions about that conduct.

In a concurring opinion, Justice Devine wrote to emphasize that a prior declaration that the Texas abortion laws are unconstitutional did not remove them from the law books. Now that the declaration has been overruled, these prohibitions are enforceable.

GRANTED CASES

TEXAS CITIZENS PARTICIPATION ACT

Interpretation and Application

Winstead PC v. USA Lending Grp., Inc., 2021 WL 1047208 (Tex. App.—Tyler 2021), *pet. granted* (Feb. 24, 2023) [[21-0437](#)]

At issue in this case is whether the Texas Citizens Participation Act applies to legal malpractice claims.

Winstead represented USA Lending in its suit against a former employee and obtained a default judgment. After the court entered a final judgment, USA Lending discovered that Winstead had failed to request damages in its motion for default judgment. USA Lending sued Winstead for legal malpractice, alleging that Winstead's failure to seek damages breached the applicable standard of care and resulted in a loss of over \$1,000,000. Winstead filed a motion to dismiss under the TCPA, which the trial court denied.

The court of appeals reversed, holding that the TCPA applied to the claim, the Act's commercial-speech exemption did not apply, and USA Lending did not provide clear and specific evidence of causation. The court then remanded the case to the trial court with instructions to dismiss.

USA Lending filed a petition for review, asserting that its malpractice claim is not based on or in response to Winstead's "communications," as the TCPA requires, but instead is based on Winstead's failure to communicate. USA Lending also argues that, even if the TCPA applied, USA Lending has presented sufficient evidence of causation and damages to survive the motion to dismiss.

In contrast, Winstead argues that USA Lending's claim is rooted in Winstead's deficient motion for default judgment, which qualifies as a "communication." Moreover, Winstead contends that the commercial-speech exemption does not apply and that USA Lending has not presented clear and specific evidence to establish a *prima facie* case for its claim.

The Supreme Court granted the petition for review and set oral argument for March 21, 2023.

STATUTE OF LIMITATIONS

Tolling

El Pistolón II, Ltd. v. Levinson Alcoser Assocs., 627 S.W.3d 494 (Tex. App.—Corpus Christi—Edinburg 2021), *pet. granted* (Feb. 24, 2023) [[21-0797](#)]

The issue in this case is whether the statute of limitations is equitably tolled for a plaintiff's subsequent suit after the court dismissed the plaintiff's earlier suit based on its failure to file a statutorily compliant expert certificate.

Property owner El Pistolón sued Levinson for breach of contract and negligence, alleging that Levinson failed to competently design the architecture for a proposed shopping center. When a plaintiff claims damages arising from the provision of services

by a licensed architectural firm, Civil Practice and Remedies Code Chapter 150 requires the plaintiff to include with its petition a certificate of merit from a licensed architect attesting to the factual basis of the plaintiff's claims. The parties litigated whether El Pistolón's certificate of merit was sufficient. The trial court initially concluded that it was, but the Supreme Court reversed that decision seven years after El Pistolón filed its certificate and remanded the case. On remand, the trial court dismissed El Pistolón's claims without prejudice.

El Pistolón immediately refiled its suit against Levinson with a new certificate of merit, but the trial court granted summary judgment, concluding that El Pistolón's claims were now barred by the statute of limitations. The court of appeals reversed, holding that the statute of limitations was equitably tolled. The court of appeals relied on the legal impediment rule to conclude that the necessity of El Pistolón's subsequent lawsuit depended on the outcome of the appeal in the earlier suit, thus impeding El Pistolón from filing earlier.

Levinson petitioned for review, arguing that the court of appeals erred in extending the legal impediment rule outside the legal malpractice context. The Supreme Court granted review and set oral argument for March 21, 2023.

JURISDICTION

Personal Jurisdiction

LG Chem Am., Inc. v. Morgan, 2020 WL 7349483 (Tex. App.—Houston [1st Dist.] 2020), *pet. granted* (Feb. 24, 2023) [[21-0994](#)]

This appeal addresses personal jurisdiction over a foreign manufacturer and its U.S. subsidiary.

Tommy Morgan alleges that he suffered severe burns and other injuries when the lithium-ion battery inside of an e-cigarette exploded in his pocket. Morgan brought products-liability claims against several defendants, including the South Korean manufacturer of the battery, LG Chem, and its U.S. distributor, LG Chem America. LG Chem and LG Chem America each filed special appearances, which the trial court denied following a hearing. The court of appeals affirmed.

LG Chem and LG Chem America filed separate petitions for review, each arguing that it lacks the kind of relationship to the e-cigarette market or permanent presence in Texas that could give rise to personal jurisdiction. The Supreme Court granted the petitions for review and set oral argument for March 22, 2023.

ATTORNEYS

Escrow

Fischer v. Boozer, 2021 WL 5934465 (Tex. App.—Fort Worth 2021), *pet. granted* (Feb. 24, 2023) [[22-0050](#)]

The issue in this case is who is liable when parties to a settlement agreement place disputed funds in an account controlled by the attorney of one party, and the attorney steals the funds.

The CTMI parties and Fischer settled most of their claims arising from a previous dispute over the sale of a tax-consulting business. The settlement agreement provided that CTMI's attorney, Holmes, would hold the disputed funds in an escrow account until the conclusion of the litigation. Whichever party prevailed was entitled to the funds in the account. The Supreme Court ultimately ruled for Fischer. When Fischer went to collect the funds he was entitled to, the parties learned that Holmes

had absconded with the money.

CTMI sued Fischer for a declaratory judgment that CTMI had fulfilled its obligations under the settlement agreement by placing the disputed funds in Holmes' account. Fischer counterclaimed for breach of contract. The trial court rendered judgment for CTMI, but the court of appeals reversed. A main issue in the court of appeals was whether the settlement agreement created a valid escrow agreement. Relying on caselaw describing an escrow agreement as involving the deposit of funds with a neutral third party, the court held that the settlement agreement did not create an escrow agreement because Holmes was not a neutral third party. The court thus concluded that CTMI had breached the agreement by failing to pay Fischer the amount owed to him.

The Supreme Court granted CTMI's petition for review and set oral argument for March 22, 2023.

MUNICIPAL LAW

Authority

Emps.' Ret. Fund v. City of Dallas, 636 S.W.3d 692 (Tex. App.—Dallas 2021), *pet. granted* (Feb. 24, 2023) [[22-0102](#)]

The issues in this case are (1) whether requiring the board of a pension fund to approve amendments to the city code is an improper delegation of authority; and (2) whether an ordinance that changes one part of the city code constitutes an amendment to another part of the code.

The Dallas City Code houses the governing provisions of the City Employees' Retirement Fund. The Code provides that an ordinance amending those provisions must first be approved by the Retirement Fund's Board. Some members of the Board are elected by City employees. Without the Board's approval, the City passed an ordinance that imposes term limits on the Board's elected members. The Retirement Fund and the City each sought declaratory relief and filed cross-motions for summary judgment. The trial court granted the City's motion and rendered judgment in its favor.

The court of appeals reversed. It held that the ordinance amended the Retirement Fund's governing provisions because it fundamentally changed the qualifications to be an elected member of the Retirement Fund's Board. The court thus held that the portion of the ordinance that imposes term limits is invalid because the City failed to obtain the Board's approval.

The City petitioned the Supreme Court for review, arguing (1) that requiring the City to obtain the Board's approval to amend part of the City Code is an improper delegation of authority; and (2) that the ordinance does not amend the Retirement Fund provisions. The Court granted the petition for review and set oral argument for March 22, 2023.

GOVERNMENTAL IMMUNITY

Texas Tort Claims Act

City of Austin v. Quinlan, 2022 WL 261569 (Tex. App.—Austin 2022), *pet. granted* (Feb. 24, 2023) [[22-0202](#)]

This case concerns the City of Austin's immunity from premises-defect claims arising from an accident that occurred on a City-owned sidewalk. The City granted Guero's restaurant a permit to use a portion of sidewalk for outdoor restaurant seating. Guero's and the City also executed an agreement that required Guero's to comply with

maintenance requirements imposed by the City.

Quinlan was injured when she fell from an elevated edge of the sidewalk to the street below. She sued, alleging that the City negligently performed its obligations under the maintenance agreement, among other claims. The trial court denied the City's plea to the jurisdiction. A split panel of the court of appeals affirmed with respect to the maintenance-agreement claims. The majority concluded that the maintenance agreement created a fact issue on the jurisdictional fact of the City's control of the premises, precluding dismissal of those claims.

The Supreme Court granted the City's petition for review. The City argues that its immunity from suit is not waived under the Tort Claims Act because it retained discretion about how or whether to enforce the maintenance agreement. The City also challenges Quinlan's standing to sue for performance of an agreement between the City and a third party. The Court set oral argument for March 23, 2023.

FAMILY LAW

Divorce Decrees

In the Interest of J.N., 2022 WL 1211200 (Tex. App.—Dallas 2022), *pet. granted* (Feb. 24, 2023) [[22-0419](#)]

The issue in this case is whether harmless error review should apply when a trial court fails to comply with a statutory requirement to interview a child during a divorce proceeding.

Father filed for divorce from Mother and the parties proceeded to trial. The Family Code provides that in a bench trial, at the request of a party, the court "shall interview" a child over the age of twelve to determine the child's wishes regarding primary residence. Mother initially requested a jury trial, but she withdrew her request in order to have the trial court interview her oldest daughter, M.N., who was thirteen. The trial court denied Mother's request for an interview and granted Father the exclusive right to decide their children's primary residence. Mother appealed.

The court of appeals affirmed. It held that the trial court erred by failing to conduct the interview but that the error was harmless. The Family Code provides that interviewing the child "does not diminish the discretion of the trial court in determining the best interests of the child." Accordingly, it reasoned, even if M.N. had expressed a preference to live with Mother, the trial court would not have been obligated to make a different conservatorship decision. The court of appeals concluded that the trial court's grant of the exclusive right to Father was supported by the evidence and that M.N.'s preference to live with Mother would not have constituted a sufficient reason to separate her from her siblings.

Mother petitioned for review. She argues that applying harm analysis to the interview requirement is inappropriate because the statute is mandatory; it is impossible to determine harm; Mother gave up her constitutional right to a jury trial in reliance on the interview; and applying a harm analysis would undermine the statute's purpose of providing children with a voice in court proceedings that affect their lives.

The Court granted the petition for review and set oral argument for March 23, 2023.