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TEXAS SUPREME COURT UPDATE

Presented by
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TEXAS SUPREME COURT UPDATE

PERSONAL INJURY

Substantial Factor Test

Werner Enters., Inc. v. Blake, ___ S.W.3d ___, 2025 WL ___ (Tex. June 27, 2025) [23-0493]

If a driver is exercising ordinary care, under ordinary conditions, he cannot be held responsible when another driver loses control on an interstate highway, crosses the median, and causes a collision. *Werner Enters., Inc. v. Blake*, ___ S.W.3d ___, 2025 WL ___ (Tex. June 27, 2025) [23-0493]. Rather, liability will rest on whether his negligence was a substantial factor in causing the injury, and not merely a happenstance of place and time. *Id.* at 1. This requires the negligence play a substantial role in bringing about the injury so that the actor is actually responsible for the harm. *Id.*

This case concerns whether plaintiffs established the substantial-factor element of their negligence claims. During icy conditions, Blake and her three children were in a pickup driven by Trey Salinas, traveling eastbound on I-20. *Id.* at 2. Eastbound and westbound lanes are separated by a 42-foot grassy median. Defendant's trainee driver, Ali was driving westbound in an 18-wheeler owned by Defendant Werner Enterprises. Salinas lost control and crossed the median, into the path of the 18-wheeler Ali was driving, killing one of Blake's children and injuring other family members. *Id.* 2-3.

The Blakes sued Werner alleging Ali should never have been on the road because he was an inexperienced driver in severe winter weather, who had been negligently trained and supervised. There was evidence that Ali had passed three other auto accidents prior to being involved in this one, and that the roadway was like a sheet of ice. *Id.* Plaintiffs' experts testified Ali was traveling 50.5 miles per hour when Salinas crossed the median, when he should have been traveling 15 miles per hour, for the icy conditions. Werner's own expert testified that if Ali had been traveling 15 miles per hour, he would have stopped the 18 wheeler before the accident occurred- as it took Salinas 2 seconds to cross the median and Ali had reacted quickly by braking in one second. (Concurring). The jury found both defendant company and driver negligent and assigned 70% of responsibility to Werner, 14% to Ali, and 16% to driver who crossed the median-Salinas. The trial court rendered judgment against both defendants. The court of appeals affirmed. *Id.*

The Supreme Court reversed and rendered judgment. It held that to establish negligence, the proximate cause element requires proof of both but-for causation and substantial-factor causation. The Court opined the sole, substantial factor explaining why the accident happened was Salinas losing control of his

pickup and crossing in front of the 18-wheeler, not Ali's presence on the highway nor his speed. The Court went on to say that Ali's negligence, if any, was too attenuated to constitute a substantial factor. *Id.* at 4-7. And, there were no viable liability theories against Werner that were independent of Ali's responsibility for the accident, so Werner and Ali were entitled to rendition of judgment. *Id.* at 4-7.

Justice Bland dissented in part, concluding the jury charge was erroneous, and the jury was misled into placing disproportionate responsibility on Ali and Werner. But, there was evidence that Ali bore some responsibility for the Blakes' injuries. The dissent would have reversed and remanded for a new trial. *Id.* at 15-23.

Note- Defendants asked the Court to adopt the "Admission Rule," under which a defendant who admits that an employee was acting in the course and scope of employment need not also defend against other derivative theories of negligence. The Court held it need not consider this argument. Justice Young agreed, but in a concurrence noted his inclination to adopt the Admission Rule in a future case.

Independent Contractors

Massage Heights Franchising, LLC, v. Hagman, S.W.3d WL 12712296 (Tex. 2025).

A general contractor typically does not have a duty to ensure that an independent contractor safely performs his work. *Koch Refin. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). But when the general contractor has sufficient control over the subcontractor's work, the general contractor may be held liable for injuries resulting from his failure to exercise reasonable care in supervising the subcontractor's activities. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). The control "must relate to the activity that actually caused the injury." *Coastal marine Servs. Of Tex., Inc. v. Lawrence*, 988 S.W.3d 223, 226 (Tex. 1999).

MH Alden Bridge (Alden), a franchisee of "Massage Heights," had an agreement providing that Alden was an independent contractor, with sole responsibility for all employment decisions subject to the conditions that all massage therapists had to (1) be licensed by the State and (2) undergo oral and practical interviews and a background check by a selected third-party provider. It also provided that Alden was solely responsible for customer safety and security as well as compliance regarding hiring, training, and supervising therapists. *Massage Heights Franchising, LLC, v. Hagman*, S.W.3d WL 12712296 (Tex. 2025).

Massage therapist Mario Rubio obtained his massage license in March 2017 completing his state training. *Id.* At 619. At that time, he had a criminal record for juvenile crimes in 2006 and 2007, as well misdemeanor charges for trespass to a habitation,

aggravated robbery (later discharged) and burglary of a vehicle. *Id.* However, as those charges were more than seven (7) years old at the time of his application, and he had no sexual or felony offenses, the State issued him a license. *Id.* In May 2017, franchisee Alden hired Rubio and the background check he performed revealed the same charges the State had been aware of at the time it gave Rubio a license. *Id.* No sexual crimes or allegations were revealed in the background check. *Id.*

In September 2017, four months after being hired, Rubio sexually assaulted Danette Hagman, a regular client of the franchise since 2014. Hagman had specifically requested Rubio as her therapist (though it is not clear whether he had massaged her before), without knowledge that another customer of the franchise had reported that Rubio had sexually assaulted her during a session, a few months before. *Id.* at 620. That customer, however, did not report the assault to the police and the franchisee did not terminate Rubio- only noting the allegation in his file. *Id.*

Hagman not only reported the assault to the franchisee, but she also reported it to police and sued franchisee Alden, franchisor Massage Heights, Rubio and other parties, alleging negligence, negligent undertaking, and gross negligence. Rubio was later apprehended and convicted. *Id.* at 621.

At trial, the jury returned a verdict for \$1.5 million dollars in damages and \$1.8 million dollars in exemplary damages. The jury attributed 15% against the franchisor, who appealed. *Id.* at 619. Notably, and importantly, the jury also answered “no” when asked whether franchisee Alden was subject to the control of franchisor Massage Heights. The court of appeals *reversed* the exemplary damages award as to Massage Heights (based on section 41.005 of the Texas Civil Practice & Remedies Code), but otherwise affirmed that Massage Heights owed customers a duty of care at franchisee locations. *Id.* at 620.

Upon petition for review, the Supreme Court reversed the trial court, finding that (1) the franchisor did not have a contractual right to control (nor actual right to control) the franchisee’s hiring of massage therapists, (2) that the franchise safety guidelines did not establish the requisite degree of control necessary to create a duty and (3) that the franchisor did not undertake to keep the customer safe. *Id.*

The Court went on to say the Court of Appeals erred in finding that the Operations Manual conferred sufficient control, finding the manual constituted a “general right of control over operations” and not specific control over the specific action at issue here, Rubio’s hiring. *Id.* In other words, control over one matter cannot be the basis for liability if what caused the damage was something else. *Id.*

Control may be demonstrated either by an explicit contractual provision or by evidence of actual control. *Id.* Contractual control is control over the means, methods, or details of work. Retaining or exercising a general right to recommend a safe manner to perform work is insufficient. *Id.* The contract gave Alden sole responsibility for all employment decisions. Along with the Operations Manual, it specifically, explicitly and contractually assigned to Alden the responsibility for customer safety and hiring/training/firing and supervision of the franchisee’s employees. *Id.* The franchisor specifically assigned those responsibilities to Alden. *Id.*

“Merely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is insufficient to impose a duty. *Id.* citing *Koch Refin. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). Evidence of past safety instructions does not, on its own, establish the requisite degree of control necessary to create a duty so long as the promulgation of safety requirements and procedures did not unreasonably increase the likelihood or severity of injury. *Id.* at 156. When there are disputed facts regarding the actual exercise of control, that question should be resolved by a jury. *Id.* Citing *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001).” And, the jury had held that Alden was not subject to Massage Heights’ actual control.

Finally, the Supreme Court determined the evidence was legally insufficient to find negligent undertaking simply because the Operations Manual or Franchise Agreement included training and operational standards meant to prevent customer harm. *Id.* at 624. And, though plaintiff argued that the franchisor sought to train its franchisees on how to prevent sexual assault, the Court opined that any failure to train the franchisee was not the cause of the sexual assault, as the franchisor did not control who the franchisee hired. Thus, the alleged failure to train Alden’s principals, purportedly resulting in Rubio’s hiring, cannot be a proximate cause of Hagman’s injuries since Massage Heights did not have control over Alden’s hiring and owed no duty to Hagman in that regard. *Id.*

Dram Shop Liability

In re Raoger Corporation, Petitioner 711 S.W.3d 206 (Tex. 2025)

In this case of first impression for the Texas Supreme Court, it examined the question of whether circumstantial evidence is sufficient to create a fact issue to preclude summary judgment and what evidence is sufficient. In 1987, the legislature enacted the Dram Shop Act, codified in the Texas Alcoholic Beverage Code §2.02, holds that providing, selling, or serving alcoholic beverage may be made the basis of a statutory cause of action upon proof that (1) at the time

the provision occurred it was *apparent to the provider* that the individual being sold, served, or provided with an alcoholic beverage was *obviously intoxicated* to the extent that he *presented a clear danger* to himself and others; and(2) the intoxication of the drinker was a proximate cause of the damages suffered. *Id.* This statutory standard was higher than the “knew or should have known” standard of common law claims and therefore the sufficiency of evidence required to establish liability rested on whether the evidence was sufficient to show “apparent” or “obvious” intoxication as well as evidence that the customer presented a clear danger. *Id.*

From the record, on November 30, 2018 Nasar Khan (“Khan”) and Kelly Jones (“Jones”) arrived at Dallas restaurant Cadot at around 9:45 or 10:00 pm. They closed their tab at 10:30p.m and left thirty minutes later. *Id.* at 209. They went to Jones’ apartment and Khan left after 10-30 minutes. Just after midnight, Kahn rearended Barrie Myer’s vehicle, causing it to roll multiple times. At 3:06 a.m., Khan’s blood draw showed a blood alcohol content of 0.139 (almost twice the legal limit of 0.08). It is unclear (1) how long Kahn was at Cadot (2) how much he consumed or (3) how long he was at Jones’ home. Further, the bar tab shows that Khan and Jones ordered and paid for three vodka drinks, a sparkling wine, and a beer. *Id.* at 209-210. Khan testified he drank 3-4 drinks and testified that based on his blood alcohol content, the bartender overserved him *Id.* at 210. Surprisingly, the bartender also testified, based on Khan’s blood alcohol level, that Khan would have had to consume eight drinks. *Id.* Plaintiff’s expert testified that Khan drank anywhere between 10-19 drinks, depending on his weight. *Id.*

However, the Supreme Court held that despite testimony about what “might” have been consumed, there was overwhelming evidence that Khan did not appear intoxicated. *Id.* at 212. Instead, Khan testified that he was acting normally, was not slurring his speech, did not have bloodshot or watery eyes, was walking normally, and was not concerned about driving (neither was Jones). *Id.* The bar’s owner also testified that Khan appeared fine when Khan visited with him, and did not appear intoxicated. *Id.* The responding officer at the scene of the car crash testified that Khan appeared normal at the time he saw him and the officer did not have any “initial clue” to make him think Khan was intoxicated. It was not until a police sergeant noted he thought he smelled alcohol that the responding officer followed Khan to the hospital and administered a nystagmus test that detected signs of intoxication, later confirmed by a blood test. *Id.*

Plaintiff argued that the bartender, Plaintiff’s expert, the police officer and even Khan himself testified that the blood alcohol content proved Khan had consumed between 8-19 drinks and therefore the evidence was sufficient to find the bar liable. *Id.*

“But for such circumstantial evidence to be competent, it must be sufficient ‘to constitute the basis of a legal inference’ and not merely permit ‘speculative conclusions.’ *Green v. Tex. & Pac. Ry. Co.*, 125 Tex. 168, 81 S.W.2d 669, 673 (Tex. [Comm’n Op.] 1935); see *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993) (‘[W]e are not empowered to convert mere suspicion or surmise into some evidence.’). Findings ‘must be supported by facts in evidence, not conjecture,’ and we cannot ‘pile speculation on speculation and inference on inference.’ *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003). Speculative and conclusory testimony, by experts and lay witnesses alike, is incompetent and cannot support or defeat summary judgment. *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004).” *Id.*

Missing from the record, the Court said, was evidence of how Khan *appeared* intoxicated while at the bar. Thus, the Court said, “[e]ven assuming that Khan consumed all of the alcohol in his bloodstream that evening at Cadot, that fact may prove how intoxicated he became *at some point* that night, but it does not, standing alone, tend to prove how he *appeared to Cadot* when he was served.” *Id.* at 214. There was no evidence to support that Khan was apparently or obviously intoxicated so as to present a clear danger to himself or others. Thus, no liability could be adjudged as to the bar.

Defamation

Roe v. Patterson, 707 S.W.3d 94 (Tex. 2025)

A federal court granted summary judgment in favor of a university sued by a former student who alleged the university, its ousted President and chief of staff published defamatory statements in a letter published by supporters of the former university president. *Id.* at 98. The student appealed to the Fifth Circuit who then certified two questions to the Supreme Court, which the high Court accepted:

1. Can a person who supplies defamatory material to another for publication be liable for defamation?
2. If so, can a defamation plaintiff survive summary judgment by presenting evidence that a defendant was involved in preparing a defamatory publication, without identifying any specific statements made by the defendant? *Id.*

The Texas Supreme Court answered yes to both questions. *Id.*

In 2015, Jane Roe reported to President Leighton Patterson that John Doe (a student and employee), had sexually assaulted her, at gunpoint, on several occasions throughout her first year as a student at Southwestern Baptist Theological Seminary. *Id.* President Patterson contacted the Fort Worth police department and Roe gave a statement. University officials later found a cache of weapons in Does' room, for which he was expelled (for violating its weapons policy). *Id.* at 97.

Weeks after the report, Patterson emailed a staff member stating that he planned to meet with Roe and “break her down.” *Id.* at 97. At a meeting weeks later, President Patterson confronted Roe and confronted her with Doe’s contentions that: (1) he had evidence the relationship was consensual (2) because he had nude photos of Roe. *Id.* And, after this meeting, Roe withdrew from the University. Three years later, the University Board removed Patterson as president, in part for his treatment of Roe, including the email to the staffer.

In response to the removal, a group of donors published an open letter to the board accusing Roe of lying to the police about the assault and alleging that the encounters were consensual. The letter also included a statement that Roe had texted nude photos of herself to Doe, that she had engaged in sexual relations in campus buildings, had begged Patterson not to call the police and that Patterson was just trying to encourage her to recant her false allegations. *Id.* The donor’s open letter was sent to over 100 people, including faculty, alumni, church leaders and members of the press. *Id.* In fact, President Patterson’s chief of staff provided the donors with the names of the recipients, suggesting signatories for the letter, coordinating the timing and method of distribution and giving the draft to Patterson and his personal lawyer. The chief of staff also provided the donors with “additional information: about the alleged events. *Id.* Neither Patterson nor his chief of staff¹ signed the letter, but Patterson was aware of the letter, his staff’s involvement and Patterson went so far as to thank the letter drafters themselves. *Roe v. Patterson*, 2024 WL 1956148 (U.S. Fifth Cir. May 2024).

On appeal, the Fifth Circuit noted that:

“Roe identifies an allegedly defamatory statement—the letter’s references to her rape allegations—and also identifies an alleged speaker—Patterson, through Colter—but she does not identify the speaker as having made

the statement. Nor does her evidence identify any statements made by Colter or show that he provided language for the letter, even if it does suggest involvement with the letter generally and the provision of background information about the operative events. Instead, what she seems to argue is that, because Colter helped with the letter, he is responsible for defamatory statements contained therein. We are uncertain whether this is enough to assert and maintain a defamation claim under Texas law. We therefore conclude that certification is warranted.”

In its opinion, the Supreme Court set out that the parties all agree that a person who supplies defamatory material to another for publication can be liable for defamation. However, Roe contended a “defamer” can be liable for damage from *foreseeable* repetition of the material, where Patterson argued that the defamer must *intend* that the material be published. *Id.* In this case, the publication of the donor letter was the original publication, and Roe had to show that the chief of staff intended the publication (and did so as an agent of the president and university). *Id.*

Publication occurs when statements are communicated orally or in writing to a third person. *Id.* An intent to publish is when an “actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated.” *Id.* at 98. Further, a defamation Plaintiff must also demonstrate that the defendant knew or should have known that the statement was false and defamatory. *Id.* at 99. And finally, the defamation Plaintiff must identify the defamatory statements made, and show that the defamer was the source of those false statements- whether through direct or circumstantial evidence. *Id.* at 99-100. Evidence that the defendant was the source can include proof:

“that the defendant made the same defamatory statement to others, that the defendant had unique or personal knowledge of the defamatory content and its details, or that the publishers relied on the defendant to support the truthfulness of the allegedly defamatory statements. Evidence that amounts to mere speculation or surmise does not suffice to survive summary judgment, for this or any other tort.” *Id.* at 100.

¹ The Fifth Circuit found Patterson’s chief of staff was acting as Patterson’s agent and in furtherance of the agency. *Roe v.*

Patterson, 2024 WL 1956148 (U.S. Fifth Cir. May 2024). It declined to affirm the trial court’s judgment on that ground.

Having answered yes to both certified questions, the Fifth Circuit vacated the district court with respect to Roe's defamation claim and remanded the case back to the trial court.

INSURANCE LAW

In re State Farm Mut. Auto. Ins. Co., 712 S.W.3d 53 (Tex. 2025).

Lindsey was rear-ended and sought recovery for \$56,751.55 in past medical expenses and \$263,691.15 in future medical expenses. *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 57 (Tex. 2025). She settled with the adverse tortfeasor for his \$50,000 policy limit and looked to her own insurance carrier to recover Underinsured Motorist (UIM) benefits. *Id.* State Farm Mutual Automobile Insurance Company ("State Farm") offered Lindsey \$689.58 to settle her claim, but Lindsey wanted to recover more under her \$100,000 policy. *Id.* She sued State Farm and alleged it failed to attempt a good-faith settlement of her UIM claim in violation of the Insurance Code. *Id.* State Farm moved to sever and abate the extra-contractual claims ("EC claims") from the declaratory action, setting out the EC claims be tried either through separate trials in the same cause or by severance. *Id.* at 57. Plaintiff argued the Texas Supreme Court's recent decision in *In Re State Farm Mutual Automobile Insurance Company*, 629 S.W.3d 866 (Tex. 2021), established that bifurcation required *a single trial in two phases before the same jury*. *Id.*

Before the trial court issued its decision, Plaintiff served State Farm a corporate representative deposition notice that sought testimony on the following:

- (1) whether the adverse tortfeasor was an underinsured motorist,
- (2) the amount and basis for State Farm's valuation of Lindsey's damages,
- (3) State Farm's claims, defenses, and legal and factual contentions regarding the collision's cause, the nature and extent of Lindsey's alleged injuries and damages, and other causes for Lindsey's asserted injuries and damages.

Id. at 58.

State Farm filed a motion to quash the deposition and also tendered an unsworn declaration from its claim specialist stipulating that the UIM limits were \$100,000; that Lindsey was its insured; and that adverse tortfeasor was underinsured. *Id.* at 58. Plaintiff did not file a response to the declaration but argued at the hearing that she should be permitted to depose the Defendant, as to the claims and defenses it was going to assert at trial. *Id.* The trial court denied State Farm's motions to quash and motion to sever and abate the

claims. *Id.* The court of appeals denied State Farm's mandamus petitions without substantive explanation. State Farm sought mandamus relief with the Supreme Court of Texas.

First, UIM policies condition benefits on the legal entitlement to recover from the underinsured motorist under applicable tort law. *Id.* at 59. UIM coverage must provide for payment to the insured of all amounts that the insured is *legally entitled to recover* as damages from owners... of underinsured motor vehicles... Tex. Ins. Code §1952.106. "Legally entitled to recover" means that "the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and UIM status of the other motorist," "utilizing tort law" to make those determinations. *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53 (Tex. 2025). See also *Brainard v. Trinity Universal Ins. Co.*

The Supreme Court reiterated that discovery should be limited on proportionality grounds if the burden or expense of the proposed discovery outweighs its likely benefit. Because it is the UIM judgment that triggers the payment obligation, courts have routinely severed or bifurcated extracontractual claims from breach-of-contract claims and abated the extracontractual claims when the insurer offered to settle the insured's UIM claim. *Id.* Lindsey argues that the rule should be applied to bifurcate the trial with a *single jury*, which would make abatement impossible given the small window to conduct discovery while holding the same jury for the second phase. In the context of UIM litigation, the rule contemplates bifurcated *trials* to allow for adequate discovery. Otherwise, the insurer would have to prepare for a trial on extracontractual claims that might be rendered moot by the first trial.

The Supreme Court stated, through prior case decisions, that "[t]he general term 'bifurcate,' we observed, contemplates different types of bifurcation within the same lawsuit: for example, a 'bifurcated trial' would be '*one trial* in which one jury decides multiple questions in different phases' while 'bifurcated *trials*' are 'separate *trials* ... involv[ing] a separate jury.'" *Id.* at 61.

Here, the Court noted that the parties both agreed that the trial court had discretion to try both the declaratory action and EC claims in the same lawsuit, rather than severing the EC claims. *Id.* However, Plaintiff did not agree that State Farm was entitled to an abatement of the EC claims while the declaratory action was pending. *Id.* The Supreme Court was "unpersuaded" by Plaintiff's argument that the Court's 2021 decision in *In Re State Farm* required a bifurcated trial, i.e. one jury in one trial with two parts. *Id.* at 62. Importantly, the Court clarified:

First, Lindsey interprets [*In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53 (Tex. 2025)] as requiring

a bifurcated trial with a single jury, which would make abatement infeasible given the inadequate time to conduct discovery while holding the same jury for the second phase. But this misconstrues our opinion, which contemplated two separate trials under Rule 174(b), not a single bifurcated trial. The question pointedly posed in that case was whether the insurer “is entitled to bifurcated *trials*, which would consist of (1) initial ‘car crash’ trials” and, “if the insureds succeed at the initial trials, (2) trials of the insurance code claims.” By concluding that the insurer was entitled to these separate *trials*, we implied that this bifurcation usually would involve different juries, thereby allowing an adequate time for discovery on extracontractual matters if an insured is successful in the initial car-crash trial. *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53 (Tex. 2025). *Id.* at 62-63.

The Texas Supreme Court, therefore, opined that because the outcome of the car-crash trial may moot extra-contractual claims, an insurer has a substantial right to defer discovery and litigation costs. *Id.* And though Plaintiff argued the corporate representative deposition was proportional as she intended only to ask about State Farm’s trial claims and defenses, the Supreme Court noted that when, as here, (1) State Farm has produced over a thousand pages from its nonprivileged claim file (including correspondence, medical bills, and a certified copy of the insurance policy) (2) has established that it neither witnessed the vehicle accident nor treated Lindsey’s injuries, and (3) established that to prepare for a deposition, the corporate representative would need to review voluminous documents in consultation with experts, meet with State Farm’s counsel to prepare discussions on legal theories and defenses, and forgo worktime to prepare, sit, review, and correct the deposition, State Farm had supported its proportionality concerns. *Id.* at 68.

Thus, the Court said there is much information that Lindsey seeks which would be unreasonably cumulative or duplicative of the documents already produced and given the lack of personal knowledge on the narrowed issues, any likely benefit of the proposed deposition is outweighed by the demonstrated burden and expense of the proposed discovery. *Id.* Further, State Farm stipulated to relevant facts, and Plaintiff would not be able to investigate EC claims “under the guise of investigating a claim for benefits. *Id.* at 67. Finally, to the extent Plaintiff alleged State Farm needed to answer for its damages valuation, State Farm’s declaration established that discovery was obtainable from some other source that was more convenient, less burdensome and less expenses, i.e. State Farm would rely on medical records and documents obtained from third parties as well as medical expert depositions. *Id.* at 69.

Takeaways from this important severance or bifurcation and abatement case is that in the distinctive UIM context, a party to the suit may invoke the sever-or bifurcate-and-abate rule and is entitled to its application when –

- 1) The insurer has offered to settle the insured’s claim for UIM benefits,
- 2) The insured has not yet obtained a judgment establishing UIM coverage, and
- 3) The insured’s extracontractual claims seek damages that are dependent on the right to receive UIM benefits.

After applying that rule, a trial court should grant an insurer’s motion to quash the deposition notice of its corporate representative during the UIM-coverage portion of the action if

- 1) The insurer has stipulated to the matters within its personal knowledge,
- 2) Produced the nonprivileged documents in its possession that relate to the insured’s car crash and damages, and
- 3) Submitted evidence supporting its proportionality complaints and lack of personal knowledge regarding the disputed issues for the initial car-crash trial.

Further, this decision clarifies the Court has ruled bifurcated trials are appropriate under Texas Rule of Civil Procedure 174(b), not a bifurcated trial with the same jury. *Id.* at 62-63.

JURISDICTION

Baumgardner v. Brazos River Auth., ___ S.W.3d ___, 2025 WL ___ (Tex. June 27, 2025) (per curiam) [Misc. Docket No. 24-9101]

Last month the Supreme Court issued an opinion on the jurisdiction of the Fifteenth Court of Appeals to hear an appeal involving a river authority. The Court determined the river authority was not an agency in the executive branch, such that the Fifteenth Court has exclusive intermediate appellate jurisdiction. *Baumgardner v. Brazos River Auth.*, ___ S.W.3d ___, 2025 WL ___ (Tex. June 27, 2025). Though addressing the important issue of whether the Fifteenth Court had exclusive jurisdiction in this case, the Court’s opinion delved into the history of the 2023 Senate Bill 1045, which created the Fifteenth Court of Appeals. *Id.* at 1-2. It also set out:

“[t]hat legislation amended §22.220 of the Government Code to grant the Fifteenth Court “exclusive intermediate appellate jurisdiction” over three categories of matters arising out of or relating to civil cases: (1)

certain matters brought by or against the State, its executive branch agencies, or their officers or employees engaged in official conduct; (2) matters challenging the constitutionality or validity of a state statute or rule when the attorney general is a party; and (3) “any other matter as provided by law.” TEX. GOV’T CODE §22.220(d). *Id.* at 2.

The Supreme Court determined the river authority was a political subdivision, not an agency. *Id.* at 6. It disagreed with movant that §22.220 of the Texas Government Code’s list of matters over which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction (and those it did not), meant that if not included in §22.220(1)(A)-(O), the matter fell within the Fifteenth Court’s exclusive intermediary appellate jurisdiction. The high court disagreed. The section at issue states:

(d) The Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction over the following matters arising out of or related to a civil case:

(1) matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education as defined by Section 61.003, Education Code, or by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct, other than:

- (A) a proceeding brought under the Family Code and any related motion or proceeding;
- (B) a proceeding brought under Chapter 7B or Article 17.292, Code of Criminal Procedure;
- (C) a proceeding brought against a district attorney, a criminal district attorney, or a county attorney with criminal jurisdiction;
- (D) a proceeding relating to a mental health commitment;
- (E) a proceeding relating to civil asset forfeiture;
- (F) a condemnation proceeding for the acquisition of land or a proceeding related to eminent domain;

- (G) a proceeding brought under Chapter 101, Civil Practice and Remedies Code;
- (H) a claim of personal injury or wrongful death;
- (I) a proceeding brought under Chapter 125, Civil Practice and Remedies Code, to enjoin a common nuisance;
- (J) a proceeding brought under Chapter 55, Code of Criminal Procedure;
- (K) a proceeding under Chapter 22A, Government Code;
- (L) a proceeding brought under Subchapter E-1, Chapter 411, Government Code;
- (M) a proceeding brought under Chapter 21, Labor Code;
- (N) a removal action under Chapter 87, Local Government Code; or
- (O) a proceeding brought under Chapter 841, Health and Safety Code;

- (2) matters in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality or validity of a state statute or rule and the attorney general is a party to the case; and
- (3) any other matter as provided by law.

Thus, the Texas Supreme Court opined that the river authority did not fall within the Fifteenth District’s exclusive intermediary appellate jurisdiction and granted movant’s motion to re-transfer the appeal back to the Tenth Court of Appeals. *Id.*

As a takeaway, the Court noted that the legislature expanded the Fifteenth Court’s exclusive intermediate appellate jurisdiction to include higher-education entities. *Id.* at 6. See also Tex. Gov’t Code section 311.005(13). And for practitioners in this area, be aware that for appeals perfected on or after September 1, 2024, the Texas Supreme Court has adopted Rule of Appellate Procedure 27a to govern the transfer of appeals “inappropriately filed” in the Fifteenth Court. See TEX. GOV’T CODE § 73.001(c).

PROCEDURE

Amended Pleadings

In re Est. of Phillips, 700 S.W.3d 428, (Tex. 2024)

When a trial court grants special exceptions and strikes claims from a plaintiff’s petition, does the plaintiff waive her right to challenge that ruling on appeal if she later files an amended petition that omits the claims? Amended pleadings take the place of prior pleadings. *FKM P’ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008). Generally, “any claim not carried forward in an amended pleading is deemed dismissed.” *Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018).

However, here, the Texas Supreme Court clarified that when a plaintiff files an amended petition omitting a claim that the trial court previously ruled against (but indicating an intent not to abandon the claim), the plaintiff does not waive her ability to complain of that ruling on appeal. *In re Est. of Phillips*, 700 S.W.3d 428 (Tex. 2024). See also *Ortiz v. Collins*, 203 S.W.3d 414, 421 n.4 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In this case, Billy Phillips devised his estate to his daughters, Sheila Smith and Billie Hudson, including a tract of land. Smith was appointed as independent executor and sought to sell the tract. Hudson filed a petition in intervention seeking a partition in kind. *In re Est. of Phillips*, 700 S.W.3d 428, 429-430 (Tex. 2024). The trial court dismissed the petition, which Hudson replied to by filing an amended petition with additional facts. *Id.* Smith filed special exceptions seeking to strike the partition claims. *Id.* The trial court granted the exceptions and ordered Hudson to file another petition including only other claims against Smith in her executor capacity. Hudson complied and stated that she did not waive her causes of action and reserved the right to re-plead the causes of action that were dismissed if a court of appeals determined they were wrongly dismissed. *Id.* at 430. The trial court authorized Smith to sell the property. Hudson appealed, challenging the sale order as well as the order striking her partition claims. *Id.*

A court of appeals affirmed, holding that Hudson abandoned the partition claims by omitting them from her live amended petition, which superseded her prior petitions. The court also held her reservation language did not apply since the claims were stricken with prejudice. *Id.*

The Supreme Court disagreed and stated that there was a more basic reason why Hudson did not waive her complaint, because she did so in compliance with a contested order striking those claims. *Id.* at 431. Where the court of appeals viewed Hudson's adherence to the trial court's order as a manifestation of intent to abandon the stricken claims, the Supreme Court determined that Hudson was required to adhere to the order, whether she agreed with it or not. *Id.* Further, Texas Rule of Civil Procedure 65 applied here insofar as the trial court erred in deciding the necessity of the amendment. *Id.* Thus, this case clarifies that plaintiff did not waive her right to challenge the ruling on appeal, as was required to comply with that ruling in continuing to litigate her case; and it was unnecessary for her to make a formal exception to that ruling when she filed her amended petition.

Default Judgments

In Re Lakeside Resort JV, LLC, 689 S.W.3d 916 (Tex. 2024).

No-answer default judgments are disfavored in Texas since the losing party is wholly absent which carries inherent unfairness; like where a defendant is unaware of litigation and a plaintiff knows of the defendant's unawareness. *In Re Lakeside Resort JV, LLC*, 689 S.W.3d 916, 920 (Tex. 2024). An order or judgment that does not follow a conventional trial on the merits is not final on its face unless it is clear and unequivocal about its own finality. *Id.* at 920-921. See also *Lehman v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001). In the absence of clear and unequivocal expression of intent to enter a final judgment, the court looks to the record to determine finality. *Id.* at 921-922. A default judgment is deemed final if it expresses an unequivocal intent to finally dispose of the case. But when a court finds an affirmative indication of nonfinality on the face of a default judgment, that judgment cannot be final; it affirmatively undermines or contradicts any intent to constitute a final judgment. *Id.* at 922.

Mendez was a guest at a resort owned but not operated by Lakeside. Mendez claimed she stepped into a deep hole on the property at nighttime, causing "severe bodily injuries." *Id.* at 919. She sued Lakeside for premises liability and negligence. Lakeside failed to provide a timely answer because its registered agent failed to send Lakeside a physical copy of the service and misdirected an electronic copy. *Id.* Mendez moved for a default judgment which her counsel labeled as "Final Default Judgment." *Id.* The court signed the judgment without modification which stated that it disposed of all claims, parties, and was not appealable. *Id.* Mendez waited until the time to appeal had run to send a demand for payment to Lakeside. *Id.* Lakeside quickly filed an answer, motion to rescind the abstract of judgment, motion to set aside the default judgment and for a new trial in which it argued that the "Final Default Judgment" was not truly final. *Id.* at 920. The trial court disagreed and denied the motion, concluding that the judgment was final and that its plenary power expired. *Id.* Mendez argued that the judgment was final and appealable, so the appellate jurisdiction that would have existed has since expired. *Id.* Lakeside argued that the absence of a final judgment means that no appellate jurisdiction has existed, and therefore, Lakeside has not lost its right to appeal. *Id.* The landowner also filed a writ of mandamus seeking to stay execution of the abstract of judgment, which the Supreme Court granted.

The Supreme Court stated this case presented a new scenario in which the "final judgment" is final despite noting itself to be "not appealable." *Id.* at 918. The Court determined the order's inclusion of the phrase "not appealable" undermined or contradicted

the intent that it be final in disposing of the case. Here, “resolving doubts against default judgments extends more broadly that doubts about service...” Id. at 922. And to establish finality in orders and judgments (that do not follow conventional trials), they must (1) show that the order actually disposes of every remaining issue in the case and (2) identify language expressly disposing of all issues in the case as well as all the parties in the cause. Id. The language of the order or judgment must, themselves, unequivocally, express those words in the order itself.

To determine what language contradicts or undermines finality, the Court looked to whether this order met the clear-and-unequivocal standard. Id. at 924. And though “no magic language” is required, statements taken together can form a clear indication of finality. Id. Here, however, the phrase “not appealable” was the contradiction that rendered the judgment to be *not* final. The order/judgment otherwise used all the language necessary for finality.

The two takeaways from this decision are best summarized by the Court’s footnotes that:

“Had the ‘not appealable’ language appeared, not in a default judgment but in a judgment following a conventional trial on the merits, the presumption of finality might well justify the court of appeals’ approach. We need not resolve that question because this judgment bore no such presumption, making it circular at best to treat the ‘not appealable’ statement as simply an error of law with no possible effect on the facial clarity of the statement of finality; and (2) “We emphasize that an order does not have to state that it *is* appealable for it to be final. *See, e.g., In re Daredia*, 317 S.W.3d at 249. If the trial court’s intent to dispose of the entire case is otherwise unmistakably clear and without contradiction, the judgment will meet our standard of finality. The judgment in this case, however, is not simply silent on its appealability; it affirmatively injects the opposite of finality by stating that it is *not* appealable.” Id. at 925.