Case Summaries
June 30, 2023

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

OPINIONS

ARBITRATION

Arbitrability

Taylor Morrison of Tex., Inc. v. Kohlmeyer, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) (per curiam) [21-0072]

The issue in this case is whether subsequent purchasers of a home are required to arbitrate their claims against the builder for alleged construction defects.

Shortly after purchasing their home, the Kohlmeyers sued the builder, Taylor Morrison, for negligent construction, violations of the Deceptive Trade Practices-Consumer Protection Act, and breach of the implied warranties of habitability and good workmanship. The Kohlmeyers allege that construction defects caused a serious mold problem in the home. Taylor Morrison filed a motion to compel arbitration of the Kohlmeyers' claims, arguing that the Kohlmeyers are bound by the arbitration clause in the original purchase agreement under the doctrines of implied assumption and direct-benefits estoppel. The trial court denied the motion to compel, and the court of appeals affirmed, holding that direct-benefits estoppel does not require arbitration of the Kohlmeyers' common-law claims because they do not arise solely from the original purchase agreement.

In a per curiam opinion, the Supreme Court explained that the court of appeals' opinion conflicts with the Court's recent opinion in *Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley*. For the reasons explained in that case, direct-benefits estoppel requires arbitration of all of the Kohlmeyers' claims. Accordingly, the Court reversed the court of appeals' judgment, rendered judgment ordering arbitration of the Kohlmeyers' claims, and remanded the case to the trial court for further proceedings.

MEDICAL LIABILITY

Expert Reports

Collin Creek Assisted Living Ctr., Inc. v. Faber, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [21-0470]

This case examines whether a cause of action is a "health care liability claim" under the Texas Medical Liability Act.

Christine Faber sued an assisted living facility for premises liability after her mother, a facility resident, died from injuries she sustained while being transported by a facility employee. The employee pushed Faber's mother on a rolling walker along the

facility's sidewalk to the parking lot. A walker wheel caught in a crack, causing Faber's mother to fall and hit her head on the concrete. The facility filed a motion to dismiss on the grounds that Faber had not timely served an expert report as required by the TMLA. The trial court granted the motion, but the court of appeals, sitting en banc, reversed.

In an opinion by Justice Busby, the Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing Faber's claim, and remanded the case to the trial court for an award of attorney's fees. The Court explained that the court of appeals had focused too narrowly on the claim pleaded rather than having considered the entire record, which included allegations directed to employee conduct, the condition of the walker, and the decedent's status as a recipient of personal-care services. Applying the factors articulated in *Ross v. St. Luke's Episcopal Hospital*, the Court held that Faber's claim is a health care liability claim under the TMLA and that, therefore, an expert report was required.

Justice Young, joined by Justice Blacklock, concurred, suggesting that the *Ross* factors should be revisited.

Justice Boyd dissented, joined by Justice Lehrmann and Justice Devine. The dissent would have affirmed because the record lacks evidence that the facility provided the decedent with "health care" as defined in the Act.

TEXAS PUBLIC INFORMATION ACT

Exceptions to Disclosure—Attorney–Client Privilege

Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [21-0534]

The issue in this case is whether documents underlying an external investigation into allegations of undue influence in a public university's admissions process are protected by the attorney–client privilege and are thus exempt from disclosure under the Texas Public Information Act.

The University of Texas System hired Kroll Associates to investigate allegations of improper admissions practices at UT Austin. During its investigation, Kroll obtained thousands of documents from UT and interviewed relevant individuals. After Kroll completed its investigation and released its final report, Franklin Center made a request under the Public Information Act for documents that were either provided to Kroll by the System or created by Kroll during its investigation. The System argued that all the documents sought were protected from disclosure by the attorney–client privilege because Kroll was serving as its "lawyer's representative" under Texas Rule of Evidence 503 in conducting the investigation.

After reviewing the disputed documents *in camera*, the trial court determined that they were privileged. The court of appeals reversed and ordered disclosure of all the documents. The court reasoned that Kroll did not qualify as a "lawyer's representative" because the final report did not contain legal advice, Kroll did not provide legal services to the System, and Kroll's investigation was not performed to advise the System regarding potential legal liabilities.

The Supreme Court reversed, holding that the attorney–client privilege attached to the disputed documents. The Court held that, to qualify as a "lawyer's representative" for purposes of the privilege, assisting in the rendition of professional legal services must be a significant purpose for which the representative was hired. Applying that standard, the Court concluded that Kroll acted as a lawyer's

representative in conducting the investigation and that the disputed documents were intended to be kept confidential. The Court also held that the publication of the final report did not result in a complete waiver of the privilege as to all documents reviewed or prepared by Kroll. However, to the extent the report directly quoted from or otherwise disclosed "any significant part" of the disputed documents, publication of the report waived the System's attorney–client privilege with respect to those specific documents.

Justice Devine, joined by Justice Boyd, dissented. While agreeing with the Court's standard, the dissent would have held that the record did not sufficiently demonstrate that assisting UT's lawyers in the rendition of legal services was a significant purpose of Kroll's audit.

PROCEDURE—PRETRIAL

Dismissal

McLane Champions, LLC v. Hous. Baseball Partners LLC, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [21-0641]

The issue in this case is whether the Texas Citizens Participation Act applies to a private business transaction between private parties that later generates public interest.

Houston Baseball Partners purchased the Houston Astros from McLane Champions in 2011. The deal included both the team and its interest in a planned regional sports network in which Comcast also owned an interest. Partners alleges that the Astros' interest in the proposed network was the primary reason Partners acquired the team. But the network collapsed shortly after the purchase. Partners alleges that once the network began experiencing financial trouble, it learned for the first time that Champions and Comcast had materially misrepresented the proposed network's financial prospects, causing Partners to pay substantially more for the Astros than the team was worth. Partners sued, and Champions moved to dismiss Partners' claims under the TCPA. The trial court denied the motion, and the court of appeals affirmed.

The Supreme Court affirmed, holding that the TCPA did not apply to Partners' claims because Partners' lawsuit was not based on or in response to Champions' exercise of either the right of free speech or the right of association. As to the former, the communications underlying Partners' suit were not "made in connection with a matter of public concern" because they did not hold relevance to a public audience when they were made. Rather, the challenged communications were private business negotiations in an arms-length transaction subject to a nondisclosure agreement relevant only to the private business interests of the parties. As to Champions' exercise of the right of association, the Court held that the "common interest" that individuals join together to express, promote, pursue, or defend when exercising that right under the TCPA must relate to a government proceeding or a matter of public concern. Because the interest that Champions joined with Comcast to promote was their mutual private business interests, the Court held that the TCPA did not apply.

Chief Justice Hecht, joined by Justice Blacklock, dissented. He would have held that Partners' suit implicated Champions' right to free speech under the TCPA and that Partners failed to make a prima facie case for its fraud-based claims.

Justice Blacklock dissented separately to further highlight that the basis for Partners' lawsuit is substantially undermined by the Astros' extraordinary competitive and financial success under Partners' ownership.

FEDERAL PREEMPTION

Railroads

Horton v. Kan. City S. Ry. Co., ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [21-0769]

This case raises questions of federal preemption, evidentiary sufficiency, and charge error. Ladonna Sue Rigsby was killed when her truck collided with a train operated by Kansas City Southern Railroad Company while she was driving across a railroad crossing. Her children sued the Railroad Company, alleging two theories of liability: (1) the Railroad Company failed to correct a raised hump at the mid-point of the crossing; and (2) it failed to maintain a yield sign at the crossing. Both theories were submitted to the jury in one liability question. The jury found both the Railroad Company and Rigsby negligent, and the trial court awarded the plaintiffs damages for the Railroad Company's negligence.

A divided court of appeals reversed. The majority concluded that the federal Interstate Commerce Commission Termination Act preempted the plaintiffs' humped-crossing theory and that the submission of both theories in a single liability question was harmful error. The court remanded for a new trial on the yield-sign theory alone.

Both sides petitioned for review. The Supreme Court granted the petitions and affirmed the court of appeals' judgment but for different reasons. The Court held that (1) federal law does not expressly or impliedly preempt the humped-crossing claim; and (2) no evidence supports the jury's finding that the absence of the yield sign proximately caused the accident. However, the Court agreed that a new trial is required because submitting both theories in a single broad-form question was harmful error.

Justice Busby filed a concurring opinion, urging the Supreme Court of the United States to reconsider *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), and its progeny on the basis that implied obstacle preemption is inconsistent with the federal Constitution.

ATTORNEYS

Escrow

Boozer v. Fischer, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [22-0050]

This case involves an escrow agreement among parties that were engaged in active litigation against each other, requiring the Supreme Court to address: (1) whether an attorney for one party may serve as an escrow holder despite the ongoing litigation and (2) which party bears the risk of loss when that attorney misappropriates escrowed funds.

Ray Fischer sold his tax-consulting business to CTMI, a company owned by Mark Boozer and Jerrod Raymond. That transaction generated litigation among the parties. They settled but also severed one claim pertaining to Fischer's entitlement to certain disputed funds. The Supreme Court ultimately resolved that claim in 2016 in favor of Fischer. The parties' settlement agreement had provided that, pending the ultimate resolution of the litigation regarding the severed claim, CTMI would deposit the funds at issue into an "escrow" account owned by CTMI but controlled by Wesley Holmes (Boozer and Raymond's attorney) and that Fischer would receive the funds if he won.

After the Supreme Court ruled in favor of Fischer, however, it came to light that Holmes had drained the account and taken the money. CTMI sued, seeking a declaration that it had satisfied its obligations to Fischer under the settlement agreement by depositing the funds in the account. The trial court agreed, concluding that CTMI properly placed the funds in the account, the parties had created an escrow

with Holmes as the escrow holder, and CTMI owed Fischer nothing further. The court of appeals reversed, holding that there was no escrow and CTMI therefore had not discharged its liability to Fischer.

The Supreme Court affirmed the court of appeals' judgment, but for different reasons. First, the Court held that the parties created an escrow. While an escrow holder is typically a neutral third party, parties—even those involved in active litigation against each other—may designate one of their attorneys as the escrow holder if they clearly agree to do so. Second, however, the Court held that the parties' creation of an escrow did not shift the risk of loss in this case. Because the escrow holder was the attorney for CTMI's owners and CTMI agreed to retain title to the escrowed property, CTMI presumptively retained the risk of loss. Nothing in the parties' agreement rebutted that presumption, and CTMI therefore bore the risk of the escrow's failure.

TEXAS DISASTER ACT

Executive Power

Abbott v. Harris County, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [22-0124]

The question presented in this case is whether the Governor has authority to issue executive orders that prohibit local governments from imposing mask-wearing requirements in response to the coronavirus pandemic.

In 2020 and 2021, Harris County officials issued a series of executive orders requiring masks in certain public settings. The Governor then issued executive order GA-38, which stated that no local government or official "may require any person to wear a face covering." Citing independent authority under the Disaster Act and the Health and Safety Code, Harris County obtained a temporary injunction against the enforcement of GA-38 and future orders. The court of appeals affirmed.

The Supreme Court reversed and dissolved the temporary injunction. It concluded that the County had standing to sue the Attorney General but no probable right to relief. The Court concluded that county judges, who are the Governor's designated agents, have no authority to issue contrary orders. And while the Court noted that the Governor's view of the Act created constitutional questions, it concluded that GA-38 fell within the Governor's authority to control the movement of persons and the occupancy of premises in a disaster area. In light of statutory provisions vesting the State with final authority over contagious disease response, the Court concluded that the Disaster Act at least authorizes the Governor to control local governments' disease control measures, whether or not it also allows him to impose mask-wearing requirements of his own. In light of its decision, the Court vacated and remanded similar cases that were consolidated for oral argument.

Justice Lehrmann concurred, noting her view that the Governor's authority to balance competing concerns when responding to a disaster comes from the Disaster Act itself.

EMPLOYMENT LAW

Disability Discrimination

Tex. Tech Univ. Health Scis. Ctr. – El Paso v. Niehay, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) [22-0179]

The issue in this case is whether morbid obesity qualifies as an "impairment" under the Texas Commission on Human Rights Act without evidence that it is caused by an underlying physiological disorder or condition.

Texas Tech dismissed Dr. Lindsey Niehay from its medical residency program, and Niehay sued for disability discrimination. She claims that Texas Tech dismissed her because it regarded her as being morbidly obese. Texas Tech filed a combined plea to the jurisdiction and motion for summary judgment, asserting that Niehay had not shown a disability as defined by the TCHRA. Specifically, Texas Tech argued that morbid obesity is not a disability without evidence that it is caused by an underlying physiological disorder. The trial court denied the plea and motion, and the court of appeals affirmed.

In an opinion by Chief Justice Hecht, the Supreme Court reversed. The TCHRA defines disability as "a mental or physical impairment", but it does not define impairment. Because the TCHRA is analogous to the federal ADA, the Court looked to the federal regulatory definition of impairment. It held that, under the definition's plain language, an impairment requires a physiological disorder or condition. It further held that weight is not a physiological disorder or condition—it is a physical characteristic. The Court noted that this interpretation is consistent with the decisions of four federal circuit courts and with interpretive guidance by the EEOC. Niehay presented no evidence that her morbid obesity is caused by an underlying physiological disorder or that Texas Tech perceived it as such, so the Court ultimately held that Niehay has not shown a disability under the TCHRA.

Justice Blacklock filed a concurring opinion, joined by two other justices. He emphasized that the medical community's current understanding of morbid obesity is not a basis for interpreting fixed statutory language enacted in 1993 and that while Texas courts may look to federal law for assistance, federal authorities are not binding on Texas courts interpreting the TCHRA.

Justice Boyd filed a dissenting opinion, joined by one other justice. He would have held that morbid obesity qualifies as an impairment without evidence of an underlying physiological condition.

GOVERNMENTAL IMMUNITY

Texas Tort Claims Act

City of Houston v. Green, ___ S.W.3d ___, 2023 WL ___ (Tex. June 30, 2023) (per curiam) [22-0295]

The issue in this case is whether a police officer is entitled to immunity under the Texas Tort Claims Act's emergency exception.

Houston police officer Samuel Omesa was responding to an emergency call when his vehicle collided with one driven by Crystal Green. Omesa testified that he had his emergency lights on and his siren activated intermittently. He claimed that he stopped and looked both ways at each intersection he crossed but that Green appeared suddenly from behind other vehicles and did not have her headlights on. Green disputed Omesa's testimony that he was driving at a reasonable speed and had his siren on.

Green sued the City of Houston. The City moved for summary judgment, asserting that the TTCA's emergency exception preserved the City's immunity. The trial court denied the motion, and the City appealed. The court of appeals affirmed, holding that Green raised a fact issue as to whether Omesa's conduct was reckless. The City petitioned the Supreme Court for review.

In a per curiam opinion, the Court reversed the court of appeals' judgment and rendered judgment dismissing Green's claims against the City. The Court held that the emergency exception applies—and that immunity is not waived—because Green failed

to raise a fact issue as to whether Omesa acted with reckless disregard for the safety of others. Specifically, Green failed to introduce evidence that could support anything more than a momentary judgment lapse or failure to use due care, neither of which suffice to show reckless disregard for the safety of others.