



## Case Summaries April 28, 2023

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### OPINIONS

#### PROCEDURE—PRETRIAL

##### Statute of Limitations

*Ferrer v. Almanza*, \_\_\_ S.W.3d \_\_\_, 2023 WL \_\_\_ (Tex. Apr. 28, 2023) [[21-0513](#)]

The issue in this case is whether a statute that suspends the running of a statute of limitations during a defendant’s “absence from this state” applies when a Texas resident is physically absent from Texas but otherwise subject to personal jurisdiction and amenable to service.

Sibel Ferrer sued Isabella Almanza for personal injuries but did not file her claim until more than two years after the accident. Almanza moved for summary judgment on limitations. Ferrer responded that the running of limitations was suspended while Almanza was attending college outside Texas. Ferrer relied on Section 16.063 of the Civil Practice and Remedies Code, which suspends the running of a statute of limitations during a defendant’s “absence from this state.” The trial court granted summary judgment for Almanza, and the court of appeals affirmed. Ferrer petitioned for review, arguing that the statute required the limitations period to be suspended while Almanza was physically absent from Texas.

The Supreme Court affirmed. The Court held that a defendant’s “absence from this state” under Section 16.063 does not depend on physical location but rather on whether the defendant is subject to personal jurisdiction and service. The Court applied the interpretation of “absence” it adopted in *Ashley v. Hawkins*, 293 S.W.3d 175 (Tex. 2009), in which the Court concluded that Section 16.063 does not apply to a defendant who permanently leaves Texas but remains subject to personal jurisdiction and is amenable to service under the Texas long-arm statute. The Court held here that Section 16.063 likewise does not apply to a Texas resident who is subject to personal jurisdiction and amenable to service during the limitations period. The Court rejected Ferrer’s argument that *Ashley* is distinguishable, concluding that Section 16.063’s text does not support applying it only to Texas residents. The Court also noted that its interpretation was bolstered by the Legislature’s codification of Section 16.063, which deleted two phrases the Court previously had relied on to hold that the statute applied to physical absences from the state, and the fact that the Legislature had not amended the statute since *Ashley* was decided.

Justice Busby dissented. He would have held that the plain meaning of “absence” as used in Section 16.063 applies to the time a defendant is living out of state, and he

argued that the Court's construction renders the statute a nullity.

## OIL AND GAS

### Leases

*Apache Corp. v. Apollo Expl., LLC*, \_\_\_ S.W.3d \_\_\_, 2023 WL \_\_\_ (Tex. Apr. 28, 2023) [[21-0587](#)]

This case primarily concerns whether the oil-and-gas lease at issue departed from the default common-law rule for computing time measured “from” a particular date.

In 2011, Apollo Exploration, Cogent Exploration, and SellmoCo (collectively, Sellers), along with Gunn Oil Company, entered into purchase-and-sale agreements with Apache. In the PSAs, each Seller and Gunn conveyed to Apache 75% of their interests in 109 oil-and-gas leases, one of which was the Bivins Ranch lease at issue in this appeal, and entered into joint operating agreements making Apache the operator for these leases. There were two key features of the Bivins Ranch lease: (1) its primary term, which was to last three years “from” the lease’s effective date of January 1, 2007, and (2) its continuous-drilling provision, through which the lease could be continued after the primary term expired by splitting the land into three equally sized blocks and drilling a certain amount each year. However, one of these blocks, the North Block, terminated after Apache did not fulfill that year’s drilling requirement for that block.

Sellers later alleged, among other things, that Apache breached the PSAs by not offering the North Block and other leases back to Sellers. Apache argued that the North Block expired January 1, 2016, not (as Sellers argue) December 31, 2015—a one-day difference with significant consequences for the amount of potential damages. The trial court agreed with Apache, excluded Sellers’ expert witness on damages, and granted Apache’s summary-judgment motion challenging Sellers’ claims on the basis that Sellers have no evidence of damages. The court of appeals, however, reversed on each of these issues.

The Supreme Court reversed. The Court held that the Bivins Ranch lease unambiguously imposed a January 1, 2010, expiration date for the primary term, which resulted in a January 1, 2016, expiration date for the North Block based on the text of the lease’s continuous-drilling provision. The lease’s primary term measured time “from” January 1, triggering the longstanding default common-law rule that years measured in this way end on the anniversary of that date (i.e., January 1 rather than December 31). Parties may measure time in any other way; and if they measure time “from” a date, they may freely depart from the default rule, but the text of the lease did not do so. The Court also addressed several other issues, holding that (1) the PSAs did not require Apache to offer Gunn’s former interest—the remainder of which Apache had later also acquired, along with Gunn’s PSA rights—back to Sellers, (2) the PSAs’ back-in trigger—the point at which each Seller could “back in” for up to one-third of the interests it sold to Apache—should be calculated based on a 2:1 ratio of specified revenues versus specified expenses, and (3) the trial court correctly excluded Sellers’ expert witness on damages. The Court then remanded the case to the court of appeals to determine whether Sellers otherwise produced evidence sufficient to demonstrate damages and to address all remaining issues.

## INSURANCE

### Rescission of Policy

*Am. Nat'l Ins. Co. v. Arce*, \_\_\_S.W.3d \_\_\_, 2023 WL \_\_\_ (Tex. Apr. 28, 2023) [[21-0843](#)]

The principal issue is whether proof of intent to deceive is required to rescind a life insurance policy during the contestability period based on a material misrepresentation in the insurance application.

Sergio Arce applied for life insurance from American National Insurance Company without disclosing certain health conditions. Thirteen days after the policy was issued, Arce died in an automobile accident. American National refused to pay the beneficiary's claim because Arce had misrepresented his medical history.

In the beneficiary's suit for breach of contract and violations of the Texas Insurance Code, the insurer argued that the common-law scienter requirement is repugnant to Section 705.051 of the Insurance Code, which provides that a misrepresentation in a life insurance application "does not defeat recovery . . . unless the misrepresentation: (1) is of a material fact; and (2) affects the risks assumed." According to the insurer, Section 705.051 permits rescission of a policy if the two stated conditions are satisfied and, in doing so, renders the common-law intent-to-deceive requirement a dead letter. The trial court agreed and granted a take-nothing judgment for the insurer, but the court of appeals reversed, holding that the insurer could not rescind the policy without pleading and proving the misrepresentations were intentional.

The Supreme Court affirmed in part and reversed in part. On the main issue, the Court held that Section 705.051 does not abrogate the common law because the statute prescribes necessary, not exclusive or sufficient, conditions for denying recovery under a contestable life insurance policy. As written, Section 705.051 does not guarantee the insurer can "defeat recovery under the policy" if both conditions are satisfied; it only guarantees that recovery *cannot* be defeated if one or the other is not. The Court was not persuaded that this construction would render meaningless the express inclusion of an intent-to-deceive limitation in a different statutory provision applicable to incontestable life insurance policies. Finding no conflict with the statute, the Court also rejected the insurer's entreaty to repudiate the common-law rule as a product of "judicial drift" that adopts a minority view. However, the Court reversed and rendered judgment that the insurer did not forfeit its misrepresentation defense under a statutory notice provision that was inapplicable to Arce's life insurance policy as a matter of law.

In addition to joining the Court's opinion, Justice Young filed a concurring opinion elaborating on why principles of stare decisis require the Court to adhere to the common-law rule, which has coexisted with the statutory scheme for more than a century.