# SUPREME COURT OF TEXAS UPDATE
January 2023 through February 2024

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Special thanks to all the Staff Attorneys and
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## I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from January 1, 2023, through February 29, 2024. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to amy.starnes@txcourts.gov.

## II. DECIDED CASES

### A. ADMINISTRATIVE LAW

#### 1. Jurisdiction

a) *Morath v. Lampasas Indep. Sch. Dist.*, ___ S.W.3d ___, 2024 WL 648671 (Tex. Feb. 16, 2024) [22-0169]

The central issue in this case is whether the Commissioner of Education had jurisdiction over a detachment-and-annexation appeal.

A land development company petitioned two school boards to detach undeveloped property from one school district and annex it to the other. Under the relevant statutory provisions, if both boards agree on the disposition of a petition, the decision is final. But if only one board "disapproves" a petition, the Commissioner can settle the matter in an administrative appeal. Here, one board approved the petition, but the other board took no action following a hearing. The company appealed to the Commissioner, asserting that the board constructively disapproved the petition by its inaction. The Commissioner approved the annexation but surpassed a statutory deadline to issue a decision. In a suit for judicial review, the trial court affirmed. The court of appeals vacated the judgment and dismissed the case, holding that a board's inaction cannot provide the requisite disagreement for an appeal to the Commissioner.

The Supreme Court reversed. The Court held that the Commissioner had jurisdiction because, under a plain reading of the statute, a board "disapproves" a petition by not approving it within a reasonable time after a hearing. The Court further held that the Commissioner did not lose jurisdiction when the statutory deadline passed. The deadline is not jurisdictional, and the Legislature did not intend dismissal as a consequence for noncompliance with that deadline. The Court remanded the case to the court of appeals to address other challenges to the Commissioner's decision.

### ARBITRATION

#### 2. Arbitrability

a) *Alliance Auto Auction of Dall., Inc. v. Lone Star Cleburne Autoplex, Inc.*, 674 S.W.3d 929 (Tex. Sept. 1, 2023) (per curiam) [22-0191]

This case concerns the issue of incorporation of American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator when the selection of AAA rules is contingent on another clause in the agreement.

Lone Star sued Alliance, alleging that Alliance conspired with two of Lone Star's employees to embezzle money from Lone Star. Alliance moved to stay the suit and compel arbitration,

relying on arbitration clauses contained in authorization agreements between Lone Star and a third party. Alliance argues those agreements designate it as a third-party beneficiary who may invoke the arbitration clause against Lone Star. The arbitration agreement states that if the parties are unable to agree on an alternative dispute resolution firm, the arbitration will be conducted under AAA rules.

The trial court denied Alliance's motion to compel arbitration. The court of appeals affirmed, holding that the question of whether a case should be sent to arbitration is a gateway issue that courts must decide. After Alliance filed its petition for review in the Supreme Court, it issued its decision in *Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, ___ S.W.3d ___, 2023 WL 2939648 (Tex. April 14, 2023), which held that the general rule is that the incorporation of AAA rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration.

Lone Star argues that this case is distinguishable from *TotalEnergies* because (1) the parties here agreed to arbitrate under the AAA rules only if they are unable to agree on a different ADR firm; and (2) Alliance is not a party to the arbitration agreement but is instead a third-party beneficiary that may, or may not, elect to invoke the arbitration agreement. In a per curiam opinion, the Court remanded to the court of appeals to consider Lone Star's arguments, along with any other issues the parties raised that the court did not reach, in light of the Court's holdings in *TotalEnergies*.

b) *Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley*, 672 S.W.3d 367 (Tex. May 12, 2023) [21-0783]

The issue in this case is whether a subsequent purchaser of a home was required to arbitrate her claims against the builder for alleged construction defects.

Cody Isaacson purchased a house from its builder, Lennar Homes. The applicable purchase-and-sale agreement and the home's warranty, which the purchase-and-sale agreement incorporated by reference, each included arbitration clauses. A similar arbitration provision incorporated by reference in the special warranty deed that Lennar recorded in the county records. Isaacson later sold the home to Kara Whiteley.

Shortly after purchasing the home, Whiteley sued Lennar for negligent construction and breach of the implied warranties of good workmanship and habitability. 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 on its counterclaim for breach of contract. Lennar and Whiteley then filed cross-motions to confirm and to vacate the award, disputing whether the subsequent purchaser was bound by the arbitration clauses. The trial court granted Whiteley's motion and vacated the award against Whiteley.

The court of appeals affirmed, holding that the doctrine of direct-benefits estoppel did not require Whiteley to arbitrate her common-law claims. The court of appeals also rejected Lennar's alternative arguments in support

of arbitration, holding that (1) Whiteley did not impliedly assume the purchase-and-sale agreement when she purchased the home; (2) Whiteley was not a third-party beneficiary of the warranty, (3) the arbitration provision attached to the deed was not a covenant running with the land, and (4) Whiteley did not waive her objections to arbitration during the course of those proceedings.

The Supreme Court reversed the court of appeals' judgment. The Court held that a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract. Moreover, although liability for Whiteley's claims arises in part from the general law, nonliability arises from the terms of any express warranties. Accordingly, Whiteley's claims were premised on the existence of the purchase-and-sale agreement and, as such, she was bound to arbitrate under the doctrine of direct-benefits estoppel. The Court therefore reversed the court of appeals' judgment, rendered judgment confirming the award against Whiteley, and remanded to the trial court for further proceedings.

c) *Taylor Morrison of Tex., Inc. v. Kohlmeyer*, 672 S.W.3d 422 (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.

d) *Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694 (Tex. April 14, 2023) [21-0028]

This case answers the question of whether parties who incorporate the American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator.

MP Gulf of Mexico and Total E&P owned an oil-and-gas processing system that serviced leases in the Gulf of Mexico. The parties signed two contracts to govern the system, the System Operating Agreement and the Cost Sharing Agreement. The dispute began when MP Gulf demanded that Total E&P pay certain costs incurred under the Cost Sharing Agreement. Total E&P refused and sued for a declaration construing that agreement. MP Gulf, however, initiated an arbitration proceeding before the AAA based on a provision in the System Operating Agreement stating that "any dispute or controversy aris[ing] between the Parties out of this Agreement . . . shall be submitted to arbitration . . . in accordance with the rules of the AAA." MP Gulf argued that this provision, which incorporated the AAA rules, required the AAA arbitrator to decide whether the parties agreed to submit their controversy to arbitration.

The trial court granted Total E&P's motion to stay the arbitration. The court of appeals reversed, holding that by agreeing to arbitrate before the AAA and in accordance with its rules, the parties delegated the arbitrability issue to the arbitrator.

The Court affirmed. Usually, courts determine the validity or scope of an arbitration agreement in a contract, but parties can agree to delegate those disputes to arbitrators. The Court agreed with the majority of other courts that, as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes clear and unmistakable evidence that the parties agreed to delegate issues of arbitrability. And although parties can contractually limit their delegation of arbitrability to only certain claims, the Court concluded that the agreements did not do so here. The delegation provision incorporated the AAA rules, and nothing in that provision or in those rules limited the scope of the delegation.

Justice Bland filed a concurring opinion. She agreed with the majority opinion but would also affirm on the ground that the parties agreed to arbitrate the underlying controversies in this case.

Justice Busby filed a dissenting opinion. He would hold that the language of the contracts indicates that the parties did not intend to empower an arbitrator to decide whether the contractual preconditions to arbitration have been met. The arbitration provision states that the power to decide what claims are arbitrable only belongs to arbitrators if the preconditions are met. And even if the AAA rules apply, the rules' delegation language is not exclusive and thus does not deprive courts of the power to address the scope issue. For either of those reasons, he would hold that the court of appeals erred by failing to address the issue of the scope of the arbitration clause.

### 3. Enforcement of Arbitration Agreement

a) *Hous. AN USA, LLC v. Shattenkirk*, 669 S.W.3d 392 (Tex. May 26, 2023) [22-0214]

The issue in this employment-discrimination case is whether an arbitration agreement is unconscionable, and thus unenforceable, on the ground that the allegedly excessive costs associated with arbitration would foreclose

the employee from pursuing his statutory claims.

AutoNation USA Houston owns and operates a car dealership in Houston. AutoNation hired Walter Shattenkirk as its general manager but fired him approximately six months later. Shattenkirk sued AutoNation for discrimination and retaliation, alleging that he was terminated for reporting racist comments made by his supervisor. AutoNation moved to compel arbitration based on an agreement, which Shattenkirk allegedly signed during the hiring process, that requires the parties to arbitrate any claims arising from the employment relationship, including discrimination claims. The agreement does not discuss who would pay administrative fees, the arbitrator's compensation, or other expenses. The trial court denied the motion to compel, concluding that the agreement is unconscionable and unenforceable because the cost of arbitration would be so high that it would effectively preclude Shattenkirk from pursuing his claims. The court of appeals affirmed.

The Supreme Court reversed, holding that Shattenkirk failed to demonstrate the arbitration agreement's unconscionability. To show that the prohibitive cost of arbitrating renders an agreement to do so unconscionable, the party opposing arbitration must present more than evidence of the risk of incurring prohibitive costs; he must present specific evidence that he will actually be charged such costs. Here, Shattenkirk presented only conclusory evidence that the increased cost of arbitration compared to litigation would foreclose him from proceeding with the case. Further, given the agreement's silence on costs and the lack of other record evidence indicating how those costs would be allocated, any holding that they render the agreement unconscionable would be premature. Accordingly, the Court held that Shattenkirk failed to meet his burden of proving the likelihood that he would incur prohibitive arbitration costs and thus failed to show that the agreement was unenforceable on that ground. The Court remanded the case to the court of appeals to address the parties' issues regarding whether Shattenkirk signed the agreement.

b) *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529 (Tex. Jan. 27, 2023) (per curiam) [22-0331]

The issue in this case is whether a spouse and minor children may be compelled to arbitrate pursuant to the other spouse's arbitration agreement when the family sues for construction-defect claims concerning their family home.

Tony Ha signed a purchase agreement to buy a home from home-building company Taylor Morrison. The purchase agreement included an arbitration provision. Mr. Ha later sued Taylor Morrison, alleging that the home had developed significant mold problems and asserting claims based on construction defects and fraud. He was joined in the suit by his wife, Michelle Ha, and their three minor children. In their original petition, the Ha family collectively asserted a number of claims, including breach of contract. They later amended their petition, however, so that only Mr. Ha asserted the breach-of-contract claim.

The trial court granted Taylor Woodrow and Taylor Morrison's motion to compel arbitration with respect to Mr. Ha, but it denied the motion as to Mrs. Ha and the children. The court of appeals affirmed.

The Supreme Court reversed. Under direct-benefits estoppel, litigants who sue based on a contract or who otherwise seek direct benefits from the contract subject themselves to its terms, including any arbitration provision. The Court held that direct-benefits estoppel applies in this case because Mrs. Ha and the children sought direct benefits from Mr. Ha's purchase agreement by living in the home. When a spouse and minor children live in a family home purchased by the other spouse, they have accepted direct benefits from the other spouse's purchase agreement such that they may be compelled to arbitrate under that agreement's arbitration provision when the family sues as an integrated unit for factually intertwined construction-defect claims.

c) *Taylor Morrison of Tex., Inc. v. Skufca*, 660 S.W.3d 525 (Tex. Jan. 27, 2023) (per curiam) [21-0296]

The issue in this case is whether children who sue with their parents for construction defects in their family home have joined their parents' contract claims—and therefore may be compelled to arbitrate under their parents' arbitration agreement—when the petition fails to distinguish between the parents' and children's causes of action.

Jack and Erin Skufca purchased a home from homebuilding company Taylor Morrison. The purchase agreement included an arbitration provision. The Skufcas allege that less than a year after moving in, the home developed significant mold problems that caused their children to be continuously ill. They sued Taylor Morrison for construction defects and fraud. The Skufcas' petition included both Mr. and Mrs. Skufca as plaintiffs, as well as Mrs. Skufca as next friend of the couple's two minor children. The Skufcas' petition, however, did not distinguish between the parents and children in any of its causes of action, including the breach-of-contract claim.

Taylor Morrison moved to compel the Skufcas to arbitrate. The trial court denied the motion as it pertained to the children. Taylor Morrison appealed, arguing that direct-benefits estoppel—the principle that a litigant who sues based on a contract subjects himself to the contract's terms, including its arbitration provision—requires the children to arbitrate their claims. The court of appeals affirmed, holding that direct-benefits estoppel did not apply because, based on its reading of the petition, the children did not actually join the breach-of-contract claim.

The Supreme Court reversed. The Court held that, because the breach-of-contract claim simply referred to "Plaintiffs" and did not distinguish between the parents and the children, the children joined their parents' breach-of-contract claim. The children were thus subject to their parents' arbitration agreement through direct-benefits estoppel. Moreover, even if the children had asserted only tort and other noncontractual claims, they would still be compelled to arbitrate

because they sought direct benefits from their parents' purchase agreement by living in the home and suing for factually intertwined construction-defect claims.

## B. ATTORNEYS

### 1. Attorney–Client Privilege

a) *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (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. 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 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.

**2. Escrow**

a) *Boozer v. Fischer*, 674 S.W.3d 314 (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 except for one severed claim pertaining to Fischer's entitlement to certain funds. The parties' settlement agreement provided that, pending the 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).

After Fischer prevailed on his claim, it came to light that Holmes had drained the account. 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. 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. 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.

**3. Fees**

a) *Pecos Cnty. Appraisal Dist. v. Iraan-Sheffield Indep. Sch. Dist.*, 672 S.W.3d 401 (Tex. May 19, 2023) [22-0313]

The issue in this case is whether the district court properly dismissed a suit because a school district employed an attorney on a contingent-fee basis. Iraan-Sheffield ISD hired attorney D. Brent Lemon to pursue claims regarding the Pecos County Appraisal District's allegedly inaccurate valuation of Kinder Morgan's mineral interests. The school district is a taxing unit within the Appraisal District. The fee agreement with Lemon specified his compensation as 20 percent of amounts received by the school district that were related to claims Lemon pursued.

Under the Tax Code, Lemon brought a claim before the Appraisal District's Appraisal Review Board alleging erroneous appraisals of Kinder Morgan's properties. After the Review Board denied relief, Lemon brought an appeal in district court. Kinder Morgan filed a Texas Rule of Civil Procedure 12 motion to show authority, arguing that Lemon's contingent-fee agreement was not allowed under Texas law. The district court granted the motion and

dismissed the suit with prejudice. The court of appeals reversed, reasoning that the fee agreement was permitted under Section 6.30(c) of the Tax Code.

The Supreme Court did not agree with the court of appeals' reasoning. The Court held the contingent-fee agreement was not permitted under Texas law. Political subdivisions possess only such powers as are expressly provided by statute or impliedly conferred by the Legislature. Implied powers are limited to powers essential and indispensable to the exercise of expressed powers. Section 6.30 does not expressly permit the agreement, because that section is limited to the collection of delinquent taxes. Taxes are not delinquent until they are imposed by the taxing unit, and here no taxes had been imposed on the higher valuations the school district sought. There was also no basis under Texas law for concluding that authority to make the contingent-fee agreement was impliedly conferred on school districts.

Even though the Court agreed with the district court that the contingent-fee agreement was not permitted, the Court concluded that the district court should not have dismissed the suit with prejudice. The Court concluded that Rule 12 was a proper vehicle for challenging the legality of the agreement, but the Court interpreted the rule as requiring the district court to give the school district a reasonable opportunity to adjust its arrangement with Lemon or hire another attorney. The Court therefore affirmed the court of appeals insofar as it reversed the dismissal of the suit, and the Court remanded the case to the district court for further proceedings.

## C. CLASS ACTIONS

### 1. Class Certification

a) *Am. Campus Cmtys., Inc. v. Berry*, 667 S.W.3d 277 (Tex. April 21, 2023) [21-0874]

The issue in this case is whether a court may properly certify a class under Texas Rule of Civil Procedure 42 when the proposed class claim is facially defective as a matter of law. Former tenants sued American Campus alleging that it had omitted required language from their leases. Section 92.056(g) of the Texas Property Code requires that leases contain bold or underlined language informing tenants of the remedies available when a landlord fails to repair or remedy conditions that materially affect the tenant's physical health or safety.

The class sought is not made up of individuals who alleged American Campus deficiently repaired their particular apartments. Rather, the class sought certification on a theory that the omission of the required lease language alone entitled each class member to recover statutory damages, penalties, and attorney's fees. The trial court denied American Campus's summary judgment motion and certified the class of tenants. The court of appeals affirmed the class certification.

The Court held that the class certification was improper because the tenant's claim had no basis in law, and, therefore, the rigorous analysis required by Rule 42 could not meaningfully be performed. The Court reversed the court of appeals' judgment and the district court's order certifying a class and remanded the case to the district court for further proceedings consistent with its opinion.

b) *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234 (Tex. Apr. 21, 2023) [19-0612, 21-0159]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Paul Simien sued the owners and managers of his apartment complex, alleging that Mosaic had violated various Public Utility Commission rules that govern how landlords may bill tenants for water and wastewater service and was therefore liable under section 13.505 of the Water Code. The trial court granted partial summary judgment on liability in Simien's favor, rejecting Mosaic's arguments that Simien lacked standing and that subsequent amendments to section 13.505 had deprived the trial court of subject-matter jurisdiction. The trial court also granted Simien's motion to certify a class of current and former Mosaic tenants who were also subject to the challenged billing practices. Mosaic requested and received permission to file an interlocutory appeal of the trial court's order granting partial summary judgment.

Mosaic filed an application for permission to appeal the partial summary judgment, which the court of appeals denied, as well as an interlocutory appeal of the class certification order. The court of appeals (1) declined to reach the merits of the trial court's rulings on summary judgment as part of its review of the propriety of class certification and (2) rejected Mosaic's challenge to the trial court's compliance with Rule 42(c)(1)(D), concluding that the trial court's rulings on Mosaic's special exceptions and Simien's motion for summary judgment adequately addressed Mosaic's defenses.

Mosaic petitioned the Supreme Court for review in both cases. The Court granted the petitions and consolidated them for argument with *Mosaic Baybrook One, L.P. v. Cessor*, ___ S.W.3d ___, 2022 WL 3027939 (Tex. Apr. 21, 2023) [21-0159]. The Court affirmed the trial court's partial summary judgment and affirmed the court of appeals' judgment affirming the trial court's order certifying a class. After rejecting Mosaic's challenges to standing and subject-matter jurisdiction, the Court held that Mosaic failed to raise an issue of fact regarding whether it had a right to charge Simien the disputed fees because Mosaic conceded that it had bundled a water-related service fee with other fees unrelated to water or wastewater service that were not authorized under his lease. The Court also rejected Mosaic's challenge to the trial court's failure to list the elements of Mosaic's limitations defense in its order certifying a class, holding that the trial court's temporal limitations on the class definition adequately accounted for the defense.

The dissent, authored by Justice Bland, would have reversed. In its view, the Water Code and its implementing rules require metered-water charges to be calculated and presented independently, not other charges. Because Simien's bills complied with this requirement, the dissent concluded that Simien failed to establish his sole claim of a Water Code violation as a matter of law.

c) *Mosaic Baybrook One, L.P. v. Cessor*, 668 S.W.3d 611 (Tex. Apr. 21, 2023) [21-0161]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Tammy Cessor sued the owners and managers of her apartment complex, alleging that Mosaic had assessed fees for late payment of rent in violation of section 92.019 of the Texas Property Code. Cessor also filed a motion to certify a class of current and former Mosaic tenants who were also subject to the challenged late fees. Mosaic initially filed an answer that generally denied Cessor's claims. Mosaic later amended its answer three days prior to the hearing on class certification, raising several affirmative defenses for the first time and months after the deadline for amended pleadings had passed. The trial court granted Simien's motion to certify a class, and Mosaic filed an interlocutory appeal.

On appeal, Mosaic complained that the trial court did not conduct the requisite rigorous analysis under Rule 42, relying on the trial court's failure to definitively construe section 92.019 of the Property Code or address the affirmative defenses raised in Mosaic's late-filed answer. The court of appeals affirmed without addressing the parties' arguments about statutory construction, reasoning that courts should not decide the merits of a suit as a means of determining its maintainability as a class action. Mosaic petitioned the Supreme Court for review. The Court granted the petition and consolidated it for argument along with *Mosaic Baybrook One, L.P. v. Simien*, ___ S.W.3d ___, 2022 WL 3027992 (Tex. Apr. 21, 2023) [19-0612, 21-0159].

The Court rejected Mosiac's argument that the trial court had misconstrued or failed to construe section 92.019 but agreed with Mosaic that the trial court's failure to list the elements of or otherwise address Mosaic's late-asserted answers constituted reversible error. Because Cessor did not object to the amended pleading, the trial court had no discretion under Texas Rule of Civil Procedure 63 to refuse to consider the defenses. The Court therefore reversed the court of appeals' judgment affirming the trial court's order certifying a class under Rule 42 and remanded the case to the trial court for further proceedings.

## D. CONSTITUTIONAL LAW

### 1. Abortion

a) *In re State*, ___ S.W.3d ___, 2023 WL 8540008 (Tex. Dec. 11, 2023) (per curiam) [23-0994]

The issue in this case is whether the trial court erred in granting a temporary restraining order enjoining the Attorney General from enforcing Texas abortion laws.

Kate Cox was about twenty weeks pregnant when her unborn child was diagnosed with a genetic condition that is life-limiting. Cox, her husband, and Dr. Damla Karsan sued the State, the Attorney General, and the Texas Medical Board, seeking a declaration that Cox's pregnancy fell within a statutory exception for abortions performed "in the exercise of reasonable medical judgment" on a woman with "a life-threatening condition" that places

her "at risk of death or poses a serious risk of substantial impairment of a major bodily function." In a verified pleading, Dr. Karsan asserted a "good faith belief" that Cox met the exception, but Dr. Karsan did not base this belief on her reasonable medical judgment or identify Cox's life-threatening condition. The trial court entered a temporary restraining order, enjoining the State defendants from enforcing any abortion law against the Coxes or Dr. Karsan.

The State petitioned for a writ of mandamus, and the Supreme Court conditionally granted relief. The Court stressed that a court order is unnecessary for the provision of an abortion under the emergency exception. Nonetheless, the Court directed the trial court to vacate its order because Dr. Karsan failed to invoke the exception. The court explained that "reasonable medical judgment" requires more than a subjective belief that an abortion is necessary, and it held that the trial court erred in applying a standard that is different from the statutory standard.

**2. Due Process**

a) *B. Gregg Price, P.C. v. Series 1 – Virage Master LP*, 661 S.W.3d 419 (Tex. Feb. 17, 2023) (*per curiam*) [21-1104]

The issue in this case is whether due process entitles a defendant to an amended notice of hearing when a trial court cancels a hearing and subsequently reschedules it for the same date.

B. Gregg Price, P.C., a law firm, took out a loan from Series 1 – Virage Master LP. Virage alleged that B. Gregg Price personally guaranteed the loan and that his law firm failed to repay the loan. Virage sued Price and the firm and moved for summary judgment.

Virage served Price with the motion for summary judgment on March 12, 2020, and notified him of the hearing set for April 2. That same day, the trial court announced that in-person proceedings would be canceled in response to the emerging COVID-19 pandemic. Price's lawyer saw this announcement and assumed he would be notified of a new hearing date when the hearing was rescheduled. Rather than reschedule the oral hearing, the court changed the hearing method to submission and scheduled it for April 2. Price's lawyer first realized the change when he contacted the court on April 1, and he immediately filed a response. On April 2, the trial court granted summary judgment for Virage without considering Price's late-filed response.

Price moved for a new trial, which the trial court denied. The court of appeals held that the original notice was sufficient to apprise Price of the rescheduled hearing date and affirmed the summary judgment for Virage. Price petitioned the Supreme Court for review.

The Court reversed, holding that Price did not receive adequate notice of the April 2 hearing as required by the United States and Texas Constitutions. Notice of a proceeding must be reasonably calculated, given the circumstances, to apprise the parties of the pending action and give them a meaningful opportunity to respond. When a previously scheduled hearing is canceled by the trial court, a new hearing

requires new notice. Price did not receive proper notice as required by due process and is therefore entitled to a new trial.

### 3. Separation of Powers

a) *City of Houston v. Hous. Pro. Fire Fighters Ass'n, Local 341* and *Hous. Police Officers' Union v. Hous. Pro. Fire Fighters Ass'n, Local 341*, 664 S.W.3d 790 (Tex. Mar. 31, 2023) [21-0518, 21-0755]

The Court decided three issues in these consolidated cases: (1) whether a statute that requires the judiciary to set the compensation for firefighters after collective bargaining fails violates the constitutional separation of powers; (2) whether the statute waives governmental immunity; and (3) whether the statute preempts a local city charter provision that also governs firefighter pay.

The City of Houston's collective-bargaining agreement with its Fire Fighters Association expired, and the parties did not reach a new agreement. The Fire Fighters sued the City under The Fire and Police Employee Relations Act, alleging that the City failed to provide the terms of employment required by the Act, and asking the court to establish their terms of employment for one year as the Act provides. The City countered that the Legislature delegated the task of establishing firefighter pay to the judiciary in violation of the constitutional separation of powers and that the City's immunity was not waived under the Act because the firefighters failed to propose certain required terms during collective bargaining. The trial court rejected the City's constitutional and immunity challenges, and the court of appeals affirmed.

Meanwhile, the Fire Fighters successfully campaigned for a city charter amendment that would require their compensation to be in parity with city police officers. Upon its passage, the Police Officers' Union, joined by the City, sued for a declaratory judgment that the Act preempts the pay-parity amendment. The trial court held that the Act preempts the pay-parity amendment, but a divided court of appeals reversed.

The Supreme Court held that the Act does not unconstitutionally delegate legislative authority. The Act furnishes a judicial remedy that provides adequate and familiar comparators to guide judicial discretion in setting terms of employment, like requiring compensation to be "substantially equal" to "comparable employment" in the private sector. The Supreme Court held that the Act's waiver of immunity was not contingent on the proposal of certain terms during collective bargaining because the statutory definition of the bargaining duty is limited to meeting at reasonable times and conferring in good faith. Finally, the Supreme Court held that the Act preempted the pay-parity amendment because the amendment attempted to supplant the Act's rule of decision for establishing firefighter compensation.

## E. CONTRACTS

### 1. Damages

a) *MSW Corpus Christi Landfill, Ltd. v. Gulley-Hurst*, L.L.C., 664 S.W.3d 102 (Tex. Mar. 24, 2023) (per curiam) [21-1021]

This case concerns the correct calculation of damages when (1) a buyer breaches a real estate contract, (2) after the seller has fully performed, and (3) the property has appreciated in value since the underlying sale. Gulley Hurst, L.L.C. and MSW Corpus Christi Landfill, Ltd. entered into a mediated settlement agreement that required MSW to sell back a one-half interest in a landfill that it had previously purchased from Gully Hurst. The agreement also required Gulley Hurst to assume an outstanding loan in MSW's name. When Gulley Hurst failed to refinance the loan as promised, MSW sued Gulley Hurst for breach of contract. By the time of trial, the value of the landfill had significantly increased.

Following a trial, a jury awarded MSW two types of damages: (1) lost "benefit of the bargain" damages, which they were instructed to calculate based on the property's appreciation in value; and (2) lost "opportunity cost" damages, which they were instructed to calculate based on investments MSW could have made had Gulley Hurst performed as promised. Gulley Hurst filed a motion for judgment notwithstanding the verdict, challenging the trial court's instructions on calculating the two types of damages. The trial court granted the JNOV in part, issuing a final judgment that awarded MSW $372,484.70 in lost opportunity cost damages but reduced the jury's award for benefit of the bargain damages to $0.

Both parties appealed. After the court of appeals affirmed, the parties filed petitions for review, which the Court granted without hearing oral argument. Agreeing with Gulley Hurst that the underlying jury instructions were incorrect, the Court affirmed the trial court's final judgment with respect to the benefit of the bargain damages. The Court reversed the trial court's judgment and rendered a take-nothing judgment on the lost opportunity cost damages, holding that MSW failed to establish the foreseeability required to support such damages.

### 2. Interpretation

a) *U.S. Polyco, Inc., v. Tex. Cent. Bus. Lines Corp.*, 681 S.W.3d 383 (Tex. Nov. 3, 2023) (per curiam) [22-0901]

The issue before the Court concerns whether a land-improvement contract's requirement of a further writing applies to certain improvements Polyco made so that Polyco had to obtain Texas Central's further written agreement.

Polyco sued Texas Central for breach of contract and moved for partial summary judgment on this issue. The trial court granted the motion, concluding that a further written agreement was not required. Texas Central appealed. The court of appeals held that there were multiple reasonable interpretations of the contract provision and that the in-writing provision was therefore insolubly ambiguous. The court of appeals reversed and ordered a new trial on the meaning of the contract provision.

The Supreme Court reversed and remanded to the court of appeals. The Court concluded that the multiple interpretations the court of appeals deemed reasonable are merely the parties' competing theories about the text's meaning. Looking to the structure and syntax of the provision, the Court concluded that the in-writing requirement only applies to the last antecedent. The Court remanded to the court of appeals to address Texas Central's other arguments in the first instance.

### 3. Releases and Reliance Disclaimers

a) *Austin Tr. Co. v. Houren*, 664 S.W.3d 35 (Tex. Mar. 24, 2023) [21-0355]

The issues in this case involve the scope and validity of liability releases in a family settlement agreement related to the administration of Bob Lanier's estate. Some of the parties to that agreement were the remainder beneficiaries of a marital trust, of which Bob had served as trustee and sole beneficiary. The trust was initially valued at $54 million, but at the time of Bob's death, only $5.5 million in assets remained. To facilitate the prompt distribution of the trust and estate assets, Jay Houren—the independent executor of Bob's estate—proposed a family settlement agreement to all interested parties, including the marital trust beneficiaries. Before signing the agreement, the parties obtained independent counsel and received various disclosures, including general accounting ledgers listing $37 million in payments made from the trust to Bob during his life.

After executing the agreement, the trust beneficiaries demanded that Houren repay that $37 million, which they claimed the trust had loaned to Bob. In response, Houren sued for a declaration that the alleged debt did not exist. The trust beneficiaries counterclaimed, alleging that the debt did exist or alternatively that Bob, as trustee, breached his fiduciary duty to the trust's remainder beneficiaries by making unauthorized distributions of principal to himself during his lifetime. According to the beneficiaries, the settlement agreement did not prohibit them from pursuing their claims because (1) the releases did not extend to the debt claim and (2) they were not provided with the "full information" required by statute to release a trustee from liability. Houren filed a motion for summary judgment, arguing that the evidence conclusively negated the existence of a debt and that the agreement's broad release provisions barred both claims.

The trial court rendered summary judgment for Houren. The court of appeals affirmed, holding that the beneficiaries released all claims against the other parties to the agreement. The court further held that the releases were valid irrespective of any fiduciary duties owed by Houren or Bob.

The Supreme Court affirmed, holding that the trust beneficiaries released their debt and breach of fiduciary duty claims. The Court first concluded that the releases encompassed the debt claim, holding that the parties' release of liability for such debts superseded Houren's general obligation to pay all debts and claims of the estate. The Court also determined that Houren did not owe a fiduciary duty to

the trust beneficiaries since they were not devised any probate assets. Although the Court assumed without deciding that the statutory "full information" requirement governing beneficiary releases of trustee liability cannot be waived, the Court held that Houren provided the trust beneficiaries with such information. Specifically, the Court held that the beneficiaries were sufficiently informed to understand the character of the act they were releasing and make an informed decision about whether to agree to the release.

## F. CORPORATIONS

### 1. Stock Redemption

a) *Skeels v. Suder*, 671 S.W.3d 664 (Tex. June 23, 2023) [21-1014]

The central issue in this declaratory-judgment suit is whether a corporate resolution authorized a law firm to redeem a departing shareholder's shares on terms unilaterally set by the firm's founders.

As a shareholder in a law firm, David Skeels signed a corporate resolution generally authorizing the firm's founders "to take affirmative action on behalf of the Firm." After his relationship with the firm soured, the firm terminated his employment and proposed separation terms, including that Skeels relinquish his rights to his shares. When Skeels did not agree, the founders purported to redeem his shares at no cost. Skeels then sued the firm and two of its founders, and the firm counterclaimed. Both sides raised competing declaratory-judgment claims on whether the resolution authorized the founders' redemption actions. In a pretrial ruling, the trial court declared that it did, and the court of appeals affirmed.

The Supreme Court reversed. The Court held that the resolution, by modifying "affirmative action" with "on behalf of the Firm," authorized the founders to take action the firm could take, but it neither expanded the scope of the firm's authorized actions nor constituted an agreement that the founders may set redemption terms on Skeels's behalf. And because the firm was not authorized to set the redemption terms without Skeels's agreement, the Court held that the resolution did not independently authorize the founders to unilaterally set those terms. Chief Justice Hecht dissented, concluding that Skeels agreed in the resolution that the firm could redeem his shares on his departure without payment.

## G. DAMAGES

### 1. Settlement Credits

a) *Virlar v. Puente*, 664 S.W.3d 53 (Tex. Feb. 17, 2023) [20-0923]

The main issues in this medical malpractice case involve settlement credits under Chapter 33 of the Civil Practice and Remedies Code and periodic payments for future medical expenses under the Texas Medical Liability Act in Chapter 74 of the Code.

Jo Ann Puente suffered brain injuries due to complications of a prior surgery while in the hospital care of Dr. Jesus Virlar. Puente and members of her family sued Virlar; the physicians association that employed him, referred to as Gonzaba; and other health care providers. Several claims settled prior to trial, including the claims by Puente's minor daughter against some

defendants for loss of consortium and services. Ultimately, the only claims tried were Puente's claims against the non-settling defendants, including Virlar and Gonzaba.

After a jury verdict of $14 million for Puente, the defendants moved for a settlement credit under Chapter 33, arguing that the $3.3 million Puente's daughter received in settlement should reduce the amount of Puente's award. The defendants also moved for periodic payments of the award under the Medical Liability Act. The trial court denied both motions.

A majority of the court of appeals, sitting en banc, largely affirmed. Without addressing the predicate question whether Chapter 33 requires a credit for the daughter's settlement, the court held that applying Chapter 33 here would violate the Open Courts provision of the Texas Constitution. The court further held that the defendants had not presented sufficient evidence for the trial court to grant periodic payments. The defendants petitioned for Supreme Court review.

The Court affirmed in part and reversed in part. The Court first reversed with respect to the court of appeals' Chapter 33 analysis. The Court held that the daughter is a "claimant" under Chapter 33 because her claims for loss of consortium and services are claims for injury to another person, Puente. Chapter 33 therefore requires that the daughter's settlement be credited against the judgment. The Court went on to hold that applying Chapter 33 here would not violate the Open Courts provision because the statute gives Puente a greater recovery than she would have obtained under the common law.

The Court also reversed with respect to the court of appeals' analysis of the Medical Liability Act. The Court held that the defendants had presented sufficient evidence of the statutory prerequisites and that the trial court was therefore required by the Act to order periodic payments for at least some of Puente's future damages. Finally, the Court affirmed with respect to some evidentiary challenges raised by the defendants.

**2. Wrongful Death**

a) *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. June 16, 2023) [21-0017]

In this wrongful death case, the main issue is whether a noneconomic damages award of just over $15 million is supported by sufficient evidence.

Sarah Gregory—a truck driver for New Prime, Inc.—jackknifed her eighteen-wheeler, causing a multiple-fatality, multi-vehicle pileup. Among the deceased was Bhupinder Deol, whose estate and family brought suit. The case, which involved Deol and other decedents, was tried to a jury, which returned a nearly $39 million verdict. Deol's family's share was nearly $16.5 million, and the family's noneconomic damages accounted for just over $15 million. Concluding that the award neither shocked the conscience nor manifested passion or prejudice, the court of appeals affirmed.

In divided opinions, the Supreme Court of Texas reversed. Writing for a plurality, Justice Blacklock concluded that parties must provide both evidence of the existence of mental anguish and evidence to justify the

amount awarded. The plurality would require parties defending a noneconomic damages award to demonstrate a rational connection between the evidence and the amount awarded. The "shock the conscience" standard of review is insufficient, and parties should not rely on unsubstantiated anchors or ratios between economic and noneconomic damages.

Justice Devine, joined by Justice Boyd, concurred in the judgment. His concurrence expressed concern that the plurality's "rational connection" requirement is an impossible standard to meet that infringes upon the jury's traditional role.

Justice Bland concurred in part. She agreed that improper argument affected the jury's verdict but considered that a sufficient basis for reversal in this case.

The case presented a secondary issue about whether ATG Transportation, another trucking company whose truck overturned during the accident, was wrongly excluded as a responsible third party. Both concurrences agreed with the plurality that ATG should have been joined as a responsible third party, and on that basis, the Court remanded for a new trial.

## H. ELECTIONS

### 1. Injunctive Relief

a) *In re Morris*, 663 S.W.3d 589 (Tex. Mar. 17, 2023) [23-0111]

The issue in this case is whether a voter is entitled to pre-election relief to delay an election on a proposed city charter amendment, divide the proposed amendment into single subjects, and amend the wording of the ballot language describing the amendment.

Advocacy organizations drafted a proposed amendment to the San Antonio City Charter. The proposed amendment purports to, among other things, prohibit local enforcement of state laws related to marijuana possession, theft offenses, and abortion. The City Clerk certified that the proposed amendment met the requirements to appear on the ballot. The City Council ordered it placed on the ballot for the May election, but the abstention of three councilmembers caused the order to take effect fewer than the required seventy-eight days before the election.

A prospective voter sought relief in an original proceeding in the Supreme Court. The voter argued that (1) the election was untimely ordered and should be reset for the November election, (2) the proposed amendment violates a state law requiring such amendments to contain only a single subject, and (3) the ballot language misleads voters as to which city officials would be barred from enforcing abortion laws.

The Court denied the petition for writ of mandamus, continuing the Court's jurisprudence of judicial noninterference with elections. The Court observed that the City Council had dual ministerial duties to order the election at least seventy-eight days ahead of the election date and to set the charter amendment on the earliest lawful uniform election date. The Court declined to supersede the City Council's decision, noting the absence of any particularized harm and the availability of post-election remedies for election irregularities. The Court declined to order the City Council to divide the proposed amendment into single subjects

because the City Council lacks authority to redraft the citizen-initiated amendment, and the alleged violation of the single-subject rule may be determined in an election contest. Finally, the Court held that the voter lacked standing to challenge the ballot language before the election because she had not identified an injury distinct from that to the general public.

Justice Young issued a dissenting opinion, joined by Justice Devine and Justice Blacklock. The dissent would have granted partial relief to move the election to November. The dissent concluded that the seventy-eight-day deadline for ordering the election is express and unambiguous, and that the proper relief is to direct the City Council to hold the election at the correct time.

## I. EMPLOYMENT LAW

### 1. Disability Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Niehay*, 671 S.W.3d 929 (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. claiming 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.

The Supreme Court reversed. The majority opinion, authored by Chief Justice Hecht, held that the plain language of the TCHRA's definition of disability as "a mental or physical impairment" requires an impairment to have an underlying a physiological disorder or condition. It further held that weight is not a physiological disorder or condition—it is a physical characteristic. 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.

### 2. Employment Discrimination

a) *Scott & White Mem'l Hosp. v. Thompson*, 681 S.W.3d 758 (Tex. Dec. 22, 2023) [22-0558]

This case concerns the causation standard at the summary-judgment stage in an employment-discrimination lawsuit.

Dawn Thompson worked as a registered nurse at Scott & White Memorial Hospital. She had received two prior reprimands for violating the hospital's personal-conduct policy. The second reprimand warned that any future violation "will result in separation from employment."

Thompson then received a third reprimand. She had become concerned that the parents of a child patient were not properly managing the child's medications. Thompson called the child's school nurse and disclosed the child's health information, which Scott & White claimed was a HIPAA violation. Thompson then reported her concerns to Child Protective Services. After the child's mother complained to the hospital, it fired Thompson. The form documenting her termination stated, "As a result of this [HIPAA] violation your employment is being terminated immediately." It also included the statement: "Furthermore a CPS referral was made without all details known to Ms. Thompson."

Thompson sued Scott & White under Section 261.110(b) of the Family Code for firing her for making a statutorily protected CPS report. Scott & White moved for summary judgment, arguing that it terminated Thompson for violating its personal-conduct policy by disclosing protected health information to the school nurse—not for making the CPS report. The trial court granted summary judgment in Scott & White's favor, but the court of appeals reversed.

The Supreme Court reversed the court of appeals' judgment and reinstated the summary judgment in Scott & White's favor. It held that Scott & White's evidence conclusively negated the "but for" causation element of Thompson's claim because it demonstrated that the hospital would have fired Thompson when it did for her third violation of its policy, regardless of the CPS report. Thompson therefore could not establish a violation of Section 261.110, and summary judgment in favor of Scott & White was proper.

## J. EVIDENCE

### 1. Exclusion for Untimely Disclosure

a) *Jackson v. Takara*, 675 S.W.3d 1 (Tex. Sept. 1, 2023) (per curiam) [22-0288]

The issue in this case is whether the trial court committed reversible error by allowing an untimely identified witness to testify.

Reuben Hitchcock fell while trimming a tree on Andrew Jackson's property and died. Hitchcock's sister, Kristen Takara, sued Jackson on the estate's behalf. Shortly before trial, Jackson identified Valerie McElwrath, a neighbor, as a person with knowledge of relevant facts. Takara moved to exclude McElwrath from testifying because the identification was untimely. Jackson's counsel represented to the trial court, without objection, that the parties had agreed to extend the discovery period and that Takara was not unfairly surprised or unfairly

prejudiced because she knew McElwrath and mentioned McElwrath by name multiple times in her deposition. The trial court allowed McElwrath to testify. The jury found neither Jackson nor Hitchcock negligent, and the trial court rendered a take-nothing judgment.

A divided court of appeals reversed and remanded for a new trial. It held the trial court should have prohibited McElwrath from testifying because she was not timely identified, there was no discovery agreement that complied with Rule 11, and there was no evidence in the record that Takara was aware of McElwrath or her potential testimony.

The Supreme Court reversed and rendered judgment for Jackson. The Court held that the trial court did not abuse its discretion by allowing McElwrath to testify because the record included counsel's uncontested statements regarding the state of discovery and Takara's knowledge of McElwrath. The Court also held that the trial court's ruling, even if erroneous, would not constitute reversible error because the jury's failure to find negligence did not turn on McElwrath's testimony.

**2. Expert Testimony**

a) *Helena Chem. Co. v. Cox*, 664 S.W.3d 66 (Tex. March 3, 2023) [20-0881]

The issue in this case is whether expert testimony on causation was sufficiently reliable to survive the defendant's no-evidence summary-judgment motion. Plaintiffs are farmers who claimed their cotton crops were damaged by an aerial spraying of herbicide. The damage was allegedly caused by Helena Chemical Company's large-scale spraying of an herbicide called Sendero for a customer owning the Spade Ranch. Sendero contains two herbicides, clopyralid and aminopyralid and is used to kill mesquite trees. Sendero can damage other plants including cotton. Plaintiffs' cotton fields were located over hundreds of square miles and up to twenty-five miles from the Spade Ranch.

Plaintiffs sued Helena for negligence and trespass. They relied on experts to establish damages causation. Helena filed a motion to strike the expert testimony as unreliable and a no-evidence motion for summary judgment. The trial court granted the motions and dismissed the case. The court of appeals reversed in part, concluding the experts had provided a reliable scientific basis for their opinions. The Supreme Court concluded that the district court did not abuse its discretion in striking the expert testimony as unreliable. The Court therefore reinstated the summary judgment dismissing all claims.

The Court reasoned that expert testimony was required to prove that aerial drift from Helena's Spade Ranch application reduced the yield from plaintiffs' crops. If expert testimony is unreliable, it is no evidence. To be admissible, expert testimony must be grounded in the methods and procedures of science. The causation opinions proffered by the experts were not reliable and summary judgment was therefore warranted. Of the 111 fields owned by plaintiffs, only three positive lab tests for herbicide were obtained at identifiable locations. These tests only showed the presence of clopyralid. The experts failed to offer a scientifically reliable method for extrapolating the positive test results to all the other fields. The experts also failed to establish the dose of Sendero that landed

on plaintiffs' fields or the dose required to cause a loss of crop yield. Further, the experts failed exclude other plausible causes for the crop damage, including other applications of herbicides and inclement weather. There was evidence of other applications of herbicides, and many plaintiffs filed insurance claims claiming their crop losses were the result of drought or other weather conditions.

### 3. Medical Expense Affidavits

a) *In re Chefs' Produce of Hous., Inc.*, 667 S.W.3d 297 (Tex. Apr. 21, 2023) (per curiam) [22-0286]

The issue in this mandamus proceeding is whether the trial court abused its discretion by striking Chefs' Produce's medical expense counteraffidavit and prohibiting the counteraffiant from testifying at trial.

Antonio Estrada was injured in a car accident with Mario Rangel, who was driving a box truck for his employer, Chefs' Produce. Estrada sued both Rangel and Chefs' Produce claiming that Rangel's negligence caused the wreck.

Estrada timely filed an affidavit under Section 18.001 of the Civil Practice and Remedies Code averring that he had incurred reasonable and necessary medical expenses because of the accident. Chefs' Produce timely filed a counteraffidavit under Section 18.001(f) challenging Estrada's expenses. Chefs' Produce retained an anesthesiologist and pain management doctor as the counteraffiant.

Estrada moved to strike the counteraffidavit and testimony. The trial court granted the motion to strike and precluded the counteraffiant from testifying at trial. Chefs' Produce moved for reconsideration shortly after the Supreme Court issued its opinion in *In re Allstate Indemnity Insurance Co.*, 622 S.W.3d 870 (Tex. 2021), arguing that that opinion established that the trial court improperly struck the counteraffidavit. The trial court denied the motion for reconsideration. Chefs' Produce sought mandamus relief in the court of appeals, and a divided court denied relief.

The Supreme Court conditionally granted Chefs' Produce's petition for writ of mandamus and ordered the trial court to vacate its order striking the counteraffidavit and testimony. The Court held that the counteraffidavit satisfied all of Section 18.001(f)'s requirements and provided Estrada with reasonable notice of Chefs' Produce's basis for controverting the initial affidavit's claims. The Court further held that the mere inclusion of a causation opinion in an otherwise compliant Section 18.001(f) counteraffidavit is not a proper basis for striking it. Finally, the Court held that Chefs' Produce lacked an adequate appellate remedy because, given the procedural posture of the case, the trial court's improper order effectively foreclosed Chefs' Produce from presenting rebuttal testimony on the reasonableness and necessity of Estrada's medical expenses.

## K. FAMILY LAW

### 1. Termination of Parental Rights

a) *In re J.N.*, 670 S.W.3d 614 (Tex. June 9, 2023) [22-0419]]

This case concerns a trial court's failure to interview a child under Section 153.009(a) of the Family Code. Under this section, upon application by

certain parties, a trial court "shall" interview a child twelve and older to determine the child's wishes as to who will have the exclusive right to determine their primary residence. This statute applies only to nonjury trials or hearings. Therefore, a litigant must forgo her right to a jury trial to benefit from Section 153.009(a)'s interview provision.

In this divorce proceeding, Mother withdrew her jury demand and properly invoked the trial court's statutory obligation to interview her thirteen-year-old daughter regarding which parent she would prefer to have determine her primary residence. The trial court did not conduct the interview and ultimately granted the father the exclusive right to determine the primary residence of the couple's four children.

The court of appeals affirmed in a split decision. The panel agreed that the trial court erred in failing to conduct an in-chambers interview but disagreed about whether the error is subject to a harm analysis.

The Supreme Court held that the trial court erred in failing to conduct the interview because Section 153.009(a)'s interview requirement is mandatory, and such an error is subject to a harm analysis. Here, the trial court's error was harmful. Consequently, the Court reversed the judgment in part and remanded for an interview under Section 153.009(a) and a new judgment regarding the child's primary residence.

b) *In re J.S.*, 670 S.W.3d 591 (Tex. June 16, 2023) [22-0420]

This case concerns the findings a trial court is required to make under Section 263.401(b) of the Family Code to extend the automatic dismissal deadline for a parental-rights-termination suit.

The suit to terminate the rights of J.S.'s parents was initially set for trial by remote appearance on the same day as the deadline for either commencing trial or dismissing the suit under Section 263.401(a). But J.S.'s attorney ad litem failed to appear, and both parents made last-minute requests for a jury trial. The trial court granted DFPS's motion to extend the dismissal deadline and rescheduled the trial to a later date. At DFPS's prompting, the court made an oral finding that the extension was in the best interest of the child. The court did not mention the second finding required by Section 263.401(b), that extraordinary circumstances necessitate the child's remaining in DFPS's conservatorship. Neither parent's counsel objected to the extension. The court later signed a written extension order that included both findings.

The parents' rights were eventually terminated after a jury trial, and Mother appealed. The court of appeals reversed, holding that the trial court's failure to make the extraordinary-circumstances finding when it granted the extension deprived the court of subject-matter jurisdiction. The court of appeals then vacated the trial court's judgment and dismissed the case.

The Supreme Court reversed. The Court held while Section

263.401(b) requires the best-interest and extraordinary-circumstances findings to be made expressly, these findings are mandatory rather than jurisdictional. As a result, a parent whose rights have been terminated generally must object before the initial automatic dismissal deadline passes in order to preserve the complaint for appellate review. Because Mother did not raise her complaint before the initial automatic dismissal deadline and did not oppose the extension, she had not preserved her complaint. Holding otherwise, the Court said, would penalize the trial court for doing its best to honor the parents' last-minute requests for a jury trial.

Justice Boyd concurred in judgment. He would have held that the findings are jurisdictional but can be made impliedly. Because the record in this case supports an implied finding of extraordinary circumstances, he joined the Court's judgment.

c) *In re R.J.G.*, 681 S.W.3d 370 (Tex. Dec. 15, 2023) [22-0451]

The issue in this case is whether strict compliance is required to avoid parental-rights termination based on the alleged failure to comply with the provisions of a court-ordered service plan.

The Department of Family and Protective Services removed Mother's three children and prepared a service plan identifying required actions for her to obtain reunification. The Department alleged that Mother failed to complete requirements that she participate in individual counseling and complete classes on parenting and substance abuse. It sought termination solely on that basis under Section 161.001(b)(1)(O) of the Family Code.

Mother argued that she substantially complied with these requirements. The Department's only witness testified that Mother had complied with the plan's requirements but not when she needed to or in the way she was ordered to comply. The trial court ordered termination of Mother's parental rights, concluding that strict compliance with the plan was required. The court of appeals affirmed.

The Supreme Court reversed, holding that strict or complete compliance with every plan requirement is not always necessary to avoid termination under (O). The Court noted that (O) authorizes termination only when the plan requires the parent to perform direct, specifically required actions. In addition, the parent must have failed to comply with a material plan requirement; termination is not appropriate for noncompliance that is trivial or immaterial in light of the plan's requirements overall. In this case, the plan did not specifically require Mother to achieve any particular benchmark in her individual counseling sessions, so the Department did not establish by clear and convincing evidence that Mother failed to comply with that requirement. And there was evidence that Mother completed the parenting and substance abuse classes with another provider, so her asserted failure to provide a certificate of completion was too trivial and immaterial, in light of the degree of her compliance with the plan's material requirements, to support termination. Because Mother complied with the material provisions of the plan, the Court held there was

insufficient evidence to support termination by clear and convincing evidence under (O). The Court therefore reversed and vacated the order terminating Mother's parental rights.

## L. FEDERAL LAW

### 1. Regulatory Interpretation

a) *Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc.*, 663 S.W.3d 569 (Tex. March 17, 2023) [20-0980]

The central issue in this tort and breach-of-contract case is whether a federal regulation, which authorizes retailers to store electronic transactions when the cardholder verification system is unavailable and later forward them "at the retailer's own choice and liability," insulated a state agency contractor from liability for retailers' losses in connection with an outage of the contractor's verification system.

The federally funded, state-administered Supplemental Nutrition Assistance Program (SNAP) provides nutritional financial support for low-income individuals and families. Wal-Mart accepts SNAP benefits for qualifying food items, and Xerox contracts with state agencies to provide retailers like Wal-Mart with electronic verification of SNAP purchases. On a busy Saturday, Xerox's verification system went offline for around 10 hours due to a power failure while Xerox performed unannounced maintenance at its data center. During the outage, Wal-Mart continued to allow customers to make purchases but held the electronic transactions in abeyance for later submission and reimbursement, as authorized by the federal regulation. When Xerox's system came back online, and the stored transactions were forwarded, Wal-Mart was ultimately denied reimbursement for nearly 90,000 transactions worth around $4 million.

All parties agreed that the federal regulation precluded Wal-Mart from seeking reimbursement from SNAP beneficiaries or the government. But Wal-Mart sought to hold Xerox liable for its losses under tort theories and as a third-party beneficiary under Xerox's agreements with state agencies. Xerox moved for summary judgment, arguing that the federal regulation insulated it from liability for Wal-Mart's losses and submitting contractual excerpts disclaiming third-party beneficiaries from its contracts with state agencies. The trial court rendered a take-nothing judgment against Wal-Mart, and the court of appeals affirmed.

The Supreme Court, after examining the text, structure, history, and purpose of the federal regulation allowing retailers to store and forward transactions at their "own choice and liability," concluded that the regulation did not insulate Xerox, as the state contractor, from liability. Accordingly, the Court reversed the summary judgment on the tort claims and remanded those claims to the court of appeals to consider alternative grounds for affirmance. But the Court affirmed summary judgment on the breach-of-contract claim, holding that the relevant disclaimer provisions were sufficient to shift the burden to Wal-Mart to produce evidence of its third-party-beneficiary status and the contract provisions Wal-Mart identified in response failed to raise a fact issue on its status.

## M. FEDERAL PREEMPTION

### 1. Railroads

a) *Horton v. Kan. City S. Ry. Co.*, ___ S.W.3d ___, 2023 WL 4278230 (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 midpoint 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.

## N. GOVERNMENTAL IMMUNITY

### 1. Arm of the State

a) *CPS Energy v. Elec. Reliability Council of Tex.* And *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund LLC*, 671 S.W.3d 605 (Tex. June 23, 2023) [22-0056, 22-0196]

The main issue in these cases is whether ERCOT is entitled to sovereign immunity.

In *CPS*, CPS sued ERCOT for breach of contract and other claims, alleging that ERCOT unlawfully short-paid CPS to offset losses suffered after Winter Storm Uri caused some wholesale market participants defaulted on their payment obligations to ERCOT. ERCOT filed a plea to the jurisdiction, asserting sovereign immunity and, alternatively, that the Public Utility Commission had exclusive jurisdiction. The trial court denied the plea, and the court of appeals reversed and dismissed the claims for lack of jurisdiction.

In *Panda*, Panda sued for fraud and other claims, claiming that

ERCOT fraudulently projected a severe electricity shortfall when in fact there would ba an excess of supply and that Panda relied on ERCOT's reports when it decided to construct new power plants. ERCOT filed a plea to the jurisdiction asserting sovereign immunity and that the PUC had exclusive jurisdiction. The trial court granted the plea. Sitting en banc, the court of appeals reversed.

In an opinion by Chief Justice Hecht, the Supreme Court rendered judgment for ERCOT in both cases. After concluding that ERCOT is a "governmental unit" entitled to an interlocutory appeal, the Court held that ERCOT is entitled to sovereign immunity. Specifically, the Court held that ERCOT is an "arm of the State" because, pursuant to the Utility Code, ERCOT operates under the direct control and oversight of the PUC, it performs the governmental function of utilities regulation, and it possesses the power to adopt and enforce rules. The Court further held that recognizing immunity satisfies the policies underlying immunity because it prevents the disruption of key governmental services, protects public funds, and respects separation of powers principles. The Court also held that the PUC has exclusive jurisdiction.

Justice Boyd and Justice Devine filed a jointly authored dissenting opinion, joined by two other justices. They agreed that ERCOT is a governmental unit and that the PUC has exclusive jurisdiction, but they would have held that ERCOT is not entitled to sovereign immunity.

**2. Condemnation Claims**

a) *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178 (Tex. May 19, 2023) [21-0507]

The issue in this case is whether governmental immunity bars a condemnation suit brought by one political subdivision against another.

The Improvement District and the Irrigation District provide water and irrigation services in Hidalgo County. The Irrigation District operates an open irrigation outtake canal in McAllen through which most of Edinburg's drinking water flows. The Improvement District operates an underground irrigation pipeline along the right-of-way for Bicentennial Boulevard in McAllen. The Improvement District entered into an agreement with the City of McAllen to extend the irrigation pipeline in conjunction with the City's northward extension of Bicentennial Boulevard. The route of the proposed pipeline extension crosses the Irrigation District's canal.

The Improvement District offered to purchase an easement from the Irrigation District. After negotiations between them failed, the Improvement District filed a condemnation action. The trial court appointed special commissioners who awarded the Irrigation District $1,900 in damages. The Irrigation District objected to the commissioners' award, arguing that the Improvement District could not establish the "paramount public importance" of its proposed pipeline. Under the paramount-public-importance doctrine, a condemnation authority cannot condemn land that is already devoted to

public use if doing so would effectively destroy the existing public use, unless that authority can show that the intended use is of "paramount public importance" and cannot be accomplished by any other means.

Before the trial court ruled on the objection, the Irrigation District filed a plea to the jurisdiction asserting that, as a governmental entity, it is immune from condemnation suits and that the Legislature has not waived that immunity. The trial court granted the plea and dismissed the suit. The court of appeals affirmed.

The Supreme Court reversed, holding that sovereign immunity, and by extension governmental immunity, does not apply to the Improvement District's condemnation suit. The Court first reiterated the modern justifications for sovereign immunity and analyzed how the doctrine's modern justifications define its boundaries and inform whether it applies in the first instance. Next, the Court analyzed the historical development of condemnation proceedings in Texas with a particular focus on condemnations of public land. The Court noted that its jurisprudence has long resolved issues arising from the condemnation of land already dedicated to a public use through application of the paramount-public-importance doctrine without reference to immunity. Finally, the Court synthesized the modern justifications for sovereign immunity with the way its precedent has developed in both the sovereign-immunity and eminent-domain contexts to hold that the Irrigation District is not immune from the Improvement District's condemnation suit.

**3. Contract Claims**

a) *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494 (Tex. June 9, 2023) [21-0307]

This case involves the governmental/proprietary dichotomy in a breach-of-contract context. League City and Jimmy Changas entered into an agreement under Chapter 380 of the Texas Local Government Code, which permits cities to provide economic-development incentives to stimulate commercial activity. The City agreed to reimburse Jimmy Changas for certain fees and taxes if Jimmy Changas built a restaurant and created jobs in League City. After Jimmy Changas completed the project, League City refused to provide the promised reimbursements, and Jimmy Changas sued. The City filed a plea to the jurisdiction, arguing that contracts made under Chapter 380 were governmental functions and the City was therefore immune from suit. The trial court denied the City's plea, concluding that the City acted in its proprietary capacity, and the court of appeals affirmed.

The Supreme Court likewise affirmed. First, it held that Chapter 380 contracts are not similar to those expressly identified in the Tort Claims Act as being governmental. The Act includes only community-development activities under Chapter 373 and urban-renewal activities under Chapter 374 and does not suggest that local economic-development activities under Chapter 380 should be impliedly included.

It then held that the *Wasson* factors weigh in favor of determining that the City's acts were proprietary. The

City's decision to contract with Jimmy Changas was discretionary, the contract primarily benefited City residents, the City acted on its own behalf (that is, it did not act as an agent of the State), and the City's acts were not sufficiently related to a governmental function so as to make them governmental as well.

Justice Young filed a concurring opinion. Although he agreed with the majority opinion, he suggested that the Court reconsider its reliance on the list of governmental functions in the Torts Claims Act when deciding a contract case, and he questioned the usefulness of the *Wasson* factors in other cases.

Justice Blacklock filed a dissenting opinion, in which Justice Bland joined in part. He agreed with the concurrence that the *Wasson* factors do not aid the Court in answering the ultimate question of whether the City's acts were governmental or proprietary. The dissent would hold that a Chapter 380 tax-incentive grant program for local economic development is a governmental function because such contracts implement a government grant program operated for a diffuse public benefit.

b) *Pepper Lawson Horizon Int'l Grp., LLC v. Tex. S. Univ.*, 669 S.W.3d 205 (Tex. May 19, 2023) (per curiam) [21-0966]

The main issue on appeal is whether a construction contractor's claim against a university falls within a statutory waiver of governmental immunity that applies to a claim for breach of an express contract provision brought by a party to the written contract.

The university contracted with representatives of two construction companies who, as part of a joint venture, subsequently formed as Pepper Lawson to build student housing. Pepper Lawson completed the project more than six months after the contractual deadline. Invoking equitable adjustments and justified time extensions under contractual provisions, Pepper Lawson invoiced the university for an adjusted remaining balance due. The university refused to pay that amount, alleging that several contract provisions precluded the adjustments and time extensions. Pepper Lawson sued the university for breach of contract to recover the amount due and sought interest and attorney's fees under a statutory provision incorporated into the contract. The university asserted its immunity in a plea to the jurisdiction and alleged that the statutory waiver is inapplicable because Pepper Lawson failed to plead a claim covered by the provision. The trial court denied the university's plea, but on interlocutory appeal, the court of appeals reversed and rendered judgment dismissing the suit. For the first time, the university argued that Pepper Lawson lacked standing because the entity was subsequently formed after the contract and was not a party to the written contract.

The Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court, holding that Pepper Lawson pleaded a cognizable breach-of-contract claim and sought categories of damages, including interest and attorney's fees, within the statutory waiver. Pepper Lawson was not required to prove its contract case to establish that the

waiver applies. Finally, the Court did not reach the university's new standing argument to allow Pepper Lawson the opportunity to develop the record and amend its pleadings.

**4. Texas Tort Claims Act**

a) *Christ v. Tex. Dep't of Transp.*, 664 S.W.3d 82 (Tex. Feb. 10, 2023) [21-0728]

The issue in this case is whether the Tort Claims Act waives immunity for a premises-defect claim based on a commonly occurring condition.

Daniel Christ and his wife were riding their motorcycle through a construction zone when they collided head-on with a vehicle that crossed into their lane. The Texas Department of Transportation prepared the construction project's traffic control plan, which called for the placement of concrete barriers between the opposing lanes of traffic. The contractor instead placed yellow stripes and buttons, acting on TxDOT's purported oral approval. The Christs sued TxDOT, alleging negligence based on a premises defect.

TxDOT filed a plea to the jurisdiction and no-evidence motion for summary judgment. It argued the Tort Claims Act did not waive its sovereign immunity because the Christs failed to raise a fact issue on their premises-defect claim and because TxDOT's roadway-design decisions were discretionary. The trial court denied TxDOT's plea and motion, and TxDOT appealed. The court of appeals reversed, holding that TxDOT retained its immunity because it had discretion to orally modify the traffic control plan. The Christs petitioned the Supreme Court for review.

The Court affirmed on different grounds. The Court held that the Christs failed to raise a fact issue on whether a condition of the roadway was unreasonably dangerous. In the trial court, the Christs argued the construction zone was unreasonably dangerous solely due to the substitution of stripes and buttons for concrete barriers. The Christs presented no evidence that the use of stripes and buttons to separate travel lanes, a common condition on roadways, was measurably more likely to cause injury in this case. Nor did they present evidence of any complaints or reports of injuries from the use of stripes and buttons. Because the Christs did not raise a fact issue as to the existence of an unreasonably dangerous condition, an essential element of their premises-defect claim, they failed to establish a waiver of TxDOT's immunity under the Tort Claims Act.

b) *City of Austin v. Quinlan*, 669 S.W.3d 813 (Tex. Jun. 2, 2023) [22-0202]

The issue is whether the Texas Tort Claims Act waives the City of Austin's governmental immunity from a claim that it negligently maintained a permitted sidewalk café.

The City granted a restaurant a permit to use a portion of the sidewalk for a sidewalk café. The restaurant agreed to operate and maintain the sidewalk café's premises at its own expense. The City had the right to enter the sidewalk café premises to ensure the restaurant's compliance.

Quinlan was injured after exiting the restaurant when she fell from an elevated edge of the sidewalk to the street below. She sued the City, alleging, among other claims, that it

negligently implemented a policy of ensuring that the restaurant complied with the maintenance agreement. The City filed a plea to the jurisdiction. The trial court denied the City's plea. A divided court of appeals affirmed with respect to Quinlan's negligent-implementation claims.

The Supreme Court reversed, holding that Quinlan's claims are subject to the discretionary-function exception to the Texas Tort Claims Act. First, the Court noted that neither Quinlan nor the court of appeals identified any maintenance- or inspection-related act that the City was affirmatively required to perform under the maintenance agreement. Rather, the agreement granted the City permission to conduct inspections and order additional maintenance as it deemed fit. Second, the Court rejected Quinlan's argument that the City had a nondelegable statutory duty to protect the public from sidewalk cafés with dangerous conditions. Because the City had discretion, but not a legal obligation, to intervene, the City's decision not to do so was a discretionary decision for which it remained immune.

c) *City of Houston v. Green*, 672 S.W.3d 27 (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.

d) *Fraley v. Tex. A&M Univ. Sys.*, 664 S.W.3d 91 (Tex. Mar. 24, 2023) [21-0784]

The issue in this case is whether the Texas Tort Claims Act waives immunity for a governmental unit's design of an intersection, including a ditch adjacent to the roadway.

Kristopher Fraley drove through an intersection and crashed into a ditch while driving at night on a property owned and controlled by Texas A&M University System. Fraley sued the University, alleging that the Act waived the University's governmental immunity because the unlit, unbarricaded intersection where he crashed constituted an unreasonably dangerous condition or, alternatively, a special defect. The trial court denied the University's jurisdictional plea. The court of appeals reversed, holding that the complained-of condition was not a special defect and that the discretionary-function exception shielded the University from liability for the decision not to install safety features.

The Supreme Court affirmed. A governmental unit retains immunity for its discretionary design decisions, including the decision not to install safety features, if the decision results in an ordinary premises defect. If the complained-of condition is a special defect, however, the governmental unit owes a heightened duty, and the Act waives immunity correspondingly.

The Court held that Fraley's complaint about the intersection's lack of lights, barricades, and warning signs fell squarely within the discretionary-function exception for which the University retained immunity.

The Court also held that the complained-of condition was not a special defect. The Act describes special defects as being akin to obstructions or excavations on the road, and the Court has long analyzed special defects with reference to the risk posed to the ordinary user of the roadway. The Court held that the ditch adjacent to the roadway was not a special defect because it posed no danger to an ordinary user, who is expected to remain on the paved surface of the road.

e) *Rattray v. City of Brownsville*, 662 S.W.3d 860 (Tex. Mar. 10, 2023) [20-0975]

The primary issue in this case is whether a city's decision to close a stormwater gate during a rainstorm, which immediately preceded the flooding of a neighborhood, constitutes the "use or operation of . . . motor-driven equipment" under the Tort Claims Act.

Eleven homeowners in the City of Brownsville alleged that city officials closed a stormwater gate during a rainstorm and thereby caused a nearby resaca (a former channel of the Rio Grande River) to overflow and flood their homes. To recover for their property damage, they sued the City under section 101.021(1)(A) of the Tort Claims Act, which waives governmental immunity for any property damage that "arises from" the "use or operation of . . . motor-driven equipment."

The City filed a plea to the jurisdiction, challenging both the "use or operation" and "arises from" elements of the claim. The trial court denied the plea, but a divided court of appeals reversed. The "gravamen of the homeowners' complaint" concerned *non*use of the gate, the court of appeals observed, so the homeowners could not invoke the statutory waiver. The court of appeals further held that, even if the homeowners' allegations did concern the use of motor-driven equipment, the homeowners' property damage did not "arise from" the gate's closure because their homes would have flooded

regardless of whether the gate was opened or closed.

The Supreme Court reversed. The Court held that because closing the gate put it to its intended purpose (blocking water), and because the gate's closure and the flooding of the homes all happened within the same episode of events, the homeowners had adequately pleaded enough facts to show use or operation of motor-driven equipment. As for the second issue, the Court held that the homeowners had produced enough evidence to create a fact issue on causation. In so holding, the Court clarified that plaintiffs can show that their property damage meets the "arises from" standard by meeting the familiar requirement of proximate cause.

**5. Texas Whistleblower Act**

a) *Tex. Health & Hum. Servs. Comm'n v. Pope*, 674 S.W.3d 273 (Tex. May 5, 2023) [20-0999]

The main issue in this case is whether two employees reported violations of law by their "employing governmental entity or another public employee" under the Texas Whistleblower Act when they reported violations of law by a private company that contracted with their employer.

Two employees of the Health and Human Services Commission, Dimitria Pope and Shannon Pickett, served as directors of a program that provides Medicaid beneficiaries with non-emergency transportation to and from medical providers. Federal and state law require that children who are Medicaid beneficiaries be accompanied by a parent or another authorized adult to receive transportation services and for the Commission to receive federal Medicaid reimbursement for providing the transportation. The employees reported to law enforcement that a private company the Commission contracted with to provide the transportation was transporting children without a parent or authorized adult.

After the employees were fired, they sued the Commission under the Whistleblower Act, alleging that they were terminated in retaliation for reporting violations of law by the Commission to law enforcement. The trial court denied the Commission's plea to the jurisdiction, and the court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the Commission. The main issue before the Court was whether the employees' reports against the private contractor satisfied the Whistleblower Act's requirement that an employee report a violation of law by the "employing governmental entity or another public employee." The employees argued that their reports against the contractor were impliedly against the Commission too because of the structure of Medicaid's federal reimbursement scheme. The Court rejected that argument and held that the Act only protects express reports that unambiguously identify the employing governmental entity as the violator.

**6. Ultra Vires Claims**

a) *Hartzell v. S.O.* and *Trauth v. K.E.*, 672 S.W.3d 304 (Tex. Mar. 31, 2023) [20-0811, 20-0812]

These cases, consolidated for oral argument, address whether a public university has authority to revoke a former student's degree. In *Hartzell*, S.O. received a Ph.D. from UT Austin, which subsequently initiated disciplinary proceedings premised on allegations that S.O. engaged in scientific misconduct and academic dishonesty in connection with her doctoral research. In *Trauth*, K.E. received a Ph.D. from Texas State, which subsequently revoked K.E.'s degree after determining in an administrative proceeding that she engaged in academic misconduct in connection with her doctoral research. In both suits, the former students brought *ultra vires* claims against the respective university officials, asserting that they lack statutory authority to revoke previously conferred degrees. In *Trauth*, K.E. also alleged that she was denied due process. The trial courts denied the universities' pleas to the jurisdiction with respect to the statutory-authority and due-process claims, and the courts of appeals affirmed.

The Supreme Court reversed as to the statutory-authority claims and dismissed those claims. The Court held that the statutory authority of the university systems' boards of regents is broad enough to encompass the authority to determine that a student did not meet the requisite conditions for earning a degree because of academic misconduct. The Court reasoned that whether the determination is made before or after a degree has been formally conferred is immaterial so long as the underlying conduct occurred during the student's tenure at the university, and due process is provided. The Court explained that courts in other states applying similarly worded grants of authority have uniformly determined that public universities have degree-revocation power.

However, the Court affirmed the denial of the jurisdictional plea as to K.E.'s due-process claim. The Court held that K.E. properly seeks prospective relief with respect to that claim and remanded the claim to the trial court for further proceedings.

Justice Boyd concurred in the judgment, opining that the only actions alleged to be *ultra vires* are scheduling a disciplinary hearing for S.O., noting on K.E.'s transcript that her degree was revoked, and requesting that K.E. return her diploma and no longer represent that she holds her degree. Justice Boyd concluded that the universities did not act *ultra vires* with regard to those specific actions.

Justice Blacklock, joined by Justice Devine, dissented, concluding that the governing statutes grant the universities neither express nor implied authority to revoke a previously conferred degree. The dissent would have held that revocation of a degree—an intangible asset—may result only from a judicial determination in a court of law.

b) *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 660 S.W.3d 108 (Tex. Jan. 13, 2023) [21-0194]

The issue in this case is whether a school district is entitled to prospective injunctive relief against the oversight actions of the Texas Education Agency Commissioner after the Legislature substantially amended the portions of the Education Code limiting the Commissioner's authority.

In 2016, the Commissioner appointed a conservator to Houston Independent School District to address repeated unacceptable academic accountability ratings received by a high school in the district. In 2019, a second high school received its fifth unacceptable rating in six years, and the Commissioner received a recommendation from a special accreditation investigation to appoint a board of managers to Houston ISD and lower the district's accreditation status.

Before the Commissioner could act, Houston ISD sought and received a temporary injunction barring the Commissioner from appointing a board of managers or taking any other action based on the results of the investigation. The Commissioner appealed and a divided court of appeals affirmed, based on its interpretation of the then-existing Education Code. While the Commissioner's petition to this Court was pending, the 87th Legislature substantially amended the relevant provisions of the Education Code.

The Supreme Court reversed. The Court held that the temporary injunction must be supportable under the amended statutes because Houston ISD only has the right to seek prospective compliance with the law. The Court interpreted the amendments to eliminate the grounds the court of appeals relied on to affirm the temporary injunction. Because Houston ISD failed to show that the Commissioner's planned actions would violate the amended law, the Court vacated the temporary order and remanded the case for the parties to reconsider their arguments in light of intervening changes to the law and facts.

## O. HEALTH AND SAFETY

### 1. Involuntary Commitment

a) *In re A.R.C.*, ___ S.W.3d ___, 2024 WL 648677 (Tex. Feb. 16, 2024) [22-0987]

At issue in this case is whether a second-year psychiatry resident qualifies as "psychiatrist" under the Texas Health and Safety Code.

A.R.C. was detained on an emergency basis after exhibiting psychotic behavior during a visit to an emergency room. After a medical examination yielded troubling results, the State filed an application for involuntary commitment. By statute, a court cannot hold a hearing to determine whether involuntary civil commitment is appropriate unless it has received "at least two certificates of medical examination for mental illness completed by different physicians." One of those certificates must be completed by "a psychiatrist" if one is available in the county. In this case, both certificates of medical examination filed with respect to A.R.C. were completed by second-year psychiatry residents.

In the probate court, A.R.C. argued that neither resident qualifies as a psychiatrist under the statute

because each was licensed under a physician-in-training program and was training under more senior doctors. The court disagreed and ordered A.R.C. to undergo in-patient mental health services for forty-five days.

A split panel of the court of appeals held that the residents are not psychiatrists and vacated the probate court's order.

The Supreme Court granted the State's petition for review, reversed the court of appeals' judgment, and remanded the case to that court to consider A.R.C.'s remaining challenges. The Court held that physicians who specialize in psychiatry are psychiatrists under the applicable statute. The statutory definition of "physician" includes medical residents who practice under physician-in-training permits, and dictionaries show that psychiatrists are physicians who specialize their practices in psychiatry. Because the second-year residents who completed A.R.C.'s certificates of medical examination met that standard, they qualify as psychiatrists.

## P. INSURANCE

### 1. Appraisal Clauses

a) *Rodriguez v. Safeco Ins. Co. of Ind.*, ___ S.W.3d ___, 2024 WL 388142 (Tex. Feb. 2, 2024) [23-0534]

The U.S. Court of Appeals for the Fifth Circuit certified this question to the Supreme Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?"

A tornado struck Mario Rodriguez's home. His insurer, Safeco, issued a payment, which Rodriguez accepted. But Rodriguez claimed he was owed an additional sum and then sued, asserting breach of contract and statutory claims under the Insurance Code. The parties agreed that Chapter 542A would govern an attorney's fees award for any of Rodriguez's claims.

After removing the case to federal court, Safeco invoked the policy's appraisal provision. The appraisal panel valued the damage, and Safeco paid that amount plus interest to Rodriguez. The parties' remaining disagreement was whether Safeco's payment of the appraisal award foreclosed an award of attorney's fees under Chapter 542A.

The Court answered the certified question yes. Under Chapter 542A, attorney's fees are limited to reasonable fees multiplied by a specified ratio. The ratio is "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy" divided by the amount claimed in a statutory notice under Chapter 542A. The Court reasoned that, here, the numerator of the ratio is zero. The Court reasoned that no amount could be awarded in a judgment under the policy because Safeco had complied with its contractual obligation when it timely paid the full amount owed under the policy's appraisal provision. The Court rejected Rodriguez's argument that this interpretation led to an absurd result because under the default American Rule, each side pays its own attorney's fees.

**2. Incorporation by Reference**

a) *ExxonMobil Corp. v. Nat'l Union Fire Ins. Co.*, 672 S.W.3d 415 (Tex. Apr. 14, 2023) [21-0936]

At issue in this case is whether an umbrella insurance policy incorporates the payout limits of an underlying service agreement.

ExxonMobil entered into a service agreement with Savage Refinery Services, under which Savage was required to obtain liability insurance for its employees and to name Exxon as an additional insured. Savage obliged and obtained five different policies. National Union Fire Insurance Company underwrote two of them—a primary policy and an umbrella policy. After two Savage employees were severely injured during a workplace accident, Exxon settled with both for about $24 million, some of which National Union paid under its primary policy. National Union denied Exxon coverage under its umbrella policy, however, so Exxon sued for breach of contract. The trial court granted Exxon summary judgment, but the court of appeals reversed, holding that Exxon was limited to only primary coverage because the umbrella policy incorporated the primary policy's definition of "additional insured," which in turn was "informed by" the coverage limits spelled out in the service agreement.

The Supreme Court reversed. The Court began by noting the longstanding principles that insurance policies can incorporate extrinsic contracts, but only if they clearly do so, and that such extrinsic contracts will be referred to only to the extent required by the incorporation, but no further. Based on those principles, the Court concluded that National Union's umbrella policy incorporated the primary policy only for the purpose of identifying who was insured. The Court also rejected National Union's argument that Exxon was not entitled to coverage under the umbrella policy because that policy expressly disclaimed "broader coverage" than the primary policy. "Interpreting 'broader coverage' to refer to payout limits," the Court explained, "would give the umbrella policy a self-defeating meaning," and nothing in the policy's text required a "departure from the settled understanding that umbrella policies provide greater limits for *the risks already covered* by primary policies." The Court accordingly reversed and remanded for further proceedings in light of Exxon's status as an insured under National Union's umbrella policy.

**3. Policies/Coverage**

a) *In re Ill. Nat'l Ins. Co.*, ___ S.W.3d ___, 2024 WL 736751 (Tex. Feb. 23, 2024) [22-0872]

This mandamus action concerns the no-direct-action rule and when a settlement agreement may be admissible as evidence to establish the amount of the insured's loss.

Relator GAMCO sued Cobalt for securities fraud. Cobalt's insurers denied coverage. Cobalt filed for bankruptcy, and GAMCO and Cobalt settled. The parties agreed that GAMCO would pursue the settlement amount solely through insurance proceeds. The federal bankruptcy and district courts approved the settlement.

GAMCO then intervened in a suit by Cobalt against its insurers. The

trial court entered summary-judgment orders ruling that: (1) GAMCO was permitted to sue Cobalt's insurers, (2) Cobalt suffered insured losses, and (3) the settlement was enforceable against the insurers. The insurers sought mandamus relief, which the court of appeals denied.

The Supreme Court granted relief in part. It held that the settlement agreement legally obligated Cobalt to pay to GAMCO its insurance benefits. If Cobalt fails to fulfill its obligations, GAMCO's release will not become effective. And because the settlement agreement establishes that Cobalt is in fact liable to GAMCO for any recoverable insurance benefits, Cobalt has suffered a covered loss and the no-direct-action rule does not prevent GAMCO from suing the insurers directly.

However, the settlement did not result from a fully adversarial proceeding and was therefore not binding against the insurers as to coverage and the amount of Cobalt's loss. Cobalt did not have a meaningful incentive to ensure that the settlement accurately reflected GAMCO's damages. Mandamus relief was warranted on this issue because the trial court's rulings prevent the insurers from challenging their liability for the full settlement amount.

**4. Private Right of Action**

a) *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424 (Tex. Jan. 13, 2023) [21-0291]

The Texas Insurance Code requires an insurer to pay for emergency care provided to its insureds by an out-of-network provider at the provider's "usual and customary rate." The main issue in this case and a companion case brought on certified question from the U.S. Court of Appeals for the Fifth Circuit, No. 22-0138, *United Healthcare Insurance Co. v. ACS Primary Care Physicians Southwest, P.A.*, is whether the Code authorizes a private damages action by a physician against an insurer for violating this statutory requirement.

Out-of-network emergency-care doctors sued Molina, alleging that the insurer failed to pay the doctors' usual-and-customary rates for treating thousands of Molina's insureds. They pleaded a cause of action directly under the Code's emergency-care provisions, a common-law quantum meruit claim, and a statutory claim for unfair settlement practices. The lower courts dismissed all of the doctors' claims, and the Supreme Court affirmed.

The Court first held that the Code does not authorize a private cause of action for a violation of the usual-and-customary rate payment requirement. The Court reasoned that a private a cause of action is not clearly implied in the text of the emergency-care provisions and noted that the Legislature has given the Department of Insurance broad authority to enforce those provisions. The Court also rejected the doctors' argument that recent statutory amendments that created a mandatory arbitration scheme for claims under the emergency-care provisions retroactively created a private cause of action for claims governed by the old, pre-arbitration law.

As to the doctors' other claims, the Court held that the doctors cannot satisfy the second element of a quantum meruit claim—that they

undertook to treat Molina's insureds for the benefit of Molina—and also that the doctors' unfair-settlement-practices claim is not viable. Finally, the Court addressed the parties' and lower courts' characterizations of Molina's challenges to the doctors' claims as issues of the doctors' standing. The Court reiterated that statutory or common-law prerequisites to a plaintiff's filing suit or recovering on a claim are not issues of standing but of merits.

**5. Rescission of Policy**

a) *Am. Nat'l Ins. Co. v. Arce*, 672 S.W.3d 347 (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.

## Q. INTENTIONAL TORTS

### 1. Defamation

a) *Lilith Fund for Reprod. Equity v. Dickson* and *Dickson v. Afiya Ctr.*, 662 S.W.3d 355 (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 i40nowledgegeable 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.

b) *Polk Cnty. Publ'g Co. v. Coleman*, ___ S.W.3d ___, 2024 WL 648672 (Tex. Feb. 16, 2024) [22-0103]

This case involves the application of the Texas Citizens Participation Act to a defamation claim against a newspaper.

The *Polk County Enterprise* published an article criticizing local prosecutor Tommy Coleman and his former employer, the Williamson County District Attorney's office, for their involvement in the wrongful conviction of Michael Morton. Coleman sued the Polk County Publishing Company—the *Enterprise*'s owner—alleging that the article was defamatory. Coleman challenged as false the statement that he had "assisted with the prosecution of Michael Morton" while a prosecutor in Williamson County. Coleman averred that he was not a licensed lawyer when Morton was convicted in 1987; that he was only a prosecutor in the Williamson County DA's office from 2008 to 2012; and that, while there, he never appeared as counsel, signed court filings, discussed case strategy, argued in court, or gave any public statements or interviews in the Morton case. The trial court denied Polk County Publishing's motion to dismiss under the TCPA, and the court of appeals affirmed.

The Supreme Court reversed. In an opinion by Justice Blacklock, the Court explained that an article is substantially true and not defamatory if the "gist" of the article is true, even if it "errs in the details." The *Enterprise* article reported that Coleman, while present in the courtroom during one of Morton's post-conviction hearings, mocked Morton's efforts to obtain the DNA evidence that ultimately exonerated him. The Court reasoned that, reading the article as a whole, an average reader would understand the article's gist to be that Coleman "assisted with the prosecution" by mocking Morton's post-conviction efforts to exonerate himself and by providing courtroom support for his office's opposition to Morton's efforts. The Court also held that the challenged statement is not actionable for the additional reason that the undisputedly true account of Coleman's courtroom mocking of Morton, in the mind of an average reader, would be more damaging to Coleman's reputation than the specific statement that Coleman alleged to be false and defamatory.

## R. JURISDICTION

### 1. Appellate

a) *In re A.B.*, 676 S.W.3d 112 (Tex. Sept. 15, 2023) (per curiam) [22-0864]

The issue is whether an appellant can consolidate two separate appeals from a single judgment in one court of appeals by moving to consolidate in one court of appeals and voluntarily dismissing the appeal in another, when both courts of appeals have statutory jurisdiction to hear the case and no party objects.

In Gregg County, the trial court terminated Mother's and Father's parental rights in one trial court proceeding. Both the Sixth and Twelfth Courts of Appeals have jurisdiction to hear appeals from Gregg County. Father noticed his appeal to the Twelfth Court, and Mother to the Sixth Court. Father then amended his notice of appeal to reflect that he was appealing to the Sixth Court under the same case number as

Mother. Father also moved to dismiss his appeal in the Twelfth Court, and the Twelfth Court granted his motion. After briefing was complete, the Sixth Court determined that it lacked jurisdiction over Father's appeal because the Twelfth Court had acquired dominant jurisdiction, and Father's amended notice of appeal did not properly invoke the Sixth Court's jurisdiction.

The Supreme Court reversed, holding that Father's amended notice of appeal attempted compliance with the rule of judicial administration requiring consolidation of such cases. The Sixth Court acquired dominant jurisdiction when Father indicated his lack of intent to prosecute the appeal in the Twelfth Court.

b) *In re A.C.T.M.*, 682 S.W.3d 234 (Tex. Dec. 29, 2023) (per curiam) [23-0589]

In this appellate-jurisdiction case, the court of appeals dismissed as untimely two attempts by Mother to appeal the trial court's termination of her parental rights.

The trial court first made an oral pronouncement terminating Mother's parental rights in October. Mother filed her notice of appeal from that pronouncement before the trial court signed a written order. The trial court did sign a written order in November, but it was never made part of the appellate record. The court of appeals dismissed Mother's appeal for lack of jurisdiction after concluding that the trial court had not yet issued a final judgment.

In January, after the court of appeals issued its opinion and judgment, the trial court signed a second order terminating Mother's parental rights. Mother filed a new notice of appeal, but a split panel of the court of appeals dismissed this appeal as untimely too. In an about-face, the majority concluded that the November order was the trial court's final judgment after all, rendering Mother's second notice of appeal untimely. The majority further reasoned that the trial court's January order is void because it was issued after the court's plenary power expired. Mother filed a petition for review in the Supreme Court. The Department of Family and Protective Services conceded error in its response.

The Supreme Court reversed without requesting further briefing or hearing argument, holding that Mother timely sought to invoke the appellate court's jurisdiction with respect to both orders. The Court explained that if the November order was the trial court's final judgment, then Mother's premature appeal from the court's oral pronouncement was effective under Texas Rule of Appellate Procedure 27.1(a) to invoke the appellate court's jurisdiction. Furthermore, that the November order was not included in the record of Mother's first appeal presented a record defect, not a jurisdictional defect. By obtaining the January order and filing a new notice of appeal, Mother was following the court of appeals' instructions, and she could not have done more to invoke her appellate rights. The Court remanded the case to the court of appeals with instructions to address the merits.

c) *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, ___ S.W.3d ___, 2024 WL 735942 (Tex. Feb. 23, 2024) [22-0459]

This case raises questions of appellate jurisdiction and finality of judgments, including whether a trial court can sever unresolved claims following a grant of partial summary judgment, thereby creating an appealable final judgment, and the extent to which summary judgment against a party's claim resolves a related request for attorney's fees.

FERMA sued Sealy ER for breach of contract. Sealy ER counterclaimed and requested attorney's fees on those claims. FERMA obtained a grant of partial summary judgment on its counterclaims that did not separately dispose of Sealy ER's request for attorney's fees. FERMA moved to sever the claims disposed of on partial summary judgment. Sealy ER agreed with FERMA's proposal to sever but moved for reconsideration of the partial summary judgment ruling. The trial court granted the motion to sever and denied the motion for reconsideration. Sealy ER sought to appeal the trial court's judgment, but the court of appeals determined it lacked jurisdiction in light of the claims still pending in the original action and because the trial court's partial summary judgment order did not dispose of Sealy ER's request for attorney's fees on its counterclaims.

The Supreme Court reversed. If an order in a severed action disposes of all the remaining claims in that action or includes express finality language, then that order results in a final judgment regardless of whether claims remain pending in the original action. The Court further noted that although an erroneous severance does not affect finality or appellate jurisdiction, it may have consequences for any preclusion defenses. The Court also held that when a party seeks attorney's fees as a remedy for a claim under a prevailing-party standard, a summary judgment against the party on that claim automatically disposes of the fee request, and therefore a trial court's failure to expressly deny a request for attorney's fees in this context will not affect a judgment's finality for purposes of appeal.

**2. Mandamus Jurisdiction**

a) *In re Renshaw*, 672 S.W.3d 426 (Tex. July 14, 2023) (per curiam) [22-1076]

The central issue in this proceeding is whether a court of appeals must address a petitioner's request for mandamus relief when he expressly requests it as alternative relief.

Timothy Renshaw petitioned the trial court for release from his civil commitment, which the court denied without a hearing. Renshaw petitioned the court of appeals for writ of habeas corpus and, in the alternative, requested that the court "consider this a petition for a writ of mandamus." The court dismissed his habeas petition for want of original jurisdiction but did not address Renshaw's express request for mandamus relief.

Without hearing oral argument, the Supreme Court conditionally granted mandamus relief and directed the court of appeals to withdraw its previous opinion and to reconsider

Renshaw's habeas corpus petition as a petition for writ of mandamus, as he requested.

### 3. Personal Jurisdiction

a) *LG Chem Am., Inc. v. Morgan*, 670 S.W.3d 341 (Tex. May 19, 2023) [21-0994]

The issue in this case is whether nonresident defendants' purposeful contacts with Texas are sufficiently related to a plaintiff's products-liability claims to support the exercise of specific personal jurisdiction.

Tommy Morgan alleged that he was injured when a lithium-ion battery he used to charge an e-cigarette exploded in his pocket. Morgan sued several defendants, including LG Chem, the South Korean manufacturer of the battery, and LG Chem America, its American distributor. LG Chem and LG Chem America each filed special appearances, which the trial court denied. The court of appeals affirmed.

LG Chem and LG Chem America petitioned for review. They argued that they only sold and distributed the battery that injured Morgan to industrial manufacturers, not individual consumers like Morgan, so their Texas contacts were insufficiently related to the plaintiff's claims to justify haling them into a Texas court.

The Supreme Court affirmed. The Court noted that the exercise of specific personal jurisdiction involves two components: first, the defendant must purposefully avail itself of the privilege of conducting activities in the forum state; and second, the plaintiff's claim must arise out of or relate to the defendant's contacts with the forum. The Court held that analyzing personal jurisdiction requires evaluation of a defendant's contacts with the forum—Texas—as a whole, not a particular market segment within Texas the defendant may have targeted. LG Chem and LG Chem America did not dispute that they purposefully availed themselves of the privilege of doing business in Texas by selling and distributing into Texas the same product that allegedly injured Morgan. The Court therefore held that Morgan's products-liability claims were sufficiently related to the defendants' Texas contacts to satisfy due process and subject LG Chem and LG Chem America to specific personal jurisdiction in Texas.

### 4. Subject Matter Jurisdiction

a) *Ditech Servicing, LLC v. Perez*, 669 S.W.3d 188 (Tex. May 19, 2023) [21-1109]

At issue in this case is whether a county court at law, exercising jurisdiction pursuant to its independent, county-specific statute, is subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction.

Perez purchased property subject to a deed of trust held by Ditech's predecessor in interest. After Ditech initiated foreclosure proceedings, Perez filed suit in a Hidalgo County court at law. Perez asserted that Ditech waived its right to foreclose on the property, and Ditech counterclaimed for judicial foreclosure.

The county court at law rendered judgment for Perez. Ditech appealed, and the court of appeals reversed and remanded. On remand, Ditech moved for summary judgment

on its judicial foreclosure counterclaim. In response, Perez argued that county courts at law lack subject-matter jurisdiction over actions requiring the resolution of issues of title to real property. The county court at law rejected Perez's jurisdictional challenge and granted Ditech's motion for summary judgment. Perez appealed, challenging only the county court at law's subject-matter jurisdiction. The court of appeals agreed with Perez, vacated the judgment, and dismissed the case for lack of subject-matter jurisdiction.

The Supreme Court reversed and rendered judgment for Ditech. Perez argued that the jurisdictional limitations on constitutional county courts—including the statutory provision depriving such courts of jurisdiction in a suit for the recovery of land—also apply to county courts at law. The Supreme Court explained that although county courts at law generally have concurrent jurisdiction with constitutional county courts, here the Hidalgo County court at law was exercising jurisdiction pursuant to its independent, county-specific statute, which granted the court jurisdiction in addition to its concurrent constitutional county court jurisdiction. Therefore, it was not subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction. Accordingly, the Supreme Court held that the Hidalgo County court at law had jurisdiction over Ditech's counterclaim.

## S. JUVENILE JUSTICE

### 1. Mens Rea

a) *In re T.V.T.*, 675 S.W.3d 303 (Tex. Sept. 8, 2023) (per curiam) [22-0388]

This case concerns whether consent is relevant when a child under the age of fourteen is charged with aggravated sexual assault of another child under fourteen.

The State charged T.V.T. with aggravated sexual assault. At the time of the offense, T.V.T. was thirteen years old and the complainant was twelve. The trial court placed T.V.T. on probation and required that he receive sex-offender treatment. The court of appeals reversed and dismissed the case, holding that T.V.T. could not commit sexual assault because he lacked the legal capacity to consent to sex. Shortly thereafter, the Supreme Court held in *State v. R.R.S.*, 597 S.W.3d 835 (Tex. 2020), that juveniles under fourteen are capable of committing aggravated sexual assault.

In light of *R.R.S.*, the State moved for rehearing. The court of appeals denied the motion but issued a supplemental opinion, holding that consent, while not a defense, can still inform whether T.V.T. had the intent to commit aggravated sexual assault. The court also noted that when both the accused and complainant are close in age and under fourteen years old, it is difficult to distinguish between the victim and the offender.

The Supreme Court reversed. The Court first concluded that, even though T.V.T.'s probation had ended, the case was not moot because he still faced potential collateral consequences based on his adjudication as a sex

offender. The Court then held that evidence of a victim's consent is not relevant to the accused's *mens rea*, reasoning that such a rule would circumvent the Legislature's exclusion of consent as a defense for engaging in the prohibited conduct with children under fourteen. The Court also found immaterial the fact that the T.V.T. and the victim were close in age, noting that the plain text of the statute covers conduct between children who are both under fourteen. The Court remanded the case to the court of appeals for consideration of T.V.T.'s constitutional arguments.

## T. MEDICAL MALPRACTICE

### 1. Expert Reports

a) *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879 (Tex. June 30, 2023) [21-0470]

This case examines what constitutes 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 pushed on a rolling walker by a facility employee along the facility's sidewalk. A walker wheel caught in a crack, and Faber's mother fell. 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 did not consider 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.

## U. MEDICAL LIABILITY

### 1. Health Care Liability Claims

a) *Uriegas v. Kenmar Residential HCS Servs., Inc.*, 675 S.W.3d 787 (Tex. Sept. 15, 2023) (per curiam) [22-0317]

The issue in this Chapter 74 case is whether two expert reports provide a fair summary of the experts' opinions regarding the standard of care and breach elements of a negligence claim against a residential care facility.

Brandon Uriegas, a nonverbal adult with intellectual and physical disabilities, resided at a residential care facility operated by Kenmar. Uriegas fell while showering and was treated for scalp lacerations. The next day, Uriegas fell in the bathroom again, allegedly while unsupervised,

and did not receive an immediate medical evaluation. When Uriegas could not stand the following day, Kenmar staff took Uriegas to the hospital where he was diagnosed with a fractured hip and femur. Uriegas's guardian sued Kenmar and provided expert reports. Cumulatively, the reports state that after Uriegas fell the first time, Kenmar should have closely monitored Uriegas, especially while using the bathroom, and that Kenmar should have sought an immediate medical assessment of Uriegas after the second fall because Uriegas could not verbalize any pain or discomfort. The trial court denied Kenmar's motion to dismiss under Chapter 74 on the basis that the reports insufficiently described the applicable standard of care and breach of that standard. Agreeing with Kenmar, the court of appeals reversed.

The Supreme Court reversed the court of appeals, holding that the reports together provide a fair summary of the applicable standard of care and breach, namely, increased monitoring after a fall and medical assessments for nonverbal patients. That Kenmar disagrees about the appropriate standard of care is not a reason to reject the expert report at this stage of the case.

## V. MUNICIPAL LAW

### 1. State Law Preemption

a) *Hotze v. Turner*, 672 S.W.3d 380 (Tex. Apr. 21, 2023) [21-1037]

The issue in this case is whether one proposed city charter amendment may impose a higher vote threshold for adoption on another proposed city charter amendment when both win a majority of votes at the same election.

A group of citizens submitted a proposed city charter amendment, Proposition 2, that would impose a strict voter-approval requirement before the City of Houston could increase tax revenues. The Houston City Council responded with its own proposed amendment, Proposition 1, that would require a more lenient voter-approval threshold; it also included a primacy clause that would require Proposition 1 to prevail over another majority-winning amendment "relating to limitations on increases in City revenues" if Proposition 1 passed with a higher number of votes. A majority of voters approved both propositions at the same election, but Proposition 1 earned more votes than Proposition 2.

The City declined to comply with Proposition 2, claiming that Proposition 1's primacy clause prevented its enforcement and, moreover, that the City Charter's reconciliation provision required such a result when two adopted amendments conflict. Bruce Hotze sued for enforcement, arguing that the primacy clause and the reconciliation provision violated a state law that provides for the adoption of a proposed charter amendment if it passes by a majority of votes. The trial court ruled that the primacy clause defeated Proposition 2. A divided court of appeals affirmed, holding that the state-law requirement that a majority-approved amendment must be adopted does not also require that the amendment be enforced.

The Supreme Court reversed, holding that the primacy clause improperly imposed a higher vote threshold than state law permits and that the City had no discretion to refuse to

enforce a charter amendment after its approval and adoption. The Court observed, however, that state law does not address the unusual situation in which conflicting amendments pass simultaneously, and it remanded the case to the trial court to consider whether the City Charter's reconciliation provision governs the two amendments.

## W. NEGLIGENCE

### 1. Duty

a) *Hous. Area Safety Council v. Mendez*, 671 S.W.3d 580 (Tex. June 23, 2023) [21-0496]

The issue in this case is whether third-party companies that collect and test employment-related drug-testing samples owe a duty of care to the employees being tested.

Mendez was required to submit to a random drug test as part of his employment. Houston Area Safety Council collected Mendez's samples, and Psychemedics tested them. Mendez's urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although two subsequent hair tests came back negative, Mendez's employer refused to assign him to any jobsites.

Mendez sued the Safety Council and Psychemedics, alleging the companies negligently administered and analyzed the first hair sample, resulting in a false positive that cost him his job. Both companies filed motions for summary judgment. The trial court concluded that the companies did not owe Mendez a duty of care and granted summary judgment for the companies. The court of appeals reversed.

The Supreme Court reversed and rendered judgment for the companies. Chief Justice Hecht delivered the opinion of the Court, which held that third-party companies hired by an employer do not owe the employees they test a common-law duty of care. The Court concluded that the risk–utility factors set out in *Greater Houston Transportation Co. v. Phillips* weigh against imposing such a duty and that declining to recognize a duty is consistent with existing tort law.

Justice Young filed a concurring opinion joined by one other justice. They agreed with the majority but wrote separately to emphasize that the result could be reached without reliance on the risk–utility factors.

Justice Boyd filed a dissenting opinion joined by two other justices. They would have held that the risk–utility factors weigh in favor of imposing a duty on the third-party companies.

b) *HNMC, Inc. v. Chan*, ___ S.W.3d ___, 2024 WL 202323 (Tex. Jan. 19, 2024) [22-0053]

The issue in this case is whether a property owner owes a duty to make an adjacent public roadway safe from, or otherwise warn of, third-party drivers.

Leny Chan, an HNMC nurse, was struck and killed by a careless driver while she was crossing the street adjacent to the HNMC hospital where she worked. Chan's estate and surviving relatives sued HNMC, the driver, and the driver's employer for negligence. A jury found HNMC 20% liable, and the trial court entered a final judgment against HNMC based on that

finding. The court of appeals affirmed the judgment, holding that HNMC owed a duty to Chan under the factors described in *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990).

The Supreme Court reversed and rendered judgment for HNMC. The Court explained that courts should not craft case-specific duties using the *Phillips* factors when recognized duty rules apply to the factual situation at hand. Because the facts of this case implicated several previously recognized duty rules—including the rule that a property owner need not make safe public roadways adjacent to its property and the rule that a property owner who exercises control over adjacent property is liable for that adjacent property as a premises occupier—HNMC had, at most, a limited duty as a premises occupier based on its exercise of control over certain parts of the right-of-way adjoining its hospital. But there was no evidence that any condition HNMC controlled in the right-of-way caused Chan's harm and therefore no basis for liability against HNMC.

### 2. Res Ipsa Loquitur

a) *Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577 (Tex. June 16, 2023) [22-0030]

The main issue in this case is whether the trial court abused its discretion by including in the jury charge an instruction on res ipsa loquitur.

Darren Ceasar alleges he was injured in a hotel elevator that ascended rapidly and then came to an abrupt stop at the wrong floor. He sued the hotel's elevator-maintenance company, Schindler, for personal injuries and presented two theories of negligence to the jury: (1) res ipsa loquitur and (2) the theory that Schindler negligently maintained the elevator's SDI board, which controls the elevator's position and velocity. The trial court submitted a jury instruction on res ipsa over Schindler's objection. The jury found for Ceasar, and the court of appeals affirmed.

The Supreme Court reversed and remanded for a new trial. The first evidentiary requirement for a res ipsa instruction is that the character of the accident is such that it would not ordinarily occur in the absence of negligence. The Court held that Ceasar presented no evidence to support this requirement because the testimony of Ceasar's elevator expert was conclusory and conflicting.

The Court further held that the court's submission of the res ipsa instruction was harmful because both of Ceasar's negligence theories were hotly contested, and the jury returned a 10–2 verdict. Finally, the Court rejected Schindler's challenges to a discovery-sanctions order, the court's exclusion of evidence, and the court's refusal to include a jury instruction on spoliation.

### 3. Unreasonably Dangerous Conditions

a) *Union Pac. RR. Co. v. Prado*, ___ S.W.3d ___, 2024 WL 736035 (Tex. Feb. 23, 2024) [22-0431]

This case asks what makes a railroad crossing extra-hazardous or unreasonably dangerous.

Rolando Prado was killed by a Union Pacific train after he failed to stop at a railroad intersection located

on a private road owned by Ezra Alderman Ranches. Prado's heirs sued the Ranch and Union Pacific for negligence, negligence per se, and gross negligence. They argued that various elements obstructed the view of the train and that the defendants breached their duties to warn of extra-hazardous and unreasonably dangerous conditions. The trial court granted summary judgment for the defendants. The court of appeals reversed, holding that fact issues existed as to whether the crossing was extra-hazardous and unreasonably dangerous.

The Supreme Court reversed and reinstated the trial court's summary judgments. The Court held that a reasonably prudent driver would stop at the posted stop sign at the intersection where he could see and hear an oncoming train. Evidence that most drivers do not stop at a particular stop sign does not establish that reasonably prudent drivers could not stop. Evidence of one similar accident over a nearly forty-year period was also no evidence that the crossing was extra-hazardous.

The Court next held that there was no evidence that the Ranch had actual knowledge that the crossing was unreasonably dangerous. There was no evidence that any Ranch employee knew that the previous fatality resulted from a train–vehicle collision or if the circumstances of that accident were similar. And assuming the Ranch had a duty to evaluate the dangerousness of the crossing, that would establish only that the Ranch should have known it was unreasonably dangerous, not that it actually knew.

## X. OIL AND GAS

### 1. Deed Construction

a) *Thomson v. Hoffman*, 674 S.W.3d 927 (Tex. Sept. 1, 2023) (per curiam) [21-0711]

At issue in this case is whether a 1956 deed reserved a fixed or floating royalty interest.

Peter and Marion Hoffman conveyed to Graves Peeler 1,070 acres of land in McMullen County, Texas, but reserved a royalty interest for Peter Hoffman. The deed expressly gave Peter "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty) in and to all the oil, gas and other minerals." Other parts of the deed then referred to 3/32 without using the double-fraction description. Two interpleader actions were filed and consolidated in the trial court for a determination of the deed's meaning. The trial court concluded that the deed created a fixed 3/32 nonparticipating royalty interest, but the court of appeals reversed, holding that "the usual one-eighth (1/8th) royalty" language indicated an intent to reserve a floating interest.

The Hoffmans petitioned for review. After the parties filed briefs on the merits, the Supreme Court decided *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), in which it held that an antiquated mineral instrument containing "1/8" within a double fraction raised a rebuttable presumption that 1/8 was used as a term of art to refer to the total mineral estate, not simply one-eighth of it. Because the court of appeals did not have the benefit of *Van Dyke* and its rebuttable-presumption framework, the Supreme

Court vacated the court of appeals' judgment and remanded for further proceedings in light of changes in the law.

b) *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353 (Tex. Feb. 17, 2023) [21-0146]

This dispute concerns whether a 1924 deed reserving "one-half of one-eighth" of the mineral estate reserved a 1/2 interest or a 1/16 interest.

In 1924, the Mulkey parties conveyed their ranch and the underlying minerals to the White parties with a reservation of "one-half of one-eighth" of the mineral estate. For many decades, the parties' interactions with each other and in transactions with third parties reflected the understanding that both sides had a 1/2 interest. But in 2013, nearly 90 years after the deed, the White parties brought a trespass-to-try-title action asserting that the deed had reserved only a 1/16 interest. The Mulkey parties assert that they possess a 1/2 interest today for one of two reasons. Either the deed reserved that 1/2 interest all along, or else, even if it originally reserved only a 1/16 interest, the other 7/16 must be recognized by operation of the presumed-grant doctrine. The trial court granted the White parties' motion for partial summary judgment and declared that the deed unambiguously reserved a 1/16 interest. The court of appeals affirmed, holding that the deed unambiguously conveyed 15/16 of the mineral estate to the White parties and that the presumed-grant doctrine did not apply.

The Supreme Court reversed. First, the Court held that the text of the 1924 deed reserved the Mulkey parties a 1/2 interest in the mineral estate. Terms must be given the plain meaning that they bore at the time they were written. Thus, the reservation depends on whether the use of "1/8" in a double-fraction reflected an arithmetical meaning in 1924. The Court held that the double-fraction instead reflects a contemporary term of art, as the estate-misconception theory and the use of 1/8 as the standard royalty show. The Court thus applied a rebuttable presumption that instruments from this time used 1/8 within a double-fraction to refer to the entire mineral estate. Nothing in the text or structure of the deed in question rebuts that presumption, so the 1924 deed's reservation of "one-half of one-eighth" reserved 1/2 of the mineral estate.

In rare cases, the presumed-grant doctrine recognizes that the original instrument does not accurately reflect current ownership. The Court addressed that doctrine and held that the parties' extensive and unbroken history of recognizing and acting in reliance on a 1/2–1/2 split meant that the Mulkey parties had obtained the rest of a 1/2 interest at some point after 1924 even if the deed had reserved only a 1/16 interest.

The Court therefore reversed the judgment of the court of appeals and remanded to the trial court for further proceedings that will lead to a final judgment.

**2. Force Majeure**

a) *Point Energy Partners Permian LLC v. MRC Permian Co.*, 669 S.W.3d 796 (Tex. Apr. 21, 2023) [21-0461]

In this permissive interlocutory appeal, the central issue is whether a force majeure clause was properly invoked when the operation allegedly delayed by the force majeure had been untimely scheduled to begin after the lease deadline.

To suspend termination of its oil-and-gas lease at the end of the primary term, MRC had to commence drilling a new well by a certain date. But MRC mistakenly scheduled the drilling to begin three weeks after that deadline. MRC discovered its mistake after the deadline passed and invoked its lease's force majeure clause. The clause provided that "[w]hen Lessee's operations are delayed by an event of force majeure," the lease shall remain in force during the delay with ninety days to resume operations. In a notice to the lessors, MRC alleged that a month before the deadline, a wellbore instability on an unrelated lease set back its rig's schedule for drilling on other leases—including the untimely scheduled operation—by thirty hours. Point Energy responded that it had taken the lease from the lessors after the deadline had passed and challenged MRC's continued leasehold interests.

MRC sued Point Energy for tortious interference with its lease and declaratory relief that it properly invoked the force majeure clause. Point Energy counterclaimed for declaratory relief that MRC's lease terminated and that MRC's retained interests in production units for wells it had drilled during the primary term were limited in size to the smaller of two options described by the lease. On cross-motions for partial summary judgment, the trial court ordered that MRC's lease terminated, Point Energy did not establish the production-unit size as a matter of law, and MRC take nothing on its tortious-interference claims. The court of appeals reversed the declaratory judgment that the lease terminated, concluded that the question of the production-unit size was unripe for decision, reversed the take-nothing summary judgment on the tortious-interference claim, and remanded the case.

The Supreme Court held that, construed in context, "Lessee's operations are delayed by an event of force majeure" does not refer to the delay of a necessary drilling operation that had been scheduled to commence after the deadline for perpetuating the lease. Accordingly, the Court reversed the court of appeals' judgment on the force majeure and tortious-interference issues, rendered judgment that the force majeure clause did not save the lease as a matter of law, rendered a take-nothing judgment in part on MRC's tortious-interference claims to the extent they are predicated on the force majeure clause saving the lease, and remanded the case to the court of appeals to consider two issues preserved but not reached: the size of MRC's retained production units and whether the evidence raised a fact issue on MRC's tortious-interference claims regarding any leasehold interest in the retained production units.

**3. Leases**

a) *Apache Corp. v. Apollo Expl., LLC*, 670 S.W.3d 319 (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 agreements, 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.

The Sellers later alleged, among other things, that Apache breached the purchase agreements by not offering the North Block and other leases back to the Sellers. Apache argued that the North Block expired January 1, 2016, not (as the 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 the Sellers' expert witness on damages, and granted Apache's summary-judgment motion challenging the Sellers' claims on the basis that the 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 purchase agreements did not require Apache to offer Gunn's former interest—the remainder of which Apache had later also acquired, along with Gunn's purchase and sale rights—back to the Sellers, (2) the purchase agreements' 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 the Sellers' expert witness on damages. The Court then remanded the case to the court of

appeals to determine whether the Sellers otherwise produced evidence sufficient to demonstrate damages and to address all remaining issues.

**4. Release Provisions**

a) *Finley Res., Inc. v. Headington Royalty, Inc.*, 672 S.W.3d 332 (Tex. May 12, 2023) [21-0509]

At issue was the scope of a release provision in an acreage-swap agreement between two oil-and-gas lessees. The parties disputed whether contract language releasing claims against a corporate entity's "predecessors" referred only to entity-related predecessors or more broadly encompassed an unnamed and unrelated entity as a "predecessor in title" under a different mineral lease for the same property.

Finley owned development rights for the Loving County Tract's shallow zones under the Arrington Lease. Headington owned the deep rights under the same lease. Petro secured the right to develop all depths on the property under a top lease (the WIRC Lease) that would become effective only when the Arrington Lease terminated. When questions arose about whether that event had occurred, Petro and Headington made separate demands to Finley for production information. Petro and Finley later settled the matter by entering an agreement in which (1) Finley assigned its Arrington Lease interests, if any, to Petro via a Quitclaim Assignment; (2) Finley certified there had been no production or well operations for at least eight months; and (3) Petro assumed all liabilities and obligations under the Arrington Lease and agreed to indemnify Finley for claims and damages arising from the same.

Contemporaneously, Headington negotiated with Petro to acquire the WIRC Lease in exchange for the deep rights in a different tract. Headington was informed about Finley's lease assignment, and not long after, Headington and Petro consummated an acreage-swap agreement that included mutual releases of liability limited to the Loving County Tract. The agreement did not name Finley or mention the Arrington Lease, and the releases expressly excluded, and assigned to Petro, liability for plugging and restoring Finley's wells. Petro, its affiliates, and their "predecessors" were otherwise released from all claims and liabilities "related in any way to the Loving County Tract." A few months later, Headington sued Finley, alleging it lost its mineral rights under the Arrington Lease due to nonproduction from Finley's wells and Finley's failure to provide well information warning Headington about the same. Finley and Petro (as an intervenor) asserted that Headington had released its claims against Finley as Petro's predecessor-in-title, predecessor-in-interest, and predecessor well operator.

The trial court rendered summary judgment for Finley and Petro that "predecessors" broadly includes a predecessor-in-title to the subject property interest. A divided court of appeals reversed, holding that "predecessors," as used in the release, unambiguously referred only to Petro's corporate predecessors.

The Supreme Court affirmed. The court first corrected the lower court's mischaracterization of releases

as effecting a "forfeiture," explaining that releases involve a voluntary relinquishment, while forfeiture connotes a penalty. The Court then cited the rule that categorical releases are construed "narrowly" and will only release an unnamed party described with such particularity that "a stranger could readily identify the released party." Even so, the outcome did not turn on a narrow construction or the absence of "descriptive particularity" but, rather, on the plain meaning of the contract language construed in context. Although "predecessors" has a potentially broad meaning, the grammatical and syntactic structure in which it was used limited the term to corporate predecessors. The Court also explored the limits on "surrounding circumstances" as an interpretive aid, noting that it was "not an invitation to backdoor parol evidence of subjective intent" and could not be used to impose a broader meaning than the text of the contract, construed as whole, allowed.

In a concurring opinion, Justice Boyd concluded that the meaning of "predecessors" was ambiguous and Finley's identity as a release party was therefore in doubt. Because precedent holds that a release is only effective as to unnamed parties described with sufficient particularity, the existence of an ambiguity made the release ineffective as to Finley.

**5. Royalty Payments**

a) *Devon Energy Prod. Co. v. Sheppard*, 668 S.W.3d 332 (Tex. Mar. 2023) [20-0904]

At issue in this mineral dispute is whether a bespoke royalty provision required the producers to include a third-party purchaser's postproduction costs in the royalty base before calculating the landowners' royalty.

In fairly standard language, the mineral leases provided for royalty payments based on gross sales proceeds, broadly defined as "all consideration" received from unaffiliated third-party sales. But in more unusual language, the leases mandated that, if "any reduction or charge for [postproduction] expenses or costs" has been "include[d]" in "any disposition, contract or sale" of production, those amounts "shall be *added to* the . . . gross proceeds." (Emphasis added.)

Unlike typical postproduction-cost disputes, the parties agreed that, under the leases, (1) the landowners' royalty is free of costs to the point of sale; and (2) the producers cannot directly or indirectly charge the royalty holders with a proportionate share of those expenses. But the landowners claimed the producers were also required to pay royalty on sums all agreed were neither the producers' incurred postproduction costs nor gross proceeds: the buyer's actual or anticipated costs to enhance the value of production after the point of sale.

After severing and abating breach-of-contract claims, the parties filed cross-motions for summary judgment on twenty-three stipulated issues, seeking a declaration as to whether the producers were required to add different categories of amounts to the royalty base under the "added to" "gross proceeds" clause. The trial court rendered judgment for producers. The court of appeals reversed and rendered in part and affirmed in part.

Only the producers appealed the

adverse judgment. Illustrative of the transactions at issue were contracts setting the sales price—and thus the gross sales proceeds—by using published index prices at market centers downstream from the point of sale and then subtracting $18 per barrel for the buyer's anticipated post-sale costs for "gathering and handling, including rail car transportation." The question was whether the producers were required, as the lower courts held, to add sums like the $18 adjustment to the royalty base.

The Supreme Court affirmed, holding the broad lease language unambiguously contemplates a royalty base that may exceed gross proceeds and requires the producers to pay royalties on the gross proceeds of the sale *plus* sums identified in the producers' sales contracts as accounting for actual or anticipated postproduction costs, even if such expenses are incurred only by the buyer after or downstream from the point of sale. The Court observed that the parties expressly deviated from the usual rule that landowners proportionally share the burden of postproduction costs by (1) providing for a "gross proceeds" royalty and (2) mandating that certain sums beyond consideration accruing to the producers be "added to" gross proceeds.

In dissent, Justice Blacklock argued that the mineral leases did not bargain for royalties to be paid on market-center prices, so the producers' sales contracts did not actually include a "reduction" or "charge" for postproduction costs. To the contrary, the sales contracts merely employed a formula for valuing the products at the point of initial sale. Although nothing would ever actually be "added to" "gross proceeds" under this construction of the lease, the dissent explained that the clause prevented "accounting gimmicks" to reduce gross proceeds for the initial sale and thereby reduce the royalty payment."

b) *Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC*, 672 S.W.3d 391 (Tex. May 19, 2023) [22-0095]

The issue in this case is whether an operator of oil-and-gas wells was entitled to withhold production payments under the Texas Natural Resources Code's safe-harbor provisions.

Two energy-production companies, Ovintiv and 1776 Energy, entered into a series of agreements to jointly develop and produce minerals from oil-and-gas leases they owned in Karnes County. As the operator of the leases, Ovintiv was responsible for distributing production payments from these leases to 1776 Energy. A third party, Longview Energy, later sued 1776 Energy and obtained a judgment ordering 1776 Energy to transfer its interest in the Karnes County leases to Longview and imposing a constructive trust on those interests until the transfer occurred. Based on this judgment, Ovintiv suspended payments to 1776 Energy. 1776 Energy sued.

The court of appeals in the Longview suit reversed the judgment, and the Supreme Court affirmed. After that mandate issued, Ovintiv paid the withheld funds to 1776 Energy. 1776 Energy accepted the payments but pursued this suit to collect interest on the withheld payments. The trial court

granted summary judgment for Ovintiv, determining that the statutory safe-harbor provisions allowed it to withhold the funds without interest. The court of appeals reversed, holding that fact issues surrounding the safe-harbor provisions precluded summary judgment.

The Court reversed and held that the safe-harbor provisions applied as a matter of law for two reasons. First, the Natural Resources Code allows withholding payments without interest when a title dispute "would affect distribution of payments." The Court held that "would affect" means the title dispute was expected or likely to influence or alter the distribution of the payments. Here, the Longview lawsuit "would affect" the distribution of payments because it would require that payments be made either to Longview or to 1776 Energy.

Second, the Code allows a payor to withhold payments without interest when the payor has reasonable doubt that the payee has clear title to the proceeds. Here, Ovintiv had a reasonable doubt that 1776 Energy had clear title because the constructive trust established by the Longview suit clouded title. In fact, the very existence of the underlying dispute, so long as it was not frivolous, clouded title. Thus, the Court reversed the court of appeals and reinstated the trial court's final judgment dismissing 1776 Energy's claims.

## Y. PROCEDURE—PRETRIAL

### 1. Compulsory Joinder

a) *In re Kappmeyer*, 668 S.W.3d 651 (Tex. May 12, 2023) [21-1063]

The principal issue in this case is whether individual property owners are required to join a subdivision's 700 other owners to secure a declaration against the homeowners association regarding enforcement of amended restrictive covenants. The Kappmeyers, who own property in the Key Allegro Island Estates subdivision, sued the Key Allegro Canal and Property Owners Association for a declaratory judgment that the amended restrictions, including their imposition of mandatory annual assessments, could not be enforced against the Kappmeyers because the amendments had not been approved by the required vote of the subdivision's owners; instead, the Association's board of directors had unilaterally executed the amended restrictions without a vote of the owners. The Association filed a motion to abate and compel joinder of the other owners. The trial court granted the motion and ordered the Kappmeyers to join and serve all 700 owners within ninety days on pain of dismissal. The court of appeals summarily denied mandamus relief.

The Supreme Court conditionally granted the Kappmeyers' petition for writ of mandamus and ordered the trial court to vacate its order. Rule 39(a)(2)(ii) of the Texas Rules of Civil Procedure requires joinder of a person who "claims an interest relating to the subject of the action" if disposition in the person's absence subjects any of the current parties "to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." The Court explained that, while the absent homeowners *could* claim an interest in enforcing the amended restrictions

against the Kappmeyers, no evidence indicates that any of them has *actually* claimed such an interest as required to compel their joinder. The fact that the declaration sought could affect the absent homeowners does not in itself satisfy Rule 39's joinder prerequisites. Thus, the trial court clearly abused its discretion in granting the Association's motion.

The Court further held that the Kappmeyers lack an adequate remedy by appeal, explaining that the underlying order, which requires them to bear the significant expense of joining and serving several hundred parties, puts them in danger of succumbing to the burden of litigation and abandoning the suit. Further, such orders all but ensure that this kind of litigation will never be pursued.

**2. Discovery**

a) *In re Liberty Cnty. Mut. Ins. Co.*, 679 S.W.3d 170 (Tex. Nov. 17, 2023) (per curiam) [22-0321]

The issue in this case is whether the trial court abused its discretion by quashing a subpoena seeking medical records from a plaintiff's primary care physician in a case where the plaintiff's injuries are in dispute.

Following a car accident, Thalia Harris sued the other driver and settled for that driver's policy limits. Harris then sued her insurer, Liberty County Mutual Insurance Company, for underinsured motorist benefits, alleging that her damages exceeded the settlement amount. Liberty sent two subpoenas to Harris's primary care physician seeking all documents, records, and films pertaining to the care, treatment, and examination of Harris for a fifteen-year period. Harris moved to quash both subpoenas as facially overbroad and for sanctions. In its written response, and again at the hearing, Liberty agreed to reduce the timeframe of the requests to ten years (five years before the accident and five years after). The trial court granted Harris's motion to quash and sanctioned Liberty's counsel. Liberty sought mandamus relief, which the court of appeals denied. Liberty then petitioned the Supreme Court for a writ of mandamus.

The Court conditionally granted Liberty's petition. The Court held that the trial court clearly abused its discretion because Liberty's requests sought relevant information and, as modified, were not so overbroad or disproportionate as to justify an order precluding all discovery from Harris's primary care physician. By suing Liberty for UIM benefits, Harris placed the existence, causation, and extent of her injuries from the car accident at issue. The record also showed that Harris was involved in multiple other car accidents both before and after the accident at issue, some of which involved similar injuries. The Court further held that mandamus relief was appropriate because the trial court's order denied Liberty a reasonable opportunity to develop a defense that goes to the heart of its case, and it would be difficult to determine on appeal whether the discovery's absence would affect the outcome at trial. Finally, the Court set aside the sanctions order because it was supported only by the erroneous order quashing Liberty's discovery requests.

b) *In re Sherwin-Williams Co.*, 668 S.W.3d 368 (Tex. May 5, 2023) (per curiam) [22-0559]

The issue in this mandamus proceeding is whether the trial court abused its discretion by denying the defendants' motion under Texas Rule of Civil Procedure 204.1 to conduct a medical examination of the plaintiff.

Marcos Acosta alleges that he was injured in a car accident caused by the negligence of Roberto Hernandez and that Hernandez's employer, the Sherwin-Williams Company, was vicariously liable. Acosta designated two physicians who had examined him to opine on his medical treatment and inability to return to work. Sherwin-Williams and Hernandez designated Dr. Anton Jorgensen to testify as their expert and moved to compel a medical examination of Acosta. After a hearing on the motion, Sherwin-Williams filed a supporting affidavit from Dr. Jorgensen stating the tests he would perform and why they were necessary to opine on Acosta's injuries. The trial court denied the motion, and the court of appeals denied mandamus relief.

The Supreme Court conditionally granted mandamus relief in a per curiam opinion. The Court first held that, because the order denying the motion stated that the trial court had considered all of the pleadings on file, Dr. Jorgensen's affidavit was properly before and considered by the trial court.

The Court next held that the affidavit sufficiently established good cause under Rule 204.1. The Court reasoned that the affidavit showed that, without conducting his own exam, Dr. Jorgensen could not fully opine on Acosta's injuries and would be at a disadvantage in front of the jury. Thus, the Court held that the exam would be the least intrusive means of discovery available. After concluding that Sherwin-Williams and Hernandez lacked an adequate remedy by appeal, the Court directed the trial court to withdraw its order denying the motion to compel and enter an order requiring Acosta to submit to an examination.

**3. Dismissal**

a) *In re First Rsrv. Mgmt., L.P.*, 671 S.W.3d 653 (Tex. June 23, 2023) [22-0227]

The issue in this case is whether the trial court should have dismissed the plaintiffs' negligent-undertaking claim against a group of private-equity investors under Texas Rule of Civil Procedure 91a.

After explosions at a chemical plant caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. When it became clear that the original defendant, plant-owner TPC, was bankrupt, Plaintiffs sued TPC's private-equity investors, First Reserve, for negligent undertaking. Plaintiffs allege that First Reserve undertook to take charge of TPC's operations and was negligent by failing to provide resources for safety measures that could have prevented the explosions. The trial court denied the motion to dismiss, and the court of appeals denied mandamus relief.

The Supreme Court held that the trial court should have dismissed the claim for lacking a basis in law. The only factual allegation in the petition about how First Reserve controlled TPC's operations is that First Reserve,

together with another investor group, appointed four members to the five-member board of managers that governed TPC. Plaintiffs failed to plead facts that would take First Reserve's conduct outside the norm of private-equity-investor behavior.

Despite its holding, the Court declined to grant relief because of procedural irregularities in the case caused by TPC's bankruptcy. Justice Boyd concurred in the Court's disposition but did not file a separate opinion.

b) *McLane Champions, LLC v. Hous. Baseball Partners LLC*, 671 S.W.3d 907 (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 alleged 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. 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. And 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.

**4. Finality of Judgments**

a) *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151 (Tex. Feb. 10, 2023) (per curiam) [21-0643]

The issue in this case is whether a judgment confirming a final arbitration award was final.

This case arose out of a construction-project dispute between Nations, Huntley, and a third party, in which all parties agreed to submit all claims to binding arbitration. The arbitrator issued a final arbitration award in Nations' favor. At Nations' request, the district court rendered a judgment confirming the arbitration award. The judgment stated that: "Nations have all writs and processes to aid in execution of this judgment[,] . . . that all relief not granted herein is denied[,] . . . [and] that this is a final judgment and appealable." However, after the arbitration award was issued, and then again after the judgment confirming the arbitration award was signed, Nations added additional defendants to the case, including relator Patel. Nations alleged that the new defendants are alter egos of Huntley and sought to hold them vicariously liable for the damages owed by Huntley.

Approximately a year and a half later, Nations moved the district court to modify the judgment to clarify that it was interlocutory, not final. Unsure of its jurisdiction and whether the judgment was final, the district court granted Nations' motion to modify the judgment but sua sponte certified the question for interlocutory appeal. The court of appeals denied review.

Treating the defendants' petition for review as a petition for writ of mandamus, the Supreme Court held that the judgment confirming the arbitration award was clearly and unequivocally final. The Court reasoned that while no magic language is required to establish sufficient indicia of finality, the statements in the judgment here, taken together, render it final, even though none of the statements would alone be sufficient. The Court then clarified that a judgment cannot be final as to some parties but not others. Finally, the Court pointed out that Nations' motion to modify came far too late; if, when the judgment was entered, Nations was unsure as to its finality or thought that a final judgment had been entered erroneously, Nations should have sought clarification or appealed within the statutory time frame for doing so. Because the order granting the motion to modify the judgment confirming the arbitration award was void, the Court granted mandamus relief directing the trial court to withdraw it.

**5. Personal Jurisdiction**

a) *State v. Volkswagen Aktiengesellschaft and State v. Audi Aktiengesellschaft*, 669 S.W.3d 399 (Tex. May 5, 2023) [21-0130, 21-0133]

In this civil-enforcement action, German automobile manufacturers challenged specific personal jurisdiction in Texas on claims arising from their scheme to embed illegal emissions-beating technology during post-sale service at Texas dealerships. The appeal presented two issues: (1) whether the manufacturers purposefully availed themselves of the privilege of conducting activities in

Texas by deploying defeat-device software to Texas vehicles through intermediaries and instrumentalities under their contractual control, and (2) whether purposeful availment is lacking because the manufacturers targeted vehicles nationwide.

After an affiliated, Virginia-based distributor independently sold more than half a million illegal vehicles nationwide, hardware failures prompted the German manufacturers to develop and deploy defeat-device software updates. Without disclosing the software's true purpose, the German manufacturers initiated voluntary recall and service campaigns, which enabled dealerships nationwide to install the software on manufacturer-targeted vehicles. Importer agreements between the German manufacturers and the U.S. distributor required the distributor and all local dealers to perform recall and service campaigns when, as, and how the manufacturers' directed. Although the German manufacturers deployed the software updates in Germany, the distribution system "automated" downstream delivery to the local dealerships, including those in Texas. When targeted vehicles were presented for service or recall work in Texas, the software was "transmit[ted]" to those vehicles via the manufacturers' proprietary diagnostic system. The dealers slated to receive the software updates, including those in Texas, were known to the manufacturers.

The State of Texas sued the German manufacturers, the U.S. distributor, and other American entities, seeking civil penalties and injunctive relief under state environmental laws. The trial court denied the German manufacturers' special appearances, but on interlocutory appeal, a divided court of appeals reversed and dismissed the State's claims. The appeals court held that the manufacturers' post-sale tampering activities were directed toward the United States as a whole, not Texas specifically.

The Supreme Court, with two justices sitting by commission of the Texas Governor, reversed and remanded. After exploring the evidence in detail, the Court held that the German manufacturers could reasonably anticipate being haled into a Texas court because they knowingly and purposefully leveraged a distribution system under their contractual control to bring the tampering software to Texas. The Court explained that the outcome would be the same whether the German manufacturers' purposeful actions were characterized as direct contacts effectuated through instrumentalities or indirect contacts effected through intermediaries. The Court observed that (1) controlling the distribution scheme that brought a product to the forum state is a recognized "plus factor" under a stream-of-commerce purposeful-availment analysis; (2) actions taken through a "distributor-intermediary" or an agent acting as the defendant's "boots on the ground" "provides no haven from the jurisdiction of a Texas Court"; and (3) the dissent's conclusion that purposeful-availment was lacking misfocused on contacts related to initial vehicle sales in Texas and was contrary to the applicable standard of review.

The Court also held that the purposefulness of the forum contacts was

not diminished by the pervasiveness of the tampering scheme because personal jurisdiction is a forum-specific inquiry. Accordingly, a defendant's contacts with other states—whether more, less, or exactly the same—do not affect the jurisdictional force of purposeful contacts with Texas.

Justice Huddle dissented, joined by Chief Justice Hecht and Justice Bland. The dissent would hold that the Texas-specific contacts of VW America and the local dealers cannot be imputed to the German manufacturers under an agency or other theory because there is insufficient evidence that the German manufacturers controlled the means and details of the recall process. The dissent would also hold there is no evidence the German manufacturers purposefully targeted Texas specifically as opposed to the United States as a whole.

### 6. Statute of Limitations

a) *Ferrer v. Almanza*, 667 S.W.3d 735 (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.

**7. Venue**

a) *Fortenberry v. Great Divide Ins. Co.*, 664 S.W.3d 807 (Tex. Mar. 31, 2023) [21-1047]

This case addresses whether an injured plaintiff presented sufficient evidence to support the application of a statute that mandates venue in the county where he resided at the time of his injury.

After signing a three-year contract to play for the Dallas Cowboys, Alcus Fortenberry stayed in a Dallas County hotel room provided by the team while he trained and participated in preseason activities. Fortenberry was injured while training out of state, and the Cowboys terminated his contract. Great Divide Insurance Company, the Cowboys' insurer, denied Fortenberry's request for workers' compensation benefits. After exhausting the administrative process, Fortenberry sued Great Divide in Dallas County. Great Divide moved to transfer venue to Travis County, which the trial court denied. The trial court rendered judgment for Fortenberry following a jury verdict, and Great Divide appealed.

Great Divide challenged the trial court's venue determination among other things. The court of appeals concluded that Fortenberry failed to present prima facie evidence that he resided in Dallas County at the time of his injury as required under the venue statute governing workers' compensation appeals. The court reversed and remanded for further venue proceedings. Fortenberry petitioned for review, which the Supreme Court granted.

The Supreme Court reversed. The Court reiterated that a trial court's venue determination must be upheld if there is any probative evidence in the record to support it and that appellate courts must consider the entire record, including the trial on the merits, when reviewing that determination. The Court recognized that Texas cases have taken a flexible view of what it means to reside in a county for venue purposes, particularly when a party is in the process of moving from one county to another. It therefore rejected the court of appeals' categorical prohibition against a hotel room serving as a person's residence for venue purposes.

The Court concluded there was sufficient evidence in the record to support the trial court's venue ruling. Fortenberry testified by affidavit that he lived in Dallas County at the time of his injury. He was working out and participating in team activities for nearly three months before his injury after signing a three-year contract with the team. And the parties stipulated during the administrative proceeding that Fortenberry resided within 75 miles of the Workers' Compensation Division's Dallas Field Office at the time of his injury. The Court therefore reversed the judgment of the court of appeals and remanded for that court to consider Great Divide's other, unaddressed issues.

## Z. PROCEDURE—TRIAL AND POST-TRIAL

### 1. Batson Challenge

a) *United Rentals N. Am., Inc. v. Evans*, 668 S.W.3d 627 (Tex. May 12, 2023) [20-0737]

The issues in this case are (1) whether a new trial is required because of *Batson* violations during jury selection, (2) whether United Rentals owed a duty to the decedent, and (3) whether United Rentals is entitled to rendition of judgment on the plaintiffs' survival claim. Texas caselaw prohibits counsel from stating a racial preference in open court and exercising peremptory strikes in concert with that preference. The Texas common law establishes a duty to avoid negligently creating dangerous situations. To recover survival damages, there must be evidence, beyond mere speculation, that would allow a reasonable juror to find that suffering occurred.

United Rentals is an equipment-rental company. It mistakenly released a piece of equipment to a driver who was supposed to transport a smaller load. When the oversized load struck an overpass, a beam fell off the truck and landed on Clark Davis's pickup truck, crushing Davis to death. Davis's mother and son brought wrongful death claims; his mother also filed a survival claim on behalf of his estate. After a jury verdict for the plaintiffs, the district court rendered a substantial money judgment, which the court of appeals affirmed. United Rentals petitioned the Supreme Court for review, and the Court granted the petition.

The Court held that a new trial is required under *Batson* because plaintiffs' counsel announced on the record that the plaintiffs had a racial preference in jury selection, and all of the plaintiffs' peremptory strikes were consistent with the stated preference. The Court also held that United Rentals owed a common law duty to Davis to avoid negligently creating dangerous road conditions. Finally, the Court held that United Rentals was entitled to rendition of judgment on the plaintiffs' survival claim. The plaintiffs sought only pain-and-suffering damages for this claim, and there was no evidence at trial that would allow a reasonable juror to find that suffering occurred. The Court reversed the court of appeals' judgment on the survival claim and rendered a take nothing judgment on that claim. The Court remanded the case to the district court for a new trial on the remaining claims.

### 2. New Trial Orders

a) *In re Rudolph Auto., LLC*, 674 S.W.3d 289 (Tex. June 16, 2023) [21-0135]

The issue in this case is whether the trial court abused its discretion in granting a new trial.

This case arose after a tragic accident: after several employees consumed beer on the premises of Rudolph Mazda, one departing employee hit Irma Vanessa Villegas, another employee, with his truck when she was walking in the parking lot. Villegas suffered serious injuries and was left permanently paralyzed on one side before passing away several years later. Villegas's daughter, Andrea Juarez, sued Rudolph and its employees for negligence, failure to train, and premises liability.

A pretrial order in limine

prohibited testimony about Villegas's drinking habits aside from the day of the accident. At the end of the three-week jury trial, the final witness—an expert toxicologist—provided testimony that the court found to have violated the order. The judge gave a stern limiting instruction to the jury and the trial proceeded. The jury awarded Villegas and Juarez over $4 million in damages.

Juarez then filed a motion for new trial, which the district court granted. The court listed four reasons in its new-trial order: (1) the apportionment of responsibility to Rudolph was irreconcilable with the jury's failure to find Rudolph negligent; (2) the jury's awards in certain categories of non-economic damages were inadequate given the record's positive depiction of Villegas; (3) on the day of the jury verdict, this Court issued a decision in an unrelated case that might have affected the trial court's earlier rulings; and (4) the expert's improper testimony was incurable and caused the rendition of an improper verdict.

The court of appeals denied mandamus relief. The Supreme Court granted relief based on its precedents requiring clear, specific, and valid reasons to justify a new trial.

The Court reasoned that, individually or collectively, none of the articulated errors warranted a new trial: (1) the verdict could be harmonized as a matter of law, so a new trial was unnecessary; (2) nothing in the new-trial order explained, based on the evidence, why the jury could not have rationally allocated damages as it did; (3) this Court's separate decision in a different case had no plausible effect on this verdict; and (4) the jury system depends on the presumption that jurors can and will follow instructions, as they each said they would do in this case regarding the curative instruction about expert testimony. To rebut this presumption, a new-trial order must show why this jury could not follow the instruction, but no such reason was given here.

Because no new trial was necessary, the Court conditionally granted mandamus relief and ordered the trial court to vacate the new-trial order, harmonize the verdict, and move to any remaining post-trial proceedings.

## AA. REAL PROPERTY

### 1. Easements

a) *Albert v. Fort Worth & W. R.R. Co.*, ___ S.W.3d ___, 2024 WL 648670 (Tex. Feb. 16, 2024) (per curiam) [22-0424]

The issue presented is whether legally sufficient evidence supports a jury's finding of an easement allowing a landowner to cross adjacent railroad tracks to access a highway.

Albert purchased a tract of land in Johnson County, which is separated from a state highway by a strip of land owned by Fort Worth & Western Railroad. Western operates railroad tracks along that strip. After the purchase, Albert and his business partners formed Chisholm Trail Redi-Mix, LLC to operate a concrete plant on the property. After the plant became operational, Chisholm Trail's trucks used a single-lane gravel road to cross the tracks and access the highway. The gravel road is the sole point of access between the concrete plant and the highway.

Western sent Albert a cease-and-desist letter demanding that he and Chisholm Trail stop using the gravel crossing. Albert and Chisholm Trail sued, seeking a declaration that they possessed easements by estoppel, necessity, and prescription allowing them to use the gravel road. The jury found that the plaintiffs were entitled to all three easements, and the trial court rendered judgment on the verdict. The court of appeals reversed, holding that the evidence is legally insufficient to support the easements.

The Supreme Court affirmed the court of appeals' judgment in part and reversed it in part. The Court agreed that the evidence is legally insufficient to support the jury's findings as to the easements by estoppel and necessity, but it held the evidence sufficient to support the prescriptive easement. The testimony presented at trial could enable a reasonable and fair-minded juror to find that Albert and his predecessors-in-interest used the gravel crossing in a manner that was adverse, open and notorious, continuous, and exclusive for the requisite ten-year period. The Court remanded the case to the court of appeals to consider additional, unaddressed issues.

**2. Subrogation**

a) *PNC Mortg. v. Howard*, 668 S.W.3d 644 (Tex. May 12, 2023) [21-0941]

The issue in this case is when a refinance lender's claim to foreclose on a lien acquired through equitable subrogation accrues.

John and Amy Howard refinanced their mortgage with a bank that later assigned its note and deed of trust to PNC. Then the Howards stopped paying. PNC accelerated the note in 2009 but did not assert a claim for foreclosure until 2015. PNC conceded in the trial court that the four-year statute of limitations had expired on a claim to foreclose on its own lien. But PNC asserted that it still could foreclose on the original lender's lien, which PNC's predecessor had acquired through equitable subrogation in the refinance transaction and assigned to PNC. The trial court rendered judgment for the Howards, and multiple appellate proceedings followed. Ultimately, the court of appeals concluded that PNC's claim to foreclose through equitable subrogation accrued in 2009 when PNC's claim to foreclose on its own lien accrued and that the equitable-subrogation claim was therefore time-barred. The court of appeals thus affirmed the trial court's judgment for the Howards.

The Supreme Court affirmed. The Court explained that what subrogation transfers to a refinance lender is the original lender's security interest, which gives the refinance lender an alternative lien if its own lien is later determined to be invalid. Subrogation thus provides a refinance lender with an alternative remedy, not an additional claim. Like the original lender, a refinance lender has only one foreclosure claim, which accrues when the note made in the refinance transaction is accelerated.

## BB. STATUTE OF LIMITATIONS

### 1. Discovery Rule

a) *Marcus & Millichap Real Est. Inv. Servs. of Nev., Inc. v. Triex Tex. Holdings, LLC*, 659 S.W.3d 456 (Tex. Jan. 13, 2023) (per curiam) [21-0913]

The issue in this case is the proper application of the discovery rule to a breach of fiduciary duty claim. In 2008, Triex bought a gas station in Lubbock and leased it back to its existing operator, Taylor Petroleum. Triex and the gas station's owner both retained Marcus & Millichap to represent them in the transaction. In 2012, Taylor Petroleum defaulted on the lease. A little over three years later, Triex sued Taylor Petroleum and related parties. After deposing Taylor Petroleum's corporate officers a year later, Triex suspected that Marcus & Millichap misrepresented the sale and lease transaction, and added the company to the suit. Triex asserted claims for fraud, breach of fiduciary duty, and conspiracy, which allegedly occurred during the 2008 transaction. These claims were subject to a four-year limitations period. Triex pleaded the discovery rule to save its otherwise time-barred claims.

The trial court granted Marcus & Millichap's motion for summary judgment on limitations grounds. The court of appeals reversed. It concluded that the evidence conclusively established that Triex knew it was injured when Taylor Petroleum defaulted, but, applying the discovery rule, it held that there was a fact issue as to whether Triex knew or should have known in 2012 that Marcus & Millichap caused its injury. In reaching this holding, the court of appeals concluded that because there was a fiduciary relationship between Triex and Marcus & Millichap, Triex had no duty to make a diligent inquiry into its possible claims.

In a per curiam opinion, the Supreme Court reversed. It concluded that the discovery rule applied to Triex's claims, but, as prior cases explain, a fiduciary relationship does not eliminate a plaintiff's duty of reasonable diligence. It also noted that the discovery rule does not delay accrual until the plaintiff knows the exact identity of the wrongdoer. Accordingly, the Court held that despite the fiduciary relationship, Triex was required to exercise reasonable diligence, and had it done so, it should have timely discovered the facts giving rise to its claims against Marcus & Millichap. The Court reinstated the trial court's summary judgment.

### 2. Lien on Real Property

a) *Moore v. Wells Fargo Bank*, ___ S.W.3d ___, 2024 WL 735927 (Tex. Feb. 23, 2024) [23-0525]

These certified questions concern whether a lender may reset the limitations period to foreclose on a property by rescinding its acceleration of a loan in the same notice that it reaccelerates the loan.

After the Moores failed to make payments on a loan secured by real property, the lenders accelerated the loan, starting the running of the four-year limitations period to foreclose on the property. Several months later, the lenders notified the Moores that they had rescinded the acceleration and, in the same notice, reaccelerated the loan.

The lenders issued the Moores four similar notices over the next four years and never foreclosed on the property. After four years, the Moores sought a declaratory judgment that the limitations period had run. The federal district court granted the lenders' motion for summary judgment, holding that the lenders had rescinded the acceleration under Section 16.038 of the Civil Practice and Remedies Code. The Fifth Circuit certified the following questions of law to the Supreme Court: (1) May a lender simultaneously rescind a prior acceleration and re-accelerate a loan under Section 16.038? and (2) If a lender cannot simultaneously rescind a prior acceleration and re-accelerate a loan, does such an attempt void only the re-acceleration, or both the re-acceleration and the rescission?

The Court answered the first question "yes." The lenders' notices to the Moores complied with the requirements of Section 16.038 to be in writing and served via an appropriate method. The statute did not require that a notice of rescission be distinct or separate from other notices, nor did it establish a waiting period between rescission and reacceleration.

**3. Tolling**

a) *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 670 S.W.3d 622 (Tex. June 16, 2023) [21-0797]

The primary issue in this case is whether the running of limitations was equitably tolled during the appeal of the plaintiff's earlier, identical suit, which was ultimately dismissed after limitations expired.

In 2010, El Pistolón sued Levinson for professional negligence and breach of contract arising from Levinson's performance of architectural services. El Pistolón's petition included a certificate of merit as required by statute. Levinson moved to dismiss, challenging the certificate of merit. The trial court denied the motion, but the court of appeals and the Supreme Court held that the certificate failed to satisfy statutory requirements. The trial court dismissed El Pistolón's suit without prejudice in 2018.

El Pistolón immediately refiled with a new certificate of merit and pleaded that equitable tolling paused the running of limitations. Levinson moved for summary judgment on limitations. The trial court granted Levinson's motion, but the court of appeals reversed, holding that the running of limitations was equitably tolled while the 2010 suit was on appeal. Levinson petitioned for review.

The Supreme Court reversed and reinstated the trial court's judgment. The Court noted that equitable tolling is sparingly applied and limited in scope. It concluded that the court of appeals improperly relied on a broad "legal impediment rule" to support equitable tolling because the Court's precedents have limited such a rule's application to (1) cases where an injunction prevents a claimant from bringing suit and (2) legal-malpractice claims. The Court also held that the dismissal of El Pistolón's 2010 suit was not based on a procedural defect that would support equitable tolling. The Court rejected El Pistolón's alternative arguments that summary judgment was improper because Levinson's motion inartfully recited the summary-

judgment burden and failed to establish the precise accrual date.

## CC. SUBJECT MATTER JURISDICTION

### 1. Standing

a) *Busbee v. County of Medina*, 681 S.W.3d 391 (Tex. Dec. 15, 2023) (per curiam) [22-0751]

This case involves a dispute between the 38th and 454th Judicial Districts over an office building in Medina County.

In 1998, when Medina County was part of the 38th Judicial District, the 38th District used funds from its forfeiture account to buy an office building in the County. The property's deed named the County as the grantee but restricted the building's use to 38th District business for as long as the County owned the property. The deed also required the 38th District Attorney's consent before the County could sell the property.

In 2019, the Legislature carved Medina County out of the 38th District into the new 454th District. Because of the deed's restrictions on use, the County decided to sell the property and divide the proceeds with the two counties that remained in the 38th District. Before the sale closed, newly elected 38th District Attorney Christina Busbee notified the County that she did not consent to the sale and took the position that all sale proceeds were 38th District forfeiture funds under Chapter 59 of the Texas Code of Criminal Procedure.

Medina County sued Busbee in her official capacity to quiet title. Busbee asserted several counterclaims stemming from her assertions that the property—and any proceeds from its sale—rightfully belonged to the 38th District Attorney and that the County could not sell the property without her consent. The County filed a plea to the jurisdiction as to the counterclaims, arguing among other grounds that Busbee lacked standing. The trial court granted the plea to the jurisdiction on the standing ground and did not reach the other jurisdictional issues presented in the plea. The court of appeals affirmed, holding that only the Attorney General may sue to enforce Chapter 59 and that, because Busbee's claims were all "based on Chapter 59," she lacked standing to bring them.

The Supreme Court reversed, holding that whether Busbee may sue under Chapter 59 affects her right to relief but does not implicate the trial court's subject-matter jurisdiction over the case. The Court explained that Busbee has standing in the constitutional, jurisdictional sense if she has a concrete injury that is traceable to the defendant's conduct and redressable by court order. Busbee's claims that the County is attempting to sell the property without her mandated consent and that the 38th District Attorney is entitled to all proceeds from the property's sale present such an injury. The Court expressed no opinion on the merits of Busbee's claims or the court of appeals' analysis of Chapter 59, holding only that the court's conclusion could not support an order granting a plea to the jurisdiction. The Court remanded the case to the trial court for further proceedings.

## DD. TAXES

### 1. Property Tax

a) *Duncan House Charitable Corp. v. Harris Cnty. Appraisal Dist.*, 676 S.W.3d 653 (Tex. Sept. 1, 2023) (per curiam) [21-1117]

This case concerns the applicability of a charitable tax exemption.

Duncan House applied for a charitable tax exemption for the 2017 tax year covering its interest in an historic home, but its application was denied. Duncan House filed suit for judicial review. When its protest for a 2018 exemption was also denied, it amended its petition to also challenge the denial of the 2018 exemption. The trial court dismissed the 2018 claim for want of jurisdiction because Duncan House never applied for the 2018 exemption. The court of appeals affirmed, holding that a timely filing of an application for the exemption is a statutory prerequisite to receive the exemption.

The Supreme Court reversed, holding that Duncan House did not need to apply for 2018 if it was entitled to the 2017 exemption. That issue remains pending in the trial court. If the courts ultimately conclude that Duncan House did not qualify for the exemption in 2017, Duncan House's failure to timely apply for the 2018 exemption will preclude it from receiving the exemption for 2018. But if the courts ultimately allow the exemption for 2017, Duncan House will then be entitled to the exemption for all subsequent years, including 2018. The Court remanded to the trial court for further proceedings.

## EE. TEXAS CITIZENS PARTICIPATION ACT

### 1. Interpretation and Application

a) *USA Lending Grp., Inc. v. Winstead PC*, 669 S.W.3d 195 (Tex. May 19, 2023) [21-0437]

This case presents the issue of whether a legal-malpractice plaintiff produced sufficient evidence to survive a motion to dismiss under the Texas Citizens Participation Act.

USA Lending Group retained Winstead PC to sue a former employee for breach of fiduciary duty. Though Winstead obtained a default judgment against the former employee declaring USA Lending the owner of certain assets the employee had misappropriated, Winstead failed to also seek and obtain monetary damages. USA Lending sued Winstead for malpractice, and Winstead filed a motion to dismiss under the Texas Citizens Participation Act. USA Lending disputed the applicability of the Act and argued that clear and specific evidence supported each essential element of its claims, precluding dismissal under the Act. The trial court denied Winstead's motion, but the court of appeals reversed and ordered the case dismissed.

The Supreme Court reversed. Assuming but not deciding that the Act applies, the Court held that USA Lending put on sufficient evidence to avoid dismissal. Winstead challenged two elements of USA Lending's malpractice claim: causation and damages. As to causation, the Court concluded that evidence of USA Lending's out-of-pocket expenses to acquire and maintain the misappropriated assets sufficed to show some specific, demonstrable

injury traceable to Winstead's conduct. As to damages, the Court considered USA Lending's testimony linking the assets to a competitor company operated by the former employee's wife, coupled with expert testimony about the laws of fraudulent transfer and community property in the relevant jurisdiction. The Court deemed this evidence sufficient to rationally support the inference that USA Lending could have collected on a judgment for monetary damages against the former employee, had one been entered. Because the Act bars dismissal of claims if clear and specific evidence supports each essential element, the Court remanded the case to the trial court for further proceedings.

## FF. TEXAS DISASTER ACT

### 1. Executive Power

a) *Abbott v. Harris County*, 672 S.W.3d 1 (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.

## GG. TEXAS TIM COLE ACT

### 1. Governmental Immunity

a) *Brown v. City of Houston*, 660 S.W.3d 749 (Tex. Feb. 3, 2023) [22-0256]

At issue in this certified question is whether Tim Cole Act claimants may maintain a lawsuit after they have received compensation from the State.

Alfred Dewayne Brown was wrongfully imprisoned for capital

murder. After his release, he applied for Tim Cole Act compensation, but the Comptroller denied his applications. Brown then sued the City of Houston, Harris County, and various city law-enforcement officials in federal court, alleging violations of his constitutional rights. While that suit was pending, and based on new information uncovered during that litigation, a state district court dismissed the charges against Brown on the ground that he was actually innocent. The Comptroller, however, denied Brown's renewed request for Tim Cole Act compensation. The Supreme Court granted Brown's petition for writ of mandamus and directed the Comptroller to compensate Brown.

The defendants in Brown's federal case then argued that his suit had to be dismissed under a provision in the Act that prohibits a person receiving compensation under the Act from "bring[ing] any action involving the same subject matter . . . against any governmental unit or an employee of any governmental unit." The district court agreed and granted the defendants' motion for summary judgment. Brown appealed, and the Fifth Circuit certified the following question to the Court: "Does Section 103.153(b) of the Tim Cole Act bar maintenance of a lawsuit involving the same subject matter against any governmental units or employees that was filed before the claimant received compensation under that statute?"

The Court answered the question *yes*. In so holding, the Court principally relied on the text and history of the Tim Cole Act, reasoning that the word "bring" in Section 103.153(b) entails not only filing suit but also maintaining one. The history of the Act, the Court explained, shows that the Legislature intended to funnel all claims for compensation through the administrative process, subject only to the potential for mandamus relief in the Supreme Court. The Court also observed that this understanding of the text is consistent with its precedent, which has broadly construed Section 103.153(b) to bar all claims once a claimant receives compensation. Finally, the Court noted, it would interpret the statute in a way that preserves immunity; the Legislature's willingness to waive sovereign immunity by providing compensation was conditioned on that compensation being the last word in the dispute about the wrongful imprisonment.

## III. GRANTED CASES

### A. ADMINISTRATIVE LAW

#### 1. Judicial Review

a) *Tex. Health & Hum. Servs. Comm'n v. Estate of Burt*, 644 S.W.3d 888 (Tex. App.—Austin 2022), *pet. granted* (Mar. 10, 2023) [22-0437]

At issue in this case is whether the Texas Health and Human Services Commission reasonably interpreted the Medicaid "home" exclusion as requiring applicants asserting the exclusion to have previously occupied the property.

The Burts purchased a home in Cleburne, Texas. After living there for thirty-six years, they sold the Cleburne home to their adult daughter and moved into a rental property. In early August 2017, the Burts moved to a skilled nursing facility. At that time,

their bank account balance exceeded the eligibility threshold for Medicaid benefits. However, later that month, the Burts purchased a one-half interest in the Cleburne home, depleting their bank account balance to $2,000. The same day, the Burts deeded their newly acquired half-interest back to their daughter while reserving an enhanced life estate in the property.

The Burts then applied for Medicaid. HHSC denied their application, concluding that the Burts' resources exceeded the Medicaid resource limit. HHSC concluded that under the applicable regulation, the Burts' partial ownership interest in the Cleburne home could not be excluded from the resource calculation because they never resided in the home while having an ownership interest.

After exhausting their administrative remedies, the Burts sought judicial review. The trial court reversed, holding that HHSC unreasonably interpreted the home exemption to require prior occupancy. HHSC appealed, and the court of appeals affirmed.

In its petition for review, HHSC argues that its interpretation of the term "home" as requiring simultaneous ownership and occupancy was reasonable. The Supreme Court granted HHSC's petition for review.

### 2. Public Utility Commission

a) *Luminant Energy Co. v. Pub. Util. Comm'n of Tex.*, 665 S.W.3d 166 (Tex. App.—Austin 2023), *pet. granted* (Sept. 29, 2023) [23-0231]

This case raises questions of administrative law and judicial authority. The first issue is whether the Public Utility Commission exceeded its statutory authority by twice directing the Electric Reliability Council of Texas to affix electricity prices at $9000/MWh. The second issue is whether the court of appeals had the power, two years later, to unwind transactions with final settlement prices based upon those expired directives.

During Winter Storm Uri, the electrical power grid—overseen by the Commission through ERCOT—failed to produce enough power to meet extreme consumer demands. This failure was partially due to an error in the Commission's electricity-pricing algorithm. When the algorithm functions properly, then as demand increases, prices should increase to signal to, and provide an incentive for, energy generators to produce more energy. But the algorithm did not account for load shedding—targeted blackouts to protect the grid's physical integrity—necessitated by the storm's historically unprecedented severity. In response, the Commission issued two directives to ERCOT to set the price at the maximum $9,000/MWh allowed under the Texas Administrative Code.

Luminant sought judicial review directly in the Third Court of Appeals, as authorized by statute, and several parties intervened on both sides. The court issued an opinion reversing the Commission's orders more than two years after the appeal was filed. After rejecting mootness and other jurisdictional challenges to the appeal, the court held that the Commission had exceeded its statutory power under the Public Utility Regulatory Act by setting an anti-competitive price of

$9,000/MWh.

The Commission petitioned for review, arguing that the court of appeals lacked jurisdiction to grant Luminant's desired relief and that the Commission had acted within its statutory authority. The Supreme Court granted the petition.

b) *Pub. Util. Comm'n of Tex. v. RWE Renewables Ams., LLC*, 669 S.W.3d 566 (Tex. App.—Austin 2023), *pet. granted* (Dec. 8, 2023) [23-0555]

This case raises questions of administrative law. The first issue is whether the Public Utility Commission's approval of the Electric Reliability Council of Texas's NPRR 1081 protocol constitutes a "competition rule" under Section 39.001(e) of the Public Utility Regulatory Act and a "rule" under Section 2001.003(6)(A) of the Government Code. If the approval is considered a rule, then the second issue is whether it exceeds the Commission's statutory authority under PURA or violates the Administrative Procedure Act's mandatory rulemaking procedures.

In 2021, Winter Storm Uri strained Texas's electrical power grid to an unprecedented degree. Electricity suppliers did not produce enough electricity to meet the abnormally high demand caused by the storm, producing blackouts around Texas. As a result, the Commission struggled to maintain the balance between supply and demand needed to prevent catastrophic damage to the power grid. The Commission determined that the electricity deficit was partially due to a failure of its electricity-pricing algorithm to set the price of electricity high enough to adequately incentivize electricity generators to produce more electricity.

The Commission subsequently approved an ERCOT protocol setting electricity prices at the statutory maximum anytime consumers are cut off from power due to inadequate electricity supply in a maximum emergency-level scenario. RWE appealed the Commission's approval directly to the Third Court of Appeals as authorized by statute. The court held for RWE, determining that (i) the approval constituted a competition rule under PURA and a rule under the APA, (ii) the rule was anti-competitive and so exceeded the Commission's statutory authority under PURA, and (iii) the Commission implemented the rule without complying with the APA's rulemaking procedures.

The Commission filed a petition for review, arguing that the approval is not a competition rule under PURA or a rule under the APA. The Commission argues further that even if the approval does constitute a rule—it does not exceed the statutory authority conferred by PURA or violate the APA's requirements. The Court granted the petition for review.

## B. CLASS ACTIONS

### 1. Class Certification

a) *USAA Cas. Ins. Co. v. Letot*, ___ S.W.3d ___, 2022 WL 405820 (Tex. App.—Dallas 2022), *pet. granted* (Sept. 29, 2023) [22-0238]

The issue in this case is whether the trial court erred by certifying a proposed class action.

Sunny Letot's vehicle was rear-

ended by a USAA-insured driver. USAA determined that the cost to repair Letot's vehicle exceeded its value and deemed her car a total loss. USAA therefore sent Letot a check for the car's value and filed a report with the Texas Department of Transportation identifying Letot's car as "salvage." Letot later rejected USAA's valuation and check. She sued USAA for conversion for sending TxDOT the report before she accepted payment. Letot then sought class certification.

The trial court certified a class for both injunctive relief and damages. The class consisted of all claimants for whom USAA filed a report within three days of attempting to pay a claim for a vehicle deemed a total loss. The court of appeals affirmed the certification order.

USAA petitioned for review. It argues that neither Letot nor the alleged class members have standing to sue. In the alternative, USAA argues that the class fails to satisfy the certification requirements. The Supreme Court granted USAA's petition.

## C. CONSTITUTIONAL LAW

### 1. Abortion

a) *State v. Zurawski*, *argument granted on notation of probable jurisdiction over direct appeal* (Aug. 25, 2023) [23-0629]

This direct appeal arises from a temporary injunction enjoining the State from enforcing laws banning abortion in certain cases on the ground that the laws are unconstitutional.

Plaintiffs are women who experienced pregnancy complications and whose physicians declined to provide abortions, citing legal prohibitions on abortion and uncertainty about the medical-emergency exception for pregnancies that, in the exercise of reasonable medical judgment, place the mother at risk of death or serious risk of substantial impairment of a major bodily function. Plaintiffs also include physicians who are concerned that the abortion laws will be enforced against them. The plaintiffs sued the State, the Attorney General, and the Texas Medical Board and its executive director, seeking clarification of the medical-emergency exception. They further sought a declaration that aspects of the abortion laws are unconstitutional. The trial court denied the State parties' plea to the jurisdiction and entered a temporary injunction that reforms the statute to define particular medical conditions as within the medical-emergency exception, restrains the State parties from enforcing the abortion bans in those instances, and enjoins the State parties from enforcing Texas abortion laws against the plaintiffs in particular.

The State filed a direct appeal to the Supreme Court. The State challenges the injunction on multiple grounds, contending that the plaintiffs lack standing, that the State has not waived its sovereign immunity, that the plaintiffs have not shown that the State acted to obstruct an abortion in their cases or otherwise demonstrated a probable right to relief, and that the plaintiffs have not shown a probable, imminent, irreparable injury.

**2. Free Speech**

a) *Stonewater Roofing, Ltd. v. Tex Dep't of Ins.*, 641 S.W.3d 794 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0427]

At issue in this case is whether the statutory licensing requirement and conflict-of-interest prohibition for public insurance adjusting are content-based restraints of free speech subject to heightened scrutiny under the First Amendment.

Stonewater, a Texas-based roofing company, offers commercial and residential customers services that include repairing and replacing roofing systems. Although Stonewater is not a licensed public insurance adjuster, its website promotes extensive experience in dealing with the insurance claims process. The assertions on Stonewater's website implicate two Insurance Code provisions. The first, Section 4102.051(a), provides that a person may not act or hold himself out as a public insurance adjuster unless he is licensed. The second, Section 4102.163(a), bars contractors from both acting as public insurance adjusters and marketing claim-adjustment capabilities for projects they undertake.

Stonewater sued the Texas Department of Insurance, seeking a declaration that the two provisions violate the First Amendment and are unconstitutionally vague. The Department filed a motion to dismiss, which the trial court granted. The court of appeals reversed and remanded, holding that Stonewater's pleadings demonstrated an adequate basis in law and fact as to both its constitutional claims.

In its petition for review, the Department argues that the challenged provisions do not violate Stonewater's free speech rights because they regulate professional conduct with only an incidental effect on speech. Additionally, the Department argues that Stonewater's conduct clearly violates the challenged laws, foreclosing the company's vagueness claim.

The Court granted the Department's petition for review.

**3. Gender Dysphoria Treatments**

a) *State v. Loe, argument granted on notation of probable jurisdiction over direct appeal* (Sept. 15, 2023) [23-0697]

This case involves a challenge under the Texas Constitution to a statutory prohibition on the provision of certain medical treatments to children experiencing gender dysphoria.

S.B. 14 adds to the Health and Safety Code subchapter X, which governs "Gender Transitioning and Gender Reassignment Procedures and Treatments for Certain Children." New Section 161.702 of the Code prohibits a physician or healthcare worker from knowingly performing certain procedures or administering certain treatments "[f]or the purpose of transitioning a child's biological sex as determined by the sex organs, chromosomes, and endogenous profiles of the child or affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." S.B. 14 authorizes the Attorney General to bring an action to enforce the prohibition in Section 161.702, and it amends the Occupations Code to

require that the medical license of a physician in violation of Section 161.702 be revoked.

Plaintiffs–Appellees are the parents of children who seek medical treatments prohibited by Section 161.702, physicians who wish to continue providing such treatments to children, and organizations representing the interests of these groups. Plaintiffs sued the Attorney General and other state defendants, alleging that S.B. 14 violates the Texas Constitution. Specifically, the plaintiffs alleged that S.B. 14 violates the due course of law guarantee in Article I, Section 19 by infringing on parental autonomy with respect to medical decision-making, by depriving physicians of a vested property interest in their medical licenses, and by infringing on the occupational freedom of healthcare workers. The plaintiffs further alleged that S.B. 14 violates the guarantees of equal rights and equality under the law in Article I, Sections 3 and 3a by discriminating against transgender children because of their sex and transgender status.

The trial court denied the State's plea to the jurisdiction, concluded that the plaintiffs are likely to prevail on the merits of their constitutional claims, and granted a statewide temporary injunction prohibiting the State from enforcing S.B. 14. The State filed a direct appeal to the Supreme Court, which noted probable jurisdiction under Section 22.001(c) of the Government Code and set the case for oral argument. The State challenges the injunction on jurisdictional grounds and on the merits.

**4. Gift Clauses**

a) *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, ___ S.W.3d ___, 2022 WL 17096786 (Tex. App.—Austin 2022), *pet. granted* (Dec. 15, 2023) [22-1149]

The main issue is whether a provision in a collective bargaining agreement that allocates a pool of paid leave to further a union's interests violates any "Gift Clause" in the Texas Constitution (Article III, Sections 50, 51, 52(a) and Article XVI, Section 6(a)). The Gift Clauses are structural limitations that aim to reduce the misuse of public funds and resources by requiring specific conditions to be met before such expenditures can be made.

The Austin Firefighters Association represented members of the Austin Fire Department in contract negotiations with the City of Austin, which resulted in a collective bargaining agreement. Article 10 of the agreement allocates thousands of hours of paid leave to be used by the Association president and authorized firefighters for "Association business."

A group of Austin taxpayers sued the Association and City, arguing that Article 10 violates the Gift Clauses because it lacks sufficient consideration and fails to serve a predominantly public purpose. The State intervened in support of the taxpayers and further asserted that Article 10 does not serve a strictly public purpose. The trial court rendered judgment for the defendants after a bench trial. The court of appeals affirmed, reasoning that the paid leave arrangement is not a gratuitous gift and serves a predominantly public purpose.

The taxpayers and the State filed petitions for review, which the Supreme Court granted.

**5. Retroactivity**

a) *Hogan v. S. Methodist Univ.*, 74 F.4th 371 (5th Cir. 2023), *certified question accepted* (July 28, 2023) [23-0565]

This certified question concerns the Texas Constitution's retroactivity clause.

Luke Hogan sued SMU for refusing to refund tuition and fees after the university switched to remote instruction during the COVID-19 pandemic. The district court dismissed Hogan's complaint on the ground that Texas's Pandemic Liability Protection Act retroactively bars Hogan's claim for monetary relief and is not unconstitutional. Deciding that this ruling raises a determinative-but-unsettled question of state constitutional law, the Fifth Circuit certified the following question of law to the Court: "Does the application of the Pandemic Liability Protection Act to Hogan's breach-of-contract claim violate the retroactivity clause in article I, section 16 of the Texas Constitution?" The Court accepted the certified question.

## D. CONTRACTS

**1. Interpretation**

a) *IDEXX Lab'ys, Inc. v. Bd. of Regents of Univ. of Tex. Sys.*, ___ S.W.3d ___, 2022 WL 3267881 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Sept. 29, 2023) [22-0844]

The issue in this case is whether a contract is ambiguous. IDEXX Laboratories, a private company, sold tests to detect heartworms in dogs. Seeking to expand its product line, IDEXX contracted with the Board of Regents of the University of Texas System to license the Board's patented technology relating to Lyme Disease. Royalties owed to the Board were set out under three subparts of the agreement. Subpart (ii) set a royalty of 1% (or 0.05% if other royalties were due) on products "[s]old to detect Lyme disease in combination with one other veterinary diagnostic test or service (for example, but not limited to, a canine heartworm diagnostic test or service)." Subpart (iii) set a royalty of 2.5% on products "[s]old as a product or service to detect Lyme disease in combination with one or more veterinary diagnostic products or services to detect tick-borne disease(s)." IDEXX sold products that tested for Lyme disease, heartworm (which is not tick-borne), and one or more additional tick-borne diseases.

IDEXX paid royalties to the Board under subpart (ii). The Board sued, claiming that royalties were due under the higher rate set out in subpart (iii). The trial court granted summary judgment in favor of the Board and rendered a final judgment awarding contract damages, interest, and attorney's fees. The trial court concluded that subpart (iii) unambiguously applied to the products at issue. The court of appeals reversed and remanded, concluding that the contract was ambiguous.

The Board filed a petition for review that contends the court of appeals erred and the trial court's decision was correct. The Supreme Court granted the petition for review.

## E. DAMAGES

### 1. Settlement Credits

a) *Mulvey v. Bay, Ltd.*, ___ S.W.3d ___, 2021 WL 2942448 (Tex. App.—San Antonio 2021), *pet. granted* (Sept. 1, 2023) [22-0168]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Bay sued Mulvey and one of Bay's former employees, alleging that the employee made unauthorized improvements to a ranch owned by Mulvey using Bay's materials and equipment. Bay also sued the employee in a separate lawsuit, alleging that he engaged in a pattern of similar acts for the benefit of himself, Mulvey, and others. Bay and the employee agreed to the entry of a $1.9 million judgment for Bay, and the employee agreed to make monthly payments to Bay in exchange for Bay's agreement not to execute the judgment.

Bay then nonsuited the employee and went to trial against Mulvey for unjust enrichment. The jury found for Bay and awarded damages. Mulvey sought a settlement credit based on the other judgment and agreement. The trial court refused and rendered judgment consistent with the jury findings. The court of appeals reversed and held that Mulvey was entitled to a credit. It therefore rendered a take-nothing judgment without reaching the other issues raised by Mulvey.

Bay petitioned for review, arguing that Mulvey was not entitled to a credit because the other judgment had not been satisfied. The Supreme Court granted the petition.

## F. EMPLOYMENT LAW

### 1. Sexual Harassment

a) *Harris v. Fossil Grp., Inc.*, ___ S.W.3d ___, 2023 WL 1794030 (Tex. App.—Dallas 2023), *pet. granted* (Feb, 16, 2024) [23-0376]

The issue in this case is whether an employee's statement that she sent an email reporting sexual harassment to her employer raises a material fact issue as to whether the employer knew or should have known of the harassing behavior.

Nicole Harris was hired by the Fossil Group to work at a Fossil store in Frisco. During her employment, she began exchanging messages on Instagram with the store's assistant manager, Leland Brown. Many of these messages were sexual in nature, which Harris alleges constitutes sexual harassment. Harris contends that she reported Brown's sexual harassment to Fossil through email. However, neither she nor Fossil was able to locate the email. Harris sued Fossil, alleging a hostile work environment.

The trial court granted summary judgment for Fossil. The court of appeals reversed, holding that Harris's allegation that she sent an email was sufficient to raise a material fact issue about whether Fossil knew or should have known of the harassment and failed to take appropriate action.

Fossil petitioned the Supreme Court for review. Fossil argues that Harris has not created a fact issue on the question of whether it knew or should have known about the alleged harassment. In the alternative, Fossil argues that it has conclusively established the *Faragher*/*Ellerth* affirmative

defense to harassment because (1) it exercised reasonable care to prevent and correct promptly any harassment, and (2) Harris unreasonably failed to take advantage of any preventive or corrective opportunities provided by Fossil or to otherwise avoid harm. The Court granted the petition for review.

## G. FAMILY LAW

### 1. Divorce Decrees

a) *Baker v. Bizzle*, ___ S.W.3d ___, 2022 WL 123216 (Tex. App.—Fort Worth 2022), *pet. granted* (Mar. 10, 2023) [22-0242]

The issue in this case is whether a trial court's oral rendition of divorce is effective when one spouse dies prior to the entry of a written final decree.

Eve Baker filed for divorce from Terry Bizzle. The court held a bench trial, and the judge declared on the record, "The parties are divorced." The judge later emailed the parties a proposed property division and requested that Eve's attorney prepare the decree.

Eve died several weeks later. Neither party had submitted a proposed divorce decree to the court. After receiving notice of Eve's death, the court held a hearing at which counsel for both parties presented arguments on whether the court retained subject-matter jurisdiction to enter a final divorce decree. Eve's attorney then submitted a proposed decree, which the judge signed with some handwritten additions.

Terry appealed, arguing that the oral pronouncement, standing alone or in combination with the email containing the proposed property division, did not constitute a full and final rendition of judgment. The court of appeals held that the oral pronouncement was not a final judgment because it did not divide the marital property, and the email did not reflect a present intent to render final judgment because it expressed uncertainty and invited further discussion. The court of appeals reversed and ordered the case dismissed the case for lack of subject-matter jurisdiction.

Counsel for Eve petitioned the Supreme Court for review, arguing that the oral pronouncement and the property-division email, when viewed together, constitute a complete, present rendition of judgment. The Supreme Court granted the petition.

### 2. Termination of Parental Rights

a) *In re R.R.A.*, 654 S.W.3d 535 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (June 2, 2023) [22-0978]

The issue in this case is whether evidence of a causal connection between a parent's drug use and any alleged endangerment of the child is required to terminate a parent's rights under Section 161.001(b)(1)(D) or (E) of the Texas Family Code.

The Department of Family and Protective Services sought to terminate Father's parental rights to his three children after it learned of allegations that Father and the children were homeless and that Father was using drugs. The children were removed from Father and initially placed with their grandmother but were removed a second time after she was hospitalized and could not care for the children. At the time of the second removal, Father threatened to kill himself if the

children were removed again. Father tested positive for drugs several times after the children's removal and eventually refused to submit to required drug testing. The trial court terminated Father's parental rights, finding by clear and convincing evidence that Father had endangered the children under Section 161.001(b)(1)(D) and (E) of the Family Code and that he used a controlled substance in a manner that endangered the children under subsection (P).

Father appealed. A split panel of the court of appeals reversed. The majority relied on a recent Fourteenth Court en banc opinion, which held that evidence of a causal connection between drug use and endangerment is required to terminate a parent's rights under subsection (E). The majority concluded that no such evidence existed here. Nor did it find any other evidence against Father—including his homelessness and threat of self-harm—sufficient to support termination. Accordingly, it reversed and rendered judgment for Father.

The Supreme Court granted the Department's and the children's petition for review.

## H. GOVERNMENTAL IMMUNITY

### 1. Contract Claims

a) *San Jacinto River Auth. v. City of Conroe*, ___ S.W.3d ___, 2022 WL 1177645 (Tex. App.—Beaumont 2022), *pet. granted* (Sept. 1, 2023) [22-0649]

The principal issue in this case is whether a contractual mediation requirement is a limitation on the waiver of sovereign immunity on contract claims under the Local Government Contract Claims Act.

The Cities of Conroe and Magnolia receive water from the San Jacinto River Authority. The contracts between the Authority and the Cities require mediation of certain claims. The Authority and the Cities disagreed over the water rates the Authority charged the Cities. The Authority brought claims against the Cities for declaratory judgment and for non-payment under the contracts. The Cities filed pleas to the jurisdiction, alleging that mediation is required under the contracts and that the claims should therefore be dismissed. The trial court granted the Cities' pleas to the jurisdiction. The court of appeals affirmed.

The Authority filed a petition for review raising several issues. It argues that governmental immunity on its claims is waived under the Local Government Contract Claims Act and the terms of the contracts. The Act waives governmental immunity on certain contract claims for goods and services. The Authority argues that its contract claims are not subject to mediation under the terms of the contracts, and that even if the claims require mediation, that requirement is not a jurisdictional limitation on the scope of the Act's waiver of immunity. Conversely, the Cities argue that mediation is required because the Authority's claims include claims for "performance" defaults subject to mediation under the terms of the contracts, as opposed to "payment" defaults that are not subject to mediation. The Cities also argue that a mediation requirement is an "adjudication procedure" under the Act that limits the

scope of the Act's waiver of immunity, and therefore the trial court properly granted the pleas to the jurisdiction.

The Court granted the petition for review.

**2. Independent Contractors**

a) *Tex. Dep't of Transp. v. Self*, ___ S.W.3d ___, 2022 WL 1259094 (Tex. App.—Fort Worth 2022), *pet. granted* (Sept. 1, 2023) [22-0585]

This case presents two questions involving the scope of the Texas Tort Claims Act's immunity waiver: (1) whether a governmental employee's control over a third-party contractor constitutes "operation or use" under the Act's waiver of immunity for property damage "aris[ing] from" the operation or use of motor-driven equipment, and (2) whether a subcontractor's workers who removed trees from private property adjacent to a public roadway were TxDOT "employees" under the statute.

In a negligence and inverse-condemnation suit alleging improper removal of trees outside of a right-of-way easement, the trial court denied TxDOT's plea to the jurisdiction. The court of appeals affirmed as to the negligence claim but dismissed the takings claim for want of jurisdiction.

The appeals court acknowledged a split of authority regarding waiver of immunity based on control over motor-driven equipment that was physically operated by someone other than a state employee. Without weighing in on the debate, the court held that (1) TxDOT did not exercise sufficient control over the tree-removal equipment to invoke the Act's immunity waiver under the more expansive line of cases; however, (2) evidence that TxDOT actually controlled the details of the tree-removal task created a fact issue about whether the workers were "employees" rather than independent contractors. In dismissing the inverse-condemnation claim, the court found no evidence of "intent" as required to sustain the claim.

The Supreme Court granted the parties' cross-petitions for review.

**3. Official Immunity**

a) *City of Houston v. Rodriguez*, 658 S.W.3d 633 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Jan. 26, 2024) [23-0094]

At issue in this case is whether a police officer acted with reckless disregard such that the Texas Tort Claims Act's emergency exception does not apply, and whether the officer acted in good faith such that he is entitled to official immunity.

Officer Corral was engaged in a high-speed chase with a suspect who drove erratically and at one point against traffic. Corral tried to make a sudden right turn but was unable to complete it because of his speed. He swerved into the curb to avoid hitting a truck waiting at the stop sign but lost control and struck the truck. Corral's affidavit asserted that he only hit the curb because his brakes were not working.

The City filed a motion for summary judgment asserting official immunity and immunity under the Texas Tort Claims Act's emergency exception. The trial court denied the motion, and the court of appeals affirmed. The court

held that the City did not meet its initial burden to demonstrate good faith because Corral's affidavit did not assess the risk of harm in light of the condition of his vehicle's brakes and that Corral's alleged brake failure raises a fact issue as to whether he acted recklessly.

The City filed a petition for review, arguing that Corral engaged in risk assessment measures that precluded a fact issue for recklessness and that the unrefuted evidence offered by both parties establishes Corral's good faith. The City also argues that nothing in the record provides a reasonable inference that Corral's brakes were malfunctioning or that he was aware his brakes were malfunctioning before the incident. The Supreme Court granted the petition.

**4. Texas Commission on Human Rights Act**

a) *Tex. Tech Univ. Health Scis. Ctr. V. Martinez*, ___ S.W.3d ___, 2022 WL 3449495 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0843]

The issue is whether Certain university entities are immune from Martinez's age-discrimination suit under the Texas Commission on Human Rights Act.

In 2008, Martinez began working for the Texas Tech University Health Sciences Center as Senior Assistant to the then-President of the Center. Martinez was promoted to Chief of Staff the following year and continued serving in that position through Dr. Ted Mitchell's appointment as President of the Center in 2010, as well as his dual appointment as Chancellor of the Texas Tech University System in early 2019. Martinez's employment was formally terminated in June 2019, shortly after Mitchell had sent an e-mail to Martinez and others in May 2019, which discussed the Texas Tech University Board of Regents' expression of interest in "succession planning" following the results of an age-analysis of the President's executive council.

After receiving a Notice of Right to Sue from the Equal Opportunity Employment Commission, Martinez filed an action for employment discrimination under the TCHRA, naming the Center, the Board of Regents, Texas Tech University, and the Texas Tech University System as defendants. The university entities jointly filed a plea to the jurisdiction, arguing that the TCHRA's waiver of sovereign immunity was inapplicable because Martinez did not qualify as their indirect employee under Texas caselaw. The trial court denied the plea to the jurisdiction and the university entities filed an interlocutory appeal. The court of appeals affirmed the denial of the plea to the jurisdiction for all the university entities except Texas Tech University.

The remaining university entities filed a petition for review, which the Supreme Court granted.

**5. Texas Tort Claims Act**

a) *Cai v. Chen*, ___ S.W.3d ___, 2022 WL 2350049 (Tex. App.—Houston [14th Dist.] June 30, 2022), *pet. granted* (Sept. 1, 2023) [22-0667]

The issue is whether an employee's report of sexual harassment by

a coworker and comments about the matter to another coworker fall within the employee's scope of employment for purposes of the Texas Tort Claims Act.

Chen and Cai both worked at the M.D. Anderson Research Center in Houston and were subject to the Center's policies and procedures for the filing and investigating of sexual-harassment claims. In October 2018, Cai reported to a supervisor, as well as the Center's Title IX coordinator, that Chen was sexually harassing and stalking her, which ultimately led to Chen's placement on investigative leave and the commencement of criminal charges against him. Cai also discussed the matter with another coworker, repeating her allegations of stalking and harassment by Chen.

In November 2019, Chen sued Cai, alleging claims of slander, defamation, libel, malicious, criminal prosecution, and tortious interference with contract, among others. Chen moved to dismiss under Section 101.106(f) of the Tort Claims Act, which requires a court to dismiss a suit against a government employee based on conduct within the general scope of that employee's employment. Chen refused to amend his pleadings to substitute the governmental unit as the defendant, arguing that reporting or discussing sexual harassment was not within the general scope of Cai's employment. The trial court denied Cai's motion to dismiss.

The Court of Appeals affirmed in part and reversed and rendered judgment in part, dismissing Chen's malicious prosecution claim in its entirety and dismissing his remaining claims to the extent they are based on Cai's reports of sexual harassment or conduct relating to the subsequent investigation. One justice, dissenting in part, also would have dismissed any claims based on Cai's statements to the coworker.

Chen and Cai filed cross-petitions for review. The Supreme Court granted both petitions.

b) *City of Austin v. Powell*, ___ S.W.3d ___, 2022 WL 1509304 (Tex. App.—Austin 2022), *pet. granted* (Jan. 26, 2024) [22-0662]

At issue in this case is whether a police officer in a high-speed chase acted with reckless disregard such that the emergency exception under the Texas Tort Claims Act does not apply and immunity is waived.

Officer Bullock was assigned as backup to pursue a suspect in a vehicle chase. He was following Officer Bender who slowed down suddenly to make a right turn based on the radio report of the suspect's location. Bullock rammed into the back of Bender's vehicle, causing the two police cruisers to crash into Powell's van sitting at the stop sign.

After Powell sued the City, the trial court denied the City's plea to the jurisdiction based on the Texas Tort Claims Act's emergency exception. The court of appeals affirmed, concluding that Bullock's failure to maintain a safe following distance, combined with his inattention and failure to control his speed, create a fact issue on recklessness. The City filed a petition for review in the Supreme Court, challenging the court of appeals' analysis. The Court granted the petition.

c) *City of Houston v. Sauls*, 654 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Oct. 20, 2023) [22-1074]

The issue in this case is whether the Tort Claims Act waives the City of Houston's immunity in a negligence suit for damages caused by a Houston Police Department officer.

The officer—while responding to a 911 call for a potential suicide—was driving 62 mph in a 40-mph zone, when she hit a bicyclist entering the intersection. The collision resulted in the bicyclist's death.

In the negligence lawsuit that followed, the City filed a motion for summary judgment that sought dismissal on grounds of governmental immunity. The trial court denied the motion, and the court of appeals affirmed.

The City petitioned for review, arguing that it has not waived governmental immunity because (i) the doctrine of official immunity prevents the officer from being personally liable to the plaintiffs under Section 101.021(1), and (ii) the emergency exception in Section 101.055(2) applies. The Supreme Court granted the City's petition for review.

**6. Texas Whistleblower Act**

a) *City of Denton v. Grim*, ___ S.W.3d ___, 2022 WL 3714517 (Tex. App.—Dallas 2022), *pet. granted* (Sept. 1, 2023) [22-1023]

The issues in this case are whether two employees' report of misconduct by an unpaid city councilmember qualifies for protection under the Texas Whistleblower Act and whether there is sufficient evidence that the report caused the employees' termination.

Michael Grim and Jim Maynard worked for the City of Denton and were on the planning committee for a new natural gas plant. A city councilmember who opposed the plant released allegedly confidential documents to a local newspaper. Grim and Maynard reported this disclosure to the city attorney. Following a change in the City's leadership, the new city manager began investigating the procurement process for the new plant. Grim and Maynard were ultimately terminated.

Grim and Maynard sued the City, alleging that their terminations were in retaliation for their report and therefore violated the Whistleblower Act. The jury agreed and awarded damages, and a divided court of appeals affirmed.

The City petitioned for review. It argues that the Whistleblower Act does not apply because the councilmember was not acting in her official capacity, so there is no report of a violation by "the employing governmental entity" as required by the Act. The City also argues that the evidence is legally insufficient to support a finding that the employees' report caused their terminations. The Supreme Court granted the City's petition.

**7. Ultra Vires Claims**

a) *Image API, LLC v. Young*, ___ S.W.3d ___, 2022 WL 839425 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0308]

At issue is whether Section 32.0705(d) of the Human Resources Code imposes a mandatory

one-year time limit for the Health and Human Services Commission to conduct external audits of "Medicaid contractors."

Image API contracted with the Commission to provide document-processing services. The Commission later audited Image and demanded that Image repay over $400,000. Image sued, seeking a declaration that the audit was untimely and thus *ultra vires* because the audit was beyond the one-year time limit for external audits imposed by Section 32.0705(d). The Commission filed a plea to the jurisdiction and moved for summary judgment, arguing that Section 32.0705(d) either does not apply or is directory (and thus judicially unenforceable). The trial court denied the Commission's plea but granted its summary-judgment motion.

The court of appeals reversed in part, holding that Section 32.0705 applies to the Commission's audit because Image is a "Medicaid contractor" under that statute. The court of appeals also held that Section 32.0705(d) is merely a directory provision, not a mandatory one. Consequently, Section 32.0705(d) neither imposes a ministerial duty on the Commission to conduct audits within the one-year period nor prohibits an audit from being conducted beyond that period.

Image petitioned the Supreme Court for review, arguing that Section 32.0705(d) is mandatory. The Court granted Image's petition.

## I. INTENTIONAL TORTS

### 1. Fraud

a) *Weller v. Keyes*, ___ S.W.3d ___, 2022 WL 3638204 (Tex. App.—Austin 2022), *pet. granted* (Oct. 20, 2023) [22-1085]

At issue is whether Section 21.223 of the Business Organizations Code shields a corporate agent from being held personally liable for torts committed during the course and scope of employment or in the role of corporate agent.

David Weller, the president and sole member of IntegriTech Advisors, spent several months in employment negotiations with MonoCoque Diversified Interests LLC, which is wholly owned by Mary Alice Keyes and Sean Leo Nadeau. The parties exchanged emails detailing compensation terms, Weller's salary, IntegriTech's training supplement, and payments based on quarterly revenues. Weller declined other employment opportunities and accepted MonoCoque's employment offer. After Weller's acceptance, MonoCoque refused to pay him the promised revenue payments for the first quarter. Weller quit.

Weller filed suit asserting various fraud claims against Keyes and Nadeau alleging that they were personally liable for their own fraudulent and tortious conduct notwithstanding that they were acting as agents of MonoCoque. Keyes and Nadeau filed a motion for partial summary judgment on all of Weller's claims against them in their individual capacities. The trial court granted the motion, but the court of appeals reversed.

Keyes and Nadeau petitioned

the Supreme Court for review, arguing that Weller only relied on statements that Keyes and Nadeau made in their capacity as representatives of Mono-Coque and that Section 21.223 shields corporate agents from personal liability for the corporation's contractual obligations. Weller responds that Section 21.223 only shields veil-piercing theories of liability and was never intended to preclude personal tort liability.

The Court granted the petition for review.

## J. JURISDICTION

### 1. Injunctions

a) *Huynh v. Blanchard*, ___ S.W.3d ___, 2021 WL 3265549 (Tex. App.—Tyler 2021), *pet. granted* (March 10, 2023) [21-0676]

The issue in this case is whether a jury finding that the operation of chicken farms was a temporary nuisance precluded the trial court from issuing a permanent injunction.

Sanderson Farms along with local growers, the Huynhs, set up and operated chicken farms in East Texas. The farms were in close proximity to neighboring properties—in violation of law and Sanderson's own internal policies. Blanchard and other neighbors claimed that the size and proximity of the chicken farms to their homes created a nuisance.

The jury found that Sanderson and the growers had intentionally caused a nuisance. The jury also determined the nuisance was temporary. The trial court rendered a take-nothing judgment on damages for the neighbors and issued a permanent injunction against Sanderson and the growers. The injunction prevented Sanderson and the growers from buying, selling, delivering, receiving, shipping, transporting, hatching, raising, growing, feeding, handling, burying, or disposing of any chicken of any breed, type, size or age within five miles of where the farms were operated. The court of appeals affirmed the trial court's judgment.

The Supreme Court granted Sanderson and the growers' petition for review.

### 2. Service of Process

a) *Tex. State Univ. v. Tanner*, 644 S.W.3d 747 (Tex. App.—Austin 2022), *pet. granted* (Sept. 1, 2023) [22-0291]

At issue in this case is whether diligence in service of process is a "statutory prerequisite to suit" for claims brought under the Tort Claims Act. In 2014, Hannah Tanner sustained serious injuries after being thrown from a golf cart while on the Texas State University golf course. In 2016, Tanner timely sued TSU, the Texas State University System, and Dakota Scott (a TSU employee who drove the golf cart) under the Tort Claims Act. Tanner served the System in 2016 but did not serve Scott until 2018. Scott moved for summary judgment on the grounds that Tanner did not exercise diligence as a matter of law because she had delayed serving Scott for two years. The district court denied Scott's motion and granted the System's plea to the jurisdiction. Finally, in 2020, Tanner served TSU.

TSU filed a plea to the jurisdiction, asserting that Tanner's claims were barred by the two-year statute of

limitations because she had delayed serving TSU for over three and a half years. The district court agreed and granted TSU's plea. The court of appeals reversed, holding that diligence in service of process is not a statutory prerequisite to suit under Section 311.034 of the Government Code and is thus not jurisdictional.

TSU petitioned the Supreme Court for review, arguing that timely service is a jurisdictional prerequisite because a court does not obtain jurisdiction over a defendant until service is effectuated. The Supreme Court granted the petition.

### 3. Subject Matter Jurisdiction

a) *Pruski v. Tex. Windstorm Ins. Ass'n*, 667 S.W.3d 460 (Tex. App.—Corpus Christi 2023), *pet. granted* (Dec. 15, 2023) [23-0447]

This case concerns the effect of a statutory provision requiring that certain insurance-coverage disputes be presided over by a judge appointed by the judicial panel on multidistrict litigation.

The Texas Windstorm Insurance Association is a quasi-governmental body created by Chapter 2210 of the Insurance Code to provide an adequate market for windstorm and hail insurance in the seacoast territory of Texas. Section 2210.575 authorizes a TWIA policyholder to sue the association after it denies coverage of a claim, but subsection (e) requires that "an action brought under this subsection . . . be presided over by a judge appointed by the judicial panel on multidistrict litigation."

Stephen Pruski's beachfront home was damaged by Hurricane Harvey. After receiving what he considered to be partial payment from TWIA, Pruski sued the association in Nueces County district court. The judge assigned to the case was not appointed by the MDL panel. After the court granted summary judgment for TWIA, Pruski appealed, claiming that the judgment is void for lack of subject-matter jurisdiction. The court of appeals agreed and reversed. The court held that the panel-appointment process is mandatory; that Pruski did not waive his right to an MDL-appointed judge; and that the summary judgment is void because the trial court lacked subject-matter jurisdiction.

TWIA filed a petition for review, arguing that Pruski waived his right to an MDL-appointed judge and that the summary judgment is not void in any event because the statutory requirement of an MDL-appointed judge does not affect a trial court's subject-matter jurisdiction. The Supreme Court granted the petition for review.

### 4. Territorial Jurisdiction

a) *Sabatino v. Goldstein*, 649 S.W.3d 841 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (June 16, 2023) [22-0678]

The primary issue in this case is whether a trial court must have territorial jurisdiction over an alleged offender's conduct to issue a protective order under the Texas Code of Criminal Procedure.

Rachel Goldstein and James Sabatino dated while they both lived in Massachusetts. Three years after they stopped dating, Goldstein obtained a

protective order in Massachusetts prohibiting Sabatino from contacting her. After Goldstein moved to Texas, Sabatino filed several small-claims suits against Goldstein, and the notices were forwarded to her in Texas.

Goldstein applied for a protective order in Texas under the Code of Criminal Procedure. Following a hearing, the trial court found there were reasonable grounds to believe that Goldstein was a victim of stalking and harassment. It issued a lifetime protective order prohibiting Sabatino from various acts. The court of appeals reversed and vacated the order, holding that the trial court lacked territorial jurisdiction over Sabatino's alleged harassment because the conduct all occurred in Massachusetts.

Goldstein petitioned the Supreme Court for review, arguing that territorial jurisdiction is solely a criminal-law concept and does not apply to protective orders, which are civil matters. She contends the court of appeals erred in vacating the order because the trial court had both subject-matter jurisdiction and personal jurisdiction over Sabatino.

The Court granted Goldstein's petition for review.

## K. MEDICAL LIABILITY

### 1. Damages

a) *Velasco v. Noe*, 645 S.W.3d 850 (Tex. App.—El Paso 2022), *pet. granted* (June 23, 2023) [22-0410]

The issue in this case is what damages, if any, are recoverable in a medical negligence action based on "wrongful pregnancy."

Velasco sought prenatal care for her third child from Dr. Noe. She paid $400 to Dr. Noe's clinic, which she alleges she paid to receive a sterilization procedure when Dr. Noe performed a C-section. Dr. Noe performed the C-section, but not a sterilization procedure. Velasco subsequently became pregnant with her fourth child and sued Dr. Noe for negligence, among other torts, alleging that he failed to notify her that he did not perform the sterilization procedure.

The trial court granted summary judgment for Dr. Noe on all of Velasco's claims. A divided court of appeals affirmed in part and reversed in part. The court reversed as to her medical negligence claim, concluding that Velasco produced enough evidence on each element to survive summary judgment. Additionally, it held that mental anguish and pain and suffering damages are recoverable in a wrongful pregnancy action upon a showing of negligence. The court affirmed summary judgment on all of Velasco's other claims.

Dr. Noe petitioned the Supreme Court for review. Dr. Noe argues that Texas law does not recognize wrongful pregnancy actions, and alternatively, if it does, any damages are limited to medical expenses associated with the failed or unperformed procedure. The Supreme Court granted the petition for review.

## L. MUNICIPAL LAW

### 1. Authority

a) *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.

## M. NEGLIGENCE

### 1. Willful and Wanton Negligence

a) *Marsillo v. Dunnick*, 654 S.W.3d 224 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-0835]

In this healthcare-liability claim arising from an emergency physician's treatment of a snakebite, the main issue is whether the plaintiff has produced some evidence of "willful and wanton negligence" by the physician, as required by statute.

When Dr. Kristy Marsillo treated Raynee Dunnick for a rattlesnake bite, she followed her hospital's guidelines detailing when to administer antivenom. Raynee received the antivenom three hours after arriving at the hospital. The Dunnicks sued, alleging that Dr. Marsillo should have administered the antivenom immediately and that her failure to do so is the proximate cause of Raynee's lasting pain and impairment. The trial court granted Dr. Marsillo's no-evidence motion for summary judgment, but the court of appeals reversed.

The Supreme Court granted Dr. Marsillo's petition for review. She argues that willful and wanton negligence is the same standard as gross negligence and that there is no evidence to satisfy it. She also argues that there is no evidence of proximate cause.

## N. OIL AND GAS

### 1. Assignments

a) *Citation 2002 Inv. LLC v. Occidental Permian, Ltd.*, 662 S.W.3d 550 (Tex. App—El Paso 2022), *pet. granted* (Feb. 16, 2024) [23-0037]

The issue in this case is whether an assignment of mineral interests is limited by the depths described in the referenced exhibit.

In 1987, Shell Western E&P, Inc. assigned to Citation a large oil-and-gas property. The assignment incorporated and attached an exhibit that described the conveyed property. Some of the descriptions referenced property depth, describing a tract of land down to a certain number of feet. In 1997, Shell purported to transfer certain oil-and-gas interests to Occidental, some of which had been previously conveyed to Citation in the Shell-Citation assignment but for deeper interests than those referenced in the exhibit. Both Occidental and Citation later attempted to assign to third parties some of the interests they obtained from Shell, leaving the "deep rights" conveyed in the Shell-Occidental assignment in dispute.

Occidental contends that the interests conveyed in the Shell-Citation assignment were depth-limited, leaving Shell free to assign its deep rights to them. Citation argues that the Shell-Citation assignment was not depth-limited. Thus, Citation and the third party it sold to own all the interests described in the exhibit. The trial court held that the assignment was a limited-depth grant that did not convey Shell's deep rights to Citation. The court of appeals reversed, holding that the assignment was not depth-limited, leaving Citation and its transferee the sole owners of the described interests.

Occidental filed a petition for review in the Supreme Court, arguing that the referenced exhibit clearly describes the depths of the interests to be conveyed. It further argues that the court of appeals erred by construing the assignment's "subject to" language as an expansion rather than a limitation and by construing a Mother Hubbard clause as a general grant. The Court granted Occidental's petition for review.

### 2. Contract Interpretation

a) *Samson Expl., LLC v. Bordages*, 662 S.W.3d 501 (Tex. App.—Beaumont 2022), *pet. granted* (Sept. 1, 2023) [22-0215]

The central issue in this case is whether a contractual "late charge" on past-due royalties allows for compound rather than simple interest.

As landowners, the Bordages executed multiple oil-and-gas leases with Samson Exploration, LLC. The leases provide for an 18% late-charge penalty on past-due royalties to be calculated each month but do not expressly state whether the interest should be compound or simple. After fellow royalty owners with a similar late-charge provision sued Samson on various breach-of-lease theories, the Bordages joined suit, but their case was later severed into a separate cause. The trial court rendered judgment against Samson for just over $13 million in "late charges," with approximately $11 million of that number based on the interest being compounded monthly. The

court of appeals affirmed.

Samson petitioned the Supreme Court for review, arguing that Texas law and nationwide authority disfavors compound interest when it is not expressly provided for in a contract and that applying simple interest is supported by the leases' plain language and a utilitarian construction. The Bordages respond that stare decisis and the leases' plain language preclude Samson's construction and that collateral estoppel bars this issue because it was already resolved in the fellow royalty owners' case in favor of compounding.

The Court granted Samson's petition for review.

**3. Leases**

a) *Carl v. Hilcorp Energy Co.*, 91 F.4th 311 (5th Cir. 2024), *certified question accepted* (Jan. 19, 2024) [24-0036]

These certified questions ask the Supreme Court to construe language used in oil-and-gas leases. The plaintiffs Carl and Anderson White filed a class action on behalf of royalty owners to leases operated by defendant Hilcorp as lessee. The leases state that Hilcorp must pay royalties "on gas . . . produced from said land and sold or used off the premises . . . the market value at the well of one-eighth of the gas so sold or used." Hilcorp also "shall have free use of . . . gas . . . for all operations hereunder." The parties disagree about whether Hilcorp owes royalties on gas used off-lease for post-production costs. The district court granted Hilcorp's motion to dismiss, and the Whites appealed.

The Fifth Circuit seeks guidance from the Supreme Court as to the effect of *BlueStone Natural Resources II, LLC v. Randle*, 620 S.W.3d 380, 386 (Tex. 2021), on the issues presented. *Randle* has a discussion of a free-use clause, but the Fifth Circuit noted a lack of Texas authority analyzing *Randle* when construing value-at-the-well leases. The Fifth Circuit certified two questions to the Texas Supreme Court:

(1) After *Randle*, can a market-value-at-the well lease containing an off-lease-use-of-gas clause and free-on-lease-use clause be interpreted to allow for the deduction of gas used off lease in the post-production process?

(2) If such gas can be deducted, does the deduction influence the value per unit of gas, the units of gas on which royalties must be paid, or both?

The Court accepted the certified questions.

**4. Pooling**

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.,* 672 S.W.3d 33 (Tex. App.—San Antonio 2021), *pet. granted* (June 2, 2023) [21-1035]

At issue in this case is whether one oil-and-gas company's forced-pooling offer to another, which included a 10% risk penalty, was unreasonably low under the Texas Mineral Interest Pooling Act.

EOG Resources drilled sixteen wells on a riverbed tract based on drilling permits it received from the Railroad Commission. EOG's wells surrounded a seven-mile portion of the riverbed leased by petitioner Ammonite Oil & Gas Corp. Concerned that its mineral interested would be essentially

stranded, Ammonite sent a series of letters to EOG proposing the formation of sixteen voluntarily pooled units, including a 10% risk charge to cover the economic risks assumed in drilling the wells. EOG rejected the offer. Ammonite then sought to force-pool its riverbed tracts with EOG's wells.

The Railroad Commission rejected Ammonite's applications, finding that Ammonite's offers to EOG were not "fair or reasonable" as required by the Mineral Interest Pooling Act . Ammonite petitioned for judicial review in the trial court, which affirmed the Commission's order. The court of appeals did the same. Ammonite petitioned for review to the Supreme Court, arguing that nothing in the plain text of MIPA even requires that a risk penalty be included in a voluntary-pooling offer, so a low-risk penalty (or even the absence of one) cannot render an offer statutorily unreasonable. The Court granted the petition for review.

## O. PROCEDURE—APPELLATE

### 1. Interlocutory Appeal Jurisdiction

a) *Harley Channelview Props., LLC v. Harley Marine Gulf, LLC*, ___ S.W.3d ___, 2022 WL 17813798 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Sept. 29, 2023) [23-0078]

The issue in this case is whether an interlocutory order that grants partial summary judgment and orders a party to sell real property within thirty days is an appealable temporary injunction.

Harley Marine Gulf leases a maritime facility from Harley Channelview Properties. When Harley Marine signed the lease, it also obtained an option to purchase the property for $2.5 million at any time during the lease period or a renewal period. Eight years later, Harley Marine attempted to exercise its option, but Channelview refused to sell the property, claiming that the option had expired. Harley Marine sued for breach of the option agreement and sought specific performance. It then moved for partial summary judgment.

The trial court granted the motion and ordered Channelview to sell the property to Harley Marine within thirty days. It is undisputed that the order is interlocutory because other claims in the suit remain unresolved. Channelview appealed, claiming that the trial court's order constitutes a temporary injunction and is therefore appealable under Civil Practice and Remedies Code Section 51.014(a)(4). The court of appeals dismissed the appeal for want of jurisdiction, holding that the trial court's order lacked indicia of a temporary injunction because the order granted permanent relief on the merits.

In its petition for review, Channelview argues that the trial court's order qualifies as a temporary injunction under Supreme Court precedent. To hold otherwise, it argues, deprives it of its right to appellate review prior to compliance. The Supreme Court granted review.

## P. PROCEDURE—PRETRIAL

### 1. Compulsory Joinder

a) *In re Tr. A & Tr. C, Established Under Bernard L. & Jeannette Fenenbock Living Tr. Agreement, Dated Mar. 12, 2008*, 651 S.W.3d 588 (Tex. App.—El Paso 2022), *pet. granted* (Dec. 15, 2023) [22-0674]

The central issue in this case is whether compulsory joinder extends to subsequent purchasers of stock when a lawsuit between other parties effectively adjudicates the stock's ownership.

Glenna Gaddy, a co-trustee of a family trust, transferred stock from the family trust to her personal trust. Gaddy then sold the stock from her personal trust to her two sons. Following the sale, Mark Fenenbock sued Gaddy, seeking a declaration that he is a co-trustee under the trust agreement and that the transfer was void because he had not consented to it as co-trustee.

The probate court declared the stock transfer to be void, ordered that the stock be "restored" to the family trust, and ordered Gaddy to undertake certain actions, including an accounting and deposit of substantial funds. Gaddy appealed the probate court's order declaring the stock transfer from the family trust to her personal trust void.

The court of appeals vacated and remanded, holding that the probate court lacked jurisdiction to declare the stock transfer void due to the omission of "jurisdictionally indispensable" parties. In particular, the court of appeals concluded that the probate court committed fundamental error and lacked subject-matter jurisdiction to enter the order for failing to join Gaddy's sons—the purported owners of the stock in question.

Both parties petitioned for review as to the court of appeals' jurisdictional holding. Fenenbock argues that Gaddy's sons need not have been joined at all. Gaddy argues that her sons need not have been joined for the probate court to have jurisdiction, but that the probate court's adjudication of the stock's ownership in her sons' absence was error. The Supreme Court granted the parties' petitions for review.

### 2. Discovery

a) *In re Barnes*, 655 S.W.3d 658 (Tex. App.—Dallas 2022), *argument granted on pet. for writ of mandamus* (Nov. 10, 2023) [22-1167]

The issue in this case is whether E.B.'s healthcare records are privileged from discovery when E.B. is seeking mental-anguish damages in a negligence and bystander-recovery suit.

Ten-year-old E.B. was injured, and her younger brother was killed, in an ATV rollover accident. E.B. and her parents sued the seller of the ATV, Richardson Motorsports, and other defendants. E.B.'s claims are for negligence and bystander recovery, for which she seeks mental-anguish and other damages. In her initial disclosures, E.B. designated a clinical psychologist and her pediatrician as fact witnesses and nonretained testifying experts. At one defendant's request, E.B. produced unredacted healthcare records from those providers without objection.

Two years later, Richardson subpoenaed E.B.'s psychologist and pediatrician for updated records related to their treatment of E.B. for psychological issues. E.B. filed motions to quash, arguing that the physician–patient privilege and the mental-health-information privilege shield the records from discovery. E.B. then stated at the oral hearing that she would withdraw her designation of the doctors as testifying witnesses, though she has never amended her discovery responses to do so. The trial court denied the motions and ordered that the records be produced.

A split panel of the court of appeals granted E.B.'s mandamus petition and directed the trial court to vacate its orders and to grant E.B.'s motions to quash. The majority held that the records are not discoverable under the privileges' patient–litigation exception, which applies when a party relies on the patient's mental or emotional condition as part of a claim or defense. The majority characterized E.B.'s bystander claim as involving a routine claim for mental-anguish damages, which courts have held does not trigger the exception. The court rejected Richardson's argument that the "shock" element of E.B.'s bystander claim triggers the exception.

In its petition for writ of mandamus to the Supreme Court, Richardson challenges the court of appeals' holding that the patient–litigation exception does not apply and argues that E.B. waived the privileges' application by designating her providers as testifying witnesses and producing some of their records. The Court set the petition for oral argument.

b) *In re Metro. Water Co.*, ___ S.W.3d ___, 2022 WL 3093200 (Tex. App.—Houston [14th Dist.] 2022), *argument granted on pet. for writ of mandamus* (March 10, 2023) [22-0656]

The issue in this case is whether the trial court abused its discretion when it ordered a sweeping forensic examination of electronic storage devices as a discovery sanction.

Metropolitan Water and Blue Water were involved in litigation over a series of contracts governing rights to develop, market, and sell groundwater. Discovery was sought and ordered during the pendency of this litigation. The trial court ordered Metropolitan Water to turn over certain electronic files to Blue Water. Metropolitan Water did not comply.

The trial court entered an order for forensic inspection of Metropolitan Water's electronic devices as a sanction for its discovery abuse. The order included an inspection of the personal cell phone of Mr. Carlson, the head of Metropolitan Water. Blue Water's own expert was ordered to perform the forensic inspection. The sanction order provided no up-front limitation such as search terms or a time frame to limit the expert's search to relevant information. There was also no opportunity for Metropolitan Water or Mr. Carlson to object that data from their personal devices was private and irrelevant before it was turned over to Blue Water. The court of appeals denied Metropolitan Water's mandamus petition.

The Supreme Court granted oral argument on Metropolitan Water's mandamus petition.

c) *In re Rashid*, ___ S.W.3d ___, 2023 WL 3730320 (Tex. App.—San Antonio 2023), *argument granted on pet. for writ of mandamus* (Jan. 26, 2024) [23-0414]

The issue in this case is whether a defendant timely designated two experts who were initially designated by co-defendants that later settled.

A man passed away while receiving long-term acute care at Lifecare Hospital. His wife, Anna Marie Moreno, sued several healthcare providers for negligence, including Dr. Rashid.

The trial court issued a docket control order setting a trial date and discovery deadlines, including a deadline for designating expert witnesses. Rashid timely designated one expert, while reserving the right to call any other party's designated expert. Two of Rashid's co-defendants timely designated Dr. Garrett, a neurosurgeon, and Dr. Trevino, an economist. Moreno later settled her claims against those co-defendants.

Days before trial was set to begin, the parties received notice that the trial would be continued due to a scheduling error. The parties filed a Rule 11 Agreement extending the docket control order's deadlines relating to exchanging objections to deposition testimony, exhibit lists, motions in limine, and jury charges. The trial was eventually reset to January 9, 2023.

On December 8, 2022—months after the docket control order's deadline for defendants to designate testifying experts—Rashid supplemented his discovery responses to designate Dr. Trevino and Dr. Garrett. The trial court struck Rashid's supplemental designation on Moreno's motion and later denied his motion for rehearing. The court of appeals denied Rashid's mandamus petition.

Rashid sought mandamus relief in the Supreme Court. He argues that he properly designated Dr. Garrett and Dr. Trevino before the docket control order's deadline or that his supplementation was proper under the Texas Rules of Civil Procedure.

### 3. Responsible Third-Party Designation

a) *In re Intex Recreation Corp.*, ___ S.W.3d ___, 2023 WL 2258461 (Tex. App.—Corpus Christi 2023), *argument granted on pet. for writ of mandamus* (Sept. 29, 2023) [23-0210]

The issues in this case are whether the trial court erred by granting the plaintiffs' motion for partial summary judgment on the defendant's contributory-negligence defense and, if it did, whether mandamus is available to correct that error.

Intex manufactures ladders for above-ground swimming pools. The parents of a two-year-old child filed a products-liability suit against Intex after their child snuck out of their house in the middle of the night, climbed the ladder to their pool, fell in, and drowned. Intex's answer included an affirmative defense designating the parents as responsible third parties under Chapter 33 of the Civil Practices and Remedies Code because the parents had failed to remove the ladder from the pool and to lock the back door leading to the pool. The parents moved

for partial summary judgment, arguing that the common-law doctrine of parental immunity precludes Intex's comparative-responsibility defense. The trial court granted the parents' motion. The court of appeals denied Intex's subsequent mandamus petition.

Intex then sought mandamus relief in the Supreme Court. Intex argues that the doctrine of parental immunity does not foreclose its affirmative defense of contributory negligence and that Supreme Court precedent authorizes mandamus review of a trial court ruling denying the designation of a responsible third party. The Court set Intex's petition for oral argument.

**4. Summary Judgment**

a) *Gill v. Hill*, 658 S.W.3d 618 (Tex. App.—El Paso 2022), *pet. granted* (Sept. 1, 2023) [22-0913]

The issue in this case concerns which party to a collateral attack on a judgment bears the summary-judgment burden to show whether the underlying judgment was obtained without regard for due process.

In 1999, several taxing entities sued to foreclose on hundreds of properties in Reeves County. The taxing entities attempted service on the defendant landowners by posting notice of the suit on the courthouse door. The successors in interest to some of the original landowners collaterally attacked the foreclosure judgment, alleging that the original landowners were not provided notice of the foreclosure. The subsequent buyers of the properties moved for summary judgment, asserting that the suit was barred by the Tax Code's one-year statute of limitations on suits challenging tax foreclosure sales. The buyers attached the foreclosure judgment and resulting sheriff's deed to the summary-judgment motion; the landowners' successors attached no evidence to their response.

The trial court granted summary judgment. In a divided opinion, the court of appeals affirmed. It held that the buyers had established that the limitations period had run, which shifted the burden to the successors to produce some evidence of the due process violation. Because the successors provided no evidence in their response, they failed to meet their burden.

The successors filed a petition for review. They argue that the buyers bore the burden to show compliance with due process. Specifically, they argue that, to establish that the limitations period had run, the buyers were required to show that the sheriff's deed was valid. Additionally, the successors argue that the Tax Code's limitations period does not apply to a collateral attack on a judgment that is void for lack of due process under this Court's recent decision in *Mitchell v. Map Resources*, 649 S.W.3d 180 (Tex. 2022). The Court granted the petition for review.

b) *Malouf v. State ex rel. Ellis*, 656 S.W.3d 402 (Tex. App.—El Paso 2022) *pet. granted* (Nov. 10, 2023) [22-1046]

A primary issue in this case is whether the State can conclusively establish Medicaid fraud at summary judgment when scienter is an essential element of the claim.

Dr. Malouf is a dentist who owned a chain of dental offices and who was an approved Medicaid

provider who provided dental and orthodontic services to Medicaid recipients. Over a three-year period, Malouf submitted forms falsely representing that he provided services to Medicaid recipients, although the dental services provided to the beneficiaries of those claims were actually performed by other dentists in Malouf's practice.

Two private citizens brought separate qui tam actions against Malouf for violations of the Texas Medicaid Fraud Prevention Act. The trial court consolidated the cases after the State intervened in both. The State's live petition at the time of summary judgment asserted that Malouf knowingly failed to identify the license type and Medicaid billing number of the treating dentist on more than 1,800 Medicaid claims. Both parties moved for summary judgment, the State on traditional grounds and Malouf on no-evidence grounds. The district court denied Malouf's motion, granted the State's, and awarded more than $16 million in civil penalties, attorney's fees for the State and the private citizens who originally brought qui tam actions, and other costs and sanctions against Malouf.

Malouf filed a petition for review, arguing that the State did not conclusively show that he failed to indicate the treating dentist's license type or that he acted knowingly. Specifically, Malouf contends that he did indicate the correct license type and that his testimony that he lacked personal knowledge of improper billing raised a genuine issue of material fact as to scienter. The Court granted the petition for review.

## Q. PROCEDURE—TRIAL AND POST-TRIAL

### 1. Collateral Attack

a) *City of San Antonio v. Campbellton Rd., Ltd.*, 647 S.W.3d 751 (Tex. App.—San Antonio 2022), *pet. granted* (Sept. 1, 2023) [22-0481]

The issue is whether the City of San Antonio Water System is entitled to governmental immunity from Campbellton's breach-of-contract suit.

Campbellton planned to develop two new subdivisions in southeast San Antonio. To ensure the subdivisions would have adequate sewage services, Campbellton entered into a contract with the Water System. Campbellton agreed to design, build, and ultimately convey various oversized wastewater facilities to the Water System. In exchange, the Water System agreed to reserve adequate wastewater capacity for Campbellton's proposed development and to provide Campbellton with credits for impact fees it would otherwise owe. When Campbellton requested to connect the new subdivisions to the sewage system, the Water System had already allocated its capacity to other customers, taking the position that the contract expired by its terms years earlier.

Campbellton sued the Water System for breach of contract. The Water System filed a plea to the jurisdiction, arguing that it is immune from Campbellton's suit. The trial court denied the plea. The court of appeals reversed, holding that the contract does not qualify as an agreement for the provision of services to the Water System and that the claims for breach of the agreement thus do not fall within the

scope of Local Government Code Section 271.151, which waives governmental immunity with respect to written contracts stating the essential terms of an agreement to provide goods or services to a local government entity. Campbellton petitioned for review, arguing that Section 271.151 waives the Water System's immunity because Campbellton agreed under a written contract to provide the Water System with construction services that directly benefited the Water System.

The Supreme Court granted Campbellton's petition for review.

b) *Hensley v. St. Comm'n on Jud. Conduct*, ___ S.W.3d ___, 2022 WL 16640801 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-1145]

The issue is whether Hensley's suit against the State Commission on Judicial Conduct is a collateral attack on a public warning the Commission issued against her.

Hensley is a justice of the peace. For religious reasons, she only officiates weddings between heterosexual couples. The State Commission on Judicial Conduct initiated an investigation into Hensley's wedding practices. After a hearing, the Commission issued a public warning. Rather than appeal to a special court of review, Hensley filed this lawsuit asserting various claims under the Act.

The Commission and its members filed a plea to the jurisdiction, arguing that Hensley's suit is an impermissible collateral attack on the public warning because Hensley failed to appeal that warning to the special court of review and that both the Commission and its members have sovereign immunity. The trial court granted the plea, and the court of appeals affirmed.

Hensley petitioned for review, arguing that neither preclusion principles nor sovereign immunity bar her suit. The Supreme Court granted Hensley's petition for review.

**2. Jury Instructions and Questions**

a) *Bruce v. Oscar Renda Contracting*, 657 S.W.3d 453 (Tex. App.—El Paso 2022), *pet. granted* (Oct. 20, 2023) [22-0889]

The issue in this case is whether the trial court erred in signing a judgment that disregarded the jury's award of exemplary damages due to language in the charge and a post-verdict jury poll indicating that the verdict was not unanimous.

As part of a flood-mitigation project undertaken by the City of El Paso, Renda Contracting was awarded a contract to install a pipeline. Nearby homeowners sued Renda Contracting, alleging that vibration and soil shifting from the construction caused damage to their homes. The jury answered "yes" to Question 7 of the jury charge, which instructed the jury that it could only find gross negligence if that finding was unanimous and if its finding of simple negligence in Question 1 was also unanimous. Question 8 asked what sum of money should be awarded for exemplary damages, but the instruction did not require the jury's answer to Question 8 to be unanimous. The jury awarded $825,000 in exemplary damages.

When the trial court polled the jury, ten jurors responded that the verdict was their individual verdict, and two responded that it was not. Renda Contracting objected to the award of exemplary damages because the verdict was not unanimous. The trial court signed a final judgment that disregarded the award of exemplary damages.

A split court of appeals reversed and remanded with instructions to enter a judgment on the jury's verdict. The majority reasoned that Renda Contracting had waived its challenge by failing to properly and timely object to the jury charge and that Renda Contracting had also failed to carry its burden to prove that the verdict on exemplary damages was not unanimous.

Renda Contracting filed a petition for review, raising several challenges to the court of appeals' opinion. The Supreme Court granted the petition.

## R. PRODUCTS LIABILITY

### 1. Design Defects

a) *Am. Honda Motor Co. v. Milburn*, 668 S.W.3d 6 (Tex. App.—Dallas 2021), *pet. granted* (June 2, 2023) [21-1097]

The main issues on appeal are whether Honda defectively designed the seatbelt that caused Sarah Milburn's injuries and whether Texas Civil Practice and Remedies Code Section 82.008's rebuttable presumption of nonliability shields Honda from liability.

Honda designed a new ceiling-mounted detachable anchor seat belt system for the third-row middle seat of the 2011 Honda Odyssey. In November 2015, an Uber driver picked up Milburn and her friends in a 2011 Honda Odyssey. Milburn sat in the third-row middle seat and used the ceiling-mounted seat belt to buckle herself in. An accident caused the van to overturn on its roof. Milburn hung upside down by the shoulder strap portion of her seat belt, causing quadriplegia paralysis.

Milburn sued and settled with all defendants but Honda. Milburn asserted claims against Honda for negligence in designing, manufacturing, and marketing the van's third-row middle seat belt system. Milburn alleged that the seat belt system was defective and dangerous and its intended method of use was counterintuitive. The jury found that Honda negligently designed the defective seat belt system. The jury also found that Honda was entitled to the Section 82.008(a) presumption of nonliability, but that Milburn rebutted it under Section 82.008(b).

The court of appeals affirmed, holding that Honda was entitled to the presumption of nonliability but that Milburn rebutted it and that the record contained evidence that the detachable anchor seat belt system was defectively designed, and a safer alternative exists.

Honda petitioned the Supreme Court for review, arguing that Milburn was required, but failed, to present sufficient expert testimony to rebut Section 82.008's presumption of nonliability on regulatory inadequacy grounds. Honda contends that a "regulatory expert" must explain why the federal standards are inadequate to protect the

public from unreasonable risk.

The Court granted Honda's petition for review.

**2. Statute of Repose**

a) *Ford Motor Co. v. Parks*, ___ S.W.3d ___, 2022 WL 17423590 (Tex. App.—Dallas 2022) *pet. granted* (Dec. 15, 2023) [23-0048]

This case concerns when a sale occurs under the statute of repose for products liability, which requires a claimant to sue the manufacturer or seller "before the end of 15 years after the date of the sale of the product by the defendant."

Samuel Gama sustained permanent, severe injuries when his Ford Explorer flipped and rolled several times during a traffic accident. Gama, his mother, and his wife, Parks, sued Ford for products liability under negligence and strict-liability theories. Ford asserted the statute of repose as an affirmative defense, arguing that the case was barred because it was brought more than 15 years after the Explorer was originally sold. Ford moved for a traditional summary judgment, arguing that a dealership first sold the Explorer more than 15 years before Parks brought suit. When Parks demonstrated that the dealership had initially leased the Explorer, Ford brought a second motion for a traditional summary judgment based on its sale of the Explorer to the dealership. In response, Parks argued that Ford failed to conclusively establish the date of sale because it relied on the inconsistent and contradictory testimony of interested witnesses.

The trial court granted summary judgment for Ford, but the court of appeals reversed, and Ford filed a petition for review. Ford argues that proof of payment on a date certain is not required to demonstrate that a sale occurred for purposes of the statute of repose. Instead, Ford contends it merely had to show that a sale must have occurred outside of the 15-year window for suit. Ford also asserts that it met its burden at summary judgment to prove that a sale occurred outside the 15-year window. The Supreme Court granted the petition for review.

## S. REAL PROPERTY

**1. Implied Reciprocal Negative Easements**

a) *River Plantation Cmty. Improvement Ass'n v. River Plantation Props. LLC*, 661 S.W.3d 812 (Tex. App.—Beaumont 2022), *pet. granted* (Jan. 26, 2024) [22-0733]

The issue in this case is whether real property in a residential subdivision is burdened by an implied reciprocal negative easement requiring it to be maintained as a golf course.

River Plantation subdivision contains hundreds of homes and a golf course. The subdivision's deed restrictions provide that certain "golf course lots" are burdened by restrictions that require structures to be set back from the golf course, prevent garages from facing the golf course, and mandate that telephone lines be buried. The developer included graphic depictions of the golf course in some of the plat maps that it filed for the subdivision, and the subdivision was often marketed as a golf course community. When the developer subsequently sold

the golf course, the deed included an express restriction that the property must be operated as a golf course for ten years. Forty years later, the subsequent owner of the golf course, River Plantation Properties, sought to sell the golf course to a new owner who intended to stop maintaining the property as a golf course.

The subdivision's HOA sued River Plantation Properties to establish the existence of an implied restrictive negative easement on the golf course, requiring that it be used as a golf course. While the case was pending, River Plantation Properties sold a portion of the golf course to Preisler Golf Properties LLC, and the HOA added Preisler as a defendant. River Plantation Properties and Preisler filed motions for traditional summary judgment, contending that any restriction on the property had expired, that the HOA failed to raise a fact issue as to the existence of a common scheme, and that River Plantation Properties had no notice of any common scheme. The trial court granted summary judgment in favor of River Plantation Properties and Preisler, and the court of appeals affirmed.

The HOA petitioned for review, arguing it had at least raised a fact issue as to the existence of a common scheme sufficient to support the claimed easement of which all parties had notice. The Supreme Court granted the petition.

**2. Landlord Tenant**

a) *Virtuolotry, LLC v. Westwood Motorcars, LLC*, ___ S.W.3d ___, 2022 WL 1769232 (Tex. App.—Dallas 2022), *pet. granted* (Dec. 15, 2023) [22-0846]

This case concerns the preclusive effect of an agreed judgment awarding possession of leased premises to the landlord in an eviction proceeding on a related suit by the tenant for damages in district court.

Virtuolotry leased property to Westwood, an automobile dealer. When Westwood attempted to renew its lease under the terms of the lease contract, Virtuolotry rejected the renewal and attempted to terminate the lease.

Westwood sued Virtuolotry in district court for a declaratory judgment that Westwood had properly renewed the lease. A few weeks later, Virtuolotry initiated eviction proceedings and was awarded immediate possession of the premises by the justice court. Westwood appealed to the county court, but the parties ultimately entered an agreed judgment in that court awarding Virtuolotry immediate possession of the premises.

Westwood then amended its district court petition to add damages claims for breach of the lease and constructive eviction. After a jury trial, the trial court rendered judgment for Westwood, awarding it over $1 million in damages. The court of appeals reversed, reasoning that the agreed judgment in the eviction proceeding precluded Westwood's damages claim.

Westwood filed a petition for review, arguing that the court of appeals erred in its holding that the agreed

judgment precludes Westwood's damages claims. The Supreme Court granted the petition.

## T. RES JUDICATA

### 1. Elements of Res Judicata

a) *Wilson v. Fleming*, 669 S.W.3d 450 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted* (June 16, 2023) [22-0166]

The issue in this case is whether Texas law recognizes implied-agreement privity for collateral estoppel purposes based on an alleged implied agreement to be bound to a bellwether trial.

George Fleming and his law firm represented thousands of plaintiffs in securing a product-liability settlement. Fleming allegedly deducted costs from his clients' settlements without authorization, and approximately 4,000 plaintiffs sued for fiduciary and contractual breaches. The trial court adopted the parties' agreed trial plan, selected a subset of six bellwether plaintiffs, and severed those claims from the remaining case.

After Fleming prevailed at the bellwether plaintiffs' trial, he moved for summary judgment, contending that his trial win collaterally estopped the remaining plaintiffs from litigating the same issues. The trial court agreed and dismissed the remaining plaintiffs' claims with prejudice.

The court of appeals reversed, holding that Fleming failed to establish that the remaining plaintiffs were in privity with the bellwether plaintiffs such that they were bound by the verdict. The court of appeals rejected Fleming's argument that the plaintiffs had conceded privity with the bellwether plaintiffs by invoking offensive collateral estoppel against Fleming in their pleading. It also rejected the argument that the bellwether plaintiffs' similar allegations and use of the same counsel established privity.

Fleming petitioned for review, arguing that the Supreme Court should adopt frameworks from other contexts that permit an implied agreement to establish privity for collateral estoppel purposes and that the evidence warrants finding such privity in this case. The Court granted review.

## U. STATUTE OF LIMITATIONS

### 1. Tolling

a) *Thome v. Hampton*, ___ S.W.3d ___, 2022 WL 802562 (Tex. App.—Beaumont 2022), *pet. granted* (Mar. 10, 2023) [22-0435]

Under Chapter 74 of the Civil Practice and Remedies Code, notice of a healthcare claim must be accompanied by a medical-authorization form that meets statutory requirements, and notice that is "given as provided in this chapter" will toll limitations on the claim for 75 days. The issue in this cases is whether a form that does not strictly comply with statutory requirements will toll limitations.

Hampton underwent hernia surgery in March 2014. Dr. Thome authorized Hampton's discharge from the hospital despite concerns of lethargy. The night after Hampton's release, she fell and suffered a concussion. On November 9, 2015, Hampton served Thome with a Chapter 74 notice of claim and authorization form. Hampton then sued on May 31, 2016.

Thome filed a motion for summary judgment arguing that the form's omissions prevented the tolling of limitations. After the motion was denied, and the jury returned a verdict for the plaintiff, Thome renewed his limitations argument in a motion for a judgment not withstanding the verdict. The trial court denied that motion too, but the Ninth Court of Appeals reversed and rendered judgment for Thome after concluding that the suit was barred by limitations. The Supreme Court granted Thome's petition.

## V. TAXES

### 1. Property Tax

a) *Johnson v. Bexar Appraisal Dist.*, ___ S.W.3d ___, 2022 WL 1395332 (Tex. App.—San Antonio 2022), *pet. granted* (Sept. 29, 2023) [22-0485]

The issue is whether each spouse of a married couple may claim a separate "residence homestead" for tax-exemption purposes.

Yvondia Johnson and her husband, Gregory, are each 100% disabled U.S. Air Force veterans. The Bexar Appraisal District granted the couple a disabled veteran "residence homestead" tax exemption for their San Antonio residence. The Johnsons later separated, and Yvondia began living at a residence in Converse that the couple also owned.

Yvondia applied for her own exemption for the Converse residence, which the District denied. After exhausting her administrative remedies, Yvondia filed suit, but the trial court granted the District's motion for summary judgment. The court of appeals reversed and rendered judgment for Yvondia, reasoning that under the plain language of the statute, she satisfied the exemption's requirements.

The District petitioned the Supreme Court for review, arguing that a married couple cannot have two residence homesteads. The Court granted the District's petition.

### 2. Tax Protests

a) *J-W Power v. Sterling Cnty. Appraisal Dist.*, ___ S.W.3d ___, 2022 WL 2836807 (Tex. App.—Austin 2022), *pet granted* (Dec. 15, 2023) [22-0974], *consolidated for argument with J-W Power v. Irion Cnty. Appraisal Dist.*, ___ S.W.3d ___, 2022 WL 2836812 (Tex. App.—Austin 2022), *pet granted* (Dec. 15, 2023) [22-0975]

The main issue is whether unsuccessful ad valorem tax protests preclude a subsequent motion to correct the appraisal rolls for the same years.

J-W Power owns natural gas compressors and leases them to oil and gas companies throughout the state. When not leased, the compressors are kept by J-W Power in Ector County. For the 2013–2016 tax years, Sterling County appraised J-W Power's compressors leased in those counties as conventional business personal property. J-W Power filed protests, arguing that under the Tax Code, the compressors qualify as a "dealer's heavy equipment inventory" that can only be taxed in Ector County where the compressors are based and maintained. The Sterling County Appraisal Review Board denied the protests. J-W Power did not seek judicial review of the denials.

In 2018, the Supreme Court issued an opinion that addressed the Tax Code provisions on a "dealer's heavy equipment inventory." J-W Power then filed a motion to correct the Sterling County appraisal rolls for the years 2013-2016. The Sterling County Appraisal Review Board denied the motion, and J-W Power sought judicial review in the district court. The trial court granted summary judgment for the Sterling County Appraisal District. The court of appeals affirmed, holding that the denial of J-W Power's protests precluded its subsequent motion to correct under the doctrine of res judicata.

J-W Power petitioned for review, challenging the court of appeals' res judicata holding and analysis. The Supreme Court granted the petition.

b) *Travis Cent. Appraisal Dist. v. Tex. Disposal Sys. Landfill, Inc.*, ___ S.W.3d ___, 2022 WL 2236109 (Tex. App.—Austin 2022), *pet. granted* (Jan. 26, 2024) [22-0620]

The issue in this case is whether the trial court had subject-matter jurisdiction over an appraisal district's claim that the Appraisal Review Board's appraisal of a taxpayer's property was below market value, even though the taxpayer brought, and the board decided, only an unequal-appraisal protest.

After the Travis County Appraisal District appraised Texas Disposal Systems Landfill's 344-acre property for the 2019 tax year, the Landfill protested the value to the Travis ARB, asserting only an unequal-appraisal challenge. The ARB issued an order agreeing that the appraisal was unequal and significantly reducing the appraised value of the property. The ARB did not determine the property's market value.

As authorized by the Tax Code, TCAD appealed the ARB's order to a district court, pleading that the ARB's appraisal resulted in unequal appraised value and was below market value. The trial court granted the Landfill's plea to the jurisdiction and dismissed TCAD's market-value claim on the ground that the ARB only determined an unequal-appraisal protest. The court of appeals reversed the plea, holding that the trial court had jurisdiction over TCAD's market-value claim.

Texas Disposal Systems petitioned the Supreme Court for review, arguing that the Tax Code limits trial courts' subject-matter jurisdiction to only the grounds raised in the taxpayer protest and determined by the ARB. The Supreme Court granted the petition.

c) *Wilbarger Cnty. Appraisal Dist. v. Oncor Elec. Delivery Co. NTU, LLC*, 660 S.W.3d 760 (Tex. App.—Amarillo 2022), *pet. granted* (Feb. 16, 2024) [23-0138], *consolidated for oral argument with Oncor Elec. Delivery Co. NTU LLC v. Mills Cent. Appraisal Dist.*, 660 S.W.3d 288 (Tex. App.—Austin 2022), *pet. granted* (Feb. 16, 2024) [23-0145]

The issue is whether Oncor can revise the description of its property on the appraisal roll after having settled the total value of its property on the roll with the appraisal district.

In 2019, Oncor's predecessor-in-interest protested the value of its transmission lines to be included on the appraisal rolls of Wilbarger and Mills counties. After an appraisal, the prior owner entered a settlement with both counties' appraisal districts agreeing to the total value of the transmission lines on each county's appraisal roll.

In 2020, Oncor acquired the company that owned the transmission lines and discovered that the company had sent incorrect data to an appraisal firm. This mistake inflated the agreed values in the settlement agreements and Oncor's tax bills. Oncor sought to correct the appraisal rolls with each county's appraisal review board. Both appraisal review boards denied the claims because the Texas Tax Code states that settlement agreements are "final." Oncor sought review in district court, winning in Wilbarger County and losing in Mills County.

In the Wilbarger County case, the court of appeals reversed and rendered for the taxing entities, holding that the value in the settlement agreement was final and nonreviewable. Oncor petitioned the Supreme Court for review.

In the Mills County case, the court of appeals reversed in part and remanded, holding that the doctrine of mutual mistake prevented that settlement agreement from becoming final. The taxing entities petitioned the Supreme Court for review.

In the Supreme Court, Oncor argues that the courts have jurisdiction to consider whether the settlement agreements are binding as to this dispute and whether the agreements are voidable for mutual mistake. The taxing entities argue that the Tax Code's provision making settlement agreements final is jurisdictional, or is at least determinative of the merits, and that Oncor's current tax protest fails.
The Court granted both petitions for review and consolidated the cases for oral argument.

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